

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JULIO de LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0496

Case Type: PA

DECISION NO. 39305

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Appearances:

Peter M. Reinhardt, Attorney, Bakke Norman, S.C., 2919 Schneider Avenue SE, P.O. Box 280, Menomonie, Wisconsin appearing on behalf of Julio de Lima Silva.

Nicole Rute, 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 October 7, 2021, Julio de Lima Silva 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. The appeal was assigned to Chairman James J. Daley. A hearing was scheduled for December 21, 2021 which was postponed due to the illness of an advocate. A zoom hearing was rescheduled for January 27, 2022. Closing oral arguments were waived and post-hearing briefs were submitted on January 29, 2022.

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

**FINDINGS OF FACT**

1. Julio de Lima Silva (Silva) is employed by the State of Wisconsin Department of Corrections (DOC) as a Sergeant at McNaughton Correctional Center (MCC) and had permanent status in class when he was suspended.

2. MCC is a correctional facility in Lake Tomahawk, Wisconsin operated by DOC, an agency of the State of Wisconsin.

3. On April 24, 2021, Silva raised his voice in an aggressive manner towards MCC's Superintendent.

4. DOC suspended Silva for three days for the conduct referenced in Finding 3, as well as allegations of harassment towards employees of MCC.

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. Silva's actions were sufficient to demonstrate just cause for discipline relating to insubordination and creating an intimidating atmosphere at MCC.

3. DOC did not meet its burden to establish the actions of Silva met the threshold for harassment.

4. The State of Wisconsin Department of Corrections did have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to suspend Julio de Lima Silva for one-day but did not have just cause for a three-day suspension.

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 Julio de Lima Silva by the State of Wisconsin Department of Corrections is modified to a one-day suspension.

Issued at Madison, Wisconsin this 3<sup>rd</sup> day of February, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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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.

Julio de Lima Silva had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause. Silva had no sustained discipline in his record prior to this incident.

The State has the burden of proof to establish that Silva 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).

A. BACKGROUND

The following is uncontested: On April 14, 2021, Sergeant Julio de Lima Silva (Silva) was working for the Department of Corrections (DOC) at the McNaughton Correctional Center (MCC). In the course of his duties, he noticed that several cabinets in the food preparation area were not properly padlocked creating the potential for inmates to acquire contraband. Silva took all of the unfastened padlocks and deposited them in Captain Berg's box. After this, Corrections Food Service Leader Gina Woertz (Woertz) arrived and noticed that the padlocks had been removed from her food preparation area. Woertz was upset over this and confronted Silva wanting the locks returned to her and, at some point, Silva retrieved the locks and both Silva and Woertz entered the office of MCC Superintendent Kosbab (Kosbab) to seek direction on what should be done. After entering the office of Kosbab the situation escalated with a confrontation between Kosbab and Silva, with Silva's voice getting loud and disruptive. As the confrontation continued, Silva and Kosbab each said to the other "Are you going to hit me?" to which they both said they did not plan on doing that to one another. During this altercation Silva threw his hat and mask on the ground and, prior to leaving the office, asked permission from Kosbab to pick those items up. At some point during the escalation, Sergeant Paul Koniar (Koniar) entered the room and Employment Support Specialist Ronald Lueneburg (Lueneburg) arrived and was in the hallway with a partial view of the events occurring that allowed him to witness Silva and Woertz but obscured Kosbab from view.

DOC contends the following occurred based primarily on the testimony of Kosbab and Woertz: Upon entering the office of Kosbab, Silva's temper increased. Silva displayed anger and became physically threatening by taking aggressive posturing including clenching his fists, flailing

his arms, slamming items on a desk, and looking as if he was ready to engage in a physical altercation and, when instructed numerous times to leave, Silva was non-compliant. DOC states that throughout this altercation Kosbab stayed calm and collective.

Silva contends that he remained calm and collective and was just trying to get clarification while Kosbab showed irritation of being brought into the matter which escalated to the point of calling Silva a “thief”. Silva, who is Brazilian by birth, admits that once this was said by Kosbab that, due to the high degree of insult associated with that term in his culture, he then grew increasingly upset and raised his voice at that point specific to the disrespect he felt he was suffering.

DOC suspended Silva for three days for the following work rule violations:

- Work Rule #2: Failure to comply with written agency policies or procedures.
- Work Rule #3: Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions or instructions.
- Work Rule #14: Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying; or using profane or abusive language in dealing with others.
- Serious Misconduct #1: While on duty, harassing a person.

## B. DISCUSSION

It is specifically noted that during her testimony, Warden Quala Champagne stated that DOC skipped progressive discipline with Silva due to the alleged violation of Serious Misconduct #1: While on duty, harassing a person. As such, the Commission will first focus only on whether the alleged misconduct satisfies any violation of Work Rules #2, #3, or #14, as any single violation of those rules would support some form of discipline against Silva. However, the allegation of Serious Misconduct will be treated separately.

### I. INSUBORDINATION/INTIMIDATION

By Silva’s own admission he raised his voice to his supervisor and testimony supports the extent of this reaching a point where others outside Kosbab’s office as well as inmates could hear Silva’s voice. This substantiates the allegation that Silva was in violation of Work Rule #3, specifically insubordination towards Kosbab by raising his voice to him, and Work Rule #14 as the Commission infers from the record that the level of volume of his voice created an intimidating atmosphere for MCC not only for those directly involved but extended beyond causing general disruption to the facility.

## II. HARASSMENT

The record does not support that Silva's conduct rose to the level of harassment against either Kosbab or Woertz. DOC justifies skipping progressive discipline for Silva by relying on Wis. Stat. § 230.34(1)(a)1., specifically alleging Silva committed a violation of Serious Misconduct specific to "while on duty, harassing a person".

Harassment is a subjective term in this context and the Commission is required to infer its definition and applicability by relying on other sources. While deserving of a much more thorough treatment, it is sufficient to state that most direction on this subject requires some combination of A) Severity; and B) Frequency/pattern. The totality of these two elements must be such that they combine to exceed the required threshold necessary for the Commission to make a determination that harassment occurred. This may take the form of a single incident of substantial severity or multiple incidents of a more moderate nature.

This leads to the Commission making a determination as to how severe the actions of Silva really were. As already stated, Silva's own admission confirms that there was "some" level of disruption that occurred, and the Commission finds such to have been reasonably viewed as aggressive by those involved. What's at issue for the Commission is to what extent Silva's actions rise and whether they exceeded the necessary threshold. Certainly, every instance of someone yelling, becoming upset, or acting out is not construed as harassment.

The Commission finds the most reliable witness to the events that unfolded was Luneburg<sup>1</sup>. Luneburg indeed testified that Silva was yelling loudly, his fingers were pointed at others, and that his eyes were watery and Silva was clearly very agitated. Additionally, in his statement of the incident and subsequent investigatory interview, Luneburg supports the level of Silva's disruption as being insubordinate and had concerns about the potential for the situation to escalate further. However, under cross-examination Luneburg admitted that he did not consider Silva's posturing to be threatening and did not see Silva having clenched fists or slamming items. Based on the description of events as testified to by Luneburg, the Commission concludes that the actions of Silva did not meet the threshold for the allegation of harassment to be sustained.

## III. DISCIPLINE

Silva argues that his discipline should be reduced due to the disparate treatment in comparison to other discipline that has been given at MCC. In order for the Commission to reach a conclusion as to the existence of disparate treatment, a grievant must demonstrate that they are being treated differently than another employee who is A) Similarly situated, for B) Similar conduct. *See Morris v. DOC*, Decision No. 35682-A (WERC, 07/15). We will briefly address the argument and examples presented by Silva.

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<sup>1</sup> To some extent all witnesses demonstrated conflicting, likely-exaggerated, purposely downplayed, or inconsistent testimony as to the events that happened.

Sergeant Meichus received a one-day suspension from MCC for placing his hands on a female staff member, placing her in a headlock, and rubbing his knuckles on her head. The conduct of Meichus is not sufficiently similar to those of Silva to satisfy the disparate treatment test.

Kosbab received a letter of expectation for being rude, disrespectful, and screaming at an employee at MCC. While the conduct could be argued to be similar, Kosbab, as a Superintendent, is not similarly situated to Silva in a manner where the Commission can find disparate treatment between the two.

DOC argues in the alternative that the Commission, having not found the existence of just cause to support the Serious Misconduct relating to harassment, should still uphold the three-day discipline subject to the authority granted to them to accelerate and skip progressive discipline under Wis. Stat. § 230.04(13m). Due to the explicit testimony of Warden Champagne previously noted specifically tying the skipping of progressive discipline to the allegation of harassment, the Commission declines to now adopt the alternative disciplinary theory.

#### C. ORDER

Given the foregoing, it is concluded that there was just cause to suspend Silva for one-day. The three-day suspension is therefore modified to a one-day suspension, and Silva shall be made whole consistent with this decision and order.

Issued at Madison, Wisconsin this 3rd day of February, 2022.

#### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman