

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER MONTES, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0141

Case Type: PA

DECISION NO. 40267

Appearances:

Jennifer Montes, 321 E. Fremont St., Appleton, Wisconsin, appearing on her own behalf.

David Makovec, 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 Health Services.

DECISION AND ORDER

On December 20, 2023, Jennifer Montes filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for one day without just cause by the State of Wisconsin Department of Health Services (DHS). The appeal was assigned to Commission Examiner Katherine Scott Lisiecki.

A telephone hearing was held on February 21, 2024, by Examiner Lisiecki. The parties submitted written closing arguments on February 27, 2024. On March 18, 2024, Examiner Lisiecki issued a Proposed Decision and Order affirming the one-day suspension of Montes by the DHS. Montes filed objections on March 25, 2024. The DHS did not file a response by the given deadline of April 1, 2024.

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

FINDINGS OF FACT

1. Jennifer Montes (Montes) is employed by the State of Wisconsin Department of Health Services (DHS), as a Psychiatric Care Technician-Advanced (PCT-A) at the Wisconsin Resource Center (WRC). She had permanent status in class when she was suspended.

2. On July 23, 2023, Montes closed her eyes for nine minutes while on duty.
3. Following an investigation, DHS suspended Montes for one day for inattentiveness and failure to comply with agency policies.

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 Jennifer Montes 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 Jennifer Montes by the State of Wisconsin Department of Health Services is affirmed.

Issued at Madison, Wisconsin, this 16th day of April 2024.

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.

Jennifer Montes 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 Montes 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).

Jennifer Montes is employed as a Psychiatric Care Technician-Advanced (PCT-A) at the Wisconsin Resource Center (WRC). On July 23, 2023, security footage shows Montes with her eyes closed – presumably sleeping – for about nine minutes while on duty. In her investigatory interview, Montes admitted to “resting her eyes” while she was on shift.

Montes argues that she only closed her eyes for a short time. However, the WRC is a maximum-security facility, and Montes was responsible for the security of the institution and its patients. Psychiatric Care Technicians are responsible for “performance of security and security-related functions necessary to maintain a safe and secure environment.” *See* Exhibit R-2, pg. 3. WRC Deputy Director Sharon Harter testified that the patients at WRC have a high risk of committing suicide or other violence, which makes staff vigilance essential. There is no acceptable amount of time to cease paying attention.

Montes argues that another employee was using the computer for personal use, thus being inattentive, and was not disciplined. However, there is no evidence that the employer was aware of this other employee’s behavior, and Montes submitted no evidence to support this claim aside from her self-serving testimony.

Montes argues that her procedural due process rights were violated. She claims that the first letter she received informing her of the investigation didn’t identify her as a subject. The letter clearly had her name on it, twice. *See* Exhibit R-5, pg. 33. Montes claims the letter incorrectly identified her as a unit 4 staff member. It did not; it simply said the interview concerned “inattentiveness on Unit A4.” *See* Exhibit R-5, pg. 33. Montes claims the letter did not state what

her work rule violations were, but investigatory letters are not required to. The investigator, Captain Nicholas Johnson, credibly testified that he observed all proper notifications during his investigation. Montes was given notice of her investigatory hearing and was given an opportunity to get a representative. *See* Exhibit R-5, pgs. 2, 33. Likewise, she was given notice before her pre-disciplinary hearing, was read a notice of her rights, obtained a representative, and was given the opportunity to present mitigating factors. *See* Exhibit R-5, pgs. 2, 6, 7, 34. Montes's due process rights were not violated in the course of the investigation.

Montes argues that the investigation was flawed because certain employees were listed as potential witnesses but never interviewed. However, WRC HR Director Gina Lippold-Ruby and Deputy Director Harter testified that these employees were not interviewed because Montes admitted to "resting her eyes" in her interview, which rendered further interviews unnecessary.

Montes further argues that she was retaliated against because she was given a three-month reassignment as well as a one-day suspension. Wisconsin Admin. Code § ER 46.02 (8) defines "retaliation" as "any action taken by an employer in order to adversely affect the employee's conditions of employment, when such action is taken because of the employee's exercise of rights under this chapter." However, Montes failed to demonstrate how her conditions of employment were adversely affected, or that such action was taken because she attempted to exercise her rights. Captain Michael Priebe's comment to Montes, when informing her of her reassignment, that she was "lucky the reassignment wasn't permanent" and that she "should never be inattentive on unit" are clearly intended as chastisement for Montes failing to complete her duties and jeopardizing institutional safety. His comments, and the reassignment, cannot be construed as threats to prevent Montes from exercising her rights or to punish her for doing so. Further, Deputy Director Harter credibly testified that Montes was reassigned because being inattentive on duty is significant, and that she was moved to a safer position.

Montes was inattentive when she closed her eyes on duty on July 23, 2023. Deputy Director Harter testified about how important it is that employees at the WRC are attentive and aware of their surroundings since the WRC is a maximum-security institution with a high risk of violence. Montes's inattentiveness could have jeopardized the institution's safety and the safety of inmates. The State followed progressive discipline in issuing this one-day suspension. There was just cause for the one-day suspension, and the suspension is therefore affirmed.

Issued at the City of Madison, Wisconsin, this 16th day of April 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman