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BY THE COURT:

DATE SIGNED: July 3, 2023

Electronically signed by Andrew J. Christenson
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN

CIRCUIT COURT

FOND DU LAC COUNTY

TIMOTHY E. JOCHMAN,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

**DECISION
AND ORDER**

WERC Decision 38450-A

INTRODUCTION

The Wisconsin Department of Corrections (“DOC”) terminated Petitioner Timothy Jochman’s employment as a corrections sergeant at Taycheedah Correctional Institution after he failed to perform cell searches as assigned on November 21, 2019. The Wisconsin Employment Relations Commission (“WERC”), after a hearing, concluded that Jochman knowingly failed to perform his assigned duties to search. On July 13, 2020, WERC issued a decision and order concluding that just cause did not exist to discharge Jochman but instead that just cause existed for his demotion without back pay. WERC further concluded that Jochman’s conduct could create issues of safety and security within the institution; it therefore concurred with DOC that Jochman not be employed as a correctional sergeant but rather that he be reinstated and demoted to correctional officer.

LEGAL ANALYSIS

Wis. Stat. § 227.57 sets forth the scope of review for a circuit court's authority over an action of an agency. Wis. Stat. § 227.57(5) provides that "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(3) states that "[t]he court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion." And further, Wis. Stats. § 227.57(6) provides that "[i]f the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record."

Thus, this court's authority is limited to when it finds an erroneous interpretation of a provision of law or an erroneous finding of material fact that is unsupported by substantial evidence. A court may not disturb the agency's exercise of delegated discretion relating to issues of agency procedure, interpretations of law, determinations of fact or policy.

Jochman cites three reasons for its contention that WERC should not have ordered the sanction of demotion: (1) the DOC violated due process protections by failing to preserve surveillance footage of Jochman on the day in question, (2) the sanction imposed was not permitted because it was not the next step up under the progressive

discipline rules, and (3) the sanction was not supported by substantial evidence that Jochman chose to perform other work over the searches for drugs. The court will address each in turn.

(1) Jochman's due process contention fails because the evidence on the tapes was not relevant. There is no dispute that on November 21, 2019, Jochman knew he was assigned to search for drugs in the cells to which the K-9 had alerted on the second floor of Addams unit. There is no dispute that Jochman did not undertake this task because he was performing other work. There is no evidence that Jochman asked others for help to do the searches or alerted a supervisor that he could not complete the searches. WERC reasonably concluded that Jochman made the choice to perform other tasks and left the searches for his relief officer. The video footage may very well have shown which other officers were present, when, and what they were doing in the Addams unit, but none of this prejudices Jochman because it is uncontested that Jochman did not perform his assigned work.

(2) Jochman next contends that he was subject to demotion from correctional sergeant to correctional officer when the next step on the progressive discipline plan should have called for a five-day suspension. Wis. Stat. § 230.34(1)(a) generally allows the imposition of discipline on certain state employees' work performance or personal conduct when it is inadequate, unsuitable, or inferior, but only after imposing progressive discipline from prior incidents; the statute also lists nine violations that do not require progressive discipline presumably because they constitute egregious behavior. Wis. Stat. § 230.04(13m) requires

the Administrator of the Department of Administration's Division of Personnel Management to "establish standards for progressive discipline plans to be prepared by all agencies and applied to all employees in the classified service" and the standards "shall allow an appointing authority to accelerate progressive discipline if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance ... is severe." The DOC's relevant discipline plan in this case is "[g]ross 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." According to Warden Sarah Cooper's testimony, the DOC regularly enforces Work Rule No. 3, which prohibits disobedience, insubordination, inattentiveness, negligence, and failure or refusal to carry out written or verbal assignments; she explained that the DOC houses individuals who are unsafe to be kept in the community and maintains a chain of command with supervisors that enforce their directives in order to maintain safety. WERC reasonably found that Jochman's decision not to carry out an assignment had the potential to create safety and security issues for the institution. This court treats determinations of policy within the agency's exercise of delegated discretion. The court has no basis to question WERC's determination that DOC had good reason to treat violations of insubordination seriously and severely. In doing so, it was within its legal authority to accelerate the progressive discipline and order a demotion instead of the five-day suspension.

(3) There is substantial evidence in the record to support the decisions in this case.

The agency's findings do not need to reflect a preponderance of the evidence to constitute substantial evidence as long as they are reasonable. It is not for this court to substitute its judgment for that of the agency as to the weight of the evidence. There were multiple pieces of evidence that WERC reasonably relied on to support its decision. On November 21, 2019, Jochman did not ask for help with the drug searches or make a report that he needed help to do them; instead, he passed them along to his relief officer. Jochman did not attempt to show that other duties prevented him from conducting the searches. There is also the testimony of Officer Burg, who testified that Jochman likes to "pawn things off on officers" and would delegate work "as if it was beneath him to do it." In combination, the record reflects substantial evidence to support the agency's findings.

CONCLUSION

Accordingly, this Court, having not found a ground for setting aside, modifying, or remanding the matter, hereby affirms the action of the WERC. The petition to reverse the decision and order of the Wisconsin Employment Relations Commission is denied, and this case is dismissed.