STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TRICIA PAUZE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0545
Case Type: PA

DECISION NO. 39753

Appearances:

Patrick O'Connor, Attorney, Hurley Burish, S.C., 33 E. Main Street, Suite 400, Madison, Wisconsin, appearing on behalf of Tricia Pauze.

David 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 28, 2022, Tricia Pauze filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections.

A telephone hearing was held on October 5, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the end of the hearing. On October 10, 2022, Pauze submitted additional written argument. On October 11, 2022, the Respondent submitted a reply, and Pauze filed an additional response.

On October 25, 2022, Examiner Jaw issued a Proposed Decision and Order affirming the discharge. On November 4, 2022, Pauze filed objections to the Proposed Decision. Respondent did not file a response to the objections.

On November 21, 2022, in response to one of Pauze's objections, the Commission directed that an additional hearing be held. The Commission further requested that Respondent file a response to the Pauze objections by December 5, 2022. Respondent did not do so.

On December 14, 2022, Examiner Jaw conducted a supplemental telephone hearing. On December 15, 2022, Respondent filed an untimely response to the Pauze objections. On December 16, 2022, Pauze objected to Commission consideration of Respondent's untimely filing. On December 19, 2022, the Commission advised the parties that it would consider Respondent's December 15, 2022 submission but would allow Pauze to file additional argument. Pauze did so on January 4, 2023.

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

FINDINGS OF FACT

1. Tricia Pauze (Pauze) was employed by the State of Wisconsin Department of Corrections, Division of Adult Institutions, as a Correctional Officer at Green Bay Correctional Institution (GBCI) and had permanent status in class when she was discharged.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various corrections facilities including GBCI, a maximum-security facility located in Green Bay, Wisconsin.

3. On January 3, 2022, Pauze passed a non-GBCI library book to an inmate.

4. DOC discharged Pauze for the conduct referenced in Finding 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 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 Tricia Pauze.

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

ORDER

The discharge of Tricia Pauze by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 13th day of January, 2023.

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.

Tricia Pauze had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Pauze was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. R*einke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

It is undisputed that on January 3, 2022, Pauze passed or delivered a book to a GBCI inmate, contrary to the policies and procedures at GBCI, and without the consent of the warden. Pauze found the book, titled "Awakening the Buddha Within," in abandoned inmate property and took the book home in December 2021. On January 3, 2022, Pauze brought the book back to the institution in her backpack and gave it to an inmate. The book was a non-GBCI library soft-covered book.

DOC conducted an investigation into the matter and concluded that Pauze's conduct violated multiple work rules. On June 3, 2022, DOC discharged Pauze for her conduct on January 3, 2022. The discharge letter Pauze received states in relevant part:

> This letter is to formally notify you that effective June 3, 2022 your employment as a Correctional Officer with the Department of Corrections, Division of Adult Institutions at Green Bay Correctional Institution is being terminated.
>
> This action is being taken because you were found to be in violation of Department of Corrections Work Rule(s) and Serious Acts of Misconduct as noted below:
>
> - WR #2 Failure to comply with written agency policies or procedures.
>   - Serious Act – Fraternization with offenders, inmates, or juvenile offenders including, but not limited to: sharing personal information, providing or receiving goods or services, displaying favoritism, engaging in a personal relationship, failing to report solicitation by an offender, inmate, or juvenile offender.
>   - Serious Act – Bringing illegal substances or contraband into a DOC

employing unit where there are offenders, inmates or juvenile offenders present.

- WR #3 Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.

Specifically, on January 3, 2022, you fraternized with Persons In Our Care (PIOC) when you placed a book into a PIOC's cell, an action that is outside of your normal job duties. Between December 2021 and January 3, 2022, you were negligent in your job duties, as you failed to take proper steps to determine if a book was property of Green Bay Correctional Institution (GBCI). Further, you provided a PIOC with contraband after you removed this same book from GBCI, and then brought it back to GBCI, and subsequently provided it to a PIOC. The introduction of contraband into GBCI causes a substantial risk to the safety and security of our facilities, staff, and other PIOC. Your actions were a direct violation of Executive Directive 16 *Fraternization policy* and DAI Policy 300.00.58 *Staff Personal Property*.

According to Executive Directive 16 – Fraternization Policy, employees are prohibited in providing goods to PIOCs and/or offering special consideration or treatment to PIOCs. There is a signed copy of the DOC 1558 – Statement of Acknowledgement which includes Executive Directive 16 dated 06/12/20 in your personnel file. Your signature on this form has meaning in that you had the responsibility to read, understand and abide by these policies.

In accordance with Executive Directive 02, "The Department may impose a more severe level of discipline, up to and including discharge, for serious acts of misconduct." Fraternizing with PIOCs to coordinate the delivery of contraband into GBCI and then carrying out the delivery into the institution rises to the level of serious misconduct. Therefore, you left me no choice than to skip progression and terminate your employment.

It should be noted that DAI Policy 300.00.58 references Wis. Stat. § 302.095, which states that it is a Class I felony to deliver to any inmate confined in a state prison, any article, contrary to the rules or regulations and without the knowledge or permission of the warden.

The Commission is satisfied that any unauthorized item delivered to an inmate creates a potential risk to the safety and security of any correctional facility, its staff, and other inmates. The Commission is further satisfied that Pauze delivered an unauthorized item when delivering a non-GBCI library book to an inmate. Thus, the Commission concludes that Pauze committed serious misconduct.

Although Pauze did not testify at the hearing, she offered these defenses to excuse and/or mitigate her conduct. First, she claims that she believed the book was from the GBCI library.

Second, she asserts that she was unfamiliar with the general library book policies and procedures. And finally, she argues that other DOC employees have engaged in misconduct similar or worse than hers and received far less discipline. According to Pauze, her discipline should be rejected or she should be issued a one-day suspension.

As to the allegation that the book was a GBCI library book, no evidence was presented by Pauze to show that the book could have been mistaken for a GBCI library book. Quite the opposite. David Brooks, GBCI librarian, credibly testified that library books are easily identifiable because they are labeled with a barcode on the cover and are clearly stamped "GBCI LIBRARY" in bold block letters. On a very rare occasion, there could be a book without a barcode or stamp, however, as the GBCI librarian for the last three and a half years, Brooks has systematically made sure that all GBCI library books were coded and stamped. Additionally, Pauze brought the book home, presumably had time to examine the book, before bringing it back into the institution to give to the inmate. Therefore, the Commission does not find this argument to be persuasive.

Furthermore, as to the general library policies and procedures, the institution has an electronic system that tracks all books being checked in and out by inmates and staff. When books are checked out by inmates, there is a written or electronic receipt. The book is distributed to the inmate, only if it is checked out from the library. Thus, the Commission is not convinced that Pauze did not understand the rules related to delivering books, or any item, to inmates.

Given the foregoing, the Commission concludes that Pauze has not presented any persuasive basis for altering the determination that she engaged in serious misconduct when she passed contraband to an inmate.

Lastly, the Commission turns to Pauze's contention that DOC did not have just cause to discharge her because she was disciplined more harshly than other DOC employees who allegedly engaged in the same or worse misconduct. In this regard, Pauze cites seven examples. The evidence presented at hearing revealed that two of the seven DOC employees she cites were discharged (employee K.S. who brought vape pens and an illegal controlled substance into GBCI and shared the contraband with coworkers; and employee J.M. who brought vape pens, cell phones, marijuana and cocaine into GBCI and passed the contraband to inmates). Thus, for the purposes of analyzing Pauze's disparity claim, only five examples remain where lesser discipline was imposed by DOC.

In *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15), the Commission detailed how it would analyze claims such as the one Pauze makes here. The Commission stated:

> We have long recognized that disparities in discipline may, under certain circumstances, undermine an assertion that just cause exists. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker there must be something other than the misconduct itself that caused the disparity. The argument is also made with regard to lesser penalties but is of less consequence in those matters. We are far more

willing to defer to management's discretion when the disparity is between discipline short of discharge.

We have no statutory obligation to require consistency in treatment. The principle no doubt grows out of the traditional contractual grievance arbitration process. Generally, labor arbitrators require that "all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment." See gen. How Arbitration Works, Elkouri and Elkouri, 6th ed., pp. 995-99.

The concept of disparate treatment in discipline is also a frequent issue in employment discrimination litigation. Court decisions in that area have provided extensive guidance on how to apply the disparate treatment analysis. In labor arbitration cases the group within which to make comparisons is typically the bargaining unit or some smaller group within the bargaining unit. The employment discrimination analysis focuses on employees who are "similarly situated" and that term is defined to include employees who "had the same supervisor, were subject to the same employment standards and engaged in similar conduct." Mayors v. General Electric Co., 714 F.3d 527, 528 (7th Cir. 2013).

In our cases we have never clearly specified the "groups" from which the comparables are drawn. We believe the appropriate "group" would be employees subject to the same rules or standards and with the same decision maker applying those rules. If the agency, however, creates a policy pledging consistency of treatment within a larger group, we will accept that designation. Consistent treatment of employees in terms of discipline has the virtue of providing fair notice of the types of misdeeds and the type of work record that will result in discharge. It also fosters a belief that the employer is fairly applying its rules and making fair and equitable decisions consistent with due process.

In addition to making comparisons between employees within a specified group, the comparison must involve the same misconduct occurring under similar circumstances. If for example an employee is discharged for theft, we will examine comparable treatment of employees disciplined for theft. We will not compare a discharge for theft with, for example, discipline for fighting or insubordination. The decision as to the gravity of certain offenses is that of the employer not those charged with "just cause" determinations. The term "similar circumstances" also requires that the employees have similar work records. An employee who has worked his way through the progressive discipline regimen will not be compared to someone with a good record who commits the same offense.

Finally, we turn to the burden of proof. While the state as the employer bears the overall burden of proof it is not obliged to prove consistency of treatment. An employee who asserts that his conduct should be excused or his discipline reduced because comparable coworkers were treated more favorably has the burden of

> proving that contention. Employees pursuing § 230.44, Stats., appeals are entitled to the full range of discovery available in civil matters and are in a position to obtain that type of information. After presenting evidence of disparate treatment involving similarly situated employees the burden will shift back to the state to rebut the claimed disparity.

The first example cited by Pauze is a three-day suspension issued in June 2020 by DOC to Correctional Officer H.T. for fraternization and failing to provide truthful, accurate, and complete information when required. H.T. engaged in a recorded telephone conversation with an inmate's mother that included providing her with updates or information regarding her incarcerated son's status at GBCI. H.T. knew her friend's son was incarcerated at GBCI and failed to report the possible fraternization to a supervisor once she became aware of the inmate. The misconduct engaged by H.T. and Pauze is not similar. H.T. did not pass contraband to an inmate. Therefore, H.T.'s three-day suspension does not satisfy the disparate treatment test.

The second example cited by Pauze is a July 2022 one-day suspension issued by DOC to Correctional Officer D.Y. for failing to comply with written agency policies related to personal cell phones inside a correctional facility. D.Y. brought his personal cell phone into GBCI and sent a text message to coworkers while on duty. D.Y. admitted to bringing his cell phone into the institution. Plainly, the misconduct engaged by D.Y. is not at all similar to Pauze's misconduct. D.Y. did not pass his cell phone or any other contraband to an inmate. Thus, D.Y.'s one-day suspension does not satisfy the disparate treatment test.

The third example cited by Pauze is of Correctional Sergeant M.W. at GBCI who admitted during the course of an investigation that he brought his personal cell phone into GBCI against policy and consumed an illegal substance while on duty. No evidence was presented that DOC disciplined M.W. However, his misconduct is not comparable to Pauze's misconduct. M.W. did not deliver contraband to an inmate. Therefore, DOC's failure to discipline M.W. does not establish disparate treatment.

The fourth example cited by Pauze is a three-day suspension issued by DOC in August 2022 to Correctional Sergeant D.W. for demeaning, profane or abusive language, and treating a coworker discourteously in front of an inmate. During an investigation, it was also found that D.W. shared personal information with an inmate. DOC did not discipline for sharing personal information. However, because this type of fraternization is not comparable to providing an unauthorized item to an inmate, the failure to discipline does not establish disparate treatment. Pauze also points to D.W. providing a bag lunch to an inmate as a comparable misconduct that yielded no discipline. However, the record establishes that D.W. was authorized to provide the bag lunch and thus his action was not misconduct.

The fifth example cited by Pauze is a September 2020 three-day suspension issued by DOC to Steamfitter S.G. for negligence and failing to comply with agency policies and procedures. S.G. failed to account for a missing homemade tool for two days that was constructed by an inmate. There was concern that the tool could have been brought back to a housing unit. S.G.'s misconduct is also not comparable to Pauze's because contraband was not provided by an

employee to an inmate. Therefore, S.G.'s three-day suspension does not establish disparate treatment.

In summary, the Commission is not persuaded that Pauze has met her burden to establish disparate treatment. While some of the misconduct discussed above involved types of fraternization, all violations of the DOC fraternization policy are not comparable. In terms of the risks created by fraternization, there clearly is a meaningful distinction between sharing personal information with an inmate and providing contraband to an inmate. The record reflects that DOC has discharged other employees who, like Pauze, provided contraband to an inmate.

Given the foregoing, the Commission concludes that Pauze engaged in serious misconduct and that the risk created by that misconduct establishes just cause for her discharge. Therefore, the discharge is affirmed.

Issued at the City of Madison, Wisconsin, this 13th day of January, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman