BY THE COURT:

DATE SIGNED: December 11, 2025

Electronically signed by Benjamin Jones
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 1

State of Wisconsin
Department of Health Services,

Petitioner,

v. Case No. 2025CV1399

Wisconsin Employment Relations Commission,

WERC Decision 40767-A

Respondent.

DECISION AND ORDER

INTRODUCTION

Petitioner Wisconsin Department of Health Services ("DHS") seeks judicial review of a final decision issued by Respondent Wisconsin Employment Relations Commission ("WERC"), which modified DHS's disciplinary decision of its employee from discharge to reinstatement without backpay. For the reasons stated below, the Court affirms WERC's final decision.

I. Background

Travis Imm ("Imm") was employed by DHS's Division of Care and Treatment Services as

a Psychiatric Care Technician—Advanced at Winnebago Mental Health Institute ("WMHI"). R. 100.[1] In this position, Imm was subject to DHS attendance policy 401.01 and WMHI attendance policy 501. R. 64. It is undisputed Imm was an employee with permanent status in class and was aware of these policies at all relevant times.

On September 24, 2024, Imm called in sick to work, indicating he needed to take a mental health day. R. 213. At the time, Imm was approved for intermittent FMLA for mental illness. *Id.* However, he did not specify "FMLA" when he called in sick this day. *Id.* Imm did not have enough leave time to cover this absence, so this absence resulted in approximately three hours of unauthorized leave without pay. *Id.* Imm's unit supervisor testified that in his pre-disciplinary meeting, Imm stated he "called in sick instead of FMLA. It was a simple mistake. I have FMLA, and I can use my leave time or leave without pay." R. 32.

DHS found Imm in violation of WMHI's Attendance Policy 108.17 and DHS's Attendance Policy 401, and two State work rules: failure to comply with written agency policies/procedures, specifically, the aforementioned attendance policies; and unexcused or excessive absenteeism or tardiness. R. 97.

DHS Policy 501—Work Rules and Discipline subjects DHS employees to progressive discipline. *See* R. 120-127. DHS Policy 501.06 provides that the "schedule of progressive discipline below will be followed unless the facts of the specific situation warrant a different level of discipline." R. 123. The progression schedule outlined in Policy 501.06(1) states that a first violation is subject to a one-day suspension without pay, a second violation is subject to a three-day suspension without pay, a third violation is subject to a five-day suspension without pay, and

[1] The respondents filed the record as two docket entries at dkts. 9-10. The Court cites to the record at all times using the Bates number at the bottom of each page of the record.

a fourth violation is subject to termination. R. 124. Certain employees may receive a written reprimand in lieu of suspensions for the first two violations if they are related to attendance. *Id.*

Pursuant to DHS Policy 501.06, Imm had previously received a letter in lieu of a one-day suspension, one three-day suspension, and two five-day suspensions. R. 47. Three of Imm's previous disciplinary actions related to attendance. *Id.* The September 24, 2024 incident was Imm's fifth violation. R. 98. DHS discharged Imm effective November 7, 2024. *See* R. 97-99.

On December 10, 2024, Imm filed an appeal with WERC of DHS's decision to discharge Imm from his employment. R. 1-3. The appeal alleged that DHS did not have just cause to discharge him from his employment. *See id.* A telephone hearing via Zoom was held with a WERC hearing examiner on the merits of Imm's appeal. R. 10. On March 25, 2025, WERC issued a final decision, which held that DHS did not have just cause to discharge Imm from his employment with DHS, and modified the discharge to a reinstatement without backpay. *See* R. 212-214.

In its decision, WERC determined that misconduct had been established because Imm had violated DHS policy. R. 214. WERC found that Imm's failure to specify "FMLA" when he called in his absence resulted in his absence not getting approved under FMLA, and Imm did not have enough leave time to cover the approximately three hours of unexcused time. *Id.* DHS policy requires leave without pay be preapproved, and WERC concluded Imm violated this policy. *Id.*

Next, WERC evaluated whether the misconduct constituted just cause for the discipline imposed. WERC found that Imm's "mental health crisis is sufficient to mitigate his misconduct"[2] and concluded that the discipline should be reduced from discharge to reinstatement without backpay. R. 214.

[2] The Court advises WERC to provide greater explanation in support of legal conclusions moving forward, in part to help other agencies understand and anticipate WERC's exercise of discretion in similar cases.

On April 24, 2025, DHS filed the above-captioned lawsuit seeking judicial review of WERC's final decision.

II. Applicable Law

Judicial review of administrative decisions under Wis. Stat. ch. 227 is confined to the record. Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). A court affords "no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11). However, the court gives "due weight" to the "experience, technical competence, and specialized knowledge of the administrative agency involved, as well as discretionary authority conferred upon it." Wis. Stat. § 227.57(10). *See also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496.

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178 (Ct. App. 1984). The challenging party can satisfy its burden, among other ways, by showing that an agency committed a procedural error, erroneously interpreted a provision of law, or lacked substantial evidence in the record for its decision. Wis. Stat. § 227.57(4)-(6). Additionally,

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Wis. Stat. § 227.57(8).

III. Analysis and Legal Conclusions

DHS argues that the Court should reverse WERC's decision because WERC acted without legal authority and pursuant to unpromulgated rules in violation of Wis. Stat. ch. 227 when it

modified DHS's disciplinary decision to terminate Imm.

A. WERC acted within its legal authority.

DHS argues WERC's decision should be reversed under Wis. Stat. § 227.52(8) because WERC exceeded its discretionary authority delegated to it under the law. WERC maintains it acted within its authority, and contends that it is entitled to due weight as to its application of the long-standing statutory just cause standard.

The extent of an agency's statutory authority is a question of law the Court reviews *de novo*. *Andersen v. DNR*, 2011 WI 19, ¶ 25, 332 Wis. 2d 41. The Wisconsin Supreme Court recently described "due weight" to mean giving "respectful, appropriate consideration to the agency's views while the court exercises its independent judgment in deciding questions of law." *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 78. Due weight "is a matter of persuasion, not deference." *Id.*

An employee with permanent status in class "may" be discharged only for "just cause." Wis. Stat. § 230.34(1)(a). The statute further provides:

> It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrator's standards under s. 230.04 (13m) ….

Wis. Stat. § 230.34(1)(a). An employee may appeal a discharge to WERC if the appeal alleges the discharge was not based on just cause. Wis. Stat. § 230.44(1)(c). The legislature granted WERC the authority to determine whether "just cause" for discipline exists. Wis. Stat. § 230.44(4)(c). The employing agency has the burden to establish that the employee was guilty of the misconduct alleged and that the misconduct constitutes just cause for the discharge. *Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 133 (1971); *Safransky v. State Personnel Bd.*, 62 Wis. 2d 464, 472 (1974).

WERC's review is two-fold. First, WERC "must determine whether the discharged

employee was actually guilty of the misconduct cited by the appointing authority." *Safransky*, 62 Wis. 2d at 472. Here, WERC concluded that Imm engaged in misconduct. R. 214. Second, WERC must determine "whether such misconduct constitutes just cause for discharge." *Safransky*, 62 Wis. 2d at 472. Here, WERC concluded that "Imm's mental health crisis is sufficient to mitigate his misconduct" to justify reducing his discipline under the just cause standard to reinstate Imm without backpay. R. 214.

DHS advances several arguments as to why WERC acted without legal authority. DHS argues that WERC's decision was not reasonable because WERC failed to cite any legal authority showing it may rely on Imm's mental health status as a mitigating factor in its just cause analysis. DHS further argues that Wis. Stat. § 227.57(8) requires reversal because WERC's decision reads as an exercise of equitable power, and agencies do not possess equitable powers. These arguments fail because, as explained below, WERC acted within its proper authority to exercise its discretion.

Wis. Stat. § 230.04(13m) directs the administrator[3] to establish progressive discipline standards that DHS applies to its employees. Separately, Wis. Stat. § 230.44(1)(c) grants WERC the authority to review whether the discipline DHS imposed for misconduct under its discipline standards meets the just cause standard created under Wis. Stat. § 230.34(1)(a) on appeal.

DHS argues that the only correct decision was for WERC to affirm DHS's decision to discharge Imm. The Court disagrees. The statute which authorizes DHS to discipline Imm is permissive rather than mandatory, stating that the employee "may" be discharged for a finding of just cause. Wis. Stat. § 230.34(1)(a); *see Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125 ("[W]hen interpreting a statute, [courts] generally construe the word 'may' as

[3] The "administrator" is the administrator of the Division of Personnel Management of the Wisconsin Department of Administration. Wis. Stat. § 230.03(1), (10).

permissive."). DHS policy also uses permissive language, which further supports discretion in determining whether progressive discipline is appropriate in each case. DHS omits from its briefing the first sentence of DHS's progressive discipline policy, which states that "[t]he schedule of progressive discipline below will be followed unless the facts of the specific situation warrant a different level of discipline." DHS Policy 501.06; R. 123. Furthermore, Section 501.08 specifically allows "[a]ggravating or mitigating circumstances surrounding the violation" as one of the "factors [ ] considered in determining the appropriate level of discipline." R. 125. In short, Wis. Stat. § 230.44(4)(c) by its plain language and in the context of the above statutory provisions authorizes WERC to "affirm, modify or reject" DHS's decision based on mitigating circumstances specific to this case.

On reply, DHS argues that WERC's argument fails because it did not consider multiple factors, but rather only relied on one dispositive factor. The Court "shall not substitute its judgment for that of the agency on an issue of discretion." Wis. Stat. § 227.57(8). The Court does not find WERC's reliance on Imm's mental health crisis to be unreasonable and will not substitute its judgment for that of the agency on this issue.

The Court determines that WERC was legally authorized to consider mitigating factors as determined by the facts and circumstances of the case in its just cause analysis in order to come to its determination. DHS has failed to meet its burden to show that WERC's decision was unreasonable or that WERC exceeded its authority, and the Court finds that WERC's decision was reasonable in light of its discretionary authority.

B. DHS's rulemaking claims

DHS argues that WERC was required to promulgate rules under the process set forth in Wis. Stat. ch. 227 before relying on factors in tis just cause analysis. DHS further contends because

WERC did not do this, it acted according to unpromulgated rules and its decision must be reversed. The Court disagrees.

Pursuant to Wis. Stat. ch. 227, agencies are required to undergo a rulemaking process, in which agencies must

> [P]romulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule.

Wis. Stat. § 227.10(1).

As a threshold matter, the exclusive means of judicial review regarding the validity of an administrative rule is generally an action for declaratory judgment brought pursuant to Wis. Stat. § 227.40(1). *Midwest Renewable Energy Ass'n v. Public Service Comm'n*, 2024 WI App 34, ¶ 15, 412 Wis. 2d 698. However, the validity of a rule may be determined in a judicial proceeding under Wis. Stat. ss. 227.52 to 227.58 when material therein "for review of decisions and orders of administrative agencies if the validity of the rule or guidance documents involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered." Wis. Stat. § 227.40(2)(e). Under this statute, a plaintiff may challenge the validity of an agency action on the ground that it was not promulgated in compliance with the rulemaking procedures set forth in Wis. Stat. § 227.40(4)(a), if the action meets the statutory definition of an administrative rule under Wis. Stat. § 227.01(13). *Midwest Renewable Energy Ass'n*, 2024 WI App 34, ¶ 15. "An agency action need not be called a 'rule' to be deemed invalid as an unpromulgated rule." *Id.*

Assuming *arguendo* that WERC's decision relied upon an unpromulgated "rule," the Court

would not have jurisdiction to hear DHS's claim because DHS failed to comply with the requirements under Wis. Stat. § 227.40. DHS did not bring duly challenge the claimed rule before WERC, so the Court cannot review this claim under 227.52 review. *See* Wis. Stat. § 227.40(2). DHS also could not bring this claim under Wis. Stat. § 227.40(1) because it did not comply with the requirements under 227.40(5) when it failed to serve the Joint Committee for Review of Administrative Rules with a copy of its petition.[4] A failure to comply with this requirement results in the Court losing jurisdiction over the case. *Marta v. Dep't of Children & Families*, 2014 WI App 69, ¶ 10, 354 Wis. 2d 486.

Even if the Court did have jurisdiction, WERC's decision does not constitute a rule. Whether an agency's action constitutes a "rule" under Wis. Stat. § 227.01(13) presents an issue of law the Court reviews *de novo*. *Midwest Renewable Energy Ass'n*, 2024 WI App 34, ¶ 16. A "rule" is "a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 227.01(13). An agency action must meet a five-element test to fulfill the statutory definition of a rule: "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Midwest Renewable Energy Ass'n*, 2024 WI App 34, ¶ 44. However, the statute relieves agencies from the rulemaking requirement for specific actions, even if the action would otherwise meet the statutory definition of a rule. Wis. Stat. § 227.01(13)(a)-(zz). Relevant here, a rule "does not include, and 227.10 does

[4] Wis. Stat. § 227.40(5) provides that the "joint committee for review of administrative rules shall be served with a copy of the petition in any action under this section and, with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard."

not apply to, any action or inaction of any agency, whether it would otherwise meet the definition under this subsection, that" … "[i]s a decision or order in a contested case." Wis. Stat. § 227.01(13)(b).

The question here is whether Wis. Stat. § 227.01(13) required WERC to promulgate administrative rules before considering Imm's mental health crisis as a mitigating factor in its decision to reduce his discipline from discharge to reinstatement without backpay. DHS argues that the "lack of statutory or legal authority" to consider Imm's mental health crisis "necessarily implies that WERC engaged in improper rulemaking when making" the determination to reinstate Imm's employment without backpay. Dkt. 21 at 12.

"Statutory interpretation begins with the plain language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633 (citation omitted). By the plain language of the statute, WERC's decisions itself is not a rule because it falls under one of the enumerated exceptions. *See* Wis. Stat. § 227.01(13)(b).

Likewise, WERC's reliance on the mitigating factor does not satisfy Wis. Stat. § 227.01(13)'s criteria to constitute a rule. DHS argues that WERC relied on a statement of general policy that directly contradicts "relevant administrative provisions, such as those governing progressive discipline." Dkt. 21 at 13. Contrary to DHS's assertion, WERC's consideration of Imm's mental health crisis in its just cause analysis is not a statement of policy of general application. "An agency decision on 'a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule.'" *Wisconsin Manufacturers & Commerce, Inc. v. Wisconsin Natural Resources Bd.*, 2025 WI 26, ¶ 46, 416 Wis. 2d 561 (quoting Wis. Stat. § 227.10(1)). As explained above, the legislature

delegated WERC the authority to review DHS's disciplinary decisions for just cause, and modify those decisions if it sees fit. Accordingly, WERC has the authority to weigh discretionary factors without undergoing the rulemaking process. *See Sierra Club v. Public Service Comm'n of Wisconsin*, 2024 WI App 52, ¶ 34, 413 Wis. 2d 616; *Lamar Central Outdoor, LLC v. DHA*, 2019 WI 109, ¶ 11, 389 Wis. 2d 486.

The Court concludes WERC's decision did not rely upon an unpromulgated a rule under Wis. Stat. § 227.01(13); consequently, WERC was not required to go through rulemaking, and its actions do not constitute illegal rulemaking to necessitate reversal.

ORDER

For the reasons stated, the Court finds that DHS has not meet its burden to show that WERC's decision should be reversed. Accordingly, the Court DENIES DHS's petition and WERC's final decision is AFFIRMED.