

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JULIO DE LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0514

Case Type: PA

DECISION NO. 39434

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 M. Rute, 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 March 14, 2022, 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 (DOC).

A telephone hearing was held on May 24, 2022, by Commission Examiner Anfin Jaw. The parties submitted written argument on June 3, 2022. Mr. de Lima Silva filed a written response on June 7, 2022. On June 14, 2022, Examiner Jaw issued a Proposed Decision and Order affirming the three-day suspension by DOC. On June 17, 2022, Mr. de Lima Silva filed objections to the Proposed Decision. DOC did not file a reply by the deadline given of June 22, 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, herein de Lima Silva, is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at the Flambeau Correctional Center. He had permanent status in class at the time of his suspension.

2. De Lima Silva engaged in discourteous behavior towards another DOC employee.

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 Julio de Lima Silva for three days.

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 affirmed.

Issued at the City of Madison, Wisconsin, this 29th day of June, 2022.

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.

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.

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

The record establishes that, on multiple occasions, de Lima Silva mispronounced his coworker's first name, Gina Harbottle or Woertz, as "jina," phonically sounding like the last four letters of vagina. De Lima Silva denies the conduct. However, credible testimony from several witnesses persuades the Commission that he did engage in the alleged behavior. In any context, the Commission has no problem concluding that de Lima Silva's behavior, essentially rhyming a coworker's name with vagina, constituted misconduct.

The last question is whether the three-day suspension was excessive. The record shows that prior to the discipline imposed here, de Lima Silva received a one-day suspension. That suspension occurred within the preceding 12 months. Given de Lima Silva's standing in the DOC disciplinary progression schedule, a three-day suspension was not excessive.

Based on the foregoing, the Commission concludes that DOC has proven that de Lima Silva was guilty of misconduct. The Commission further concludes that there was just cause for the imposition of a three-day suspension and it is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 29th day of June, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman