

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES TAULBUT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0629

Case Type: PA

DECISION NO. 40388

Appearances:

Kostas Korias, 508 Doty Street, Waupun, Wisconsin, appearing on behalf of James Taulbut.

Nicole Porter, 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 March 28, 2024, James Taulbut filed an appeal with the Wisconsin Employment Relations Commission asserting that he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Commission Examiner Peter G. Davis.

On June 4, 2024, Examiner Davis conducted a hearing in Waupun, Wisconsin. The parties made oral argument at the conclusion of the hearing.

On June 27, 2024, Examiner Davis issued a Proposed Decision and Order modifying the discharge to a reinstatement without back pay.

On July 2, 2024, DOC filed objections to the Proposed Decision and Order and on July 3, 2024, Taulbut filed a response.

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

FINDINGS OF FACT

1. James Taulbut, herein Taulbut, was employed as a Correctional Officer by the State of Wisconsin Department of Corrections (DOC) at the Dodge Correctional Institution((Dodge). At the time of his discharge, he had permanent status in class.
2. When driving a perimeter vehicle at Dodge, Taulbut exceeded the maximum speed limit.
3. When driving a perimeter vehicle at Dodge, Taulbut did not lock the shotgun in the vehicle.

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 did not have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge James Taulbut but did have just cause to suspend him.

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

ORDER

The discharge of James Taulbut by the State of Wisconsin Department of Corrections is modified to a suspension. He shall be reinstated without back pay but without loss of fringe benefits or seniority.

Issued at Madison, Wisconsin, this 25th day of July 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

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.

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

The State has the burden of proof to establish that Taulbut 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).

At the time of his discharge, Taulbut had worked for DOC for three years as a Correctional Officer. Early in the morning of October 1, 2023, he was driving a locked vehicle armed with a shotgun patrolling the perimeter fence of the Dodge Correctional Institution. It was not an assignment he routinely performed. When he began driving that night, he was concerned that a button in the vehicle that automatically unlocked the shotgun (in the very unlikely event it was needed) might malfunction. So, he had the shotgun unlocked resting upright in a stand. The shotgun can also be unlocked manually with a key, but Taulbut believed that use of a key in the dark might be problematic.

Taulbut knew he had the option of immediately reporting the button issue to supervisors but did not do so as he was concerned he would be viewed as a troublemaker who risked his job security due to a recent five-day suspension. While the record provides no objective justification for such a belief, Taulbut's testimony supports the proposition that he viewed that concern as real.

A Correctional Officer in a security tower observed Taulbut driving at speeds she concluded exceeded the maximum speed limit of 15 miles per hour. She asked the Correctional Officer who had been driving the vehicle as part of her standard assignment earlier in the shift (and who had not noticed/been concerned about a potential button malfunction) to contact Taulbut and ask him to slow down. That second Correctional Officer was conducting rounds at the time and gestured for Taulbut to stop. When he did so, she told him to slow down and then observed that the shotgun in the vehicle was not locked into place and was within arm's reach from the passenger-side. She told him he needed to lock the shotgun up. Taulbut told her he wanted it unlocked for faster access if the gun were to be needed. At least after that conversation, it was Taulbut's intent to turn in a work order at the end of the shift related to the button.

The exchange between Taulbut and the Correctional Officer about the status of the gun left the Correctional Officer concerned enough that she reported the matter to supervisors. Supervisors concluded that the reports of excessive speed and the unlocked gun were credible and directed Taulbut to report to them. During the conversation with the supervisors, Taulbut mentioned that the button mechanism that would automatically unlock a locked shotgun was loose and would potentially malfunction. After his conversation with supervisors ended, Taulbut submitted a work order to have the button mechanism checked. It is not clear whether any repair of the button mechanism was needed or performed.

As of October 1, 2023, Taulbut had received a “Letter in lieu of 1-day suspension” for an attendance issue, a “Letter in lieu of 3-day suspension” for an attendance issue, and a “5-day suspension” for a non-attendance issue. DOC advised Taulbut that all three matters could be appealed as discipline. Taulbut unsuccessfully attempted to appeal the “five-day suspension.”

If Taulbut had had a clean disciplinary record on October 1, 2023, he would have received a one-day suspension for speeding and having an unlocked firearm. Because Taulbut had already reached the five-day suspension level in the DOC disciplinary progression, DOC discharged him as discharge is the next step in the standard DOC disciplinary progression.

The evidence in the record satisfies the Commission that Taulbut was exceeding the 15 miles per hour maximum on the night in question. While his testimony at hearing was ambiguous, there was unrebutted testimony from one of the Correctional Officers that Taulbut admitted he was travelling 25 miles per hour. As DOC witnesses testified, the low-speed limit allows for better observation and enhances the ability to avoid hitting animals that might be in the roadway. However, it is apparent that speeding in and of itself would not have produced formal discipline. Indeed, the matter would never have reached supervisor’s knowledge had the shotgun in the vehicle been locked.

As to the unlocked shotgun, Taulbut points not only to the “button issue” but also to a portion of the post orders that uses the word “secure” as opposed to “locked” regarding the appropriate status of the gun in the vehicle. Drawing partly on his 26 years of service in the military, he contends that the gun was “secure” because it was under his control and the vehicle was locked while he was driving. Be that as it may, it is clear that Taulbut knew that DOC expected the gun to be locked.

As to the level of discipline appropriate under the applicable statutory just cause standard, Taulbut generally attacks the DOC disciplinary progression as outmoded. He also asserts that discharge should be reserved for acts of serious misconduct-which DOC concedes were not present here.

Contrary to Taulbut’s view, the Commission concludes that the current DOC standard disciplinary progression is not inconsistent with the applicable statutory just cause standard. The Commission is also satisfied that discharge for misconduct that does not independently rise to the “serious” level can be consistent with the just cause standard if the employee has already progressed to the upper levels of the disciplinary progression. However, the Commission has long

held that it is not obligated to follow the DOC progression and has the “just cause” discretion to independently fashion the level of discipline warranted by the specific facts before it.¹ Here, while Taulbut’s concerns about the button function and the ramifications of immediately reporting same were overblown, the Commission is satisfied that those concerns were real to him and establish a persuasive basis for Taulbut receiving a very lengthy suspension in lieu of the capital punishment of discharge. Therefore, he is to be reinstated but without back pay.

DOC contends that the Commission lacks the statutory authority to modify Taulbut’s discipline and is obligated to follow the DOC progression authorized by the Administrator of the Division of Personnel Management—at least where, as here, Taulbut was at the five-day suspension level when the misconduct occurred. The Commission disagrees.

The Commission submits that the Administrator’s authority under Wis. Stats. § 230.04(13m) is limited to establishing disciplinary standards that DOC must follow when it **acts as an employer** and disciplines employees. There is nothing in the text of § 230.04(13m) that even suggests that the Administrator has the authority to bind the WERC in any manner. The authority to provide binding disciplinary standards to DOC is separate and apart from the statutory authority of the Commission under Wis. Stats. § 230.44(1)(c) to determine whether discipline imposed by DOC for misconduct meets the just cause standard created by Wis. Stats. § 230.34(1)(a). One type of statutory authority gives direction to DOC when it chooses to discipline DOC employees. The other type of statutory authority establishes a standard by which the Commission determines if there was just cause for the discipline imposed if misconduct occurred. There is no conflict. The Administrator directs, DOC acts consistent with that direction, and the Commission applies a just cause standard if there is an appeal of the discipline.

The DOC position eliminates the second of the two parts of the Commission's statutory just cause jurisdiction and ignores the Commission’s explicit statutory authority to “modify” discipline. As stated by the Wisconsin Supreme Court in *Safransky v. Personnel Bd.*, 62 Wis.2d 464, 472 (1974) “[t]he board must determine whether the discharged employee was actually guilty of the misconduct cited by the appointing authority **and** whether such misconduct constitutes just cause for discharge.” (citing *Bell v. Personnel Board*, 259 Wis. 602 (1951) (*emphasis added*)).

The Commission acknowledges that when determining the level of discipline that is appropriate under a just cause standard, it often considers any reasonable disciplinary progression established by the Administrator and adopted by a State agency. That is so because said progressions are typically consistent with the just cause concept of having the “punishment fit the crime”, allowing employees the chance to conform their behavior to the employer’s expectations, but ultimately allowing employers to discharge an employee who has failed to perform satisfactorily despite being warned by receipt of lower levels of discipline. But the Commission is not legally obligated to follow the Administrator’s standards adopted by DOC. Thus, when determining whether to modify discipline imposed as part of a progression, the Commission also considers other factors such the employees’ work performance (*see Gliniecki v. DOC*, Dec. No. 38291 (WERC, 1/20); seniority (*see Gomez v.*

¹Aside from the specific progression established here for attendance violations, the standard progression consists of suspensions of one, three and five days followed by discharge. If the Administrator were to establish a disciplinary progression that provided no intermediate steps between a one-day suspension and discharge, the WERC would likely not consider that progression at all because it would be at odds with a just cause standard as to many types of minor misconduct.

DOC, Dec. No. 39760 (WERC, 2/22); lack of prior discipline (*see Nowak v. DOC*, Dec. No. 37951, WERC, 6/19); extenuating circumstances (*see Wholf v. DOC*, Dec. No. 36317 (WERC, 5/16); employer animus (*see Franke v. DOC*, Dec. No. 37807-B (WERC, 2/19); disparate treatment (*see Waterman v. DOC*, Dec. No. 36741 (WERC, 12/16); or whether the employee had the due process related right to challenge some level of prior discipline the State relies upon as a basis for the discipline imposed. Thus, under the just cause standard, the Commission is not obligated to follow any disciplinary progression the Administrator has established and DOC has adopted.

In the instant matter, the Commission concludes that Taulbut's good faith state of mind as to the shotgun issue is an extenuating circumstance that warrants a modification of the DOC imposed discipline to something less than but just short of discharge.

Issued at Madison, Wisconsin, this 25th day of July 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman