STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CURTIS ANDERSEN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0793
Case Type: PA

DECISION NO. 41245

Appearances:

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

David G. Makovec, 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 Corrections.

DECISION AND ORDER

On July 10, 2025, Curtis Andersen 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 appeal was assigned to Commission Examiner Anfin J. Wise. On July 11, 2025, pursuant to Wis. Stat. § 227.46(3)(a), Examiner Wise was given final authority to issue the Commission's decision.

A hearing was held on October 6, 2025, by Examiner Wise. The parties submitted written closing argument on October 17, 2025, whereupon the record was closed.

On October 22, 2025, Andersen filed a Motion and Brief in Support of an Award of Attorney Fees under the Wisconsin Equal Access to Justice Act totaling $23,300.00. On October 28, 2025, DOC filed objections to the request for fees and costs.

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

FINDINGS OF FACT

1. Curtis Andersen (Andersen) was employed by the State of Wisconsin Department of Corrections (DOC), as a Correctional Sergeant at Oakhill Correctional Institution (OCI) and had permanent status in class when he was discharged.

2. The DOC is a state agency responsible for the operation of various correctional facilities including OCI, a minimum-security facility located in Oregon, Wisconsin.

3. Andersen was discharged effective June 3, 2025, for allegedly violating the following DOC work rules on March 24 and April 3, 2025.

- WR 1 Falsification of records, knowingly giving false information or knowingly permitting, encouraging, or directing others to do so. Failing to provide truthful, accurate and complete information when required.
    - Serious Act of Misconduct 5-Falsifying records of the agency

- WR 2 Failure to comply with written agency policies or procedures

- WR 3 Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.
    - DOC Serious Act of Misconduct 5-Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of our facilities, staff, the community or inmates, offenders or juvenile offenders under our care.

4. On March 24, 2025, Andersen mistakenly and carelessly documented in the agency's electronic logbook to inaccurately reflect that he had completed a security round when he had not, thereby creating a false record.

5. On March 24, 2025, Andersen engaged in serious misconduct for creating a false record, in violation of Serious Act of Misconduct #5-falsifying records of the agency and DOC's Serious Act of Misconduct #5-conduct by an employee which causes a substantial risk to the safety and security of our facilities, staff, the community or inmates, offenders or juvenile offenders under our care.

6. On June 3, 2025, DOC discharged Andersen for falsification of records on March 24, an inadequate round at 3:11pm on March 24, and a late round on April 3.

7. On July 18, 2025, Andersen timely served discovery requests—Interrogatories and Requests for Production of Documents—on the DOC, making answers and responses due on July 28, 2025. DOC did not provide the requested documents by the deadline.

8. On September 19, 2025, Andersen filed a Motion to Compel Discovery Responses, along with a petition for attorneys' fees and costs. On September 23, DOC provided a partial

response. On September 25, Examiner Wise stated that she was prepared to award fees and costs to the Appellant and requested detailed billing information.

9. On September 25, 2025, Andersen submitted an Affidavit of Counsel in support of her petition for attorneys' fees and costs totaling $7,560.00, $2,520.00 specifically addressing DOC's discovery deficiencies. She filed an amended affidavit that same day, requesting $7,210.00 in attorneys' fees and costs, $2,170.00 specifically addressing DOC's discovery deficiencies. DOC did not file objections to the request for fees and costs by the stated deadline of September 30, 2025.

10. By October 1, 2025, DOC had partially complied with Examiner Wise's orders to provide discovery responses to Andersen. That same day, Andersen submitted a Supplemental Affidavit of Counsel, requesting $2,730.00, as a sanction for DOC's discovery abuse. DOC did not file an objection by the stated deadline of October 6, 2025.

11. On October 6, 2025, during the hearing on the merits, Examiner Wise orally granted Ansdersen's motion for fees and costs.

12. On October 17, 2025, in his closing argument, Andersen renewed his request for fees and costs. Also in its closing argument on October 17, the DOC filed objections to the request for fees and costs.

13. On October 22, 2025, Andersen filed a Motion and Brief in Support of an Award of Attorney Fees under the Wisconsin Equal Access to Justice Act totaling $23,300.00.

14. On October 28, 2025, DOC filed objections to the request for fees and costs.

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 Curtis Andersen but did have just cause to suspend him for three days.

3. Curtis Andersen is a prevailing party within the meaning of Wis. Stats. §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 Curtis Andersen was substantially justified within the meaning of Wis. Stat. § 227.485(2)(f).

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 Curtis Andersen by the State of Wisconsin Department of Corrections is rejected and modified to a three-day suspension without pay. Andersen shall immediately be reinstated and made whole with interest.[1]

2. Curtis Andersen's petition for fees and costs is denied.

Issued at Madison, Wisconsin, this 6th day of November 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., 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.

Curtis Andersen 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 Andersen 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).

Andersen was a Correctional Sergeant at OCI. Sergeants, by virtue of rank, are designated as lead workers, and have increased responsibility as well as increased authority. As a Sergeant, Andersen was responsible for completing security rounds throughout his shift at irregular intervals of no more than 60 minutes, as well as logging them into the agency's electronic logbook or WICS (Wisconsin Integrated Corrections System). On March 24, 2025, Andersen mistakenly and carelessly documented in the WICS e-logbook that he had completed a security round at approximately 2:30pm, when he had not. It was later alleged that his 3:11pm round on March 24 was inadequate because he failed to look into the cells as required. Additionally, on April 3, 2025, Andersen conducted security rounds at 2:39pm and 3:53pm. However, the latter round was 14 minutes late. Andersen did not notify a supervisor of the late round or document the reason for the late round, as required by policy.

The DOC contended that a "skip" straight to termination was warranted due to the serious nature of Andersen's misconduct of falsifying agency records. The Department maintained that the falsification of agency records created a substantial risk to the safety and security of the institution, staff, and the inmates in his care. The electronic log is an official document reflecting a truthful and accurate account of what occurs during each shift. Missing a round can be a matter of life or death for inmates; logging a round without completing it is therefore a serious infraction. It creates a false record of the agency.

The Department must be able to rely on its security staff to accurately document security rounds. It is not an unreasonable expectation. At the hearing, Andersen acknowledged that when he documents a round, he should be sure it was actually completed. If unsure, he has the ability to

call a supervisor to verify the round or missed round. There is simply no excuse for logging a round you did not complete. If there is the slightest bit of uncertainty, staff can document that they are unsure, notify a supervisor, document the reason they are unsure (busy performing other duties), then immediately complete a round. OCI houses an aging population, where medical emergencies are routine. Staff assaults and other emergencies also occur. While there was not an incident that occurred, missed rounds and falsely recording rounds that were not completed creates a real risk to safety of the institution, the staff, its inmates, and the community at large. Thus, there is no doubt that Andersen's falsification of his 2:30pm round on March 24, 2025, constituted serious misconduct. Accordingly, we find that DOC had just cause to issue formal discipline with a skip in progression for Andersen's serious misconduct.[2]

Turning now to Andersen's defenses.

Andersen concedes that a one-day, or at most, a three-day suspension may be appropriate for the work rule violations cited in the discipline letter. Appellant asserts that there are mitigating factors to consider.

First, Andersen contends there was a lack of due process accorded him because one allegation the Department based its decision on was never investigated and Andersen did not have an opportunity to respond. Andersen credibly testified that the first time he saw the allegation of the inadequate round on March 24 at 3:11pm was when it was presented to him in his termination letter. That allegation was not raised during the investigation or the pre-disciplinary process. Andersen argues, "[t]o discipline Andersen for something not raised until the termination letter would be a violation of his Constitution right to Due Process."

The seminal due process case relating to the property interests of public employees in their continued employment is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). In that case, the Court balanced the following competing interests relating to the *discharge* of public employees: "[1] the private interests in retaining employment, [2] the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and [3] the risk of an erroneous termination." The weight accorded the final interest varies depending on the severity of the disciplinary action taken.

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. . . .

[2] With respect to Andersen's late security round on April 3, the Commission is not persuaded that that incident in itself is worthy of formal discipline. Even at the hearing, the DOC's primary argument for a skip in progressive discipline was based on the falsified round on March 24. As to the allegation of an inadequate round on March 24, we address it further in Andersen's defenses.

> We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. [Citations omitted.]

Id. at 545-548.

In the present case, there is no dispute that the allegation of Andersen's 3:11pm deficient round was not raised during the investigatory or pre-disciplinary process. Thus, the failure during the investigatory or pre-discipline process to raise with Andersen all possible bases for discipline and provide him with an opportunity to respond to them is a violation of Andersen's *Loudermill* Due Process rights. Andersen did not have a pretermination opportunity to respond, as required by *Loudermill*. Therefore, the 3:11pm inadequate round allegation on March 24 that was included in the discipline letter is rejected.

Next, Andersen claims that the Commission has consistently held that "falsifying agency records requires a finding that it was done knowingly or intentionally." Appellant cites *Brand v. DOC*, Dec. No. 39897 (WERC, 4/23) (citing *Sawall v. DOC*, Dec. No. 34019-D (WERC, 5/15); *Delrow v. DOC*, Dec. No. 40922 (WERC, 08/25), and *de Lima Silva v. DOC*, Dec. No. 40966 (WERC, 10/25). Appellant also argues that in the just cause disciplinary setting, "gross negligence" is defined as an "intentional" or "willful" act, taken "in flagrant or reckless disregard of the consequences to persons or property." *Oneida and Vilas Counties*, WERC Dec. No. 67400 (Millot, 2008); *see also Brand*, ed., DISCIPLINE AND DISCHARGE IN ARBITRATION, pp. 145-157 (BNA, 1998).

The decisions in *Brand*, *Sawall*, *Delrow,* and *de Lima Silva* are fact specific and show somewhat inconsistent outcomes in levels of discipline for arguably similar conduct. The DOC points out that in *Brand*, the Appellant was initially terminated for falsifying a record stating that she had been assaulted by a PIOC when video revealed that she had not. At hearing, Brand's discipline was overturned because the Hearing Examiner found that Brand honestly, but mistakenly, believed that she had been struck by a PIOC; and for disparate treatment due to other staff members not being investigated for their own false reports in the matter. The conclusion about Brand's false report relied on a finding that the trauma she suffered during the incident as new security staff and the extreme time pressure she was put under to complete a report rendered her false report an honest mistake. DOC further argues that Andersen had no such trauma and no such time pressure, and as an experienced Correctional Sergeant, was aware of his ability and the resources at hand to verify whether he had completed a round. The Commission agrees that *Brand* can be distinguished from the present case.

In *Sawall*, the DOC explained that the employee was disciplined for providing false information in the course of her investigation under a former work rule #6, which prohibited knowingly providing false information. This rule has largely been adapted as the current Work Rule #1, "Falsification of records, knowingly giving false information or knowingly permitting, encouraging, or directing others to do so. Failing to provide truthful, accurate and complete information when required." Work Rule #1 is distinct from Serious Act of Misconduct #5, "Falsifying records of the agency." Serious Act of Misconduct #5 is enshrined in Wis. Stats. §

230.34(1)(a). Notably, Sawall was disciplined prior to 2015's Act 150, which created the serious acts of misconduct. Thus, Sawall's conduct can also be distinguished from Andersen's conduct.

Furthermore, DOC argues that *Brand* mistakenly applies the explicit knowing requirement from the prior Work Rule #6 and current Work Rule #1 to the legislatively created Serious Act of Misconduct #5. Even the current Work Rule #1 distinguishes "falsifying records of the agency" from the following clause, "*knowingly* giving false information…" (*emphasis added*). It is an error in construction to apply the knowing standard within Work Rule #1 to the Serious Act of Misconduct #5 work rule's falsifying records clause. Had the legislature wished to impose a knowing or intentional requirement on this serious act of misconduct, they were perfectly capable of doing so.

In *Delrow*, the Hearing Examiner upheld termination and concluded that the Appellant intentionally falsified a missed round because the record established that efforts were made to make it appear that he had completed the round. "Delrow went to great efforts to undo/cover up his falsification after it became apparent that DOC knew he had missed the round in question." The DOC viewed intentional falsification of records as a serious matter and imposed a one level skip in the progressive disciplinary levels, which was upheld by the Commission. In *Delrow*, it appears that the DOC itself included intent as a factor to consider. Interestingly, the Commission noted in *Delrow* that, if he had had a clean disciplinary record at the time of the incident, he would only have received a three-day suspension for his misconduct. Therefore, for consistency, is a one-level skip a more appropriate level of discipline in the present case?

In *de Lima Silva*, an inmate piled blankets and clothing to make it appear that he was asleep in his bunk. Video evidence showed that the inmate escaped the minimum-security correctional center at 2:32am. The Appellant completed security rounds during third shift between 2 and 2:30am, 5 and 6am, and 6 and 6:30am. During each round, Appellant entered the escaped inmate's barracks and looked around with a flashlight. During these rounds, he recorded that the inmate was present, when he was not. Several other officers, including three Sergeants, also fell for the inmate's ruse, even during the daytime, as the inmate's absence was not noticed until 3:47pm. The Hearing Examiner found that the Appellant credibly testified that he mistakenly believed he saw the inmate's blanket move. And given that he was examining a dark bunk room using a flashlight, his mistake was understandable. Thus, since de Lima Silva believed, albeit mistakenly, that he saw the inmate move, he did not falsify records by reporting the inmate as present, because he did not do so knowingly or intentionally. De Lima Silva completed his rounds negligently, but his understandable mistake can be distinguished by Andersen's conduct. De Lima Silva did not document a missed round as completed. As previously stated, there is no reason to document a round you did not complete when there is an avenue to check on the round. If unsure, then log that you are not sure if you completed the round. Andersen made a conscious choice to document the round as completed at approximately 2:30pm.

Ultimately, the Commission has not consistently held that falsifying agency records requires a finding that it was done knowingly or intentionally. In this case, we are persuaded that Wis. Stat. § 230.34(1)(a)5., provides just cause to skip progression for "[f]alsifying records of the agency" and does not require that the conduct be done willfully or intentionally. As the Department

has noted, had the legislature intended to require a level of intentionality or knowledge on the part of the employee when records of the agency are falsified, they could have done so.

We note that the legislature in fact did make clear that intent was required for other acts of misconduct that serve as just cause for skipping progression. *See* Wis. Stat. § 230.34(1)(a)2. While on duty, *intentionally* inflicting physical harm on another person; Wis. Stat. § 230.34(1)(a)6. Theft of agency property or services *with intent to deprive an agency* of the property or services permanently, theft of currency of any value, felonious conduct connected with the employee's employment with the agency, or *intentional* or negligent conduct by an employee that causes substantial damage to agency property; Wis. Stat. § 230.34(1)(a)8. Misuse or abuse of agency property, including the *intentional use* of the agency's equipment to download, view, solicit, seek, display, or distribute pornographic material. (emphasis added). These provisions show that the legislature intended to exclude situations where an employee accidently causes physical harm to another person, or where the pornographic material was mistakenly downloaded, viewed, displayed, or distributed. If they had wanted to exclude falsification without intent, they could have included language like the other acts identified in the same statutory section. Or they could have included language similar to the definitions of misdemeanors in Wis. Stat. § 230.43, which requires willful or corrupt conduct. They could even have gone as far as including language similar to Wis. Stat. § 943.39, for felonious fraudulent writings, requiring intent to injure or defraud. They did not do so.

For argument's sake, even if the Commission agreed with the Appellant's assertion that falsification requires a finding that it was done knowingly or intentionally, the facts in this case do not support Andersen simply making a mistake. At the hearing, he testified that he was tending to other duties around 2:30pm and did not turn his attention to the logbook until 3:10pm. Andersen also testified that he had no clear memory of what occurred that day. He insisted that his memory of his recent activities was foggy, so he must have mistakenly logged completing a round at 2:30pm. He also testified in detail about what he was doing at 2:30pm: observing suspicious inmate activity and having to resolve his observations by dealing with the inmates. Based on Andersen's testimony, it is unclear what exactly occurred that day, except that he logged a round for 2:30pm without knowing for certain that he completed the round.

The record also established that on March 24, Andersen completed a security round at 1:53pm and entered the completed round in the WICS e-log at 1:54pm. At 2:32pm, video evidence showed Andersen exiting his office and returning at 2:34pm. He did not record a security round. Andersen next exited his office at 2:51pm and returned at 2:53pm. He did not record a security round. Then at 3:10pm, he logged that he had completed a round at 2:30pm "Time Approx." Immediately thereafter, Andersen completed a security round at 3:12pm, then logged it into WICS at 3:13pm. It appears that Andersen has a pattern of logging his rounds shortly after completing them. Thus, the timeline does not support a simple mistaken entry. However, even an honest mistake can have significant potential negative consequences warranting significant discipline.

Finally, the Commission turns to Andersen's contention that the Department has issued inconsistent levels of discipline to other employees for similar misconduct, even from the same

institution. 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).

First, Andersen asserts that the WERC's decision in *Esterholm v. DOC*, Dec. No. 37484 (WERC, 9/18) is instructive. Esterholm was accused of serious misconduct – falsifying records by indicating that she had performed visual monitoring checks of youth in the juvenile detention center when she had not in fact performed those checks. The DOC terminated her for falsifying records. The WERC determined that her documentation was a mistake, not intentionally inaccurate. In light of that determination, Esterholm's termination was reversed and replaced with a one-day suspension. However, it is unknown if Esterholm was similarly situated to Andersen. While she was also accused of falsifying a record on one occasion, she was not found to have violated two Serious Acts of Misconduct rules. Therefore, Esterholm's one-day suspension is informative, but does not satisfy the disparate treatment test.

The next case presented by Andersen is a three-day suspension issued in June 2025 by DOC to Sergeant Keith Duerst. Andersen contends that Duerst's situation was virtually identical to his case: same institution, same decisionmakers, close in time, both wrote down a round they failed to complete, both charged with the same forms of serious misconduct, both have decades of service to the DOC, both have clean disciplinary records, both were valued employees. However, DOC argues that Duerst had a "spotless" employment history, void of any discipline, letters of expectation, or even job instructions. While that may be the case, Andersen's 2016 one-day suspension related to attendance has long been cleared from his record and therefore cannot be considered in the matter. Additionally, letters of expectation are not discipline and have no impact on an employee's cumulative disciplinary record.[3] Consequently, the distinction between Duerst and Andersen is negligible. Thus, we find that Duerst's three-day suspension does demonstrate disparate treatment.

Andersen also specifies other "serious misconduct" disciplines that resulted short of termination. DOC correctly points out that out of the numerous examples raised by the Appellant, almost all were disciplined under a single Serious Act of Misconduct, in contrast to Andersen's two Serious Acts of Misconduct. The two remaining were Tawarna Graham and the previously addressed Keith Duerst. DOC distinguishes Graham's skip to a five-day suspension from Andersen's termination because Graham was twenty minutes late for a round and falsified the record that he completed the round sixteen minutes prior to the actual round being completed. This is clearly different than falsifying a record of a completed round that was never completed. As such, Graham's misconduct is not the same or similar to Andersen's misconduct.

In summary, the Commission is ultimately persuaded that Andersen has met his burden to establish disparate treatment, given the discipline issued to Duerst and the reasoning in *Delrow*.

[3] Andersen received two non-disciplinary letters of expectation on September 25, 2024, and November 6, 2024, regarding his performance and responsibilities related to the importance and timeliness of rounds.

We see no clear distinction between Andersen and Duerst. Both were Sergeants at OCI, both documented a security round that they did not complete, both in violation of Serious Act of Misconduct #5 and DOC Serious Act of Misconduct #5; falsifying records of the agency and conduct by an employee which causes a substantial risk to the safety and security of DOC facilities, the community, or inmates. While Andersen's falsification warrants serious discipline, the Commission concludes that discharge is not warranted under the just cause standard. We are persuaded that a one-level skip in progression is more appropriate, like Duerst and Delrow. Given the foregoing, we find that Andersen's discharge be modified to a three-day suspension. Andersen shall be reinstated with back pay and made whole in all regards.

Lastly, Andersen maintains that, as an additional penalty, above and beyond termination but part and parcel to that decision, DOC also deemed Andersen "ineligible for any continuation or conversion privileges for any insurance" such as the state's group health insurance. This was an excessive penalty, unfounded in any law or policy.

Indeed, guidance from the Department of Employee Trust Funds contained in ET-1118, "State Agency Health Insurance Standards, Guidelines and Administration Employer Manual," provides that an employee who appeals his termination "may continue to be insured from the date of the contested discharge until a final decision has been reached." Andersen further argues that the DOC directly violated this provision by cutting off Andersen's access to his insurance at the end of the month in which he was terminated. And while that guidance provides that if a discharge is for "gross misconduct" the employee may not be eligible to "continue" coverage after termination for the balance of the 18 months following termination, even in the case of gross misconduct, the employee is still supposed to be eligible for "conversion coverage." It appears that the DOC contradicted this state policy when it told Andersen that he was not only ineligible for continuation, but also ineligible for "conversion privileges."

"Gross misconduct" is a term of art under the Federal Consolidated Omnibus Budget Reconciliation Act ("COBRA"). To justify ineligibility for continuation coverage under COBRA, an employer is required to prove more than its "honest, actual belief—the record must demonstrate that the employee did indeed engage in gross misconduct." *Kariotis v. Navistar Int'l. Transp. Corp.*, 131 F.3d 672, 680 (7th Cir. 1997). Negligence or job incompetence does not amount to gross misconduct for COBRA purposes. *Mlsna v. Unitel Commc'ns, Inc.,* 91 F.3d 876, 881 (7th Cir. 1996). Courts agree mere lapses in good judgment on isolated occasions cannot constitute gross misconduct. *See Richard v. Indus. Commercial Elec. Corp.,* 337 F. Supp. 2d 279, 282 (D. Mass. 2004) (defining gross misconduct as "flagrant and extreme" and "out of all measure; beyond allowance; not to be excused; flagrant; shameful" and something "more than that conduct which comes about by reason of error of judgment or lack of diligence.")

Under the circumstances, the Commission finds that it was improper for DOC to deem Andersen ineligible to continue or convert his health insurance, both while he pursued this appeal and generally. Additionally, no evidence was presented to demonstrate that the COBRA standard of "gross misconduct" was met to justify the penalty of ineligibility to continue or convert health insurance at Andersen's own cost. Accordingly, the denial of COBRA shall be reversed and Andersen shall be reimbursed for costs he would not have incurred but for the discharge.

DECISION ON FEES AND COSTS

Earlier rulings awarding attorney's fees and costs related to DOC's discovery abuse were premature and erroneous. Wis. Stat. § 227.485(3) empowers a Hearing Examiner to award the prevailing party costs incurred in a connection with the contested case, "unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position…" Without a decision being rendered, there is no prevailing party.

The DOC appropriately asserts that the Commission does not have the power to award attorney's fees and costs for discovery motions filed against the state. *See DOT v. Wisconsin Personnel Commission*, 176 Wis.2d 731 (1993). That case cites the administrative code applicable to the Personnel Commission, WERC's predecessor, governing discovery, Wis. Admin. Code sec. PC 4.03. The quoted language is identical to that contained within Wis. Admin. Code § ERC 93.03. Discovery. The decision in *DOT* has not been overruled and the relevant statutes, specifically Wis. Stat. §§ 227.45(7) and 804.12(1)(c), have not been changed. While *DOT* addressed a decision under the WFEA, Wis. Stat. § 111.31, et. seq., the Wisconsin State Employment Relations Act in Chapter 230 contains no language contrasting with the language in that decision.

The Commission concludes that although Andersen 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 Andersen'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.

Andersen argues that the DOC's position was not substantially justified because he asserts that DOC abandoned key aspects of its original position, specifically the March 24, 3:11pm deficient round allegation and his denial of COBRA.

DOC did have a reasonable basis in truth for the facts alleged because Andersen did not deny that he logged the 2:30pm round on March 24 as completed, when it was not, and that he was late in completing his round on April 3. Thus, Andersen's admissions establish that the Department relied on a reasonable basis in truth for the facts alleged in its position to discipline Andersen.

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. After investigation, the Department found that Andersen's conduct violated multiple work rules and ultimately determined that his conduct rose to the level of serious misconduct, supporting as reasonable Respondent's theory that just cause existed to discharge Andersen. DOC's legal theory and basis for discipline were sound. The Commission's decision to reject the discharge turned on the finding that there was disparate treatment rather than any lack of a factual or legal basis argued by DOC. Thus, there was a reasonable connection between the facts alleged and the legal theory advanced.

Given all of the foregoing, Curtis Andersen's petition for fees and costs is denied.

Issued at the City of Madison, Wisconsin, this 6th day of November 2025.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

Anfin J. Wise, Hearing Examiner