STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUNIOR GEBERT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0581
Case Type: PA

DECISION NO. 39939-A

Appearances:

Junior Gebert, 459 E. Johnson Street, Fond du Lac, Wisconsin, appearing on his own behalf.

David G. Makovec, Attorney, 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 May 1, 2023, Junior Gebert filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections (DOC). The matter was assigned to Commission Examiner Anfin Jaw.

A hearing was held on July 17, 2023, by Examiner Jaw. The parties made oral arguments at the conclusion of the hearing.

On August 4, 2023, Examiner Jaw issued a Proposed Decision and Order affirming the 3-day suspension. On August 7, 2023, Gebert filed objections to the Proposed Decision. Respondent did not file a response to the objections.

On August 15, 2023, in response to one of Gebert's objections, the Commission reopened the record for the limited purpose of allowing Gebert to present evidence relevant to his disparate treatment claim. On August 21, 2023, Gebert submitted additional evidence and argument. On August 21, 2023, the DOC filed a written response.

Pursuant to Wis. Stat. § 227.46(3)(a), Examiner Jaw has been given final authority to issue the Commission's decision.

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

FINDINGS OF FACT

1. Junior Gebert (Gebert) is employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Sergeant at Dodge Correctional Institution (DCI). He had permanent status in class at the time of his suspension.

2. DCI is a correctional facility located in Waupun, Wisconsin, operated by DOC, a state agency of the State of Wisconsin.

3. Gebert was insubordinate and failed to comply with written agency policies and procedures on December 28, 2022.

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 suspend Junior Gebert for three days.

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

ORDER

The three-day suspension of Junior Gebert by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 24th day of August 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Anfin Jaw, Examiner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Wisconsin Stat. § 230.34(1)(a), states in pertinent part "[a]n employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause."

Wisconsin Stat. § 230.44(1)(c), 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."

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).

It is undisputed that on December 28, 2022, while working as the Unit 30/31 Sergeant, Gebert had both security doors to Unit 30 and Unit 31 open, as well as the unit control center or "bubble" door open at the same time, in violation of agency policies or procedures and institution Unit 30/31 Sergeant post orders. As the sergeant assigned to the control center or bubble, Gebert is solely responsible for keeping the doors secured. Failing to follow post orders and secure doors not only constitutes insubordination, but it can compromise the safety and security of the institution. Thus, workplace misconduct has been established.

The Commission has previously held that that "[e]mployers have a legitimate interest in ensuring that employees follow the directives they are given. When employees fail to follow orders or directives, that conduct is obviously detrimental to the workplace environment. If an employee does not comply with a work order or directive, then their conduct constitutes insubordination, and there can be adverse employment consequences as a result." *See Reesman v. DOC*, Dec. No. 37301 (WERC, 2/18).

In his defense, Gebert argues he was observing "chow" time, and may have misread the electronic panel that indicates which doors are open. While he may have been multi-tasking at the time, there is no question that Gebert was the only staff person assigned to the unit control center or bubble, and therefore, the only one responsible for assuring that the doors are secured. Thus, the Commission rejects this argument.

Gebert also claims that the Unit 31 door was broken and did not get repaired until months later. Assuming that were true, there would be even more of a reason to have the bubble door secured at all times. Additionally, Gebert was fully aware of his post orders having previously received a non-disciplinary Letter of Expectation (LOE) in May 2022 for unit/area door security related to similar behavior. Bottom line, the post orders and directives are clear, if a unit door is open, the bubble door must be secured.

Lastly, the Commission turns to Gebert's contention that he is being singled out by the warden and treated differently than other staff who have propped bubble doors open while having unit doors also open. Gebert argues that having all doors open is considered normal operating procedure and other staff have not been investigated or disciplined for the same conduct. In this regard, Gebert cites ten examples; seven of which received a non-disciplinary LOE, and three of which received progressive discipline similar to Gebert. Thus, for the purposes of analyzing his disparity claim, only seven 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 Gebert 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 Decision No. 39753 Page 7 willing to defer to management's discretion when the disparity is between discipline short of discharge.
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> 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.
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> 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).
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> 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.
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> 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.
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> 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 Decision No. 39753 Page 8 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 presented by Gebert is an LOE issued in April 2020 by DOC to Correctional Officer S.B. for overriding sally port doors while exiting the control center. There were no inmates present at the time, and when S.B. was made aware of the issue, she proceeded to secure the doors in question. The misconduct engaged by S.B. is similar, however there were inmates present when Gebert left his doors unsecured. Additionally, Gebert had been previously put on notice with his May 2022 LOE regarding the same behavior. Therefore, S.B.'s LOE does not satisfy the disparate treatment test.

The second example cited by Gebert is an LOE issued in October 2017 by DOC to Correctional Sergeant J.D. for failing to secure housing unit doors when there is no inmate movement. No evidence was presented that J.D. also left the control center or bubble door unsecured when the housing unit doors were unsecured. Thus, J.D.'s misconduct is not similar to Gebert's misconduct and J.D.'s LOE does not satisfy the disparate treatment test.

The third example Gebert cites is an LOE issued in June 2023 by DOC to Correctional Sergeant M.F. for having a hallway slider door as well as two unit entry doors open and unsecured at the same time. However, the control center or bubble door was secured at the time. M.F.'s misconduct is not comparable to Gebert's misconduct. While multiple unit doors were left open, the bubble door is the most important door to have secured. Accordingly, M.F.'s LOE does not establish disparate treatment.

The fourth example presented by Gebert is an LOE issued in February 2019 by DOC to Correctional Sergeant J.K. for overriding the main entry doors on a unit and inadvertently opening a cell door that housed an inmate that was in Administrative Confinement. Again, no evidence was presented that J.K. also left the bubble door unsecured while the other doors were unsecured. Therefore, J.K.'s LOE does not satisfy the disparate treatment test.

The fifth example Gebert cites is an LOE issued in October 2017 by DOC to Correctional Sergeant S.K. for failing to secure a door without inmate movement. Since there were no inmates present, the misconduct engaged by S.K. is not comparable to the misconduct engaged by Gebert. Thus, S.K.'s LOE does not satisfy the disparate treatment test.

The sixth example offered by Gebert is an LOE issued in October 2017 by DOC to Correctional Sergeant R.S. for failing to secure a door without inmate movement. Comparable to Correctional Sergeant S.K. above, there were no inmates present. And similarly, R.S.'s LOE does not satisfy the disparate treatment test.

The final example Gebert presents is an LOE issued in March 2018 by DOC to Correctional Sergeant T.W. for failing to secure housing unit doors, including entrance doors leading from the main hallway, without staff or inmate movement. Since no inmates were present at the time, and presumably the bubble door was secured, T.W.'s misconduct is not similar to Gebert's misconduct. Therefore, T.W.'s LOE does not satisfy the disparate treatment test.

In summary, the Commission is not persuaded that Gebert has met his burden to establish disparate treatment. While some of the misconduct discussed above involved types of unit or area door security, all violations involving unsecured doors are not comparable. As previously noted, the control center or bubble door is to be secured at all times when unit doors are open, especially when there are inmates present. The record reflects that DOC has issued progressive discipline to other employees, like Gebert, who have failed to secure the bubble door and unit or cell doors while inmates were present.

Given the forgoing, the Commission finds that Gebert's insubordination provides just cause for the three-day suspension imposed by the DOC. We further find that a three-day suspension was not an excessive punishment for Gebert's misconduct. In so finding, it is expressly noted that Gebert previously received a one-day suspension on April 4, 2022. The three-day suspension is the next step in the disciplinary progression schedule and is therefore affirmed.

Issued at Madison, Wisconsin, this 24th day of August 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Anfin Jaw, Examiner