

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JONATHAN LOWY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0579

Case Type: PA

DECISION NO. 39924

Appearances:

Sean P. Daley, Business Agent, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Jonathan Lowy.

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 Corrections.

DECISION AND ORDER

On April 17, 2023, Jonathan Lowy filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Examiner Anfin Jaw.

On April 24, 2023, the Appellant waived his right to have a contested hearing. The Respondent filed exhibits on June 9, 2023. The parties filed written closing arguments on June 15, 2023. Also on June 15, the Appellant stipulated to the Respondent's exhibits and facts presented. The Respondent filed a written response to the Appellant's closing argument on June 20, 2023. Lowy did not file a written response by the deadline given of June 21, 2023.

On June 22, 2023, Examiner Jaw issued a Proposed Decision and Order affirming the five-day suspension of Lowy by DOC. No objections were filed by the parties by the deadline given of June 27, 2023.

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

FINDINGS OF FACT

1. Jonathan Lowy (Lowy) is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at Stanley Correctional Institution (SCI) and had permanent status in class at the time of his five-day suspension.

2. The DOC is a state agency responsible for the operation of various corrections facilities including SCI, a medium-security facility located in Stanley, Wisconsin.

3. On October 23, 2022, Lowy was inattentive and sleeping while on duty.

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 to review 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 Jonathan Lowy for five days.

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

ORDER

The five-day suspension of Jonathan Lowy by the State of Wisconsin Department of Corrections is affirmed.

Issued at the City of Madison, Wisconsin, this 18th day of July 2023.

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.

Jonathan Lowy 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 Lowy 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 Lowy was inattentive and observed to be sleeping during his shift on October 23, 2022. DOC initiated an investigation and Lowy admitted that he fell asleep while on duty. Based on his admission, misconduct has been established.

Nonetheless, Lowy asserts that his discipline should be rejected because it violates anti-discrimination law, including the Rehabilitation Act and the Americans with Disabilities Act's duty to provide reasonable accommodations for the Appellant's disability. Lowy claims he made a reasonable accommodation request just days before the October incident, however, did not provide any evidence or documentation to support his claims. The evidence presented by DOC established that Lowy was approved for intermittent FMLA on April 27, 2022, for his sleeping disorder and disability. Based on Lowy's FMLA Designation Notice, Lowy had the ability to request FMLA leave "2-3 times per month 1 day per episode." No evidence was presented that Lowy requested and/or was denied FMLA leave. Finally, there was evidence that Lowy requested a reasonable accommodation, but only after the October incident at issue. According to the Respondent, that accommodation was promptly granted sometime in November 2022. Under the circumstances, the Appellant's arguments lack merit. Accordingly, the Commission finds that Lowy can be held accountable for his misconduct.

Turning now to the level of discipline imposed here, it is expressly noted that Lowy received a one-day suspension on March 15, 2022, for being inattentive during his shift, a three-day suspension on June 13, 2022, for sleeping on duty, and a five-day suspension on October 19, 2022, for inattentiveness or sleeping while on post.

Given the foregoing, it is concluded that there was just cause for Lowy's five-day suspension and it is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 18th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman