

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEVIN KIOSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0810

Case Type: PA

DECISION NO. 40939-B

Appearances:

Tamera B. Packard, Attorney, Pines Bach LLP, 122 W. Washington Avenue, Suite 900, Madison, Wisconsin, appearing on behalf of Kevin Kioski.

Nicole M. Porter, 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 August 11, 2025, Kevin Kioski (Kioski) filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged 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 November 13, 2025, by Examiner Wise. The parties made oral argument at the conclusion of the hearing. On November 18, 2025, Examiner Wise issued a Proposed Decision and Order, modifying the discharge of Kioski by DOC to a three-day suspension, and to make whole with interest for lost wages and for medical expenses incurred as a result of his discharge. No objections were received by the parties and the matter became ripe for Commission consideration on November 25, 2025.

On November 17, 2025, Kioski filed a Motion and Brief in Support of an Award of Attorney Fees under the Wisconsin Equal Access to Justice Act. On November 24, 2025, the DOC filed a response to the Motion. On November 26, 2025, Examiner Wise issued a Proposed Decision and Order Denying Kioski's Motion for Fees. No objections were received by the parties and the matter became ripe for Commission consideration on December 2, 2025.

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

FINDINGS OF FACT

1. Kevin Kioski (Kioski) was employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at Oakhill Correctional Institution (OCI), and he had permanent status in class at the time of his discharge.
2. The DOC is a state agency responsible for the operation of various corrections facilities including OCI, a minimum-security facility located in Oregon, Wisconsin.
3. On March 24, 2025, Kioski failed to complete a security round.
4. Kioski wrongly believed he had completed the round and incorrectly documented that he had completed the round.
5. On March 26, 2025, Kioski was 24 minutes late in completing a security round, did not report the late round to a supervisor, did not e-log the late round, and did not file an incident report, as required by policy.
6. On April 10, 2025, Kioski was 27 minutes late in completing a security round.
7. Kioski received a non-disciplinary Letter of Expectation (LOE) regarding rounds expectations on March 17, 2025, just seven days prior to the misconduct described in Findings of Fact 3, 4, 5, and 6.
8. DOC discharged Kioski for the misconduct described in Findings of Fact 3, 4, 5, and 6.
9. The former OCI Warden credibly testified at the hearing that a three-day suspension would be appropriate, given other comparable discipline issued by OCI.

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 discharge Kevin Kioski but did have just cause to suspend him for three days.

3. Kevin Kioski is the prevailing party within the meaning of Wis. Stat. § 227.485(3).

4. The position of the State of Wisconsin Department of Corrections before the Wisconsin Employment Relations Commission as to the discharge of Kevin Kioski was substantially justified within the meaning of § 227.485(2)(f), Stats.

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

ORDER

1. The discharge of Kevin Kioski by the State of Wisconsin Department of Corrections is modified to a three day suspension and he shall be made whole with interest¹ for lost wages and for medical expenses incurred as a result of his discharge.

2. Kevin Kioski's Motion for fees and costs is denied

Issued at Madison, Wisconsin, this 8th day of December 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Chairman

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.

Kevin Kioski had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Kioski 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).

It is undisputed that Kioski engaged in the misconduct described in Findings of Fact 3, 4, 5, and 6. Therefore, we now turn to the question of whether there was just cause for discharge.

Here, the former OCI Warden provided credible testimony as to the importance of rounds and why a missed security round can be a matter of life or death for an inmate—especially given the aging inmate population housed at OCI. Additional risks are created if an employee even inadvertently records a round he did not conduct. Consequently, there can be no doubt that Kioski's misconduct met the just cause standard for significant discipline. However, the Commission concludes discharge is too severe a penalty. Rather, a three-day suspension, the one level skip in discipline affirmed by the former OCI Warden, meets the just cause standard.

Given the foregoing, Kevin Kioski shall be reinstated and made whole for lost wages with interest and for medical expenses he incurred that would not have been incurred had he not been discharged.²

² DOC deemed Kioski “ineligible for any continuation or conversion privileges for any insurance” such as the state’s group health insurance, denying him the option of COBRA insurance. By doing so, DOC potentially increased the amount it may be obligated to reimburse Kioski.

DECISION ON FEES AND COSTS

The State has the burden to establish that its position was “substantially justified,” and to meet this burden the State must show (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. *Board of Regents v. Personnel Commission*, 254 Wis.2d 148, 175 (2002). Losing a case does not raise the presumption that the agency was not substantially justified nor does advancing a novel but credible extension or interpretation of the law. *Sheely v. DHSS*, 150 Wis.2d 320, 338 (1989).

The Commission concludes that although Kioski is a “prevailing party” within the meaning of Wis. Stat. § 227.485 (3), the DOC was “substantially justified” within the meaning Wis. Stat. § 227.485 (2)(f) regarding the position it took before the Commission as to just cause for Kioski’s discharge. Therefore, his request for fees and costs is denied.

Issued at Madison, Wisconsin, this 8th day of December 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Chairman