

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GABRIEL JOHNSTON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0740

Case Type: PA

DECISION NO. 40913

Appearances:

Andrew Hulce, c/o Wisconsin Secure Program Facility, 1101 Morrison Drive, Boscobel, Wisconsin, appearing on behalf of Gabriel Johnston.

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 11, 2025, Gabriel Johnston filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Commission Examiner Anfin J. Wise.

A zoom hearing was held on June 26, 2025, by Examiner Wise. The parties submitted written closing arguments on July 2, 2025.

On July 11, 2025, pursuant to Wis. Stat. § 227.46(3)(a), Examiner Wise was given final authority to issue the Commission's decision.

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

FINDINGS OF FACT

1. Gabriel Johnston (Johnston) is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at the Wisconsin Secure Program Facility (WSPF), and he had permanent status in class at the time of his suspension.

2. WSPF is a maximum-security correctional facility located in Boscobel, Wisconsin operated by DOC, a state agency of the State of Wisconsin.

3. On September 11, 2024, Johnston used his forearm to block an inmate's face to deflect a headbutt or spit from the inmate.

4. DOC suspended Johnston for one day for failing to follow its Use of Force policy.

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 Corrections did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Gabriel Johnston 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 Gabriel Johnston is rejected and he shall be made whole with interest.¹

Issued at Madison, Wisconsin, this 18th day of July 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Anfin J. Wise, Hearing Examiner

¹ See Wis. Admin. Code ERC 94.07.

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.

Johnston 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 Johnston 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).

On September 11, 2024, Johnston and another officer were escorting an inmate when the inmate began to actively and physically resist. The inmate turned his head in Johnston's direction and Johnston believed a sudden assault, a headbutt or spit, was imminent. Johnston reacted by using his forearm to block the inmate's face to deflect the assault. To finally gain control of the inmate's head, a third officer then arrived to assist.

The DOC initiated an investigation and a use of force review of the incident. The use of force committee determined that force was justified, however concluded that the level of Johnston's reactive use of force was not justifiable nor reasonable and/or necessary to gain the inmate's compliance. The committee reasoned that, aside from turning his head towards Johnston, the inmate did not appear to pose a threat to the officers because there were no other signs of pre-attack postures, like collecting fluid in his mouth or target glancing. DOC contended that a lower level of force should have been utilized, including continued dialogue.

At the hearing, Johnston credibly testified that he believed the inmate was going to headbutt or spit at him. Johnston reacted by bringing his forearm up to create distance between him and the inmate's face. The video evidence confirmed that Johnston then tucked his head behind his arm to protect his own face. Under the circumstances, we are persuaded that Johnston's reaction was not unreasonable. Even if Johnston was wrong about the inmate's potential attack, the Commission has previously found that there is a margin of error when force is used. Even a "potentially erroneous" employee belief regarding the need for force may be reasonable and thus, not subject to discipline. See *Grabowski v. DOC*, Dec. No. 36756 (WERC, 12/16). Additionally, we acknowledge that DOC employees must make difficult judgment calls on a daily basis as to the use of force.

Given the foregoing, it is concluded that the judgment of an experienced employee such as Johnston regarding his reactive use of force was a reasonable one that does not warrant discipline. Therefore, the one-day suspension is rejected, and Johnston shall be made whole consistent with this order.

Issued at Madison, Wisconsin, this 18th day of July 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Anfin J. Wise, Hearing Examiner