

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0890

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

HARRISON D. KERN,

PLAINTIFF-APPELLANT,

v.

**BOARD OF FIRE AND POLICE COMMISSIONERS FOR THE
CITY OF MILWAUKEE AND PHILIP ARREOLA,
CHIEF OF POLICE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
LEE E. WELLS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Harrison D. Kern appeals from an order of the circuit court affirming disciplinary actions imposed against him by the Milwaukee Fire and Police Commission (FPC). Kern claims: (1) he was denied due process because his FPC hearings were not held until five and three years after the alleged

violations; and (2) he was denied equal protection because the discipline imposed on Kern was harsher than any discipline imposed on any of his co-employees. Because Kern waived his right to complain about the delay between the violations and the hearing and because there was no equal protection violation, we affirm.

I. BACKGROUND

Kern was employed as a Milwaukee police officer from 1980 until 1986 when he was promoted to the position of police alarm operator. On August 21, 1989, Kern was thirty-nine minutes late for work. On December 6, 1989, he was four minutes late for work. This tardiness prompted the chief of police to issue a disciplinary order dated April 6, 1990. The order was based on Milwaukee Police Department Rule 4, Section 33, which requires members of the department to be “punctual in reporting for duty.” The order imposed a ten-day suspension and demotion to police officer.

On September 17, 1992, Kern was again disciplined for violating the same rule by being fifty-five minutes late on August 6, 1992. The discipline imposed was a thirty-day suspension. Kern appealed both orders to the FPC. After repeated delays and adjournments, hearings were finally held on October 24, 1995, and December 12, 1995. The FPC found Kern guilty of both charges, but reduced the penalties on the first disciplinary action to a ten-day suspension, reinstating him to the position of police alarm operator with back pay, and reduced the thirty-day suspension on the second disciplinary action to a one-day suspension.

Kern sought review of the FPC decisions by both statutory appeal under § 62.50(20), STATS., and by writ of certiorari. The cases were consolidated by stipulation of the parties and order of the circuit court. The circuit court found

that Kern waived his right to raise a due process claim because he failed to make a timely objection to the delay of the hearings and found no equal protection violation.¹ The circuit court entered an order affirming the decisions of the FPC. Kern now appeals only from the circuit court's decision on the certiorari review of both FPC decisions.

II. DISCUSSION

A. *Due Process Claim.*

Kern first claims that his due process rights were violated because of the lengthy delay between the time of the disciplinary actions and the time of the hearings. The circuit court determined that Kern waived the right to assert this claim because the delays were at the behest of both sides and because “there is no evidence in the record that Kern registered an objection to any delay until ... the initial hearing.” We agree.

The Due Process Clause provides: “No State ... shall ... deprive any person of life, liberty, or property, without due process of law” U.S. CONST. AMEND. XIV, § 1. Due process requires reasonable notice and a fair opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The record documents a protracted and complicated procedural history between the time the discipline occurred and the time the hearings actually commenced. The FPC set dates for the hearings eight times before the hearings actually occurred. The procedural history demonstrates that Kern, through his

¹ The circuit court also found that the decision of the FPC was reasonable and supported by credible evidence. Kern does not challenge this determination and we do not review it.

counsel, did not object to the repeated adjournments, and actually requested one of the postponements. In June 1993, when the FPC sent a letter to counsel requesting that the hearing take place within ninety days, Kern failed to respond.

Based on these facts, we conclude that Kern waived his right to claim that the delay violated his due process rights. Not only did Kern fail to request that the hearings occur promptly, but he also acquiesced without objection to repeated adjournments and postponements. We have said that the failure to object promptly constitutes waiver. An objection should be made as soon as possible so the lower tribunal may forthwith take appropriate steps to cure the error or to minimize possible prejudice. *See Mul kovich v. State*, 73 Wis.2d 464, 469, 243 N.W.2d 198, 201 (1976). We conclude that Kern failed to preserve this issue.

B. Equal Protection.

Kern next claims that his right to equal protection was violated because the discipline imposed on him was more severe than that imposed on his co-employees. Our review is limited to whether the FPC exceeded its jurisdiction or proceeded on an incorrect theory of law. *See Owens v. Board of Police & Fire Comm'rs*, 122 Wis.2d 449, 451, 362 N.W.2d 171, 173 (Ct. App. 1984).

The Equal Protection Clause is included in the Fourteenth Amendment of the United States Constitution which states, in pertinent part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause requires equal protection and security for all under like circumstances. *See In Matter of Complaint Against Seraphim*, 97 Wis.2d 485, 496, 294 N.W.2d 485, 492 (1980). Thus, where those who are similarly situated are treated similarly, no equal protection violation occurs. *See*

State v. Post, 197 Wis.2d 279, 319, 541 N.W.2d 115, 129 (1995), *cert. denied*, 117 S. Ct. 2507 (1997). Unless government action involves classifications based on a suspect class, such as race or alienage, or invidious classifications that arbitrarily deprive a class of persons of a fundamental right, the rational basis test applies. *See id.* Under a rational basis test equal protection analysis, there must be a rational relationship between the disparity in treatment resulting under a statute and a legitimate governmental objective.

The FPC's decision provides in pertinent part:

It should be noted by those reviewing this decision that we do not intend to condone tardiness by any Department member. We fully appreciate the need for all Department members to appear for work promptly as scheduled, and strongly encourage the Department to continue attempts to hold Department employees to the highest standards in this regard. Citizens, co-workers and supervisory personnel have a right to expect every Department member to appear on a timely basis, ready to immediately perform assigned duties. This is an absolute minimum standard which should not be relaxed absent extraordinary circumstances.

It is obvious, based upon our review of Appellant Kern's record, that he has been less than exemplary in meeting this minimum standard. Over the course of a nine year period between 1980 and 1989, Harrison Kern was cited on a number of occasions for being late for duty, late for court appearances, late returning from a scheduled break or failing to appear for court appearances. This course of conduct shows a lack of commitment which is unacceptable and deserving of disciplinary action. We do not, however, believe that a demotion is warranted in this case.

It has been brought to our attention that, prior to 1986, those employees assigned to the Communications Division of the Milwaukee Police Department were not always required to adhere to normally accepted standards regarding timeliness and other issues. Efforts were made by newly assigned supervisors to eliminate this disparity after 1986, and dissatisfaction arose among rank and file employees. Several Communications Division members,

including Harrison Kern, were cited for rule violations related to tardiness, work attire and other issues. Only rarely within the Milwaukee Police Department did disciplinary action related to tardiness include a suspension without pay, and a demotion was essentially unheard of for such an infraction.

....

It is our opinion that, given Appellant Kern's poor record concerning punctuality and the Department's prior unsuccessful attempts at corrective discipline, a suspension of ten (10) consecutive working days without pay is warranted and is hereby ordered. The rule violations and disciplinary history which are before us do not warrant demotion at this time.

The FPC also found that "the good of the service requires that Harrison D. Kern be suspended for one day without pay" relative to the second violation, which had carried a thirty-day suspension.

Although Kern asserts that he was treated more harshly because of his race, this allegation is based solely on hearsay statements made by one member of the Department. Therefore, it is not supported by the record and we dismiss this contention as meritless. Further, Kern does not argue that the rule does not serve a legitimate purpose. Rather, he contends that he was treated differently from his co-workers who were similarly situated. He argues that his ten-day suspension far exceeded any discipline imposed on co-workers also found in violation of the rule. He argues that there is no evidence in the record that provides a basis for this disparate treatment.

We are not persuaded that the FPC violated any equal protection rights in rendering its decision. The record demonstrates that certain rules, including the "tardiness" rule, were not enforced prior to 1986. With a new administration, however, the communication division officers were now being required to abide by the rule. Kern did not want to have to comply with it then

because he did not have to comply with it in the past. Further, the record demonstrates that Kern was an individual with a record of chronic failing to report to duty on time. His habitual tardiness created a hardship on the Department and the individual on the preceding shift.

We see no violation of equal protection here. Guarantees of equal protection in Federal and State Constitutions require that persons similarly situated be accorded similar treatment; however, this does not require that all persons be dealt with identically, rather, equal protection is only denied when persons similarly situated are classified in an irrational or an arbitrary manner. Evidence that the tardiness rule was enforced in one instance and not in others would not in itself establish a violation of the equal protection clause. *See State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wis.2d 516, 544, 124 N.W.2d 809, 823 (1963). There must be a showing of an intentional, systematic and arbitrary discrimination. *See State ex rel. Murphy v. Voss*, 34 Wis.2d 501, 510, 149 N.W.2d 595, 599 (1967).

With the change in administration, all members were now obligated to adhere to the rule. The record demonstrates that members of the Department who violated the rule were disciplined. There is no showing that the discipline imposed on Kern for violations was some sort of intentional and arbitrary discrimination imposed solely on him. Rather, the enforcement of the rule applied to all members of the Department and evidence in the record reveals that other violators were also disciplined, including at least one other violator who was suspended. The record demonstrates that Kern was an egregious violator. Thus, although Kern may interpret his punishment as “disparity in treatment,” the record shows that his punishment was based on his repeated refusal to abide by the rule and the detrimental impact this refusal had on his co-workers and the Department.

He has not demonstrated that the FPC exceeded its jurisdiction or proceeded on an incorrect theory of the law.²

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² Kern also claims that certain evidence admitted at the hearings was inadmissible. No contemporaneous objection was asserted at the time the challenged document was offered into evidence and, therefore, Kern has failed to preserve this issue. *See* § 901.03(1)(a), STATS.

