

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

K. R., Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION, Respondent.

Case ID: 315.0029

Case Type: PA

DECISION NO. 40881

---

Appearances:

Attorney Ben Hitchcock-Cross, Cross Law Firm, S.C., 845 N. 11th Street, Milwaukee, Wisconsin, appearing on behalf of K. R.

Attorney David Makovec, 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 Administration

**DECISION AND ORDER**

On January 4, 2025, K. R. filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Administration (DOA).

On January 24, 2025, DOA filed a motion to dismiss the appeal as untimely filed. Decision on the motion was deferred pending a hearing on the motion and the merits. A zoom hearing was conducted on April 24, 2025, by Commission Examiner Peter G. Davis who has been authorized to issue the Commission's decision in this matter pursuant to Wis. Stat. § 227.46(3)(a). The parties made oral arguments at the end of the hearing.

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

**FINDINGS OF FACT**

1. K. R. was employed by the State of Wisconsin Department of Administration (DOA) and had permanent status in class at the time his employment ended.

2. At all times material herein, K.R. had a medical condition that made decision-making difficult, and he was unable to perform his job responsibilities. Due to that condition, K.R. began a 12-week Family and Medical Leave Act (FMLA) leave effective August 1, 2024, and ending October 24, 2024.
3. K.R. was not medically cleared to return to work after his FMLA leave expired. Nonetheless, DOA required that he call in each workday following the expiration of his leave to report that he would not be coming to work. DOA advised K.R. that failure to call in would be treated as a “no call/no show.” DOA did not advise K.R. that three “no call/no show” events in a calendar year might end his employment. K.R. called in two of the first six workdays following October 24, 2024.
4. On November 5, 2024, DOA advised K.R. as follows:

In accordance with Section 230.34 (1)(am), Wis. Stats. states, "If an employee falls to report for work as scheduled, or to contact his or her supervisor for a minimum of 3 working days during a calendar year, the appointing authority shall consider the employee's position abandoned and may discipline the employee or treat the employee as having resigned his or her position. If the appointing authority decides to treat the position abandonment as a resignation, the appointing authority shall notify the employee in writing that the employee is being treated as having effectively resigned as of the end of the last day worked." You have abandoned your position of . . . with the Department of Administration, Division of Facilities Development (DFD). Therefore, we are considering you as having resigned from your position effective October 31, 2024.

This action is being taken because you failed to report to work as scheduled or contact your supervisor as directed for three (3) working days in calendar year 2024. Those dates of failing to report were October 25, 2024, October 28, 2024, November 1, 2024, and November 4, 2024.

Specifically, on October 25, 2024, and October 28, 2024, you did not report to work as scheduled and did not provide notification of your absence as required. On each of these dates your supervisor attempted to reach you by phone and personal email requesting information and you failed to reply. Your supervisor also notified you that your absences were considered a No Call/No Show and unexcused. On November 1, 2024, and November 4, you did not report to work as scheduled and did not provide notification of your absence as required.

In addition to the above, it is noted that you resigned your employment while you were the subject of an ongoing disciplinary investigation that alleged you engaged in misconduct and violated department work rules that might have resulted in discipline.

5. K.R. grieved the end of his employment and identified his personal email address as the method to be used when communicating with him. On December 20, 2024, Step 2 denial of his grievance was sent to his personal email address. K.R. did not become aware of the denial until December 30, 2024. He filed an appeal with the Commission on January 3, 2025, at 5:15pm.

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

### **CONCLUSIONS OF LAW**

1. Wis. Stat. § 230.445 (3)(c) 1. provides:

An employee or an appointing authority may appeal a decision issued by the administrator under par. (b) by filing an appeal with the commission. The employee or appointing authority may not file an appeal with the commission under this paragraph later than 14 days after receiving the administrator's decision.

2. K.R. did not “receive” the “administrator’s decision” until December 30, 2024.
3. K.R. timely filed an appeal with the Commission on January 4, 2025.
4. The State of Wisconsin Department of Administration constructively discharged K.R.
5. The Wisconsin Employment Relations Commission has jurisdiction over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).
6. The State of Wisconsin Department of Administration did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge K.R.

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

### **ORDER**

1. The motion to dismiss K.R.’s appeal is denied.
2. K.R. is to be reinstated as an employee of the State of Wisconsin on an unpaid status retroactive to November 5, 2024.

3. K.R. may use any paid leave which has accrued or will accrue between November 5, 2024 and 60 days from the date of this Order.
4. Within 60 days of the date of this Order, K.R. must provide medical documentation that he is able to resume his duties. If he fails to or is unable to provide said documentation or is unable to resume his duties with or without any reasonable accommodation, the State of Wisconsin may terminate his employment once the 60-day period expires. K.R. and the State may extend the 60-day period upon mutual agreement.
5. The State of Wisconsin is free to pursue the investigation of alleged misconduct by K.R. referenced in the November 5, 2024 letter.

Issued at Madison, Wisconsin, this 5<sup>th</sup> day of May, 2025.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

---

Peter G. Davis, Hearing Examiner

**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.

K.R. had permanent status in class at the time of his employment end and his appeal alleges that he was discharged without just cause.

DOA contends that K.R.'s appeal must be dismissed as untimely filed. DOA correctly notes that on December 20, 2024, it sent K.R. an email denying his appeal and advising him he had 14 days to file an appeal with the Commission. If the 14-day clock began to tick on December 20, K.R. had until 4:30pm on January 3, 2025 to file his appeal with the Commission. K.R.'s appeal was not received by the Commission until 5:15pm that day.

Wis. Stat. § 230.445(3) (c) 1 provides:

An employee or an appointing authority may appeal a decision issued by the administrator under par. (b) by filing an appeal with the commission. The employee or appointing authority may not file an appeal with the commission under this paragraph later than 14 days after **receiving** the administrator's decision. (Emphasis added).

The Commission has stringently applied the 14 day 4:30pm deadline in other matters. However, in light of the statutory reference to receipt of the administrator's decision and K.R.'s uncontested affidavit that he did not access the December 20, 2024, email until December 30, the Commission concludes in this instance that the 14-day time period did not begin until December 30 and thus K.R.'s January 4, 2025, appeal is timely. It should be emphasized that employees cannot delay the beginning of the 14-day time period by simply not accessing the personal email address they have provided to the State for the purposes of grievance and appeal communication. It is also noted that K.R. was able to timely and successfully initiate and respond to other grievance/appeal communications. However, K.R.'s affidavit and the evidence of his medical condition serve to overcome any skepticism the Commission might otherwise have as to when K.R. did or should be presumed to have accessed the December 20 email.

Turning to the merits of the matter, there is a threshold issue as to whether K.R. resigned his employment by virtue of his failure to call in on four days following the end of his FMLA

leave.<sup>1</sup> A call in requirement only makes sense for an employee who has been medically cleared to work upon return from FMLA leave. In the context of DOA general awareness of K.R.'s medical condition (which DOA was also aware would likely be ongoing until February 2025) and of the absence of a medical clearance to return to work, a requirement to call in makes no sense and smacks of a set up.<sup>2</sup>

The Commission acknowledges that K.R. was able to call in on two of the six days in question. However, it is also true that K.R. was in the midst of interactions with DOA payroll during that same period regarding use of accrued leave and may well have believed he was on approved vacation during the times in question. Importantly, K.R.'s testimony during the April 25 hearing demonstrated occasional ongoing difficulties processing information which might explain the failure to call on certain days. There is no reason to believe that his medical condition was better in October 2024. Most importantly, the call-in requirement was not a legitimate obligation that K.R. could be required to meet. Thus, his failure to do so is of no consequence.

Given the foregoing, the Commission concludes that K.R. was constructively discharged and that he did not engage in any misconduct by failing to call in on the days in question. Therefore, he is to be reinstated in unpaid status and his continued employment thereafter hinges on the terms and conditions specified in the Commission's Order.

Issued at Madison, Wisconsin, this 5<sup>th</sup> day of May 2025.

## **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

---

Peter G. Davis, Hearing Examiner

---

<sup>1</sup> The November 5, 2024, letter states that his resignation is effective October 31, 2024. However, at that point, only two of the three no call/no show days had occurred. Perhaps a typo or perhaps indicative of a rush to judgment.

<sup>2</sup> There is evidence in the record of conflict between K.R. and his supervisor and it is apparent that workload issues may have given DOA an incentive to cut ties with K.R. as simply as possible so that a replacement could be hired.