

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

JACOB LEPAGE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0484

Case Type: PA

DECISION NO. 39276

---

Appearances:

Sean Daley, Business Agent, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin appearing on behalf of Jacob LePage.

Anfin Jaw, Attorney, 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 August 17, 2021, Jacob LePage filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on October 19, 2021. DOC made oral argument at the conclusion of the hearing and LePage filed a written brief. Examiner Jones issued a Proposed Decision on November 9, 2021 affirming the five-day suspension by DOC. LePage filed objections to the Proposed Decision on November 15, 2021, and DOC responded on November 19, 2021. Subsequently, the Commission took on a full independent review of the entire record.

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

**FINDINGS OF FACT**

1. Jacob LePage is employed by the State of Wisconsin Department of Corrections (DOC) as a youth counselor at Copper Lake School/Lincoln Hills School (CLS/LHS) and had permanent status in class when he was suspended.

2. CLS/LHS is a juvenile correctional facility in Irma, Wisconsin operated by the DOC, an agency of the State of Wisconsin.

3. On February 18, 2021, while off duty, LePage was arrested by police for Operating While Intoxicated (OWI), first offense.

4. Pursuant to its standard disciplinary progression and LePage's existing disciplinary record, DOC suspended LePage for five days for the conduct referenced in Finding 3.

5. DOC did not demonstrate a sufficient nexus between LePage's work duties and the OWI referenced in Finding 3.

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 Jacob LePage for five days.

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

### **ORDER**

The five-day suspension of Jacob LePage by the State of Wisconsin Department of Corrections is rejected, and he shall be made whole.

Issued at Madison, Wisconsin this 10<sup>th</sup> day of December, 2021.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

---

James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

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.

LePage 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 LePage 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 February 18, 2021, while off duty, LePage drank alcohol at his home. He then chose to drive his car and was subsequently issued an Operating While Intoxicated, First Offense citation which he later plead guilty to.

DOC has a work rule that says whenever an employee has “police contact” they are to notify their supervisor of their police contact within a certain time frame. LePage complied with this directive and notified his supervisor of his police contact on February 18, 2021 and his arrest for OWI.

Afterwards, DOC conducted an investigation into the matter. After its investigation was completed, DOC concluded that LePage’s conduct and arrest on February 18, 2021 violated Work Rule #25. That Rule provides:

Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee’s independence of judgment or impair the employee’s ability to perform his/her duties as an employee of the state.

In the suspension notice, DOC opined on why LePage’s arrest for OWI was problematic for the department, and the connection/nexus between his OWI arrest and his duties as a youth counselor. It provided:

The Department and its employees have a responsibility to the public to ensure that correctional, rehabilitation and treatment programs are carried out in a legal,

effective, safe and humane manner. As such, employees, especially Youth Counselors, are held to a high standard of expectations regarding their conduct both on and off duty. Executive Directive 42 is clear in stating an employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the charge or conviction if it meets the just cause threshold. As a Youth Counselor with the DOC, you are expected to adhere to the laws of the State of Wisconsin and to set an example for the youth you supervise. In addition, your job functions require you to provide effective counsel to youth seeking assistance with their rehabilitative needs, which could include drug or alcohol. As a Youth Counselor, you are called to be a positive rehabilitative influence through your conduct. However, your behavior on February 18, 2021 is not demonstrative of your ability to serve as such influence or example to the youth and the community you serve. Your decision to drive on February 18, 2021 put you and members of the community at risk of harm or injury. If not corrected, similar future behavior may adversely impact the ability for you to carry out the Department's mission and your responsibilities as a Youth Counselor.

The basic question to be answered here is whether LePage's arrest for OWI was substantially related to his job with DOC. If it was, then his OWI arrest constituted misconduct within the meaning of Work Rule #25 and he could be disciplined for that. However, if his OWI arrest was not substantially related to his job, then his OWI arrest did not constitute misconduct within the meaning of Work Rule #25 and he could not be disciplined for that.

LePage relies on the case of *Johnson v. DOC*, Dec. No. 36747 (WERC, 2/17) and sees it as dispositive here.

In *Johnson*, the Commission overturned the ten day suspension of a DOC employee who had been charged with OWI. The Commission's stated rationale for doing so was "that driving was not a part of his regular duties." Building on that, the Commission found "there is insufficient evidence to conclude that the [OWI] charge was substantially related to Johnson's employment as a corrections officer."

When someone is arrested for OWI in Wisconsin, their driving privileges are suspended. As just noted, in *Johnson*, the Commission found that Johnson did not need a driver's license to perform his job duties as a correctional officer. Similarly, LePage does not need a driver's license to perform his job duties as a youth counselor.

As stated in *Johnson*, for just cause to exist in determining whether discipline is appropriate for off-hours conduct, there must exist a nexus between the conduct and the work duties expected of the employee. The employee's behavior must directly impinge upon the employer's operational interests. Mere speculation as to adverse effect upon the employer's operation is not sufficient to establish the required nexus.

During testimony, DOC attempted to establish this nexus by presenting testimony that LePage a) would have to be open to other posts that *could* require a valid driver's license; b) that

it was *possible* to be on a trip unit driving a state vehicle; c) and as a youth counselor it *could* affect LePage's ability to interact with the population at Lincoln Hills. The speculative aspect of this testimony is insufficient to establish the nexus between LePage's off-duty conduct and the employer's legitimate operational interests.

In the Proposed Decision, the Examiner asserted that *Johnson* was undermined by the Commission's subsequent decision in *Castillo v. DOC*, Dec. No. 37487 (WERC, 9/18). It is important for the Commission to point out that the behavior of Castillo was not analogous to the current matter at hand and has no bearing on the long-standing requirement of a nexus to be established for off-duty conduct by an employee to be within the employer's disciplinary purview. Castillo attempted to use her position as a DOC employee to have the arresting officer not give her an OWI citation, a clear abuse of her position. If anything, the decision in *Castillo* only further supports our decision today, as in that matter the required nexus to the employer's operational interests was clearly established, not by Castillo's OWI, but her behavior during the issuance of the citation and her abuse of her position. In this matter, LePage did nothing of the sort and instead promptly self-reported his citation, as he was required to do, to his supervisor.

Given the foregoing, it is concluded there was not just cause for LePage's five-day suspension and it is therefore rejected. LePage shall be made whole consistent with the outcome of this order.

Issued at Madison, Wisconsin this 10<sup>th</sup> day of December, 2021.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

James J. Daley, Chairman