

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARY FREITAG, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0122

Case Type: PA

DECISION NO. 39495-A

Appearances:

Sean Heiser, Field Representative, AFSCME Council 24, 1616 East Road 2, Edgerton, Wisconsin, appearing on behalf of Mary Freitag.

David G. Makovec, 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 Health Services.

DECISION AND ORDER

On August 4, 2022, Mary Freitag filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for three days without just cause by the State of Wisconsin Department of Health Services.

A telephone hearing was held on October 7, 2022, by Commission Examiner Katherine Scott. The parties submitted written arguments on October 14, 2022. A Proposed Decision and Order was issued on November 11, 2022, by Examiner Scott, affirming the three-day suspension by the Department of Health Services. No objections were filed by the parties by the deadline given of November 16, 2022.

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

FINDINGS OF FACT

1. Mary Freitag (Freitag) is employed by the State of Wisconsin Department of Health Services (DHS) as a Psychiatric Care Technician at Mendota Mental Health Institute (MMHI). She had permanent status in class when she was suspended.

2. On January 9, 2022, nurse Elhadj Cherif Diallo (Diallo) noticed that Freitag's computer background was a photo of a coworker sleeping on the MMHI premises.

3. During the investigation, Freitag admitted to taking a different photo of that coworker, but claimed she deleted it.

4. DOC suspended Freitag for three days for failing to comply with a departmental policy prohibiting unauthorized photography on state property.

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 Health Services had just cause within the meaning of Wis. Stat. § 230.34(1)(a), to suspend Mary Freitag 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 Mary Freitag by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 25th day of November, 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.

Mary Freitag had permanent status in class at the time of her suspension and her appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that Freitag was guilty of the alleged misconduct and that the misconduct constituted 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 the evening of January 9, 2022, nurse Elhadj Cherif Diallo (Diallo) noticed that one of the computers in the nursing station had a background photo of a coworker sleeping in the Madison Juvenile Treatment Center (MJTC) gym. When it was still there at 5 a.m. the next morning, Diallo took a photo of the computer screen.

Freitag admitted taking a photo but denied uploading a photo onto the computer. During the investigation, she said that she took a different photo of that coworker but deleted it. She believes someone is harassing her by changing her computer background and said that several other computer backgrounds have been changed this way.

MMHI has a work rule prohibiting employees from taking photos on the grounds without authorization. *See* Exhibit R-5, pg. 29. The policy is meant to protect psychiatric patients' privacy. Freitag signed an acknowledgment of these policies. *See* Exhibit R-4. Freitag argued that other employees take pictures at MMHI "all the time." She claims, for example, that another employee took TikTok videos while working out in the gym. Assuming for the sake of argument that her unproven claim is correct, there is no evidence that MMHI was aware of other infractions and failed to discipline the employees. Therefore, Freitag's claim of disparate treatment is rejected.

Freitag admitted to taking a picture on MMHI grounds. In doing so, she violated a departmental policy prohibiting unauthorized photography on MMHI grounds. Because she had previously received a one-day suspension, MMHI imposed a three-day suspension pursuant to the

standard disciplinary progression. In that context, the Commission concludes that there was just cause for the three-day suspension, and the suspension is therefore affirmed.¹

Issued at Madison, Wisconsin, this 25th day of November, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ MMHI also has a policy prohibiting employees from misusing state property, including computers. See Exhibit R-5, pg. 30. MMHI presented a photo of Freitag's computer showing a photograph of a man sleeping on a mat. See Exhibit R-6. The Commission need not determine if the State met its burden of proof as to this allegation because the violation Freitag admitted is a sufficient level of misconduct to warrant the three-day suspension.