

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUNIOR GEBERT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0195

Case Type: PA

DECISION NO. 36920-A

Appearances:

Junior Gebert, Post Office Box 661 Mailbox # 408, Waupun, Wisconsin, appearing on his own behalf.

Anfin Jaw, Attorney, Wisconsin 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 February 23, 2017, Junior Gebert filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to Section 230.44(1)(c), Stats., asserting he had been suspended for one day without just cause by the State of Wisconsin Department of Corrections. The Commission assigned Danielle L. Carne to serve as Hearing Examiner. Hearing was held on April 4, 2017, in Waupun, Wisconsin. At the conclusion of hearing, each party submitted an oral argument, and the record in this matter was closed.

On May 5, 2017, Examiner Carne issued a proposed decision modifying the suspension to a written reprimand. Both parties filed objections and the matter became ripe for Commission consideration on May 16, 2017.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. Department of Corrections (DOC) is an agency of the State of Wisconsin that operates prisons and correctional facilities. One such facility is the Dodge Correctional Institution (DCI).

2. Junior Gebert is employed at DCI as a correctional officer and has permanent status in class.

3. While on duty, Gebert streamed audio and video material from the internet in violation of DOC policy.

4. DOC suspended Gebert for one day because of his misconduct referenced in Finding of Fact 3.

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 to review this matter pursuant to Section 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Section 230.34(1)(a), Stats., suspend Gebert 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 Junior Gebert is affirmed.

Signed at the City of Madison, Wisconsin, this 7th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

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.

Junior Gebert 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 Gebert 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).

Gebert is a lead worker in a DCI unit that contains two inmate barracks. A correctional officer is stationed in each barrack, and Gebert works mostly alone in a centrally-located, glass-enclosed area known as the “bubble”. Part of Gebert’s job is to observe the activity in the barracks through monitors in the bubble. The bubble also has a computer, which Gebert uses to perform various administrative tasks.

DOC has a department-wide policy regarding the use of information technology. Among other things, the policy expressly prohibits employees from “[u]sing the internet to stream services, music, radio broadcasts, and video clips . . . unless required by job function or special need”. Consistent with this policy, DOC’s system blocks many internet sites, but the firewall does not prevent all browsing and streaming. In a disciplinary investigation, Gebert admitted to accessing sites such as iHeartRadio and archive.org to play audio music files and a very small number of videos during his shift. He also occasionally listened to a Packer or Badger game.

Gebert was aware of the information technology policy, but he makes two arguments in his defense. First, he claims ignorance, asserting that he thought DOC’s firewall would prohibit access to any forbidden site and that he did not know that he was “streaming” as that term is used in the policy. We find DOC’s written rule, however, to be clear enough and broad enough to have put Gebert on notice that using a DOC computer for listening to or watching any non-work-related material was generally not allowed. He should have known the rule prohibited his conduct. Second, Gebert argues that his internet activity did not interfere with the performance of his duties. The absence of evidence regarding a disruption, however, does not bar DOC from disciplining an employee for the violation of a bright-line rule. On the contrary, the function of such discipline is to correct behavior before a more consequential event occurs.

Given the foregoing, it is clear that Gebert engaged in misconduct, and we conclude there was just cause for a one-day suspension, the first step in DOC's progressive discipline procedure.

Signed at the City of Madison, Wisconsin, this 7th day of June, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner