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-C

Appearances:

Bruce F. Ehlke, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P. O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO.

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On February 22, 2006, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Respondent Brown County (County) unilaterally changed the status quo, in violation of Sec. 111.70(3)(a)4, Stats., when it discharged Joachim Vetter, a member of the bargaining unit represented by the Complainant Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO (Union), without just cause. The Examiner ordered the County to reinstate Vetter to his employment with the County, make him whole for lost wages and benefits plus interest, and post a notice regarding the violation of law.

On March 3, 2006, the County filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the County's petition for review, the last of which was filed on April 5, 2006. For the reasons set forth in the Memorandum that follows, we affirm the Examiner's decision in all respects.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 3 are affirmed.

B. The Examiner's Finding of Fact 4 is affirmed, but amended to add that Article I, MANAGEMENT RIGHTS RESERVED, reads in full as follows:

> 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.
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> The Employer shall adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin, approving agencies such as the Joint Committee on Accreditation of Hospitals, or other governmental agencies having jurisdiction over the institutions; however, such rules shall be subject to the grievance procedure.
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> It is the duty and responsibility of management to determine if "qualified help is available" wherever stated in the labor agreement; however, the Union has the right to challenge such determination.

C. The Examiner's Findings of Fact 5 through 25 are affirmed.

D. The Examiner's Conclusions of Law 1 through 4 are affirmed.

E. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As indicated in the foregoing Order, the Commission has affirmed the Examiner's Findings of Fact, which are largely undisputed.[1] Those facts are summarized below.

Joachim Vetter is a native of Germany who moved to Wisconsin in 1996. Until the incident that gave rise to this matter, Vetter had no criminal record in Germany or the United States. He was employed by the County as a full-time Certified Nursing Assistant (CNA) at the County's Mental Health Center from October 1, 2001 until January 20, 2005, when he was terminated. Prior to his termination, Vetter had no disciplinary incidents of any kind during his employment by the County, nor any accusations of client abuse.

On April 24, 2004, Vetter and his wife had a quarrel over their young son's medical care. While the argument was ongoing, Vetter sat down and began using a computer. Vetter's wife unplugged the computer, at which point Vetter grabbed her by the hair and pushed her out the back door, in the process pulling out a clump of her hair. Vetter then called 911 and, when the police arrived, told them that he had physically abused his wife during an argument. She did not seek medical attention, but Vetter was arrested. The incident caused no publicity, nor did Vetter miss any work. Vetter did not tell his supervisors about the incident.

On June 3, 2004, Vetter appeared unrepresented in court and pled no contest to a charge of disorderly conduct, in exchange for the District Attorney dropping a battery charge. Vetter was placed on probation for 18 months, conditioned upon undergoing a domestic violence offense assessment (DVO) and paying court costs of $137. Vetter complied with these conditions, which also included a course in anger management. At the time of the court appearance, Vetter was not aware of the implications his conviction might have for his employment.

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[1] In the County's brief supporting its Petition for Review, the County requested that the Commission render an additional 11 findings of fact beyond those found by the Examiner. Paragraphs 1, 2, 4, 5, and 10 of the County's proposed additional findings involve the interpretation and application of state law and regulations relating to care giving entities and their employees. As such, they do not raise appropriate questions of fact. The Commission responds to the County's arguments about the significance of these laws in the Discussion section, below. The factual content of Paragraphs 3, 6, 8, and 11 of the County's proposed findings has already been included in the Examiner's and the Commission's Findings of Fact. Paragraph 7 of the County's proposed findings refers to testimony that Vetter's wife gave at Vetter's sentencing hearing on June 3, 2004, which post-dated the County's decision to terminate Vetter and therefore could not have played a role in the County's termination decision. As such, it is not material to the instant case. Paragraph 9 of the County's proposed findings, "The criminal acts of Vetter involved violence against a mentally ill victim," would have the Commission reach a conclusion regarding a medical fact (Vetter's wife's mental illness) that is unsupported by any medical evidence in the record. The Commission declines to do so.

On January 11, 2005, Vetter's wife informed the County that Vetter had been convicted of disorderly conduct. As permitted if not required by law when receiving such information, the County immediately initiated an investigation, which included two meetings with Vetter. During these meetings, Vetter candidly admitted the events that led to his disorderly conduct conviction. He also stated that he believed his wife suffered from some mental illness. Following this investigation, County officials exercised their discretion, pursuant to Sec. 50.065, Stats., to determine whether the circumstances of Vetter's conviction were "substantially related" to his CNA employment. The County concluded it was, for the stated reason that "these acts are of a violent nature and you are employed as a care giver to vulnerable clients." The County also advised State certification officials about Vetter's conviction and termination from employment, believing, as the County stated in its letter to the State, that "this affects his status in relation to his standing on the certified nursing assistant registry." The County also expressed its belief to Vetter that he would lose his certificate, but indicated that, once he had completed the State's certification rehabilitation procedures, the County would try to re-hire him, as the County otherwise viewed him as a good employee.

Contrary to the County's expectation, the State did not investigate or take any other action regarding Vetter's certification, and informed Vetter that the State regarded the conviction as a domestic incident that did not affect his certificate. Vetter has continually remained in good standing regarding his CNA certificate and had been working successfully for several months as a CNA at another facility at the time of the hearing in this matter.

The Examiner's Decision and the Issues on Review

As the Examiner explained, the Union's underlying claim is that the County discharged Vetter without just cause, which would violate the collective bargaining agreement. Since the grievance arose after the agreement had expired, however, the County refused to submit the grievance to contractual arbitration. Under these circumstances, the Commission has jurisdiction to resolve the matter as a prohibited practice, i.e., an alleged modification of the status quo as to a mandatory subject of bargaining and thus an alleged refusal to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats. Essentially, however, the issue is still whether the County had just cause to terminate Vetter.

Before the Examiner, the County argued that its decision to terminate Vetter was authorized and required by Sec. 50.065, Stats., a statute that is outside the Commission's jurisdiction. The County also argued that, even if the Commission has jurisdiction, the County should prevail, because the County justifiably concluded that Vetter's conviction was "substantially related" to his job as a CNA, since it was a violent crime involving a vulnerable person and his position as a CNA required him to provide care for vulnerable persons. The Examiner declined to interpret whether Sec. 50.065, Stats., required or authorized the County's decision to terminate Vetter, although the Examiner noted that, had Vetter lost his certification, the County would have had just cause to terminate him. The Examiner applied

the traditional criteria for determining whether off-duty misconduct has a sufficient nexus with the job to warrant an employee's discharge and concluded that there was not a sufficient nexus, largely because Vetter had no record of client abuse or mistreatment and no other disciplinary record.

The County's petition for review rests upon its view that the County was required by State licensing laws and regulations to determine whether Vetter's conviction was substantially related to his employment as a CNA and, in doing so, was required to consider certain criteria. Because the County's decision to terminate Vetter was in "compliance with those legal duties imposed upon a county health care entity intended to assure a safe placement to its patients," the County "as a matter of law" had just cause. Arbitral criteria regarding off-duty misconduct was thus irrelevant, according to the County, as was the Examiner's consideration of Vetter's prior employment record.

Discussion

We begin by stating our agreement with the Examiner's conclusion and his reasoning regarding how the traditional "just cause" analysis applies to Vetter's discharge. In a nutshell, the circumstances surrounding Vetter's off-duty incident with his wife, albeit he displayed some violence towards her, do not exhibit a sufficient nexus with his ability to perform his duties as a CNA to warrant discharge. It was a singular incident, did not involve clients, incurred no publicity that might tarnish the County's reputation, did not cause fellow workers to shun Vetter, and, given Vetter's several years of unblemished employment as a CNA both for the County and another facility, apparently was not characteristic of his temperament or interaction with clients. Absent a statutory basis precluding his reinstatement, therefore, the Examiner's Order is correct.[2]

In challenging the Examiner's decision, the County contends that the traditional just cause analysis has no bearing in this case, because the County's decision was a result of its "compliance with State mandates in Sec. 50.065 and Ch. HFS 12, Wis. Adm. Code and also compliance with legal duties imposed upon a county health care entity intended to assure a safe placement to its patients." County Br. at 6. The County also requests the Commission to find

[2] After indicating that he was not interpreting or applying Sec. 50.065, Stats., or State regulations applicable to health care centers and CNAs, the Examiner somewhat anomalously stated he was "following the lead of the Department of Health and Family Services," who, as the Examiner saw it, had, in refusing to take action to revoke Vetter's certification, effectively concluded that there was an insufficient nexus between the conviction and Vetter's CNA job to warrant discharge. It would have been more accurate for the Examiner to have characterized the State as determining that Vetter's conviction did not ipso facto preclude his employment as a CNA. As discussed below, we agree with the County that the law permits and perhaps requires the County to make its own judgment about the relationship between Vetter's conviction and his employment with the County, a judgment that is not necessarily dependent upon the State's action regarding certification. However, since the Examiner had previously found an insufficient nexus between the conviction and Vetter's employment based upon the traditional "just cause" analysis, his subsequent reference to the State's handling of the certification issue was not crucial to his conclusion, nor is it a factor in our decision to affirm.

that "Vetter violated the provisions of Sec. HFS 12.07(1)(a), Wis. Adm. Code, when he failed to notify his employer health care entity Brown County that he had been convicted of a crime, Disorderly Conduct, ... [which] is listed ... as one which requires reporting and employer review." Id. at 1.

Thus the County's defense in this matter rests squarely upon its view of state law other than the labor relations statutes that the Commission administers. Nonetheless, the County contends that this agency cannot interpret such outside statutes. To the contrary, however, the courts have long recognized that the Commission has jurisdiction to interpret and apply outside law – even constitutional provisions – if doing so is necessary to resolve the dispute. See MILWAUKEE BOARD OF SCHOOL DIRECTORS V. WERC, 163 WIS.2D 739 (1991). Accordingly, the Commission will consider the statute and regulations upon which the County relies to justify terminating Vetter.

Section 50.065, "Criminal history and patient abuse record search," provides in subsection (5m) as follows:

> Notwithstanding s. 111.335, the department may refuse to license, certify or register, or issue a certificate of approval to, a caregiver and an entity may refuse to employ or contract with a caregiver ... if the caregiver ... has been convicted of an offense that is not a serious crime, but that is, in the estimation of the department or entity, substantially related to the care of a client.

Elsewhere in Sec. 50.065, Stats., a "serious crime" is defined by a set of statutes that does not include Sec. 947.01, Stats., the disorderly conduct provision that Vetter was convicted of violating. However, Subsection (2)(bb) of Sec. 50.065, Stats., does require an "entity" that obtains information that a caregiver was convicted of certain other crimes, including disorderly conduct, "shall make every reasonable effort to contact the clerk of courts to obtain a copy of the criminal complaint and judgment of conviction relating to that violation. The County is an "entity" and Vetter as a CNA is a "caregiver" within the meaning of the foregoing subsection (5m).

The Department of Health and Family Services administers Sec. 50.065, Stats., and has established regulations to implement, inter alia, subsection (5m). The most pertinent provisions of those regulations are as follows:

> **HFS 12.05 Sanctions.**
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> . . .
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> **(3)** SANCTIONABLE INDIVIDUAL ACTIONS. Any person who is required to complete a background information disclosure form and who commits any of the following actions may be subject to any of the sanctions specified in sub. (4):
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> . . .

(c) After submitting a background information disclosure form to an agency or entity, subsequently fails to report any information about a conviction for a crime or other act or offense requested on the background information disclosure form, about a substantiated finding of abuse or neglect or [sic] of a client or of misappropriation of a client's property, or, in the case of a position for which the person must be credentialed by the department of regulation and licensing, about a licensure denial, restriction, or other license limitation by either the department or the department or [sic] regulation and licensing.

. . .

HFS 12.06 Determining whether an offense is substantially related to client care. To determine whether a crime … is substantially related to the care of a client, the agency or entity may consider all of the following:

(1) In relation to the job, any of the following:

(a) The nature and scope of the job's client contact.
(b) The nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions that affect the care of clients.
(c) The opportunity the job presents for committing similar offenses.
(d) The extent to which acceptable job performance requires the trust and confidence of clients or a client's parent or guardian.
(e) The amount and type of supervision received in the job.

(2) In relation to the offense, any of the following:

(a) Whether intent is an element of the offense.
(b) Whether the elements or circumstances of the offense are substantially related to the job duties.
(c) Any pattern of offenses.
(d) The extent to which the offense relates to vulnerable clients.
(e) Whether the offense involves violence or a threat of harm.
(f) Whether the offense is of a sexual nature.

(3) In relation to the person, any of the following:

(a) The number and type of offenses the person committed or for which the person has been convicted.
(b) The length of time between convictions or offenses, and the employment decision.
(c) The person's employment history, including references, if available.

(d) The person's participation in or completion of pertinent programs of a rehabilitative nature.
(e) The person's probation or parole status.
(f) The person's ability to perform or to continue to perform the job consistent with the safe and efficient operation of the program and the confidence of the clients served including, as applicable, their parents or guardians.
(g) The age of the person on the date of conviction or dates of conviction.

. . .

HFS 12.07 Reporting background changes and nonclient residency. (1) An entity shall include in its personnel or operating policies a provision that requires caregivers to notify the entity as soon as possible, but no later than the person's next working day, when any of the following occurs.

(a) The person has been convicted of any crime.

. . .

We draw the following pertinent conclusions from the foregoing set of statutes and regulations. It is clear that the County was required, once it learned of Vetter's conviction, to obtain the underlying court documents. It is also clear that, whether or not the State took action relating to Vetter's state-issued certification, the County has authority to deny employment to Vetter if, in the County's "estimation," his conviction for disorderly conduct is "substantially related to the care of a client." It is less clear whether the County is *required* to determine whether or not to continue Vetter's employment, but, for purposes of this decision, we will assume that to be the case. In undertaking that analysis, the County *may* consider *any* of the several enumerated factors set forth above relating to the job, the crime, and the employee.

Contrary to the County's contention, we see nothing in Sec. 50.065, Stats., or the related DHFS regulations that requires Vetter to report his conviction for disorderly conduct, because it is not a "serious crime" or otherwise covered by HFS 12.04 (3)(c). On the other hand, pursuant to HFS 12.07, above, the County apparently should have had a personnel rule requiring Vetter to report his conviction promptly. The record does not indicate that the County had promulgated such a rule and Vetter testified without contradiction that he was unaware of any such requirement. More importantly for purposes of the instant case, there is nothing in the record to suggest that the County contemporaneously based its termination decision upon Vetter's alleged failure to have promptly reported his conviction. Instead, this appears to have been an afterthought engendered during the litigation. Accordingly, in our view it is both immaterial and unsupported by the record.

The long and short of the situation is that the County claims to have exercised its statutory discretion, examined the various factors it was permitted to consider, and reached the conclusion that Vetter's crime was substantially related to his job as a CNA and that he therefore should be discharged. From the County's brief, it appears that the County chiefly relies upon the factors that Vetter's crime was violent, that it was perpetrated upon someone who the County had been told was mentally ill, and that clients who became aware of Vetter's behavior would no longer have confidence in his care for the vulnerable, mentally ill clients of the institution. Except for the violence factor, the County's considerations fall within those that the regulations refer to as "related to the job," rather than those related to the offense or the person. Although there are numerous other factors in the regulations that would militate in Vetter's favor, we will assume that the County's exercise of its discretion fell within the boundaries permitted by Sec. 50.065, Stats., and the regulations.

If there were no collective bargaining status quo requiring the County to have just cause for terminating Vetter, compliance with Sec. 50.065, Stats., and the regulations might be all the County need establish. However, the instant case exists because there is such an overriding commitment which is within our jurisdiction to enforce. In relying solely upon its compliance with the HFS law and regulations, the County implicitly argues that, having exercised its statutory discretion, the Commission cannot lawfully second-guess or review the exercise of that discretion under the rubric of a just cause analysis. In this the County is simply and emphatically wrong. It has long been established that a public employer's authority to dismiss employees may be limited by a just cause agreement and that a just cause agreement allows an arbitrator (or, in this case, the Commission enforcing just cause as part of the status quo) to review the public employer's judgment and decision *de novo*. SEE WEST SALEM EDUCATION ASSOCIATION V. SCHOOL DISTRICT OF WEST SALEM, 108 WIS.2D 167 (SUP. CT. 1982); EAU CLAIRE COUNTY V. TEAMSTERS NION 662, 235 WIS. 2D 385 (SUP. CT. 2000).

The Examiner conducted a lawful and appropriate *de novo* review of the County's action in terminating Vetter and concluded that it was without just cause. We have largely affirmed his analysis and we hereby affirm his Order, as well.

Dated at Madison, Wisconsin, this 30th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

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