

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRANDON PAGEL, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0128

Case Type: PA

DECISION NO. 39804

Appearances:

David Benson, 1111 North Road, Mauston, Wisconsin, appearing on behalf of Brandon Pagel.

David 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 November 16, 2022, Brandon Pagel 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 Health Services (DHS).

The parties stipulated to a consolidated hearing with three other Appellants suspended for three days by DHS; S.M. (Case ID: 2.1025), L.P. (Case ID: 2.01276), and J.S. (Case ID: 2.0127). A consolidated telephone hearing was held on January 18, 2023, by Commission Examiner Anfin Jaw for Pagel, S.M., L.P., and J.S. The parties submitted closing argument on January 24, 2023. Pagel filed a written reply on January 25, 2023. The Respondent also filed a written reply on January 26, 2023.

On February 28, 2023, Examiner Jaw issued a Proposed Decision and Order modifying the three-day suspension by DHS to a one-day suspension. The Appellant and the Respondent filed objections to the Proposed Decision on March 6, 2023.

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

FINDINGS OF FACT

1. Brandon Pagel is employed by the State of Wisconsin Department of Health Services (DHS) as a Psychiatric Care Supervisor at Sand Ridge Secure Treatment Center (SRSTC) and had permanent status in class at the time of his suspension.

2. SRSTC is a secure treatment center in Mauston, Wisconsin operated by DHS, a state agency of the State of Wisconsin. SRSTC houses Wisconsin's Sexually Violent Persons Program.

3. On July 17, 2021, on his state email, Pagel was cc'd to an email communication from coworker R.J. related to the planning and organization of a non-work-related golf outing. The email was part of a chain of emails that contained inappropriate language and sexual innuendos.

4. Pagel did not report the inappropriate language and misuse of state email to human resources, as required by policy.

5. DHS suspended Pagel for three days for negligence and failing to report the inappropriate conduct and potential respectful workplace policy violation to human resources.

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 did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Brandon Pagel 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 Brandon Pagel by the State of Wisconsin Department of Health Services is modified to a one-day suspension, and he shall be made whole for the difference with interest.¹

¹ See Wis. Admin. Code ERC 94.07.

Issued at Madison, Wisconsin, this 16th day of March, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states 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.

Pagel 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 Pagel 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 Pagel, with his state email address, received an email communication, Subject: RE: Golf Outing, from coworker R.J. on July 17, 2021, for the planning and organization of a non-work-related golf outing. It appears Pagel was added or cc'd to the golf outing emails because R.J. volunteered Pagel to provide work coverage for another coworker on the day of the outing. Two emails further down the email chain referred to the name of the outing, "Chomo," and even further down the email chain included two team names: "The Swingin' Dicks and "Babes w/ Balls." The primary organizer for the golf outing was Pagel's direct report, J.G., who sent over 90 inappropriate emails related to the outing that included more obscene language and sexual innuendos. Pagel did not stop or redirect J.G., or report the inappropriate language used by J.G. to human resources.

According to DHS Human Resources Policy and Procedure (HRPP) 703, DHS members of management are held to a higher standard and must maintain a workplace that is free from bullying, discriminatory, harassing and/or retaliatory behaviors. They are responsible for reporting all instances of such inappropriate behaviors to human resources as soon as possible. No doubt, DHS has an interest and reasonable expectation that its supervisory staff promote and maintain a respectful workplace and report any communications in violation of that goal.

DHS conducted an investigation into the emails after management received a Respectful Workplace complaint from an employee in November 2021. Given the large number of staff involved in the email exchanges and chains, the investigation was referred to the Division of Personnel Management (DPM) at the Department of Administration. DPM began conducting investigatory interviews in May 2022. The delay was due to workload and other personnel turnover issues. Pagel was interviewed in July 2022. During his investigatory interview, Pagel stated that

he did not have a clear understanding of what “CHOMO” (widely known prison slang for child molester) meant. He also asserted that he did not want anything to do with the golf outing and was not sure he even opened the email. He may have skimmed through the emails but did not read them word for word since they were related to the golf outing and he was not interested in participating. Pagel further explained that he did not correct or report the behavior of R.J. or J.G., because he was unaware of their conduct.

While Pagel continued to deny his understanding of “CHOMO” at the hearing, credible testimony from multiple witnesses persuades the Commission that Pagel, an 18-year veteran employee at SRSTC, and his coworkers who participated in the golf outing were fully aware of the meaning of “CHOMO.” We find Pagel’s denial untruthful and not credible.

Accordingly, we find that Pagel committed workplace misconduct when he failed to provide truthful information during the investigation, and most importantly, at the hearing.

Pagel offers the following defenses to excuse and/or mitigate his conduct.

First, Pagel cites the delay in the investigation. There was about a six-month delay between when management was first made aware of the emails to when DPM conducted its first investigatory interview. Given the number of staff involved and DPM’s credible explanation regarding the delay, the Commission finds that the delay was not unreasonable under the circumstances.

Second, Pagel argues that he and his fellow coworkers who were involved in the golf outing were being retaliated against by S.B, the individual who filed the initial complaint about the emails. S.B. was the subject of a separate Respectful Workplace complaint, and therefore allegedly had a desire to retaliate by filing her own complaint. However, the Department has an obligation to investigate any report or allegation of potential misconduct, especially those which fall under its respectful workplace policy, regardless of when or how it is reported. Ultimately, whatever provokes an investigation does not negate any misconduct that is discovered. Additionally, S.B. was not involved in the decision to discipline Pagel and is no longer employed with the Department. Under the circumstances, we find that S.B.’s alleged motivation in reporting the behavior does not change Pagel’s misconduct, nor reduce his culpability.

Next, at the hearing, Pagel raised a disparate treatment claim related to coworker T.S., who posted and made inappropriate and offensive comments on Facebook referencing SRSTC. However, no evidence was presented that the communication was made on state time, with a state email, or a state computer. Furthermore, T.S. is not a supervisor. When SRSTC management became aware of the posts, T.S. was given a verbal reprimand and directive to not do it again. Here, the misconduct is not similar and therefore, T.S.’s lack of discipline cannot be compared to Pagel’s three-day suspension.

Lastly, the Commission turns to Pagel’s contention that he was unfairly grouped together with other DHS employees who were also disciplined for their degrees of involvement in the inappropriate emails. During the hearing, it was established that J.G. received a five-day

suspension; S.M., L.P., and J.S. received three-day suspensions; B.H. initially received a three-day suspension but was reduced to a one-day suspension; R.J. and C.T. received one-day suspensions, and M.K. received a Letter of Expectation.

To address the differences in the level of discipline imposed, Ann Moran, appointing authority and Director of SRSTC, credibly explained that the differences were based on the different levels of involvement in the emails.

First, non-supervisory staff member J.G. was found to be the primary organizer of the golf outing, as he authored the majority of the communications by sending 92 inappropriate emails to approximately 37 coworkers using his state email and state computer. J.G. was issued a five-day suspension for serious workplace misconduct, misuse and abuse of state email and state computers, as well as failing to provide truthful and accurate information when required. Based on the seriousness of J.G.'s misconduct, the Department skipped progressive discipline. Plainly, J.G.'s misconduct was more egregious than Pagel's, which is reflected in the five-day suspension issued to J.G. compared to Pagel's three-day suspension.

Second, two other non-supervisory staff, R.J. and C.T. who were found to be co-organizers of the event, though to a much lesser extent than J.G., were issued one-day suspensions. As non-supervisory staff, R.J. and C.T. are not similarly situated to Pagel, as they are held to a lower standard and do not have a duty to report potential violations of the respectful workplace policy. Thus, the Department followed progressive discipline and issued one-day suspensions.

Third, other supervisory staff that were included on the communications received three-day suspensions, similar to Pagel, for failing to correct the behavior of staff and failing to report the inappropriate communications to human resources, as is required by policy (S.M., L.P., J.S., and B.H.). B.H.'s three-day suspension was subsequently reduced by DHS management to a one-day suspension due to mitigating circumstances. Specifically, B.H. addressed his concerns with J.G. and instructed J.G. to stop sending the inappropriate communications. B.H. was found to have failed to report the inappropriate conduct and potential policy violation to human resources. According to DHS, S.M.'s, L.P.'s, and J.S.'s involvement were directly comparable in nature to Pagel's, therefore, all were issued three-day suspensions.

Finally, supervisor M.K., received only one email referring to the "CHO" Open, with no attachments, team names, or references to any inappropriate sexual innuendos. The Department explained that the threshold warranting discipline was based on the entire term, "CHOMO." Therefore, M.K. was issued a non-disciplinary Letter of Expectation. We find M.K.'s conduct not comparable to Pagel's misconduct.

However, the Commission is persuaded that the Department did not consider mitigating circumstances when it issued Pagel a three-day suspension. S.M.'s, L.P.'s, and J.S.'s involvement were not directly comparable in nature to Pagel's misconduct. Pagel was not included in the initial planning emails related to the golf outing, and was only included later on July 17, 2021, for work coverage purposes. Regarding the actual email communications that Pagel was included in, we find him credible when he explained that he may have skimmed the emails and did not see the

inappropriate language included that were much further down the chain of emails. Thus, he cannot be found at fault for failing to address J.G.'s or R.J.'s behavior or for failing to report the behavior to human resources. But the Commission does find that his failure to be truthful during the investigation and at the hearing is worthy of discipline.

Given the foregoing, the Commission concludes that Pagel's misconduct establishes just cause for imposing progressive discipline. Therefore, the three-day suspension is modified to a one-day suspension, and he shall be made whole for the difference with interest.

Issued at Madison, Wisconsin, this 16th day of March, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman