STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSHUA DeBARGE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0343
Case Type: PA

DECISION NO. 38433

Appearances:

Joshua DeBarge, 1011 Fairview Drive, Apt. 5, Plymouth, Wisconsin, appearing on his own behalf.

Anfin Jaw, 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 20, 2020, Joshua DeBarge 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. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on May 1, 2020. The parties made oral argument at the conclusion of the hearing.

On May 14, 2020, Examiner Jones issued a Proposed Decision and Order affirming the discharge. No objections were filed and the matter became ripe for Commission consideration on May 20, 2020.

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

FINDINGS OF FACT

1. Joshua DeBarge was employed by the State of Wisconsin Department of Corrections as a correctional officer at the Kettle Moraine Correctional Institution (KMCI) and had permanent status in class when he was discharged.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various correctional facilities, including KMCI in Plymouth, Wisconsin.

3. Correctional officers are supposed to ensure the safety and security of inmates at their facility.

4. DeBarge created a fake job announcement with a State computer. This fake job announcement contained a picture of a KMCI inmate and announced that that inmate – who was identified by name – had filled the position of "unit snitch." DeBarge subsequently posted that document on the officers' station window. After it was posted, it was viewed by staff and inmates.

5. The inmate who DeBarge named in Finding 4 was subsequently referred to as a snitch by other inmates. This caused him to fear for his safety.

6. DOC discharged DeBarge for his actions referenced in Finding 4.

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 had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Joshua DeBarge.

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

ORDER

The discharge of Joshua DeBarge by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 3rd day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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.

Joshua DeBarge 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 DeBarge 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).

DeBarge admits he did the following. On November 29, 2019, DeBarge used a State computer to obtain a picture of inmate EN from the Wisconsin Circuit Court Access Program (CCAP) website. DeBarge then used that picture to create a fake job announcement. This fake job announcement showed the picture of EN and announced that EN had filled the position of "unit snitch." After DeBarge created and printed this fake job announcement on a State printer, he posted it on the officers' station window. After it was posted, it was viewed by both staff and inmates for about 15 – 20 minutes. EN was one of the inmates who saw it. DeBarge then took it down, tore it up and threw it away.

DeBarge created this document for comedic affect. He thought it was a funny joke. The record does not explain why DeBarge singled out EN for this fake job announcement. DeBarge subsequently apologized to EN for his actions. When he was questioned about the matter, DeBarge characterized his actions as a mistake.

The inmate who was referenced in DeBarge's fake job announcement (EN) was subsequently referred to as a snitch by other inmates. This caused him to fear for his safety.

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The Commission has no trouble deciding it was misconduct for DeBarge to create his fake job announcement identifying EN as "unit snitch". Being labeled as "unit snitch" by a correctional officer in a prison can have deadly consequences. It not only put the inmate's safety at risk, but it also put the staff tasked with guarding that inmate in jeopardy. Responsibility for creating that

safety issue can be laid solely at DeBarge's feet. But for his identifying EN as "unit snitch", the safety issue he created would not have occurred.

Having found that the charge made against DeBarge was substantiated, the focus now shifts to DeBarge's various defenses. First, he contends that he meant his fake job announcement to be a joke. Even if he did, that is not how EN or DOC management perceived it. When someone makes what they consider to be a joke, and it falls flat, the person who made the joke bears responsibility for same. Second, DeBarge notes he worked a 16-hour day on the day in question. Even if he worked a long day, that does not somehow entitle him to a free pass for his colossally poor judgment. Third, DeBarge avers that his actions here were out of character for him. For the purpose of discussion, the Commission accepts his assertion at face value. However, the question here is not whether DeBarge had a pattern of exhibiting this type of misconduct; it is simply whether he committed misconduct on the day in question. Finally, DeBarge notes that he later apologized to EN for his actions. Even if he did, that does not excuse his actions. The Commission therefore finds that DeBarge's defenses are insufficient to excuse and / or mitigate his misconduct.

Based on the above, the Commission finds DOC had just cause to discipline DeBarge for his misconduct.

The focus now turns to the level of discipline imposed here. DeBarge contends his discipline should have been less severe than discharge. He notes in this regard that he was never suspended prior to this incident. Thus, in this case, the Commission is tasked with deciding whether discharge was an excessive punishment for DeBarge's misconduct.

In prior cases where the Commission overturned a discharge, one reason it did so was because a charge made against the employee was not substantiated. In this case, though, the charge made against DeBarge was substantiated. Since the charge was substantiated, the Commission lacks that objective basis for overturning the discharge. Similarly, the Commission has reduced discipline in cases where the employee was a long-term employee. That is not the situation here, though, because DeBarge was a relatively short-term employee with 3.5 years with DOC. Therefore, the Commission lacks that objective basis as well for overturning the discharge.

When an employee commits serious misconduct, as DeBarge did, it logically follows that his discipline can likewise be serious. DOC routinely discharges employees who engage in serious misconduct. Here, DeBarge's egregious act of misconduct warranted a skip in the normal progressive disciplinary sequence. Thus, DOC was not obligated in this instance to suspend DeBarge; it could discharge him.

In so finding, the Commission has considered DeBarge's claim that he was subjected to disparate treatment and punished more harshly than other DOC employees. An employee who raises a disparate treatment claim has the burden of proving that contention.

DeBarge relies exclusively on a single situation that arose at the Redgranite Prison to buttress his claim of disparate treatment. The employee involved in that matter was named Wilcox. He was suspended for one day but did not appeal that suspension to the WERC. Thus, the

Commission did not review Wilcox's discipline. Nonetheless, what happened in that matter has subsequently been cited to us by DOC employees because the discipline imposed upon Wilcox was, in a word, lenient. Because of that, other DOC employees have attempted to use it as a comparable to their own. In *Gomes v. DOC*, Dec. No. 37987 (09/2019), the Commission identified the facts involved in the Wilcox matter and addressed whether it was a true comparable to Gomes' situation (where he had released confidential information about an offender who he supervised to an unknown person, specifically he disclosed that the offender was a confidential police informant). Here is what the Commission said about the Wilcox matter in *Gomes:*

> Wilcox was a prison guard who received a one-day suspension for misconduct in 2018 when he outed some prison inmates as being confidential informants. Wilcox did that by identifying certain inmates as "rats" on an internal prison document known as a range board. A range board contains the name and cell location of each inmate in the housing unit. Wilcox put rat emojis next to the names of inmates suspected of being informants. Wilcox's intended audience for his comments on the range board were other prison guards. He did not intend his comments on the range board to be seen by inmates. Somehow though, inmates learned about Wilcox's comments on the range board. While the Commission considers a one-day suspension for that misconduct to be extremely lenient, the fact that Wilcox received that suspension does not bind DOC to imposing that same suspension on Gomes. The facts in the Wilcox case are sufficiently different from the facts in Gomes' case. The Wilcox case is distinguishable on its facts. Thus, the Commission does not see the Wilcox case as a true comparable to this case for purposes of finding disparate treatment.
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> *Gomes*, page 5.

The Commission reaches that same conclusion here. As was noted above, Wilcox's intended audience for his comments on the range board were other prison guards. Here, though, DeBarge's intended audience included inmates and the inmate who was the subject of the fake job announcement (EN) saw it. That factual difference distinguishes DeBarge's situation from Wilcox's. We therefore find that DeBarge did not show he was subjected to disparate treatment in terms of the punishment he received.

Given the fact that DeBarge was not subjected to disparate treatment, the fact that he was not a long-term employee, and the fact that his misconduct was egregious, the Commission finds discharge was not excessive punishment under the circumstances.

The Commission therefore finds that DOC had just cause to discharge DeBarge.

Issued at Madison, Wisconsin, this 3rd day of June, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman