BY THE COURT:

DATE SIGNED: May 23, 2023

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

Wisconsin Department of Corrections,

Petitioner,

v.

Wisconsin Employment Relations Commission,

Respondent.

Case Number 22CV2829

Decision 39496-B

DECISION AND ORDER ON CERTIORARI

The Wisconsin Department of Corrections seeks judicial review of the Wisconsin Employment Relations Commission decision to reduce DOC's discipline of its employee Ronnelle Fields. DOC suspended Ms. Fields for 5-days without pay after her third unexcused absence. On review, WERC reduced the suspension to 3-days without pay, holding that DOC inappropriately treated this as a third incident on DOC's progressive discipline plan when the second incident did not count because WERC could not review it directly. I review WERC's decision pursuant to Wisconsin Statute Ch. 227 and vacate WERC's decision for the reasons below. In short, WERC incorrectly declares all progressive discipline steps that it cannot directly review as inappropriate under progressive discipline plans. That error rendered the remainder of WERC's decision incorrect.

STANDARD OF REVIEW

DOC summarizes the standards I apply on this review. WERC offered no alternative. I therefore borrow DOC's summary:

> In a chapter 227 judicial-review action, "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [section 227.57], it shall affirm the agency's decision." Wis. Stat. § 227.57(2). "The 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(5).
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> DOC has the burden to show that WERC's decision should be overturned. *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984) ("The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action.").

Dkt. 20 at 11. Further, I "accord no deference to the agency's interpretation of law." Wis. Stat. §227.57(11); *see also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21.

DECISION

I begin my review by setting out the principles of statutory interpretation I must apply. I then identify the statutes that regulate discipline of Ms. Fields and finish by applying those statutes to WERC's Decision and Ms. Fields' discipline.

I. Statutory Interpretation.

The legal principles that control statutory interpretation are well known. I borrow from the DOC brief as an accurate summary of the relevant law:

> "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. "If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *State v. Grunke*, 2008 WI 82, ¶ 22, 311 Wis. 2d 439, 752 N.W.2d 769 (citation omitted).
>
> "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding

> or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* (citation omitted).

Dkt. 20 at 11-12.

II. Wisconsin Statutes Require State Agencies to Establish Progressive Discipline and Control WERC Review of Discipline Decisions.

The statutes relevant to my review are in Wis. Stat. Ch. 230, which addresses issues relating to Wisconsin state employees. Section 230.04 imposes duties on the Administrator of the Division of Personnel Management in the Department of Administration. Relevant here, the Administrator must:

> establish standards for progressive discipline plans to be prepared by all agencies and applied to all employees in the classified service. The standards shall address progressive discipline for personal conduct and work performance that is inadequate, unsuitable, or inferior. The standards established under this subsection shall allow an appointing authority to accelerate progressive discipline if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance for which an employee is being disciplined is severe.

Wis. Stat. §230.04(13m).

Separate, but related, §230.34 limits when certain state employees can be suspended without pay. Ms. Fields falls within this statute's protection. It provides:

> An employee with permanent status in class…may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause. It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrator's standards under s. 230.04 (13m).

Wis. Stat. §230.34(1)(a).

The Administrator established standards for progressive discipline plans. DOC then adopted a progressive discipline plan pursuant to those standards. Applying its plan to Ms. Fields, DOC suspended her for 5-days without pay for her third unexcused absence. The statutes afforded Ms. Fields the right to appeal DOC's decision if she believed it was "not based on just cause." Wis. Stat.

§230.44(1)(c). On appeal, WERC's duties are set out by Wis. Stat. §230.44, which requires WERC to hold a hearing and further provides in relevant part:

> After conducting a hearing…on an appeal under this section, the commission…shall either affirm, modify or reject the action which is the subject of the appeal. If the commission…rejects or modifies the action, the commission may issue an enforceable order to remand the matter to the person taking the action for action in accordance with the decision.

Id.

The key question here is whether DOC had just cause to suspend Ms. Fields for 5-days. The case law addresses what constitutes "just cause" to discipline a public employee. The Supreme Court explained as follows:

> The court has previously defined the test for determining whether 'just cause' exists for termination of a tenured municipal employee as follows:
>
> > '. . . one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. The record here provides no basis for finding that the irregularities in appellant's conduct have any such tendency. It must, however, also be true that conduct of a municipal employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service.' *State ex rel. Gudlin v. Civil Service Comm.* (1965), 27 Wis.2d 77, 87, 133 N.W.2d 799, 805.
>
> Courts of other jurisdictions have required that a showing of a sufficient rational connection or nexus between the conduct complained of and the performance of the duties of employment.
>
> The basis for such a requirement of 'just cause' or rational nexus is between conduct complained of and its deleterious effects on job performance as constituting grounds for termination of tenured government employees has been to avoid arbitrary and capricious action on the part of the appointing authority and the resulting violation of the individual's rights to due process of law. Only if the employee's misconduct has sufficiently undermined the efficient performance of the duties of employment will 'cause' for termination be found.
>
> In determining whether 'cause' for termination exists, courts have universally found that persons assume distinguishing obligations upon the assumption of specific governmental employment. Conduct that may not be

> deleterious to the performance of a specific governmental position—i.e. a Department of Agriculture employee—may be extremely deleterious to the performance of another governmental occupation—i.e. teacher or houseparent in a mental ward. Thus it is necessary for this court to determine the specific requirements of the individual governmental position.

Safransky v. State Pers. Bd., 62 Wis. 2d 464, 474–75, 215 N.W.2d 379 (1974) (Footnote omitted).

I address the remaining facts and WERC's erroneous reasoning for its decision in the final section.

III. WERC Incorrectly Interpreted the Law and Reduced Ms. Fields' Discipline on that Erroneous Basis.

A. The relevant facts regarding Ms. Fields' attendance violations and the WERC decision are undisputed.

Ms. Fields worked for DOC at the Oshkosh Correction Institution ("OCI"). DOC scheduled Ms. Fields to work on March 23, 2022 from 6:30 a.m. to 6:30 p.m., but approved paid leave for Ms. Fields to participate in a civil-service interview at the Wisconsin Resource Center in Winnebago that day. She left OCI around 12:45 p.m. and concluded her interview around 2:00 p.m. She never returned to OCI for the remainder of her shift nor informed OCI she was not returning that day.

DOC suspended Ms. Fields for 5 days without pay for violating work rules. Ms. Fields had a history of discipline for attendance issues. DOC suspended Ms. Fields without pay on September 8, 2021 for 1 day due to tardy attendance. On February 3, 2022, DOC issued her a written reprimand in lieu of a 3-day suspension for a second attendance violation. The 5-day suspension was the next level under DOC's progressive discipline policy for a third attendance violation.

Ms. Fields appealed this third level of discipline as lacking just cause. On August 30, 2022, WERC's examiner held a phone hearing on that appeal. DOC presented five witnesses. Ms. Fields did not call any witness, but provided a sworn statement and was cross-examined. The parties also submitted exhibits and arguments. The Examiner issued a decision modifying the 5-day suspension to a 3-day suspension. The Examiner explained that just cause existed to impose progressive discipline, but concluded that DOC applied the wrong level of

discipline under progressive discipline policy. This decision rested on WERC's conclusion that it will never consider written reprimands in lieu of suspensions as a legitimate step in progress discipline. The reason WERC refuses to consider written reprimands in lieu of suspension is that it has no jurisdiction to review such an action pursuant to the statutory review process. Therefore, apparently, WERC believes such discipline is irrelevant and not an allowed step in progressive discipline. As such, the Examiner held that DOC's progressive discipline standards required that Ms. Fields' suspension be for 3 days, not 5, as grounds did not exist to go from the September 8, 2021 1-day suspension to a 5-day suspension.

WERC reached the same conclusion as its Examiner. WERC explained that prior WERC decisions hold that, because WERC cannot review a letter issued in lieu of a suspension, that lack of due process review allows WERC to deem any such letter as not validly constituting a step in progressive discipline. As such, WERC excluded the written reprimand in lieu of a 3-day suspension against Ms. Fields from the valid steps in progressive discipline. As a result, DOC jumped from a 1-day to a 5-day suspension of Ms. Fields, which can occur only where misconduct is severe. Ms. Fields' misconduct was not sufficiently severe to jump from a 1-day to a 5-day suspension, thus the DOC acted without just cause. A 3-day suspension was the appropriate next step in progressive discipline.

To understand why WERC erred, I turn to the progressive discipline issue. The Administrator set the following standards for state agency progressive discipline plans:

Work Rule Violations	Corrective Disciplinary Action
First Violation	1-day suspension without pay
Second Violation	3-day suspension without pay
Third Violation	5-day suspension without pay
Fourth Violation	Termination unless a 5-day suspension without pay is repeated for infractions not covered by s. 230.34(1)(a) 1-9, Wis. Stats.

(Dkt. 13:7 (R.0137).) The Administrator also made standards specific to employees with attendance issues only:

> For exempt and non-exempt staff with attendance violations only, the first and second level of discipline (1-day suspension without pay and 3-day suspension without pay) will be a written reprimand in lieu of a 1-day suspension without pay, and a written reprimand in lieu of a 3-day suspension without pay, respectively. The appointing authority may repeat a 5-day suspension level once for attendance violations. Attendance violations are those situations where the employee incurs excessive absenteeism, tardiness, unapproved leave without pay, late call in, etc. Job abandonment - No Call No Show infractions – are considered an attendance violation. However, specific circumstances surrounding a no call/no show may result in an additional finding of misconduct.
>
> Written reprimands in lieu of a period of suspension will have the same weight and effect for progressive discipline purposes as if the employee had served the comparable period of suspension without pay.

(Dkt. 13:7 (R.0137).)

DOC adopted progressive discipline standards in accordance with the Administrator's direction. The DOC standards are as follows, in relevant part:

Work Rule Violations	Corrective Disciplinary Action
First Violation	1-day suspension without pay
Second Violation	3-day suspension without pay
Third Violation	5-day suspension without pay
Fourth Violation	Discharge

> *There will be no letters in lieu of suspension issued with the exception of employees who are categorized as exempt employees under the federal and state overtime laws and regulations. For exempt staff with attendance violations only, the first and second level of discipline (1-day suspension without pay and 3-day suspension without pay) will be a written reprimand in lieu of a 1-day suspension without pay and a written reprimand in lieu of a 3-day suspension without pay, respectively. Written reprimands in lieu of a period of suspension will have the same weight and effect for progressive discipline purposes as if the employee had served the comparable period of suspension without pay.*

Dkt. 10:7-8, R.0047-48. DOC's plan also provides that the progressive discipline plan will be followed "unless the facts of the specific situation warrant a different level of discipline", and DOC can accelerate the level of discipline "if there is a violation of a serious act of misconduct, but will not repeat a level or issue a lower level of discipline." *Id.*

B. WERC misinterprets the law and thus its decision is incorrect.

WERC's Decision relies on the incorrect view of the law that WERC can ignore progressive discipline steps that are not subject to WERC review. In effect, WERC's position renders §230.04(13m)'s requirement that the Administrator and agencies establish progressive discipline procedures irrelevant. WERC asserts that the statute in no way regulates WERC's review and nothing in that statute "even suggests that the Administrator has the authority to bind the WERC in any manner." Putting WERC's view a different way, though the Administrator must establish progressive discipline standards and agencies must adopt plans that comply with those standards, none of those mandates matter when WERC decides whether just cause exists for discipline. Though WERC acknowledges that whether DOC followed progressive discipline and the history of discipline may inform its review whether just cause exists for the punishment doled out, it argues this does not control WERC's analysis. WERC further explains that it can ignore the Administrator's and DOC's progressive discipline standards altogether and can consider factors such as work performance, lack of prior discipline, extenuating circumstances, employer animus, disparate treatment and whether the employee had due process rights to challenge a prior level of discipline relied on to issue the current discipline. Dkt. 21 at 3-4.

WERC erroneously interprets the law. WERC's just cause review does not exist in a vacuum, but arises from the initial authority and limits placed on DOC when disciplining Ms. Fields. The statute's mandate that agencies create progressive discipline plans is meaningless if WERC can pick and choose whether to apply those plans. Though certainly true that WERC reviews whether just cause exists independent of the agency concluding it does, WERC cannot override the progressive discipline plan DOC created.

That the statutes required DOC to establish and follow a system of progressive discipline in accordance with the Administrator's standards is unambiguous. Wisconsin Statute §230.04(13m) uses the mandatory term "shall" - the Administrator must establish the progressive discipline standards for plans that all agencies must prepare and a decision to suspend Ms. Fields' without pay can

only occur "after imposing progressive discipline" that complies with those standards. Wis. Stat. §230.34(1)(a).

Here, WERC never argues that DOC's progressive discipline policy does not comply with the Administrator's standards. WERC also agrees/confirms that Ms. Fields' absence at issue was misconduct and does not assert that DOC incorrectly deemed the conduct "inadequate, unsuitable or inferior." Rather, WERC's Decision rests on the mistaken premise that each step of the progressive discipline process must be subject to WERC review to qualify as valid progressive discipline. WERC provides no law to support this legal conclusion. WERC's reference to its prior decisions, which also do not cite law, is unavailing. WERC cannot rely on its own prior interpretations of its authority that rely only on WERC's own say-so as binding statements of the law. I "accord no deference to" WERC's interpretations of law. Wis. Stat. §227.57(11).

WERC's premise is faulty. As some history, since 2016 WERC took the position that it will not review a written reprimand in lieu of a suspension:

> Prospectively, we will no longer exercise jurisdiction over "written reprimands in lieu of suspensions." We will not consider them as an appropriate step in a progressive disciplinary system unless it is an unusual circumstance that gives rise for the need to impose such a penalty. In other words, a written reprimand in lieu of suspension will be treated as a written reprimand.

See Schallock v. DOC, Dec. No. 36326 (WERC, 4/16) (http://werc.wi.gov/personnel_appeals/werc_2003_on/pa36326.pdf). WERC also acknowledged that it lacks jurisdiction to review written reprimands that do not involve a suspension and are not in lieu of a suspension. In other words, WERC decided to overrule the Administrator and declare written reprimands in lieu of suspension impermissible forms of progressive discipline.

WERC correctly notes that it holds limited statutory authority to review employment decisions relating to state employees. Specifically, WERC can only review decisions to "demote, layoff, suspend without pay, discharge, or reduce the base pay of an employee." Written reprimands that do not result in a suspension are thus outside the scope of what an employee can appeal to WERC. However,

neither the statutes nor case law state that only discipline actions that an employee can appeal to WERC count in progressive discipline.

The whole point of progressive discipline as a requirement for suspension without pay is to force agencies to take lighter methods of correcting employee misconduct first before taking away pay or terminating employment. That this prior instruction occurred supports finding just cause for continued misconduct. For example, if an employee received two oral coaching corrections for attendance issues, then a written reprimand for the third violation, and later a 1-day suspension without pay for the 4th instance of the same conduct, those three initial actions demonstrate just cause for the suspension without pay. Those earlier actions do not need to be supported by just cause per the statute, as they do not deprive the employee of any property rights in her employment. Therefore, there is nothing for WERC to review with those lower levels of progressive discipline. Certainly, WERC still can and must determine whether just cause exists for the suspension without pay. That can include reviewing whether the facts show earlier discipline complied with the progressive discipline policies. What WERC cannot do is overrule all steps of progressive discipline that are not reviewable directly as impermissible in a progressive discipline plan.

As WERC incorrectly held that DOC's letter in lieu of suspension could not count in the progressive discipline process, it applied the incorrect standard by treating this discipline as an escalation from a 1-day to 5-day suspension. I vacate WERC's decision and remand for further review in conformance with this decision, accepting that a written reprimand in lieu of suspension can constitute a valid step in progressive discipline, even if not directly reviewable by WERC. On remand, WERC must determine whether just cause exists for the 5-day suspension.

ORDER

1. **WERC's Decision is vacated and the case remanded to WERC for further proceedings consistent with this Decision.**

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.