

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CLYDE MAXWELL III, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0436

Case Type: PA

DECISION NO. 38946

Appearances:

Clyde Maxwell III, N3447 South End Road, Merrill, Wisconsin on his own behalf.

Anfin Jaw, Department of Administration, 101 E. 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 February 11, 2021, Clyde Maxwell III filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC)

A telephone hearing was held on May 6, 2021 by Commission Examiner Peter G. Davis. The parties made oral argument at the end of hearing.

On May 25, 2021, Examiner Davis issued a Proposed Decision and Order rejecting the suspension. On May 27, 2021, DOC filed objections to the Proposed Decision and Order and on May 28, 2021, Maxwell filed a response.

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

FINDINGS OF FACT

1. Clyde Maxwell III, herein Maxwell, is employed by the State of Wisconsin Department of Corrections (DOC) as a Supervising Youth Counselor at the Lincoln Hills School. He had permanent status in class at the time of his suspension.

2. Maxwell reasonably and independently chose to have DOC staff use a reactive use of force to remove a youth from a room.

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 have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Clyde Maxwell III for one day.

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

ORDER

The one-day suspension of Clyde Maxwell III is rejected and he shall be made whole.

Issued at Madison, Wisconsin, this 8th day of June, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORER

Section 230.34(1)(a), Stats., states in pertinent part:

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.

Maxwell 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 Maxwell 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).

Maxwell and other DOC staff were asked to remove a youth from a room. Maxwell first attempted to talk the youth into opening the room door and leaving voluntarily. The youth was agitated and refused to do so. Maxwell decided to have staff enter the room and use force to remove the youth. Staff successfully did so and although the youth resisted removal there were no injuries to staff or the youth.

Subsequent DOC review of this incident concluded that a “planned” use of force should have been used instead of the “reactive” use of force Maxwell authorized. Based on that review, Maxwell received a one-day suspension.

A planned use of force would have delayed entrance into the room while staff left to don protective gear that would have lessened the risk of injury to staff and potentially persuaded the youth that resistance was futile. Maxwell concluded that a reactive use of force was needed because the youth might have taken actions (such as breaking glass that could then be used as a weapon) while staff were absent donning protective gear that would have created a greater risk of injury to staff or the youth. DOC argues that the youth’s behavior at the time made such a risk unlikely.

Acknowledging the difficult judgment calls that DOC employees must make on a daily basis as to use of force, the Commission has held that where the use of force was reasonable under the circumstances, it may conclude that there was no just cause for discipline. *See Grabowski v. DOC*, Dec. No. 36756 (WERC, 12/16); *Franke v. DOC*, Dec. No. 37807-B (WERC, 2/19). Here, although hindsight may reveal that there was no need for a reactive use of force, the Commission is persuaded that the judgment of an experienced employee such as Maxwell regarding use of

reactive use of force was a reasonable one that warrants no discipline.¹ Therefore, the one-day suspension is rejected and Maxwell shall be made whole.

Issued at Madison, Wisconsin, this 8th day of June, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ To the extent the suspension was premised on a conclusion that Maxwell let subordinate staff make the call as to how to proceed, the record does not support that premise. Maxwell persuasively explained that his comment to the staff who would be entering the room was not to seek their approval of his choice but rather to ensure they were ready to proceed.