

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW FOCHS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0524

Case Type: PA

DECISION NO. 39473

Appearances:

Kristopher Allen, Redgranite Correctional Institution, P.O. Box 900, Redgranite, Wisconsin, and Mathew Fochs, E2430 Silver Lake Road, Scandinavia, Wisconsin, appearing on behalf of Mathew Fochs.

William Ramsey, Attorney, Wisconsin 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 April 28, 2022, Matthew Fochs filed an appeal with the Wisconsin Employment Relations Commission asserting that 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 July 14, 2022, by Commission Examiner Peter G. Davis. The parties made oral arguments at the conclusion of the hearing. On August 15, 2022, Examiner Davis issued a Proposed Decision and Order modifying the three-day suspension to a one-day suspension. The parties did not file objections to the Proposed Decision by the deadline given of August 22, 2022.

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

FINDINGS OF FACT

1. Matthew Fochs, herein Fochs, is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at Redgranite Correctional Institution. He has

worked for DOC for 27 years and has never previously been disciplined. Fochs had permanent status in class at the time of the three-day suspension.

2. Fochs did not engage in misconduct by the manner in which he interacted with Correctional Officer H in a control center.

3. Fochs did engage in misconduct as to his behavior in the context of the relationship between Correctional Officer H and Officer H's fiancé.

4. Fochs did engage in misconduct when he used a DOC computer to stream music and visit non-DOC sponsored websites on a regular basis while in pay status.

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 cause within the meaning of Wis. Stat. § 230.34(1)(a), to suspend Matthew Fochs for three days, but did have just cause to suspend him 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 three-day suspension of Matthew Fochs by the State of Wisconsin Department of Corrections is modified to a one-day suspension and he shall be made whole.

Issued at the City of Madison, Wisconsin, this 25th 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:

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.

Fochs 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 Fochs 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 March 3, 2022, suspension letter issued to Fochs stated:

This is an official notification of a 3-day suspension without pay for violation of Department work rules that apply to all Department employees, specifically:

- Work Rule #2: Failure to comply with written agency policies or procedures.
- Work Rule #14: Intimidating, interfering with, harassing, demeaning, 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.

This action is being taken, based on the fact that you engaged in harassing and demeaning behavior while on duty. You made repeated, unwelcomed comments to another officer who was assigned to your work area in a modified assignment. You admitted to feeling the officer was in the way, was in your space and was a distraction. Additionally, you told other staff that the officer had to go to the doctor to have his vagina checked out, you verbally informed the officer that he was not needed nor wanted in the control center and you told him to "sit in a corner". You sent an email to another staff member (who was the modified duty officer's fiance') referencing a female buying pants for a male with the headline, "I don't wear the pants but I buy them" with an attached message stating "I am guessing Josh does the shopping".

Your behavior is in violation of Executive Directive #5 - *Employee Harassment and Discrimination*. As a Correctional Sergeant at Redgranite Correctional Institution, you are responsible for acting as a role model for persons in our care and setting a professional and positive example in terms of language and behavior. Your responsibility as a DOC employee is to maintain a harassment free work environment.

Additionally, you utilized a state computer to stream music and other non-DOC sponsored websites on a continual basis while in pay status. Per ED # 50, using the internet to stream services, music, radio broadcasts, and video clips or for loading any continuous feeds unless required by job function or special need is prohibited.

You have not been subject to progressive discipline in the past, but in accordance with Executive Directive #2, "The Department may impose a more severe level of discipline, up to and including discharge, for serious acts of misconduct." Repeated acts of unwanted comments-and behaviors towards your coworker is considered a Serious Act of Misconduct-Harassing a Person. Therefore, a skip in progression and issuance of a 3-day suspension is warranted.

The investigation into alleged misconduct by Fochs was triggered by a Respectful Workplace Complaint filed against Fochs by Correctional Officer H. The complaint alleged that Fochs mistreated Officer H when they were working together in a Redgranite control center and that Fochs had engaged in multiple instances of harassing behavior.

As to the alleged misconduct in a control center, the record establishes that Fochs is a very experienced employee who runs a tight ship. As a consequence, when an employee on light duty such as Officer H is assigned to help out in the control center, Fochs finds it more of a hinderance than a help. While it is apparent that the Officer H took genuine offense when Fochs in effect told him to stay out of the way, the record also persuades the Commission that Officer H was overly sensitive to any perception that his light duty status (or the injury related thereto) was not legitimate. This sensitivity caused Officer H to overreact to Fochs' directives and behaviors reflecting Fochs' view that light duty personnel were more of a hinderance than a help. On balance, the Commission concludes that Fochs did not engage in misconduct by the way he interacted with Officer H in a control center.

As to the alleged harassment of Officer H (and indirectly Officer H's fiancé who was also a Redgranite Correctional Officer), the record supports the conclusion that Fochs' conduct went over the line from common and accepted banter to offensive conduct. Fochs contends that he meant no offense and was entitled to be told to stop before he could be subjected to discipline. However, Fochs should have known that belittling Officer H's masculinity in the context of Office H's romantic relationship with another Correctional Officer was out of bounds.

As reflected in the above-quoted letter suspending Fochs, the claim of "Serious Misconduct" warranting a skip in disciplinary progression is predicated on both Fochs' alleged

control center conduct and his harassing conduct. Having concluded that there was no control center misconduct, the Commission rejects the “Serious Misconduct” basis for the discipline imposed. However, the Commission is persuaded that the combination of Fochs’ harassment of Officer H and his computer/internet related misconduct referenced in Finding 4 does provide just cause for more than the Letter of Expectation Fochs asserts is appropriate. After giving due consideration to Fochs’ 27 years of DOC service and clean disciplinary record, the Commission concludes that there is just cause for a one-day suspension. Fochs shall be made whole for the difference.

Issued at the City of Madison, Wisconsin, this 25th day of August, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman