

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DREW CROSS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0520

Case Type: PA

DECISION NO. 39458

Appearances:

Drew Cross, N12687 14th Avenue, North Necedah, Wisconsin, appearing on his own behalf.

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 April 12, 2022, Drew Cross 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.

A telephone hearing was held on June 28, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the conclusion of the hearing. On July 19, 2022, Examiner Jaw issued a Proposed Decision and Order affirming the three-day suspension by the Department of Corrections (DOC). The Appellant filed objections to the Proposed Decision on July 19, 2022. DOC filed a response to the objections on July 22, 2022.

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

FINDINGS OF FACT

1. Drew Cross is employed by the State of Wisconsin Department of Corrections (DOC), Division of Adult Institutions, as a Correctional Sergeant at New Lisbon Correctional Institution (NLCI) and had permanent status in class when he was suspended.

2. On August 27, 2021, Cross was tested for COVID-19 as part of DOC's bi-weekly mandatory testing requirement for non-vaccinated staff and tested positive for COVID-19.

3. In August and early September, 2021, the Juneau County Health Department (JCHD) made several attempts to notify Cross of his positive test result by phone. The JCHD also sent Cross a letter regarding isolation dates and requesting him to contact the JCHD.

4. Cross reported to work on August 28 through September 1, and again on September 6, 2021.

4. In late October 2021, while reviewing COVID-19 test results for NLCI employees, HR became aware of Cross' positive result from August 27, 2021. The positive result was never reported to HR or a supervisor by Cross, as required.

5. DOC suspended Cross 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 Drew Cross 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 Drew Cross by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 2nd day of August, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

Drew Cross 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 Cross 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 Cross reported to work while positive for COVID-19 on August 28 through September 1, 2021, and again on September 6, 2021. Cross argues that he was not aware he tested positive for COVID after mandatory testing on August 27, 2021. Cross did not follow up with HR after not receiving his test results. This lack of diligence created a substantial risk of spreading the COVID-19 virus to other staff and inmates.

The Commission concludes it was misconduct for Cross to have reported to work while positive for COVID-19 for six days, placing his fellow coworkers and inmates at substantial risk of being unnecessarily exposed to the virus. After being tested on August 27, 2021, it was his responsibility to proactively follow up to find out his test results. If there was any issue with receiving his test results after a routine COVID test, he should have contacted HR. Cross is therefore accountable for causing a substantial risk to the physical health and safety of the RGCI population.

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

We now turn to the level of discipline imposed here. DOC imposed a three-day suspension on Cross. 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. Here, the record shows that Cross did not have any prior discipline, so the three-day suspension was a skip in progression. Cross

disagrees and believes his discipline should be rejected. Thus, the final question is whether a three-day suspension was excessive punishment for Cross' misconduct.

The Commission has previously expressed in *Helm v DOC*, Decision No. 39441 (WERC, 07/22), “[t]here is a duty and a responsibility not to put people at risk of contracting or dying from the [COVID-19] virus.” Therefore, under the circumstances, Cross' misconduct by reporting to work while COVID positive constitutes serious misconduct rather than mere negligence or mistake. While Cross may not have been aware of the positive COVID result, he had a responsibility to be proactive in finding out the test results before reporting to work.

When an employee commits serious misconduct as Cross 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 Cross' 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 2nd day of August, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman