

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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CORY HELM, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0517

Case Type: PA

DECISION NO. 39441

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**Appearances:**

Paul Mertz, P.O. Box 181, Redgranite, Wisconsin, appearing on behalf of Cory Helm.

Nicole 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 25, 2022, Cory Helm 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.

Telephone hearings were held on June 9 and 14, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the conclusion of the hearing. On June 21, 2022, Examiner Jaw issued a Proposed Decision affirming the three-day suspension by the Department of Corrections. Helm filed objections to the Proposed Decision on June 27, 2022. The Department of Corrections filed a reply to the objections on July 5, 2022.

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

**FINDINGS OF FACT**

1. Cory Helm is employed by the State of Wisconsin Department of Corrections (DOC), Division of Adult Institutions, as a Correctional Officer at Redgranite Correctional Institution (RGCI) and had permanent status in class when he was suspended.

2. On September 23, 2021, all RGCI staff were made aware that COVID testing was taking place on September 29-30, 2021, and that notification of test results was being provided via email or phone call.

3. Helm was tested for COVID-19 on September 29, 2021 and provided his work email address for his contact information.

4. On September 30, 2021, at 5:57 p.m., Helm was emailed notification of a positive test result for COVID-19. Helm never checked his work email or may have deleted the email.

5. Helm reported to work on September 30-October 4, and again on October 7-10, 2021.

6. On October 12, 2021, while reviewing COVID-19 test results for RGCI employees, HR became aware of Helm's positive result. The positive result was never reported to HR by Helm, as required.

7. DOC suspended Helm for three days for gross negligence by reporting to work while positive for COVID-19.

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 Cory Helm 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 Cory Helm by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 15<sup>th</sup> day of July, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

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.

Cory Helm had permanent status in class at the time of his three-day suspension and his appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Helm 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 Helm reported to work while positive for COVID-19 on September 30 through October 4, and again on October 7 through October 10, 2021. Helm argues that he was not aware he tested positive for COVID, because he did not check his email, and assumed he would receive a phone call. That assumption, however, created a substantial risk of spreading the COVID-19 virus to other staff and persons in our care (PIOC).

The Commission has no trouble deciding it was misconduct for Helm to have reported to work while positive for COVID-19 for nine days, placing his fellow coworkers and PIOC's at substantial risk of being unnecessarily exposed to a deadly virus. After being tested on September 29, 2021 and providing his work email address as his contact information, it was his responsibility to check his email or proactively follow up to find out his test results. He therefore is accountable for causing a substantial risk to the physical health and safety of RGCI staff and PIOC's.

Based on the above, the Commission finds DOC had just cause to discipline Helm for his misconduct.

The focus now turns to the level of discipline imposed here. DOC initially imposed a five-day suspension on Helm, but subsequently reduced the discipline to a three-day suspension. DOC's disciplinary progression schedule starts at a one-day, then a three-day, a five-day, and discharge. The normal progressive disciplinary sequence is for an employee with no prior discipline to receive a one-day suspension for the first offense. That did not happen here. Helm did not have any prior discipline, so the three-day suspension was a skip in progression. Helm objects to that and contends his discipline should have been less severe than a three-day suspension. Thus, the Commission is

tasked with deciding whether a three-day suspension was an excessive punishment for Helm's misconduct.

In addressing that matter, Helm asks the Commission to consider the following facts concerning the discipline imposed on him. After DOC completed its investigation, half a dozen DOC and Division of Personnel Management (DPM) officials reviewed the matter and opined about what they thought Helm's discipline should be. DOC's Disciplinary Action Routing form shows Warden Daniel Cromwell and Division Administrator Stephanie Hove recommending progression or a one-day suspension. Two other DOC officials and DPM supported a skip to a five-day suspension. DOC Secretary Kevin Carr concurred with DPM's and DOC HR leadership's recommendation of a five-day suspension. In reaching his conclusion, Carr viewed the same set of facts the other DOC officials had reviewed, and concluded a five-day suspension was warranted.

After issuing the five-day suspension letter, Warden Cromwell and Administrator Hove asked Secretary Carr to reconsider. Based on their request and a review of the circumstances, Carr reduced the discipline to a three-day suspension. Carr is the final decision maker. As the head of DOC, he is the appointing authority, and is therefore empowered to review disciplinary cases in the department and decide what level of discipline is imposed. Helm does not get to pick and choose which DOC official gets to impose his discipline. That call is up to DOC.

Carr persuasively testified at the hearing why he ultimately imposed a three-day suspension over a lesser suspension. In the fall of 2021, the Omicron variant was highly prevalent in Wisconsin, highly contagious, and spreading like wildfire throughout the State. Since the start of the COVID-19 pandemic, approximately 2000 staff personnel and between 10,000-12,000 PIOC's have tested positive for COVID-19. Additionally, 33 PIOC's have died due to the virus. Carr expressed that the DOC takes its responsibility to mitigate the spread of the virus very seriously. There is a duty and a responsibility not to put people at risk of contracting or dying from the virus. Under the circumstances, Carr determined that Helm's misconduct constituted serious misconduct rather than, mere negligence or a simple mistake.

When an employee commits serious misconduct as Helm did, it logically follows that his discipline can likewise be serious. The record shows DOC has discharged employees who engaged in serious misconduct. Furthermore, DOC has skipped progression and suspended employees for five days for reporting to work while positive for COVID. The five-day suspensions were issued to employees who were aware of a positive test result but reported to work nevertheless. Accordingly, the Commission concludes that Helm's serious misconduct warranted a skip in the normal progressive disciplinary sequence.

Given the foregoing, the Commission finds that the three-day suspension was not excessive under the circumstances and is therefore affirmed.

Issued at Madison, Wisconsin, this 15<sup>th</sup> day of July, 2022.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman