

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JULIO DE LIMA SILVA, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0774

Case Type: PA

DECISION NO. 40966-B

Appearances:

Will Kramer, Attorney, Pines Bach, 122 West Washington Ave., Ste. 900, Madison, Wisconsin, appearing on behalf of Julio de Lima Silva.

David 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 REHEARING

On June 4, 2025, Julio de Lima Silva filed an appeal with the Wisconsin Employment Relations Commission asserting that he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Commission Examiner Katherine Scott Lisiecki.

On July 11, 2025, pursuant to Wis. Stat. § 227.46(3)(a), Examiner Lisiecki was given final authority to issue the Commission's decision. A Zoom hearing was held on August 25 and September 12, 2025, by Examiner Lisiecki. The parties submitted written closing arguments on September 24, 2025. de Lima Silva filed a Motion and Brief in Support of an Award of Attorneys' Fees and Costs on September 24, 2025. On October 2, 2025, Examiner Lisiecki issued a Decision and Order modifying the discharge to a one-day suspension.

On October 21, 2025, the DOC filed a petition for rehearing, which Examiner Lisiecki granted on November 3, 2025. The parties submitted written arguments and replies and the record was closed on December 3, 2025.

The Examiner hereby corrects one material error of fact and one resulting material error of law, by finding that de Lima Silva did not fail to complete rounds and thus that the DOC did not

have just cause to suspend him for one day. The Examiner is otherwise satisfied that there are no other errors of fact or law in the following Decision and Order.

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

FINDINGS OF FACT

1. Julio de Lima Silva (de Lima Silva) was employed by the State of Wisconsin Department of Corrections (DOC) at the McNaughton Correctional Center (MCC) as a correctional sergeant. At the time of his discharge, he had permanent status in class.

2. On March 29, 2025, while completing rounds, de Lima Silva mistakenly believed that an inmate was present in his bunk when the inmate was not.

3. Julio de Lima Silva did not fail to complete his rounds.

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 Julio de Lima Silva.

3. Julio de Lima Silva is a 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 Julio de Lima Silva 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 Julio de Lima Silva by the State of Wisconsin Department of Corrections is rejected and he shall be reinstated and made whole with interest.¹

¹ See Wis. Admin. Code § ERC 94.07.

2. Julio de Lima Silva's motion for fees and costs is denied.

Issued at Madison, Wisconsin this 30th day of December 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Katherine Scott Lisiecki, Hearing Examiner

MEMORANDUM ACCOMPANYING DECISION AND ORDER ON REHEARING

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.

De Lima Silva 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 de Lima Silva 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).

De Lima Silva was employed as a correctional sergeant at McNaughton Correctional Center (MCC). On the evening of March 28, 2025, an inmate piled blankets and clothing to make it appear that he was asleep in his bunk. Video evidence shows that the inmate escaped from MCC at 2:32 a.m. the morning of March 29. De Lima Silva, who was working third shift the evening of March 28 – March 29, documented that he completed rounds between 2 and 2:30 a.m., 5 and 6 a.m., and 6 and 6:30 a.m. During each round, de Lima Silva entered the escaped inmate's barracks and looked around with a flashlight. However, during these rounds, he recorded that the inmate was present when the inmate was not. Several other officers, including sergeants Christopher Moon, Clyde Maxwell, and Brian Williams, also fell for the inmate's ruse. The inmate's absence was not noticed until 3:47 p.m. on March 29.

However, de Lima Silva credibly testified that he mistakenly believed he saw the inmate's blanket move. His mistake is understandable, given that he was examining a dark bunk room using a flashlight. Although the DOC argues that the inmate's ruse was "simple," it was evidently fairly convincing, since it fooled three other sergeants, Christopher Moon, Clyde Maxwell, and Brian Williams. It took a fourth sergeant, David Anderson, some time – in broad daylight – to realize that the shape under the inmate's blanket was not a human being. *See Exhibit R-7, pg. 130.* Since de Lima Silva believed, albeit mistakenly, that he saw the inmate move, he did commit misconduct by reporting the inmate as present.

In the Decision and Order issued on October 2, 2025, the Examiner modified de Lima Silva's discharge to a one-day suspension because it appeared that de Lima Silva failed to complete rounds the morning of March 29. In fact, another employee had completed rounds between approximately 2:30 a.m. and 5:30 a.m. De Lima Silva brought this factual error, and the resulting

error of law, to the Examiner's attention on rehearing. Since de Lima Silva did not commit misconduct by failing to complete rounds, there was not just cause for any discipline.

De Lima Silva was not negligent and did not falsify records when he recorded that the inmate was present, because he mistakenly believed that he observed the inmate's blanket move. Therefore, de Lima Silva's discharge shall be rejected, and he shall be reinstated with back pay and made whole in all regards.

Motion for Costs and Fees

The Commission concludes that although de Lima Silva is a "prevailing party" within the meaning of Wis. Stat. § 227.485 (3), 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 de Lima Silva's discharge. Therefore, his request for costs and fees is denied.

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).

In *Behnke v. DHSS*, 146 Wis.2d 178 (1988), the Court of Appeals adopted an "arguable merit" test for determining whether a governmental action had a reasonable basis in law and fact. It defined a position which has "arguable merit" as "one which lends itself to legitimate legal debate and difference of opinion viewed from the standpoint of reasonable advocacy." In *Sheely*, the Supreme Court commented on the "arguable merit" test as follows:

Although we disagree with the court of appeals' assessment of a reasonable basis in law and fact as being equivalent to "arguable merit," we do note that its definition of "arguable merit" is substantially similar to our comment here that a "novel but credible extension or interpretation of the law" is not grounds for finding a position lacks substantial justification.

Id. at 340.

Here, the Commission concludes that the facts that (1) the inmate had escaped and (2) that de Lima Silva did not notice the inmate's escape satisfies the "reasonable basis in truth for the facts alleged" portion of DOC's burden.

As to the "reasonable basis in law for the theory propounded" portion of the DOC's burden, the Commission is satisfied that DOC's just cause for a skip in progression or a serious misconduct theory was reasonable. The DOC reasonably believed that de Lima Silva's conduct was grossly

negligent and determined the conduct rose to the level of serious misconduct. The DOC issued discipline consistent with discipline previously imposed for instances of falsification of agency records and gross negligence.

Lastly, the Examiner concludes that the “connection between the facts alleged and the legal theory advanced” was reasonable in the context of the application of the just cause standard.

Given all of the foregoing, Julio de Lima Silva’s motion for fees and costs is denied.

Issued at Madison, Wisconsin this 30th day of December 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Katherine Scott Lisiecki, Hearing Examiner