

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JACOB LAVOY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0411

Case Type: PA

DECISION NO. 38813

Appearances:

Jacob LaVoy, E6172A Sunrise Rd. Loganville, Wisconsin, appearing on his own behalf.

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 November 23, 2020, Jacob LaVoy filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause and improperly paced on unpaid administrative leave 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 20, 2021. DOC and LaVoy made oral argument at the conclusion of the hearing.

On March 1, 2021, Examiner Davis issued a Proposed Decision and Order affirming the suspension. On March 8, 2021, LaVoy filed objections to the Proposed Decision and Order. The State did not file a response by the deadline of March 15, 2021.

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

FINDINGS OF FACT

1. Jacob LaVoy (herein LaVoy) is employed by the State of Wisconsin Department of Corrections (DOC) as a Lieutenant at the New Lisbon Correctional Facility and had permanent

status in class at the time of his placement on unpaid administrative leave and subsequent suspension.

2. On July 1, 2020, LaVoy was declared to be unfit for duty and placed on unpaid administrative leave for refusing to take a COVID test at the New Lisbon Correctional Facility.

3. On September 24, 2020, LaVoy received a one-day suspension for his July 1, 2020 refusal to take a COVID test.

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 did not violate Wis. Stats. §§ 230.37(2) or 230.34(1)(a) when it placed Jacob LaVoy on unpaid administrative leave.

3. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Jacob LaVoy.

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

ORDER

1. The placement of Jacob LaVoy on unpaid administrative leave is affirmed.

2. The suspension of Jacob LaVoy is affirmed.

Issued at Madison, Wisconsin, this 16th day of March, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The Suspension

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.

Jacob LaVoy 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 LaVoy 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).

It is undisputed that LaVoy was suspended for insubordination because he refused to take a COVID test at work. LaVoy contends his refusal to take the test was justified because the COVID testing procedure being administered by the National Guard on all DOC employees present at the work site was unsafe and violated various HIPPA and privacy rights he asserts he has. He also argues his refusal to test was warranted because DOC was not responsive to the many concerns he raised before and during the testing process and because DOC had not formally adopted appropriate policies and procedures as to testing.

However, as DOC persuasively asserts, the evidence establishes that LaVoy was actually unwilling to be tested because he felt testing should be voluntary, limited to those who were symptomatic and accessible thru his own health care provider. He found there to be such an inconsistency between the compulsory nature of the test and the need to “consent” to the testing procedure itself that he was contemplating leaving his DOC job. Because none of those motivations/concerns justified his refusal to be tested on the job, LaVoy was insubordinate and there was just cause for a one-day suspension.¹

¹ Even if LaVoy was motivated by the various alleged safety concerns, alleged HIPPA and privacy rights violations and alleged DOC process failures he cites, that would not have excused his insubordinate refusal to be tested. In this regard, DOC provided persuasive rationales for why the mass testing was justified as opposed to allowing testing to be provided at various times by employees’ health care providers.

Unpaid Administrative Leave

In *Bainbridge v. DOC*, Dec. No. 33901-B (WERC, 4/16), the Commission concluded that it had jurisdiction under Wis. Stat. § 230.44(1)(c) to review State decisions to place employees on unpaid administrative leave and would apply any relevant requirements of Wis. Stat. § 230.37(2) when exercising that jurisdiction.²

Here, because LaVoy was unwilling to submit to a test that would determine if he had COVID and thereby was potentially a danger to the health of coworkers and inmates alike, he made himself physically unable to perform his duties as a DOC Lieutenant. Therefore, DOC was justified when it placed him on unpaid administrative leave on July 1, 2020.³

Shortly after being placed on unpaid leave, LaVoy presented DOC with a document from his personal physician indicating he was “fit for duty.” Because he still had not taken a COVID test, DOC rejected LaVoy’s request to return to work and on July 3 advised him that until he did so, he would remain on unpaid leave. DOC’s response to LaVoy clearly gave him the option of testing at another DOC or community testing site and could also plausibly be understood as allowing him to be tested by his own health care provider. LaVoy did not seek any clarification as to his testing options and did not seek a COVID test until after he received the one-day suspension on September 24, 2020, which advised him that continued refusal could lead to discharge. He was subsequently tested and returned to work in early October 2020.

Given the foregoing, DOC acted appropriately when it placed LaVoy on unpaid administrative leave and continue that leave until he met the COVID testing requirement.

Issued at Madison, Wisconsin, this 16th day of March, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

² Wisconsin Stat. § 230.37(2) states “[w]hen an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from the service. The appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employee may otherwise be eligible.”

³ LaVoy contends that the leave was actually disciplinary, and thus he should have been placed on paid leave. DOC persuasively argues that its action (unlike the one-day suspension) was not disciplinary, but rather a direct consequence of LaVoy’s inability to demonstrate that he was not a health risk.