

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MICHAEL ROTH, JR., Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0406

Case Type: PA

DECISION NO. 38805

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Appearances:

Michael Roth, Jr., 10680 Teeple Creek Road, Waukon, Iowa, and Phillip Henneman, Representative, appearing on behalf of Michael Roth, Jr.

Anfin Jaw, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

**DECISION AND ORDER**

On October 26, 2020, Michael Roth, Jr. filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Examiner Peter Davis and a telephone hearing was held on January 12, 2021. DOC and Roth made oral argument at the conclusion of the hearing.

On February 2, 2021, Examiner Davis issued a Proposed Decision and Order affirming the suspension and Roth filed objections on February 8, 2021.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. Michael Roth, Jr. (herein Roth) is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer (CO) and had permanent status in class at the time of his August 14, 2020 suspension.

2. On June 7, 2020, Roth made a remark about an inmate. Based on Roth's remark, the inmate then refused to eat a "snack bag" he was otherwise prepared to eat. Another CO then called out Roth for causing the inmate to refuse to eat. Roth then said, "I don't give a fuck."

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Michael Roth, Jr.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

### **ORDER**

The three-day suspension of Michael Roth, Jr. is affirmed.

Issued at Madison, Wisconsin, this 9<sup>th</sup> day of February, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Michael Roth, Jr. had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Roth was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

On June 7, 2020, an inmate who believed that Roth was contaminating his food was willing to eat a “snack bag” so long as Roth did not deliver the food. Roth was upset that the delivery preferences of the inmate were being honored. The inmate then heard Roth say something negative about the inmate—something along the lines of the inmate “is a pussy if he eats.” Based on Roth’s remark, the inmate then refused to eat a “snack bag” he was otherwise prepared to eat. Another CO then called out Roth for causing the inmate to refuse to eat. Roth then said, “I don’t give a fuck.”

Much of Roth’s defense is based on his view that the discipline in question is simply for his use of profanity. Roth credibly testified that use of profanity is somewhat commonplace in the Wisconsin Secure Program Facility where he works. However, the essence of Roth’s misconduct is not his use of profanity but rather his willingness to make remarks that cause an inmate not to eat and then to indicate his indifference to the consequences of his actions. Such conduct is not only inappropriate but also has the potential to create inmate hostility that, in turn, puts inmates and staff at increased risk to their safety. Therefore, the Commission is persuaded that Roth’s actions do constitute workplace misconduct.

As to the level of discipline, Roth had received a one-day suspension in March of 2020. A three-day suspension for the instant misconduct builds progressively off that one-day suspension. Thus, the Commission is satisfied that there was just cause for the three-day suspension imposed here.

Issued at Madison, Wisconsin, this 9<sup>th</sup> day of February, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley