

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**BROWN COUNTY MENTAL HEALTH  
CENTER EMPLOYEES, LOCAL 1901,  
AFSCME, AFL-CIO, Complainant,**

vs.

**BROWN COUNTY, Respondent.**

Case 719  
No. 64936  
MP-4170

**Decision No. 31476-B**

---

**Appearances:**

**Mark DeLorme**, Staff Representative, Wisconsin Council 40, AFSCME, 65 Webster Heights Drive, Green Bay, Wisconsin 54301, appearing on behalf of the Complainant Union.

**John Jacques**, Corporation Counsel, Brown County, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of the Respondent County.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

On July 5, 2005, Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission (WERC) against Brown County. The complaint alleged that Joachim Vetter, an employee represented by the Union, had been discharged from his employment with Brown County. The complaint further alleged that following Vetter's discharge, a grievance was filed which asserted that Vetter was discharged without just cause. The complaint further alleged that the Union appealed the grievance to arbitration. The complaint further alleged that the County refused to arbitrate the Vetter grievance because the parties' last collective bargaining agreement had expired, and there was a contract hiatus. The Union alleged that "by terminating Vetter without just cause in violation. . . of the parties' 2003-2004 collective bargaining agreement", the County committed prohibited practices within the meaning of

No. 31476-B

111.70(3)(a)4 and 1, Stats., when it “failed to maintain the status quo of the parties’ expired collective bargaining agreement.” By framing the complaint that way (i.e. characterizing the County’s action in discharging Vetter as a status quo violation), the complaint essentially seeks to have the merits of Vetter’s discharge adjudicated by the WERC.

On September 23, 2005, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. On October 3, 2005, Respondent County filed a Motion to Dismiss Complaint. On October 20, 2005, the Complainant Union filed its response in opposition to the Motion to Dismiss. On October 27, 2005, the Examiner issued an Order Denying Motion to Dismiss Complaint.

On November 1, 2005, the County filed a petition seeking Commission review of the Examiner’s Order Denying Motion to Dismiss Complaint. The petition asked the Commission to dismiss the complaint. In response, Commission General Counsel Peter Davis sent the parties the following e-mail:

During its November 7 meeting, I anticipate the Commission will decide whether to take jurisdiction over Mr. Jacques’ petition for review as to Examiner Jones’ interlocutory Order. We will advise you of that decision on November 7.

If the WERC takes jurisdiction, the November 10 hearing will be postponed. If the WERC does not take jurisdiction, the November 10 hearing will proceed.

If Mr. DeLorme wishes to respond to the petition, he should do so as soon as possible.

On November 7, 2005, General Counsel Davis sent the parties the following e-mail:

The Commission voted this morning as to the petition and concluded on a 3-0 vote that it would not assert its jurisdiction. Thus, the Nov. 10 hearing is on.

The next day, November 8, 2005, the County filed a complaint in Brown County Circuit Court against the WERC. That complaint, which was denominated Complaint for Declaratory Relief, sought to enjoin the WERC from proceeding with the instant case and to stay or dismiss the instant case.

On November 9, 2005, Examiner Jones sent the parties an e-mail which provided in pertinent part:

Insofar as I know, the court has not enjoined the WERC from proceeding. That being so, the hearing set for Thursday, Nov. 10 is on.

Hearing on the complaint convened, as scheduled, November 10, 2005 in Green Bay, Wisconsin before Examiner Jones. As of then, the Brown County Circuit Court had not enjoined the WERC from hearing the instant complaint. The County filed an Answer to the complaint at the hearing. The hearing was transcribed. The parties filed briefs on January 6, 2006. The briefs were exchanged January 9, 2006. The Union elected not to file a reply brief on January 12, 2006. The County filed a reply brief on January 25, 2006, whereupon the record was closed.

On February 6, 2006, Examiner Jones received a copy of a written decision issued by Brown County Circuit Judge Mark Warpinski dated January 17, 2006 involving the complaint filed by Brown County against the WERC. As referenced above, that was the complaint wherein the County had sought to stay the instant case. In his decision, Judge Warpinski denied the County's Motion to Stay the Proceedings. The **DISCUSSION** section of that decision provides as follows:

The Motion before this Court to Stay the Proceedings is premature. There has been no factual determination that the Department of Health and Family Services would determine that Mr. Vetter not continue his employment upon proper application of §50.065.

This Court would have to presume that the Department of Health and Family Services would make such a determination. This Court would then have to determine that Mr. Vetter's ineligibility for employment would preclude the Wisconsin Employment Relations Commission from fashioning a remedy to correct the prohibited practice or if in fact a prohibited practice had even occurred.

This Court declines to do that. A fact finding hearing needs to be conducted. The WERC with its expertise in Labor Law matters is better equipped to conduct that inquiry than this Court under these very unique circumstances.

Having considered the record evidence and arguments of the parties, the Examiner hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

#### **FINDINGS OF FACT**

1. Brown County, hereinafter referred to as the County, is a municipal employer providing general governmental services to the people in the general area of Green Bay in northeast Wisconsin.

2. Among the services provided by the County is the operation of a mental health center. The Brown County Mental Health Center includes a skilled nursing facility; an intermediate care facility for the mentally retarded; inpatient mental health units for children

and adults; and a detoxification program for the chemically dependent. It is a regional facility primarily serving Brown County residents, but selling service to all of Northeast Wisconsin as openings occur.

3. Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, representing all regular full-time and regular part-time non-professional employees of the Mental Health Center.

4. The Union and the County have been parties to a series of collective bargaining agreements which govern the wages, hours, and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' most recent collective bargaining agreement was in effect from January 1, 2000 through December 31, 2002. It contained the following pertinent provisions:

ARTICLE 1. MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.

...

ARTICLE 26. GRIEVANCE PROCEDURE - DISCIPLINARY PROCEDURE

...

**SUSPENSION:** Suspension is defined as the temporary removal without pay of an employee from his/her designated position. No employee shall be reprimanded, suspended or discharged except for just cause. . .

**DISMISSAL:** No employee shall be discharged except for just cause. An employee who is dismissed, except probationary, shall be given a written notice of the reasons for the action at the time of dismissal, and a copy of the notice shall be made a part of the employee's personal history record and a copy sent to the Union. Any employee who has been discharged may use the grievance procedure by giving written notice to his/her steward and his/her supervisor within ten (10) working days after dismissal. Such appeal shall go directly to arbitration. If the cause for discharge is dishonesty, intoxication on the job or drinking or use of illicit drugs on duty, and/or if an employee is convicted in the

illicit sale of drugs or pushing drugs, the individual may be dismissed immediately from employment with no warning notice necessary.

**DISCIPLINARY PROCEDURE:** The progression of disciplinary action normally is, 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the type of discipline will depend on the severity of the offense. Oral warnings shall be maintained in effect for six (6) months, written warnings for twelve (12) months and (sic) disciplinary suspensions for eighteen (18) months during which time a repetition of an offense can result in a more serious disciplinary action. In all such cases the employee shall have the right to recourse to the grievance procedure.

5. Joachim Vetter was employed by the County as a full-time Certified Nursing Assistant (CNA) at the Mental Health Center from October 1, 2001 until January 20, 2005. The position description for that job provides in pertinent part:

**JOB SUMMARY:**

A position with responsibility for assisting clients with activities of daily living, providing nursing care and active treatment to clients in assigned unit(s) and assisting in the maintenance of a safe, clean and therapeutic environment.

**ESSENTIAL DUTIES:**

Assists in creating a therapeutic atmosphere conducive to the mental health of clients while maintain a clean, comfortable and safe environment for clients.

Provides client care to meet the physical needs of the client; also provides care relative to the emotional and psychosocial needs of clients.

Participates in the development of the client care plan and implement provisions of the client care plans.

Takes clients on community outings for recreational and educational purposes.

Observes client and report any change in client behavior/condition to Registered Nurse/designee immediately and respond to emergency and crisis situations.

Maintains the confidential nature of all client and business information.

Attends staff meetings, attends in-service and outside agency training sessions if appropriate.

Completes and maintains necessary documentation according to applicable requirements, codes and policies.

**NON-ESSENTIAL DUTIES:**

Performs related functions as assigned.

**MATERIALS AND EQUIPMENT USED:**

All standard medical equipment, including, but not limited to: thermometer, blood pressure apparatus, stethoscope, enema equipment, etc.

**MINIMUM QUALIFICATIONS REQUIRED:**

**Education and Experience:**

High school diploma or equivalent; certification as a Nursing Assistant from an approved training program, and current, valid registration with the Wisconsin CNA Registry.

**Licenses and Certifications:**

Valid State and Federal registration with the Wisconsin CNA Registry  
Or recently completed an approved CNA training program and Wisconsin state competency exam with ability to obtain valid registration within 90 days of employment.

Valid Wisconsin Driver's License preferred.

...

A CNA has limited discretionary authority and independent judgment. A CNA reports to a Nursing Manager or RN Designee and performs regular tasks during their shift. Although they may have input into a client care plan, the final decision is not theirs. They report changes in client behavior/condition to the Registered Nurse/Designee rather than determining the appropriate response themselves.

6. While Vetter was employed by the County, he had a clean work record. Prior to his discharge, he had not received any discipline whatsoever.

7. On April 24, 2004, the police responded to a domestic disturbance involving Vetter and his wife, Rhonda Vetter, at their home. The details of that incident follow. Vetter and his wife got into an argument that morning about medical care for their son, who was then 2½ years old. While the argument was ongoing, Vetter sat down at a computer and started using it. This act irritated his wife who attempted to unplug the computer. In response, Vetter

grabbed his wife by the hair with enough force that he pulled out a clump of hair. This hurt her. Vetter then pushed his wife out of the house through the back door. Vetter then locked his wife out of the house for several minutes. When this happened, she was not fully clothed. After Vetter let his wife back into the house, she unplugged the computer and smashed a coffee pot in frustration. Vetter then called 911. The 911 dispatcher told Vetter to step outside the house and wait for the police to arrive. He did. When the police arrived, Vetter was waiting for them outside. The police interviewed Vetter and he told them that he and his wife had an argument; that things got out of hand; that he had physically abused his wife by pulling her hair; and that he regretted doing so. The police then interviewed Rhonda Vetter. She did not seek medical attention. Following their investigation, the police arrested Vetter and took him to jail. After he was released from jail, he called an emergency counseling hotline that is part of the County's Employee Assistant Program (EAP). There were no media reports of Vetter's arrest or the incident just referenced.

8. Vetter did not miss any work as a result of his arrest. He told a co-worker about the incident and his arrest, but did not tell his supervisors about the incident and his arrest. Vetter continued to work as a CNA at the Mental Health Center.

9. On May 11, 2004, the Brown County District Attorney's office charged Vetter with two misdemeanor counts for the incident referenced in Finding 7. The two charges were battery (domestic abuse) and disorderly conduct (domestic abuse).

10. On June 3, 2004, Vetter had his court date on the criminal charges referenced in Finding 9. He was unrepresented by legal counsel at the hearing. Thus, he represented himself. At the hearing, he was offered a plea agreement by the District Attorney's office which he accepted. The plea agreement was that if he pled no contest to the charge of disorderly conduct, the battery charge would be dropped. After the judge questioned Vetter about the incident of April 24, 2004, the judge accepted Vetter's plea of no contest to a Class B misdemeanor disorderly conduct, and found him guilty of same. The judge placed Vetter on probation for 18 months, with two conditions. The first condition was that he ordered Vetter to undergo a domestic violence offense assessment. The second condition was that he ordered Vetter to pay \$137 in court costs.

11. Following his plea of no contest to disorderly conduct noted in Finding 10, Vetter underwent the domestic violence offense assessment ordered by the court. As part of that process, he was directed to attend an anger management class. He did, and subsequently completed the course.

12. On January 11, 2005, Vetter's wife, Rhonda Vetter, contacted the director of the County's Human Services Department, Dr. Allen Parks, and told him that Vetter had been convicted of disorderly conduct as a result of the April 24, 2004 incident referenced in Finding 7. Upon learning that, the County immediately began an investigation into same.

13. On January 13, 2005, Vetter was summoned to a meeting wherein he was questioned by management officials about the April 24, 2004 incident referenced in Finding 7 and the subsequent disposition of the criminal charges against him referenced in Finding 10. In that meeting, Vetter was candid about what had happened. Specifically, he admitted that he had physically abused his wife on April 24, 2004. He also admitted that he subsequently pled no contest to a Class B misdemeanor charge of disorderly conduct for that incident. At Vetter's request, a second investigatory meeting was held on January 18, 2004. In one of these two meetings, Vetter said that he thought his wife was mentally ill.

14. Following those meetings, County Human Resources Analyst Sue Gladh met with County Human Resources Director Richard Gschwend and provided him with her findings from the two aforementioned meetings. Both Gladh and Gschwend assumed that Vetter would lose his (CNA) license/certification because of his conviction of disorderly conduct. They concluded that since the disorderly conduct conviction was of a violent nature, and involved his spouse, the conviction was substantially related to his job as a CNA at the Mental Health Care Center because he provides care to vulnerable clients. They therefore decided he had to be terminated for that reason.

15. On January 20, 2005, Vetter was summoned into a meeting by County Human Resources Analyst Sue Gladh. At the outset, Gladh informed Vetter he was terminated and gave him the following discharge letter:

Dear Mr. Vetter:

You met with Sue Gladh, Human Resources Analyst, Mary Johnson, Director of Nursing, Cheryl Jahnke and Kevin Kazaluckas, Local 1901 on January 13<sup>th</sup> and January 18, 2005 to discuss the conviction of "Disorderly Conduct" Domestic Abuse incident that occurred on April 24, 2004 that involved acts of a violent nature. During this meeting, you were given the opportunity to respond to the conviction for disorderly conduct based on physical violence against Rhonda Vetter.

Wisconsin Statutes Sec. 50.065 and Department of Health and Family Services HFS 12.06 Wis. Adm. Code relating to the employment of health care givers requires the employer to make a determination as to whether these acts are substantially related to your employment as a Certified Nursing Assistant.

Based on the fact that these acts are of a violent nature and you are employed as a care giver to vulnerable clients, the County has determined that your employment with the County is terminated effective immediately.

If you have any questions, please contact Sue Gladh at 920-448-6286.

Sincerely,

BROWN COUNTY HUMAN RESOURCES

Richard Gschwend /s/  
Richard Gschwend  
Human Resources Director

Cc: Cheryl Jahnke  
President, Local 1901

Gladh then gave Vetter a packet of material pertaining to the “rehabilitation” process. Under that process, someone who loses their CNA certification can get it reinstated after they complete the rehabilitation review process. Gladh gave Vetter this material because she believed Vetter was going to lose his CNA certification (due to his conviction of disorderly conduct). She told him so at the meeting. Gladh also told Vetter that she regretted having to discharge him because he was a good employee, and that after he was “rehabilitated” (in the eyes of the State), they would try to hire him back as a CNA at the Mental Health Center.

16. On February 3, 2005, Mary Johnson, the County’s Nursing Service Administrator, sent the following letter to the State’s Bureau of Quality Assurance:

Bureau of Quality Assurance  
Caregiver Regulation and Investigation Section  
P.O. Box 2969  
Madison, Wisconsin, 53701-2969

To Whom It May Concern:

Joe Vetter an employee at Brown County Mental Health Center was terminated related to us recently gaining knowledge of a “Disorderly Conduct” domestic abuse incident that occurred on April 24, 2004. We believe this required us to make a determination as to whether this act was substantially related to his employment at Brown County as a Certified Nursing Assistant.

Based on the fact that this act was of a violent nature and the fact that he was caring for vulnerable clients, we terminated his employment with our facility. Enclosed is the letter of termination and Judgment of Conviction. We believe this affects his status in relation to his standing on the certified nursing assistant registry.

Thank you. If you have any questions, please contact me at 920-391-4712.

Sincerely,

Mary Johnson /s/  
Mary Johnson  
Nursing Service Administrator/  
Nursing Home/ICF-MR

17. In late February, 2005, Vetter contacted the Department of Health and Family Services by phone and inquired whether he was going to lose his CNA certification as a result of his disorderly conduct conviction. In response to his inquiry, he was told the following: 1) that the State regards his conviction as a domestic incident; 2) that the State would not be starting an investigation into the matter; 3) that the State would not be pulling his certificate as a (CNA) caregiver.

18. The record indicates that in response to the letter referenced in Finding 16, the Wisconsin Department of Health and Family Services took no action relative to Vetter's CNA license. Specifically, it did not revoke Vetter's license as a CNA as a result of his disorderly conduct conviction. Vetter's entry on the Wisconsin Nurse Aide Registry indicates that he "has no substantiated findings of abuse, neglect or misappropriation of property on the Wisconsin Caregiver Misconduct Registry." Thus, Vetter is still licensed with the Wisconsin Department of Health and Family Services as a CNA. Since he never lost his license as a CNA, he did not have to apply for rehabilitation with the Department of Health and Family Services.

19. The Union subsequently filed a grievance challenging Vetter's discharge. Pursuant to the parties' grievance procedure, the Union appealed the grievance to arbitration. In response to that appeal, the County's Director of Human Resources, Richard Gschwend, notified the Union that the County would not arbitrate this grievance because the parties were in a contract hiatus and the County was not arbitrating grievances during the hiatus period. The Union subsequently filed the instant prohibited practice complaint.

20. Vetter is a native of Germany. He lived there for 35 years before coming to Wisconsin in 1996. He had no criminal record in Germany and none in Wisconsin until he pled no contest to disorderly conduct on June 3, 2004. When Vetter pled no contest to disorderly conduct on June 3, 2004, he did not know it would result in his discharge from Brown County as a CNA.

21. As of the date of the hearing, Vetter and his wife were in the process of getting a divorce.

22. As of the date of the hearing, Vetter was working as a CNA for Medical Staffing Network in Green Bay, Wisconsin.

23. None of Vetter's co-workers from the Mental Health Center testified they objected to his return to work.

24. Vetter's probationary period expired December 3, 2005. Thus, as of the date of the hearing, he had three weeks left on probation.

25. The County has not shown just cause for Vetter's discharge on January 20, 2005.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

### CONCLUSIONS OF LAW

1. Respondent Brown County is a municipal employer within the meaning of Sec. 111.70(1)(j), MERA.

2. Complainant Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. Joachim Vetter is a municipal employee within the meaning of Sec. 111.70(1)(i), MERA.

4. Respondent Brown County did not have just cause to discharge Vetter and by doing so, violated the status quo created by the expired collective bargaining agreement. Respondent Brown County therefore committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and (derivatively) 1, Stats., by discharging Vetter.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

### ORDER

1. As a remedy for the violation noted in Conclusion of Law 4, Respondent Brown County shall immediately:

- A. Reinstate Vetter to a CNA position at the Mental Health Center and make him whole. The make-whole remedy shall include interest at the statutory rate of 12% (twelve percent) per year.<sup>1</sup> The interest runs from January 20, 2005 (the date of his discharge) through the date this money is paid.

---

<sup>1</sup> The rate set forth in Sec. 814.04(4), Stats., at the time the instant complaint was filed.

- B. Notify all employees represented for the purposes of collective bargaining by Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, by posting copies of the Notice attached hereto as Appendix A in conspicuous places on its premises where said employees work. The Notice shall be signed by an official of the County and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.
  
- C. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 22nd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

---

Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate the just cause provision of the expired collective bargaining agreement between the County and Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO.

WE WILL reinstate Joachim Vetter to a CNA position at the Mental Health Center and make him whole.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Brown County

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.**

**BROWN COUNTY**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

**PROCEDURAL BACKGROUND**

The following procedural background is repeated here to give context to the parties' arguments which follow. The County discharged Vetter from his job as a CNA at the Mental Health Center after it learned Vetter had been convicted of disorderly conduct for the incident referenced in Finding of Fact 7. The Union then grieved his discharge and appealed it to arbitration. The County refused to arbitrate the grievance because the parties were in a contract hiatus. The Union then filed the instant complaint wherein it characterized Vetter's discharge as a status quo violation. By framing the complaint this way (i.e. characterizing the County's action in discharging Vetter as a status quo violation), the Union essentially seeks to have the WERC adjudicate the merits of Vetter's discharge.

**POSITIONS OF THE PARTIES**

**Union**

The Union's position is that the County did not have just cause to discharge Vetter because of his disorderly conduct conviction. The Union asks that his discharge be overturned. It elaborates as follows.

The Union contends at the outset that since Vetter's misconduct was off-duty misconduct, the County has to demonstrate that that off-duty misconduct had a sufficient nexus with his job as a CNA such that termination was appropriate. According to the Union, no nexus exists between Vetter's off-duty misconduct (i.e. his conviction of misdemeanor disorderly conduct) and his job as a CNA. To support that premise, the Union cites arbitral decisions which have held that in order to show a nexus between the employee's off-duty misconduct and their on-duty responsibilities, the employee's behavior must: 1) harm the Employer's reputation or product; or 2) render the employee unable to perform their duties or be at work; or 3) lead to the refusal of other employees to work with the employee; or 4) negatively affect the employment relationship. With regard to the first point, the Union avers that Vetter does not hold a position of high public visibility and there was no publicity surrounding the (June 24, 2004) incident. With regard to the second point, the Union asserts that Vetter is prepared to resume working for the County as a CNA because he is currently working in that capacity (i.e. as a CNA). It also calls attention to the fact that Vetter had an unblemished work record (before he was fired). With regard to the third point, the Union avers that unit employees are prepared to work with Vetter again. With regard to the fourth point, the Union addresses the possibility of Vetter exhibiting similar violent behavior in the workplace (if he is reinstated). As the Union sees it, that is unlikely because the June 24, 2004 incident was, as the Union put it in their brief, "provoked by a unique and extraordinary set of

highly stressful personal circumstances.” According to the Union, what happened on April 24, 2004 was a “domestic dispute between a (at that time) married couple suffering marital problems.” Building on that premise, it is the Union’s view that “a repetition of the stress which provoked the April 24, 2004 incident is unlikely.” The Union therefore contends that the County did not establish a sufficient nexus between Vetter’s off-duty misconduct and his employment.

Next, the Union addresses the statute which the County relies on to support Vetter’s discharge – namely, Sec. 50.065. It makes the following arguments concerning same. First, the Union contends that the Examiner should not interpret that statute because he “is not authorized by the Agreement or the parties to interpret and apply” that section. According to the Union, the Examiner’s jurisdiction is limited herein to interpreting and applying the expired collective bargaining agreement (in particular, the just cause provision). Second, notwithstanding the previous argument that the Examiner should not look at external law to decide this case, the Union argues that if the Examiner does look to external law (in particular, Sec. 50.065), that section does not compel Vetter’s discharge. To support that premise, it cites Labor and Industry Review Commission (LIRC) decisions wherein LIRC made a distinction between personal matters and workplace matters, and found that domestic abuse convictions were not “substantially related” to the workplace and the jobs held by the employees involved (one of which was a CNA). The Union urges the Examiner to find likewise. Third, the Union points out that the County assumed when it fired Vetter that he (Vetter) would lose his (state) certification to work as a CNA simply because of his disorderly conduct conviction. However, that assumption turned out to be wrong, because Vetter did not lose his CNA certification following his misdemeanor disorderly conduct conviction. Fourth, the Union argues that the County did not prove that Vetter’s conviction substantially related to client care. To support that premise, it looks at Chapter 4 of the Wisconsin Caregiver Program Manual (for entities regulated by the Bureau of Quality Assurance) and avers that an analysis of the criteria contained therein shows that Vetter’s conviction for disorderly conduct involved only his wife, and had nothing to do with vulnerable clients or his work with clients. In this regard, the Union emphasizes that while Vetter has client contact, he is regularly supervised and exercises little independent judgment. It also emphasizes that Vetter has no other offenses on his record and has taken responsibility for his conduct. Putting all of the foregoing together, the Union maintains there is no reasonable basis to conclude that Vetter had to be terminated because of his disorderly conduct conviction.

The Union therefore asks that Vetter’s discharge be overturned, and that he be reinstated and made whole.

### County

The County’s position is that the Union did not prove that the County committed a prohibited practice by discharging Vetter. As a result, it maintains that the complaint against it should be dismissed. It elaborates as follows.

The County initially contends, as it did in its Motion to Dismiss, its Petition for Commission Review of Order Denying the Motion to Dismiss, and its Answer, that the Commission had neither the statutory authority to conduct an evidentiary hearing in this case, nor the authority to grant the relief requested by the Union (i.e. Vetter's reinstatement to a CNA position). The County avers that the reason the WERC is not empowered to hear or decide this case is because it involves Sec. 50.065. According to the County, the WERC has no subject matter jurisdiction over the regulatory provisions set forth in Sec. 50.065 and likewise has no expertise in construing either that section or the constitutional issues involved herein so it should not do so. In an implicit reference to its pending case against the WERC, the County contends that the Examiner should dismiss this case, and let the courts construe Sec. 50.065 and its interplay with Sec. 111.70, and the constitutional issues involved.

If the Examiner finds otherwise, and does address Sec. 50.065, the County argues that that section precludes Vetter's reinstatement because that section allows an employer to legally refuse to continue to employ a convicted caregiver. According to the County, Vetter's disorderly conduct conviction shows that he is clearly dangerous. It also characterizes Vetter's conduct on April 24, 2004 as violent, egregious and abusive. Conversely, the County characterizes Vetter's wife, Rhonda Vetter, as a "vulnerable, mentally ill person totally incapable of defending herself." Putting these two points together, the County avers that Vetter's conduct on April 24, 2004 involved acts of a violent nature to a vulnerable person. The County notes that it cares for vulnerable persons at the Mental Health Center. Specifically, it provides them with a safe and secure environment. As the County sees it, it cannot place its vulnerable (Mental Health Center) residents in the hands of someone who has been found by a court to be dangerous and someone who commits violent acts. It submits that if it had continued to retain Vetter as a CNA (after it learned of his disorderly conduct conviction), this would have created an unreasonable risk of liability (to the County) and to the safety of the residents at the Mental Health Center. The County implies that if Vetter is reinstated, he could exhibit violent behavior in the workplace with the (vulnerable) mentally ill and developmentally disabled persons who are at the Mental Health Center.

Next, the County addresses the question of whether Vetter's criminal conduct with his wife was "substantially related" to his job as a CNA. The County argues that it was. In its view, violent acts against a mentally ill victim are always "substantially related" to a caregiver's (job) duties. According to the County, it is "self-evident" that there is a substantial relationship between violent criminal acts against a mentally ill victim and a caregiver's duties toward mentally ill persons. In other words, the County believes there is an obvious connection between the two. Additionally, the County reads the Union's brief to claim that violence against victims who are "related" to the employee makes the criminal conviction unrelated to job duties. The County contends that that argument lacks merit.

Finally, the County argues that it had just cause (under the expired collective bargaining agreement) to discharge Vetter because of his disorderly conduct conviction. According to the County, it established just cause based on the undisputed fact that Vetter was convicted of disorderly conduct. In its view, that conviction was "substantially related to the care of a client", and this established just cause for the discharge "as a matter of law".

The County therefore asks that the complaint against it be dismissed.

### DISCUSSION

Since the County contends that the WERC does not have the statutory authority to hear and decide this case, that contention will be addressed first.

As noted above, this is a status quo case. The reason it is a status quo case, rather than a grievance arbitration, is as follows. The traditional mechanism for resolving grievances, such as discharges, is via grievance arbitration. The parties' expired collective bargaining agreement provided for arbitration of unresolved grievances. However, this mechanism (i.e. arbitration) is only available when a contract is in place. At the time this case arose, no contract was in place and the parties were in a contract hiatus period. The County declined to arbitrate Vetter's discharge grievance for that reason. After the County declined to arbitrate Vetter's discharge grievance, the Union filed the instant complaint wherein it characterized Vetter's discharge as a status quo violation. Specifically, it alleged that the status quo was violated because Vetter was discharged without just cause. By framing the complaint that way, and using status quo clothing, so to speak, the Union seeks to have the merits of Vetter's discharge adjudicated by the WERC. The Union has a legal right to do that. Here's why. Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

As part of its obligation to bargain collectively under that section, a municipal employer is legally obligated to maintain the status quo during a hiatus period after the expiration of an agreement with respect to mandatory subjects of bargaining (i.e. wages, hours and conditions of employment). Employee discipline under a just cause standard falls into the last category just referenced. *BELOIT EDUCATION ASSOCIATION V. WERC*, 73 Wis. 2D 43 (1976). A change in the status quo in those areas during a hiatus period constitutes a refusal to bargain and is a violation of the section just referenced. Thus, Sec. 111.70(3)(a)4 gives the WERC jurisdiction to hear claims involving alleged violations of the status quo, even discharge cases like this one, which would go to grievance arbitration if there was a contract in place. That being so, the WERC clearly has jurisdiction to hear and decide the instant case.

In many status quo cases, the exact nature of the status quo is disputed. When this happens, the Examiner has to determine what the status quo is and whether it was changed or maintained in that particular case. See, for example, *PRAIRIE DU CHIEN SCHOOL DISTRICT*, DEC. NO. 30301-A (Jones, 4/03). The Examiner makes that determination by reviewing the applicable contract language and deciding if it is mandatory, and then by reviewing any applicable practice or bargaining history. *Ibid.* In this case though, there is no need for the Examiner to review those areas in detail. Here's why. The parties have litigated status quo cases involving discharges before. See *BROWN COUNTY (SHELTER CARE)*, DEC. NOS. 29094-A

and B (WERC, 11/99). When the parties litigated this case, they agreed that the status quo relative to discharge is established in the expired collective bargaining agreement in Article 26 and is that discharges must be supported by just cause. Given that agreement, the parties focused their attention - both at the hearing and in their briefs - on whether there was or was not just cause for Vetter's discharge; not on what the status quo was. The Examiner will do likewise.

As was just noted, the status quo is that discharges must be supported by just cause. A just cause standard is commonly understood to contain two basic elements. The first is whether the employer proved the employee's misconduct, and the second, assuming the showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances.

The focus now turns to the first element of a just cause standard (i.e. whether the employer proved the employee's misconduct).

In this case, the underlying facts are undisputed. There is no question that Vetter physically abused his wife on April 24, 2004. He admitted it to the police on the day of the incident; he admitted it to the judge who sentenced him on June 3, 2004; he admitted it to management officials in investigatory meetings held January 13 and 18, 2005; and he admitted it at the hearing herein.

The County contends that Vetter's conduct with his wife on April 24, 2004 constitutes misconduct and the Union does not dispute that contention. The Union therefore concedes that Vetter's conduct on April 24, 2004 was misconduct.

Having so found, the inquiry now shifts to where this misconduct occurred. Employee misconduct usually occurs at work. That was not the case here. In this case, the misconduct occurred at Vetter's home (i.e. away from work) while he was off duty. Thus, Vetter committed off duty misconduct (as opposed to on-duty misconduct).

When arbitrators review employee discipline involving off duty misconduct, they oftentimes examine whether there is some demonstrable connection, or nexus, between the employee's off-duty misconduct and the employment setting. The Examiner will do likewise. The criteria which arbitrators often use for determining whether a nexus exists are the following: 1) whether the employee's misconduct harms the employer's reputation or business; 2) whether the employee's misconduct renders the employee unable to perform their job duties or come to work; 3) whether the employee's misconduct leads other employees to refuse to work with the offender; and 4) whether the employee's misconduct would affect the employment relationship.

Application of those criteria here yields the following results. With regard to the first criteria, there was no media coverage of the April 24, 2004 incident or notoriety to it. Since Vetter was never publicly identified as a County employee, it is hard to envision just how

Vetter's arrest and subsequent conviction for disorderly conduct damaged the County's reputation or affected its operation of the Mental Health Center. With regard to the second criteria, Vetter's arrest and subsequent conviction did not prevent him from coming to work and performing his job duties. In fact, he continued to work as a CNA right up to his discharge almost nine months later. Additionally, the fact that he is currently working as a CNA shows that he can resume working for the County in that same capacity (i.e. as a CNA). With regard to the third criteria, the only evidence in the record which pertains to same is that Vetter's co-workers are prepared to work with him again. With regard to the fourth criteria, until he was discharged, Vetter had a clean work record with no prior discipline. By all accounts, he was a good employee, and that is why Human Resources Analyst Gladh told Vetter at his discharge meeting that after he was "rehabilitated" (i.e. got his CNA license back), the County would try to hire him back at the Mental Health Center. If the employment relationship had been irretrievably broken, Gladh would not have made such a statement.

The County ignores the criteria referenced above which are traditionally used to determine whether a nexus exists between an employee's off duty misconduct and the employment setting. Instead, the County avers that the nexus between Vetter's criminal conduct with his wife and his job as a CNA is obvious and self-evident because violent acts against a victim are always related to a CNA's job duties. However, just calling something obvious and self-evident does not make it so. A causal connection still needs to be shown. The County's contention that this connection is obvious presumes that since Vetter physically abused his wife, he would do the same to the residents he works with. If that is so, one would expect Vetter's work record to contain instances wherein Vetter lost his temper or abused a resident in some way, shape or form. It does not. His work record is clean in that regard. The foregoing statement applies to the time period before the April 24, 2004 incident as well as the nine months after the April 24, 2004 incident where Vetter continued to work at the Mental Health Center. That being so, there is nothing in Vetter's work record which establishes a connection between Vetter's criminal conduct with his wife and the residents he served as a CNA. Consequently, the Examiner finds that the nexus between Vetter's off-duty misconduct with his wife and his job as a CNA is not self-evident and obvious as the County contends.

Having just found that the nexus between Vetter's off-duty misconduct and his job as a CNA is not self-evident and obvious, that begs the question whether there is enough of a nexus between the two to warrant Vetter's discharge. My response to that question is addressed in the discussion which follows.

The focus now turns to the second element of a just cause standard (i.e. whether the County established that Vetter's discharge was appropriate under all the relevant facts and circumstances). The County argues that it was, and relies on Sec. 50.065. According to the County, that statute compelled it to discharge Vetter because of his misdemeanor disorderly conduct conviction.

Sec. 50.065 is entitled “Criminal history and patient abuse record search” and is part of Chapter 50, Uniform Licensure. That statute is administered by the Wisconsin Department of Health and Family Services which maintains the Nurse Aide Registry and the Wisconsin Caregiver Misconduct Registry. The Nurse Aide Registry lists the names of nurse aides who, through training, testing and experience, meet federal and/or state requirements to work in Wisconsin. The Wisconsin Caregiver Misconduct Registry lists the names of nurse aides and other caregivers who have a substantiated finding of caregiver misconduct. Those individuals are barred from employment in any entity regulated by the Department of Health and Family Services, unless approved through the Rehabilitation Review process.

Vetter’s discharge letter makes it clear that the County’s decision to discharge Vetter was based on its understanding that Sec. 50.065 required his discharge. The County also maintains that that same statute precludes the WERC from granting the relief sought by the Union herein (i.e. Vetter’s reinstatement).

Given the County’s reliance on that section as the basis for justifying Vetter’s discharge, one would expect that the County would ask the Examiner to interpret Sec. 50.065 and apply it herein. However, it does not. In fact, both the County and the Union contend that the Examiner should not interpret that section (albeit for different reasons). They both argue that the WERC is not authorized to interpret and apply that section herein. Based on the following rationale, I agree.

The WERC does not have jurisdiction over the regulatory provisions set forth in Chapter 50, and specifically, Sec. 50.065. Another state agency does, namely the Department of Health and Family Services. The WERC’s jurisdiction is limited to determining violations of Chapter 111. In the context of this case, the Examiner is limited to determining whether Sec. 111.70(3)(a)4 and Article 26 of the parties’ expired collective bargaining agreement (particularly the just cause provision) were violated. That being so, the Examiner is not empowered to interpret and apply Sec. 50.065 herein. It follows from that finding that Sec. 50.065 will not be used as a basis to justify Vetter’s discharge.

Having just found that Sec. 50.065 will not be used as a basis to justify Vetter’s discharge, that still leaves the question of whether the County had a reasonable basis for discharging Vetter. Certainly they would have if Vetter had lost his CNA license as a result of his misdemeanor disorderly conduct conviction. This is because the CNA job description specifies that “current valid registration with the Wisconsin CNA Registry” is a qualification for the job. Management representatives assumed Vetter was going to lose his state CNA certification as a result of his disorderly conduct conviction. In fact, Gladh told him so at his discharge meeting. That is why she gave Vetter the rehabilitation materials at that meeting. However, that assumption turned out to be wrong, because Vetter did not lose his CNA certification following his misdemeanor disorderly conduct conviction. Since he never lost his CNA certification, he never had to go through the “rehabilitation” process. Thus, Vetter does not currently have, nor has he ever had, a substantiated finding of abuse by the Department of Health and Family Services. Since Vetter did not lose his CNA certification, this means that

the state agency that oversees CNA certification in Wisconsin decided that Vetter's misdemeanor disorderly conduct conviction did not warrant revoking his CNA certification.

The Examiner, following the lead of the Department of Health and Family Services, finds that there is not enough of a nexus between Vetter's misdemeanor disorderly conduct conviction and his job as a CNA to warrant discharge. Therefore, it is held that the County did not have just cause to discharge Vetter. By discharging Vetter without just cause, the County violated the status quo created by the expired collective bargaining agreement. The County therefore violated Secs. 111.70(3)(a)4 and (derivatively) 1, by discharging Vetter without just cause. Accordingly, his discharge is overturned. He is to be reinstated to a CNA position at the Mental Health Center and made whole.

Dated at Madison, Wisconsin this 22nd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

---

Raleigh Jones, Examiner

