

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUNIOR GEBERT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0425

Case Type: PA

DECISION NO. 38921

Appearances:

Junior Gebert, N6960 Center Road, Rosendale, 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 December 28, 2020, Junior Gebert filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for one day 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 March 19, 2021. The parties made oral argument at the conclusion of the hearing.

On March 30, 2021, Examiner Jones issued a Proposed Decision and Order affirming the one-day suspension. On April 5, 2021, Gebert filed objections to the Proposed Decision and Order. The State did not file a reply to the objections on or before the April 12, 2021 deadline.

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

FINDINGS OF FACT

1. Junior Gebert is employed by the State of Wisconsin Department of Corrections (DOC) as a correctional sergeant at Dodge Correctional Institution (DCI) and had permanent status in class at the time of his one-day suspension.

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

3. On September 15, 2020, Gebert made an inappropriate and demeaning statement to an inmate.

4. DOC suspended Gebert for one day for doing that.

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 to review 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 one day.

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

ORDER

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

Issued at Madison, Wisconsin, this 26th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

Junior 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).

On September 15, 2020, Gebert had a short verbal exchange with an inmate (hereinafter LW) who, by Gebert's own admission, he had previously "interacted" with "a lot." Additionally, Gebert knew the inmate was transferring to a different institution. The entire verbal exchange was witnessed by another correctional sergeant, Craig Engel.

That verbal exchange started when Gebert saw that LW's shirt was wet with sweat and his face was red. Gebert inferred from the foregoing that LW had been working out in the dayroom. That is proscribed conduct. Gebert then told LW he was not allowed to do that (i.e. workout), whereupon LW denied that he had been working out. Gebert did not believe LW's denial and then, in reference to LW's sweating, Gebert said words to the effect of "if you're not working out it must be something sexual." LW immediately took offense to Gebert's comment and said he was going to file a complaint against Gebert, which he did. That complaint prompted an investigation. In the investigation, Gebert admitted making the comment attributed to him. DOC subsequently suspended him for one day for making that comment.

The only part of Gebert's verbal exchange with LW that is at issue here is the very last comment wherein he said "it must be something sexual." As Gebert sees it, his comment was an attempt to elicit information from LW, was professional and did not demean LW. That is not how DOC sees it. They considered Gebert's comment unnecessary, unprofessional and demeaning to LW. The Commission concurs with DOC. Even if Gebert intended his comment to simply be sarcastic, that is not how it came off. It came off as accusatory and intended to cause embarrassment. That being so, Gebert's comment did not serve any legitimate purpose in the way

it was relayed to LW. It is also noteworthy that Gebert did not provide any follow-up action demonstrating concern that LW may have been involved in a sexual assault or a physical altercation.

Gebert offers the following defenses to excuse and/or mitigate his conduct.

First, he contends that DOC's investigation in this matter was flawed because the investigator only interviewed three people: LW, Engel and Gebert. Gebert contends that the investigator should have interviewed more people. However, the record shows that the three people just referenced were the only ones with direct first-hand knowledge of what happened. Under these circumstances, there simply was no need for DOC's investigator to interview more people as the ones interviewed were sufficient to determine what happened. The Commission therefore finds that DOC's investigation passes muster.

Second, for the purpose of context, it is noted that before DOC disciplines an employee, the investigator prepares a document that is known as the Final Conclusion. That document contains a narrative statement written by the investigator summarizing what happened. Gebert contends the last two sentences in the first paragraph of that document contain an error. The two sentences at issue read:

The comment by Sgt. Gebert was heard by two other PIOC in the immediate area.
The two PIOC that heard the comment expressed their discomfort as well.

(Note: PIOC is an acronym which stands for Person In Our Care; it is another word for inmate).

Gebert contends these two statements are incorrect because there were not two PIOC's who heard his comment to LW. That is true; the only two people who heard Gebert's statement were LW and Engel. Just one of them (LW) is a PIOC, so the statement in the Final Conclusion document is incorrect in terms of the number of PIOC's who heard Gebert's comment. The investigator who wrote these sentences acknowledged at the hearing that the reference to "two PIOC" was incorrect and should have instead referred to the two witnesses (LW and Engel) as being the witnesses who "expressed their discomfort" with Gebert's comment to LW. Gebert sees this mistake in the Final Conclusion document as significant. The Commission does not. It would be one thing if this mistaken entry had been quoted verbatim in the suspension letter. However, it was not. The mistake that Gebert referenced in the Final Conclusion document was not included in his suspension letter. That is important for this reason: what the Commission reviews in any disciplinary appeal is the final disciplinary letter given to the employee. In this case, the final disciplinary letter did not reference the "two PIOC's" comment that was incorrect. That being so, the fact that the Final Conclusion document contains that mistaken wording is of no consequence.

Third, Gebert makes a disparate treatment claim. For disparate treatment to occur, similarly situated employees must have engaged in similar conduct with different levels of punishment imposed. To support his disparate treatment claim, Gebert points to an incident which occurred at DCI after his incident occurred. What happened in that incident was that inmates were lined up for a temperature check by a nurse, when Corrections Officer Holtan said collectively to the entire

group of inmates “whoever is next come on up and bend over for a temperature check.” In the subsequent investigation, Holtan admitted that this comment was inappropriate. Thus, in that incident, Holtan made an inappropriate comment to a group of inmates. For the purpose of discussion, it is assumed that Holtan’s offense was similar to Gebert’s offense in that both made inappropriate comments to inmates. The record shows that Holtan was not disciplined for the incident just referenced. Gebert cries foul over the fact that he got a one day suspension while Holtan was not disciplined. While the two committed similar misconduct, the record shows that their disciplinary histories are different, to wit: Holtan had a clean disciplinary record before that incident occurred, while Gebert had three prior suspensions in the past four years. Under these circumstances where the two employees had vastly different disciplinary histories, there was a legitimate and objective basis for treating Gebert differently than Holtan when it came to imposing discipline. We therefore find that Gebert did not show he was subjected to disparate treatment in terms of the punishment imposed.

Having addressed Gebert’s defenses and found them unpersuasive, we find that Gebert committed misconduct when he made the comment at issue herein. He could be disciplined for same.

Turning now to the level of discipline imposed here, the Commission finds that a one-day suspension was not an excessive punishment for Gebert’s misconduct. In so finding it is expressly noted that a one-day suspension is the first step in DOC’s progressive discipline sequence.

Given the foregoing, it is concluded that there was just cause for Gebert’s one-day suspension and it is therefore affirmed.

Issued at Madison, Wisconsin, this 26th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman