

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KIRK KONICHEK, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case ID: 306.0018

Case Type: PA

DECISION NO. 40775

Appearances:

Sean Daley, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Kirk Konichek.

Nicole Porter, 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 Natural Resources.

DECISION AND ORDER

On December 16, 2024, Kirk Konichek 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 Natural Resources. The appeal was assigned to Commission Examiner Katherine Scott Lisiecki.

A hearing was held on February 19, 2025, at the Commission offices in Madison by Examiner Lisiecki. The parties submitted written closing arguments on February 28, 2025. On March 18, 2025, Examiner Lisiecki issued a Proposed Decision, modifying the three-day suspension of Konichek by the DNR to a one-day suspension. Both parties filed objections on March 24, 2025, and the matter became ripe for Commission consideration on April 1, 2025.

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

FINDINGS OF FACT

1. Kirk Konichek (Konichek) is employed by the State of Wisconsin Department of Natural Resources (DNR), as a Safety Specialist Warden at the Viroqua Field Office. He had permanent status in class when he was suspended.

2. On June 17, 2024, Konichek used his non-personal-use state vehicle to drive to Wisconsin Rapids for an internal job interview.

3. Konichek failed to accurately code the time spent traveling to and from, and participating in, the interview. Konichek also failed to accurately record his mileage and location.

4. Following an investigation, the DNR suspended Konichek for three days for misuse of agency property, falsification of records, and failure to comply with written 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 Natural Resources did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Kirk Konichek for three days but did have just cause to suspend him for one day.

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

ORDER

1. The three-day suspension of Kirk Konichek by the State of Wisconsin Department of Natural Resources is modified to a one-day suspension and he shall be made whole with interest.¹

2. The State of Wisconsin Department of Natural Resources shall also modify the one-day suspension letter to delete the references to falsification of records and Serious Acts of Misconduct.

¹ See Wis. Admin. Code § ERC 94.07

Issued at Madison, Wisconsin, this 15th day of April 2025.

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.

Kirk Konichek 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 Konichek was guilty of the alleged misconduct and that 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).

Kirk Konichek is employed by the State of Wisconsin Department of Natural Resources (DNR), as a Safety Specialist Warden at the Viroqua Field Office. On June 17, 2024, Konichek was working at Fort McCoy in Tomah. He used his non-personal-use state law enforcement squad car to drive to Wisconsin Rapids for an internal job interview. DNR Manual Code # 9136, Paid Leave and Other Time Away from Work, states that “State vehicles cannot be used to travel to interviews.” See Exhibit R-6, pg. 4. Although employees may make incidental stops along the route to or from their work assignment, the 116-mile round-trip from Fort McCoy to Wisconsin Rapids was not incidental. See Exhibit R-4, pg. 4. The trip was not part of Konichek’s job duties, because Konichek’s only reason for driving to Wisconsin Rapids was to participate in the job interview for his personal benefit.

The State argues that employees have a responsibility to be familiar with agency and statewide policies. See *Gebert v. DOC*, Dec. No. 36920-A (WERC, 6/17). However, it is not intuitive that wardens cannot use their state vehicles for internal job interviews. Conservation Warden Hans Walleser also drove his state vehicle to the June 17 interviews in Wisconsin Rapids, and was surprised to learn, afterwards, that it was prohibited. Conservation Warden Timothy Otto testified that he was likewise unaware of this policy. In fact, the policy prohibiting employees from using their state vehicles for internal interviews is buried in a policy about leave, DNR Manual Code # 9136, Paid Leave and Other Time Away from Work, rather than included in either the State of Wisconsin Fleet Driver and Management Policies and Procedures Manual or the DNR Fleet Management Handbook. See Exhibit A-106, pg. 4; Exhibit R-7, pg. 11; Exhibit R-8, pg. 8. Both Fleet Management policies prohibit the use of state vehicles for anything other than “official state business” but fail to define “official state business.” The State argues that Konichek should

have asked his supervisor or HR if he had any questions about whether he would be able to use his state vehicle for an internal interview. However, Konichek was under the misapprehension that internal interviews constituted “official state business.”

Konichek did not properly code his time or location for his June 17 interview. Employees are supposed to use a “Civil Service Exam” code, “LEVL-11,” when attending an internal interview. Instead, Konichek coded the time he spent driving to and from, and participating in, the interview “LEZZ,” a catch-all administrative code for project management. However, Konichek’s miscoding of his time is understandable. It is not intuitive to use “Civil Service Exam,” an antiquated and inaccurate code, for an interview. Konichek only used the “Civil Service Exam” code twice before when specifically directed to do so by interview instructions. *See* Appellant’s Closing Argument, pg. 4. Konichek also failed to include that he was in Wisconsin Rapids on June 17 in his Vehicle Operation Report. *See* Exhibit R-10, pg. 49. However, Konichek testified that he doesn’t always put his furthest destination of the day, but rather where he spent the most time that day; in this case, at Fort McCoy in Tomah.

Konichek did not enter accurate mileage the week of June 17. Although he drove approximately 42 miles from his home to Fort McCoy on June 17, 58 miles to Wisconsin Rapids, and 58 miles back to Fort McCoy – a total of 158 miles – Konichek only logged 114 miles on June 17. *See* Exhibit R-10, pg. 49. In his investigatory interview, Konichek also admitted that he does not enter his mileage daily. *See* Exhibit R-10, pgs. 24-25. The State of Wisconsin Fleet Driver and Management Policies and Procedures Manual requires that employees track business miles on a daily basis. *See* Exhibit R-7, pg. 31. The DNR Fleet Management Handbook further requires employees to report mileage and usage on a daily or trip basis. *See* Exhibit R-8, pgs. 15-16.

However, Konichek appears to have made these errors in good faith. He included his correct location, Wisconsin Rapids, in DEARS – a note-taking software where wardens can log their mileage and locations – which his supervisor is able to review. *See* Exhibit A-102, pg. 5. In the June “Monthly Narrative” report that he submitted to his supervisor, Konichek wrote that he “participated in an interview for Investigative Warden position” on June 17. *See* Exhibit A-102, pg. 9. Administrative Warden Jacob Holsclaw, who was supervising Konichek at Fort McCoy on June 17, testified that Konichek told him that he was attending an interview, and that Konichek was not trying to conceal anything. Although Konichek failed to record his time, location, and mileage accurately, it is clear that he did not intend to deceive anyone about attending an interview in Wisconsin Rapids on June 17.

Konichek argues that it is a common practice for wardens to not record their vehicle mileage daily, as required by the State of Wisconsin Fleet Driver and Management Policies and Procedures Manual. He argues that DEARS is an old program and often malfunctions. However, wardens are still expected to log their mileage daily, and testimony demonstrates that they do so. Administrative Warden Holsclaw testified that he logs his mileage on paper at the end of the day. Conservation Warden Walleser and Law Enforcement Supervisor Ed McCann testified that they take pictures of their mileage at the end of the day. Conservation Warden Otto testified that he tries to record his mileage in DEARS daily, but that he sometimes forgets. He testified that, every few months, he goes a week without logging hours. The parties stipulated that further witnesses

would testify that, like Otto, they attempt to log their miles daily, but sometimes make mistakes. Therefore, although wardens often do not enter their mileage in DEARS every day, they do track their mileage daily using paper or pictures. Konichek, by his own admission, failed to track his mileage daily. *See Exhibit R-10, pg. 24-26.*

Konichek argues that he was subject to disparate treatment, because Conservation Warden Walleser took his state vehicle to the same June 17 interview but only received a letter of expectation. An employee who raises a disparate treatment claim has the burden of proving that contention. The Commission has long recognized that disparities in discipline may, under certain circumstances, affirmatively defend against discipline despite the existence of misconduct. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker for similar misconduct, inherent unfairness exists. *See Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15). Here, however, Walleser is not similarly situated to Konichek. Walleser immediately self-reported upon learning that he had violated the policy. Deputy Chief Conservation Warden Matthew O'Brien testified that, unlike Konichek, Walleser coded his time correctly and had accurate mileage entries. Konichek argues that he "self-reported" in his pre-disciplinary meeting, but admitting to behavior after an investigation has begun is not self-reporting.

Konichek also alleges that other employees fail to record their mileage daily, but he did not provide the names of any specific individuals who have done so during the investigation or in his pre-disciplinary statement. Since Konichek did not provide examples of similarly situated employees, or evidence that his supervisors were aware of these alleged practices, there is no evidence of disparate treatment.

Konichek committed misconduct by driving his state vehicle to an internal interview, failing to correctly code his time and location, and failing to log his mileage every day as required by DNR policy. Konichek has no previous discipline. DNR Human Resources Director Jennifer Gerbert stated Konichek was given a three-day suspension, rather than a one-day suspension in line with progressive discipline, because she believed Konichek attempted to cover up his vehicle use and interview attendance. However, Konichek made these errors in good faith and made no effort to conceal his interview attendance, location, or vehicle use. Therefore, the skip in progression from a one-day suspension to a three-day suspension is not warranted. The Commission is satisfied that this warrants a reduction in the length of the suspension from three days to one day. In addition, the DNR shall modify the one-day suspension letter to delete the references to falsification of records and Serious Acts of Misconduct.

Issued at the City of Madison, Wisconsin, this 15th day of April 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman