

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN SOMMER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0528

Case Type: PA

DECISION NO. 39470

Appearances:

Rory Schneider, N6274 County Road Y, Fond du Lac, Wisconsin, appearing on behalf of Kevin Sommer.

Nicole M. Porter, 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 May 10, 2022, Kevin Sommer filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC).

A telephone hearing was held on July 29, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the conclusion of the hearing. On August 3, 2022, Examiner Jaw issued a Proposed Decision and Order rejecting the suspension. DOC filed objections to the Proposed Decision and Order on August 8, 2022 and Sommer filed a response to the objections on August 11, 2022.

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

FINDINGS OF FACT

1. Kevin Sommer is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at Dodge Correctional Institution (DCI) and had permanent status in class when he was suspended.

2. DCI is a correctional facility located in Waupun, Wisconsin operated by the DOC, an agency of the State of Wisconsin.

3. On January 15, 2022, while off duty, Sommer was arrested by police for Operating While Intoxicated (OWI), first offense.

4. Pursuant to its standard disciplinary progression schedule, DOC suspended Sommer for one day for the conduct referenced in Finding 3.

5. DOC did not demonstrate a sufficient nexus between Sommer's classification specification 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 Kevin Sommer for one day.

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

ORDER

The one-day suspension of Kevin Sommer by the State of Wisconsin Department of Corrections is rejected, and he shall be made whole.

Issued at Madison, Wisconsin this 26th 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.

Sommer 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 Sommer 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 January 15, 2022, while off duty, Sommer drank alcohol at his home and chose to drive his car. He ran a red light and was pulled over by the Fond du Lac Police Department. He was subsequently issued an Operating While Intoxicated, First Offense citation, which he later plead no contest 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. Sommer complied with this directive and notified a supervisor of his police contact that same day, January 15, 2022, and his arrest for OWI.

Afterwards, DOC conducted an investigation into the matter. After its investigation was completed, DOC concluded that Sommer’s conduct and arrest on January 15, 2022, 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 Sommer’s arrest for OWI was problematic for the department, and the connection/nexus between his OWI arrest and his duties as a correctional sergeant. It provided:

The Department and its employees have a responsibility to demonstrate correctional, rehabilitation and treatment programs are carried out in a legal, effective, safe and humane manner. As such, employees 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 Correctional Sergeant, you are expected to adhere to the laws of the State of Wisconsin and to set an example for the persons in our care that you supervise. In addition, your job functions require you to provide effective counsel to persons in our care seeking assistance with their rehabilitative needs, which could include drugs or alcohol. You are expected to be [a] positive rehabilitative influence through your conduct both on and off duty as a correctional officer. However, your conduct on 01/15/2022 is not demonstrative of your ability to serve as such influence or example to the people and community that you serve. Your decision to drive after consuming alcohol on 01/15/2022 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 Correctional Sergeant.

The basic question to be answered here is whether Sommer'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.

Sommer relies on the case of *LePage v. DOC*, Dec. No. 39276 (WERC, 12/21) and sees it as dispositive here. In *LePage*, the Commission relied on its the reasoning in *Johnson v. DOC*, Dec. No. 36747 (WERC, 2/17).

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." See pg. 4.

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, in *LePage*, the Commission found that LePage did 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.

During testimony, DOC attempted to establish this nexus by presenting testimony that Sommer, as a Correctional Sergeant, is a lead worker and expected to set an example to inmates and his coworkers, and his arrest may have the potential to affect his judgment or ability to interact with the population at DCI. The speculative aspect of this testimony is insufficient to establish the nexus between Sommer's off-duty conduct and the employer's legitimate operational interests. Additionally, the record establishes that driving is not part of Sommer's regular duties as a housing unit sergeant. Furthermore, Warden Benzel testified that there is no driver's license requirement for Correctional Sergeants, and that the arrest did not impact Sommer's decision-making or rule enforcement within the institution.

DOC's objections to the proposed decision are unpersuasive and repetitious from previous matters before the Commission involving off-duty conduct. If found persuasive, DOC's arguments would support the discharge of an employee for their off-duty conduct, not following progressive discipline as in the present case. In other words, if a first offense OWI is so fundamentally adverse to the successful performance of a Correctional Sergeant's duties, then the logical level of discipline to be levied is automatic discharge regardless of the employees' length of service or prior disciplinary history. To be certain, there are circumstances where the off-duty conduct of an employee rises to such a level as to render continued employment of an individual with DOC as no longer viable. WERC has upheld discharges in such instances.¹ But those circumstances are not present here.

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

Issued at Madison, Wisconsin this 26th day of August, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ See *Castillo v. DOC*, Dec. No. 37487 (WERC, 9/18) where the employee was cited for an OWI but attempted to use her position as a DOC employee to get out of the citation. The discharge was supported by Castillo's attempt to abuse her position for personal gain, not the underlying OWI itself.