STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHELTER CARE EMPLOYEES, LOCAL 1901F, AFSCME, AFL-CIO, Complainant,

vs.

BROWN COUNTY, Respondent.

Case 722
No. 64939
MP-4173

Decision No. 31511-A

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 65 Webster Heights Drive, Green Bay, Wisconsin 54303, appearing on behalf of the Complainant.

Whyte Hirschboeck Dudek, S.C, by **Attorney Thomas P. Godar,** One East Main Street, Madison, Wisconsin 53703-3300, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 5, 2005, Brown County Shelter Care Employees Local 1901F, AFSCME, AFL-CIO, filed a complaint against Brown County, alleging that the County violated Sec. 111.70(3)(a)4 and, derivatively, Sec. 111.70(3)(a)1, Wisconsin Statutes, by failing to maintain the status quo during the contract hiatus in that a written warning and suspension were issued to bargaining unit member Jean Elliot without just cause. The Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On November 16, 2005, the County filed an Answer to the Complaint. On December 5, 2005, a hearing was conducted in Green Bay, Wisconsin. The proceedings were transcribed and the transcript was filed on December 28, 2005. The parties filed their initial briefs by February 15, 2006 and their reply briefs by April 6, 2006, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. Brown County Shelter Care Employees Local 1901F, AFSCME, AFL-CIO, the Complainant herein, is a labor organization maintaining its principal place of business at 65 Webster Heights Drive, Green Bay, Wisconsin.

2. Brown County, the Respondent herein, is a municipal employer maintaining its principal place of business at 305 East Walnut Street, Green Bay, Wisconsin.

3. At the time of the events referenced herein, the collective bargaining agreement between the parties covering the period January 1, 2002 to December 31, 2003 had expired and the parties had not agreed to a successor contract.

4. Article 2 of the expired agreement recognized the Union as "...the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer...on questions of wages, hours and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows: All regular fulltime and regular part-time nonprofessional employees of the Brown County Shelter Care, excluding supervisors, confidential , managerial, executive, professional and probationary employees and all other employees of the Employer as certified by the Wisconsin Employment Relations Commission, dated April 21 1983."

5. At all times pertinent hereto, Jean Elliot was employed by the County as a Child and Youth Care Worker at Brown County Shelter Care, and was a member of the bargaining unit described in Finding of Fact #4.

6. Article 1 of the expired contract states, in pertinent part:

> "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 with the Employer.

7. Article 26 of the expired contract states, in pertinent part:

> 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 shall be maintained in effect for twelve (12) months, while disciplinary suspensions shall be maintained in effect for eighteen (18) months during which time a repetition of an offense can result in more serious disciplinary action. In all such cases, the employee shall have recourse to the grievance procedure. The grievance committee chairman or her designated representative shall be present during all disciplinary hearings and shall receive copies of all communications concerning disciplinary actions.

8. Pursuant to its authority under Article 1 of the agreement, the County promulgates and maintains work rules for its employees. Discipline for the breach of such rules is subject to the grievance procedure.

9. At all times in question herein, the County had a TIME-OFF AND COVERAGE OF SHIFTS POLICY, which stated, in pertinent part:

> REQUESTING TIME OFF
>
> - Fill out a *"TIME OFF REQUEST"* form. Put it in the Supervisor's mailbox or slip it under his office door. Fill out the top portion only including the date you are submitting the slip, date/shift to be covered and what benefit you are requesting to use by checking one of the following (vacation, comp, personal. etc.) Remember to mark your timecard with the same benefit that your "Time-Off Request" slip was approved for. You cannot request time off using comp time you have not yet earned. These slips should be submitted as soon as the employee has plans to be off work during the year.

10. At all times in question herein, the County had a TIMECARD POLICY, which stated, in pertinent part:

> It is each employee's responsibility to complete their own timecard each day they work and have it available to the supervisor at all times in his or her own designated mailbox. A schedule of due dates is available. Timecards are to be legible, accurate and complete. Please include your clock number, name code, department and pay period ending date on each card. Make sure the dates and times worked are correct and that you have included you shift differential, if applicable. If you have been away from work, make certain it is indicated in the correct box (i.e. vacation, comp time, sick time) Overtime hours should be reflected in either the OT column (total number of overtime hours worked) or in the COMP EARNED column (multiply the hours worked by 1½ and write the total in the comp earned box). Make sure your timecard is signed.

11. At all times in question herein, the County had an OVERTIME POLICY, which stated, in pertinent part:

> Appropriate overtime situations
>
> The following clarifies when overtime can be earned and should be considered along with other references to overtime in the Employee Manual.
>
> Staff held over until replacement coverage arrives. Follow the policy and procedure for notifying the supervisor by voice mail.
>
> If supervisor asks staff to stay for any reason past your shift.
>
> Staff meetings and required training that may occur before or after an 8-hour shift or which would require you to work over 40 hours in a week.
>
> Supervisor calls you to a meeting before or after your scheduled shift or over 40 hours.
>
> Emergency situations (defined as when law enforcement has been called and the supervisor is not present to authorize).
> When you are directly involved in such a client situation that runs past your shift and you have all-important information for the incident report and you cannot rely on the replacement staff to finish up, only then should you go into overtime and follow the policy and procedure for notifying the supervisor by voicemail.
>
> **Remember that when a manager is present in the building, you must always consult directly with that person for approval prior to staying over at overtime or offering hours at time and a half.**

12. On August 11, 2004, Elliot submitted a time off request for 4 hours on September 20, 2004, specifying that she would be using vacation time, which was approved. On September 26, 2004, Eliot submitted her timecard for the period including September 20, indicating that the time off taken that day was credited to comp time.

13. Eliot's action of submitting an incorrect timecard constituted a violation of the County's TIME-OFF AND COVERAGE OF SHIFTS POLICY and TIMECARD POLICY.

14. On September 17, 2004, Elliot was working her regular 8:00 a.m.- 4:00 p.m. shift at the Shelter Care, along with co-worker Dale Anderson. Unit Supervisor Steve Felter was not present at Shelter Care that afternoon.

15. At approximately 3:25 p.m. that afternoon three youths were delivered to Shelter Care, which required Eliot and Anderson to perform the intake processing for them, including filling out necessary paperwork and searching and inventorying their personal belongings.

16. At some time prior to 4:00 p.m. Eliot and Anderson concluded that they would need to stay beyond their shift to complete the intake. Knowing Felter was not on site, Eliot and Anderson decided to call Felter's telephone and leave a voice message explaining the need for overtime.

17. At some time shortly after 4:00 p.m. Shelter Care Superintendent Jim Hermans came out of his office and saw Eliot and Anderson. Hermans had been in his office, which was approximately 20 feet from Eliot's and Anderson's workstation, for the entire afternoon unbeknownst to Eliot and Anderson. Hermans confronted Eliot and Anderson as to why they had not left work and Anderson explained the situation and told him he intended to leave a message for Felter. Hermans replied that as the manager on site he could address the overtime situation and that the call to Felter was unnecessary. He then instructed them to complete their work as quickly as possible and go home. Notwithstanding Hermans' statement, Anderson and Eliot left a voicemail message for Felter explaining the overtime situation.

18. Eliot and Anderson indicated on their timesheets that they ended work at 4:15 p.m. Anderson further noted on his timesheet: "Busy, OK by Jim. Msg left for Steve."

By working overtime on September 17, Eliot and Anderson violated the County OVERTIME POLICY.

19. On November 4, 2004, Anderson received a Written "Verbal" Warning as a result of the September 17 incident.

20. On November 4, 2004, Eliot received a 3-day Suspension as a result of the September 17 and September 26 incidents.

21. Prior to November 4, 2004, Anderson had no disciplinary record.

22. Prior to November 4, 2004, Eliot had received the following discipline:

9/29/04 – Written Warning for a breach of client confidentiality occurring on September 15, 2004

8/26/04 - Written "Verbal" Warning for failure to respond to a co-worker's request to call law enforcement for assistance occurring on June 16, 2004.

12/10/03 - Written "Verbal" Warning for submitting an incorrect timecard on which a different form of leave than that approved was noted.

23. Article 1 of the contract gives the County authority to suspend employees for proper cause. Article 26 establishes a pattern of progressive discipline for repeated offenses during a prescribed period after receiving prior discipline, but also allows for deviation from the progression in cases of more serious offenses.

24. Eliot had not been disciplined for filing an incorrect timecard or working unauthorized overtime within six months prior to the events of September 17, 2004 and September 26, 2004.

25. Past practice of the parties in applying Article 26 to timecard and overtime violations indicates that these are not violations normally deemed serious enough by the County to merit deviation from the normal disciplinary progression.

26. The record does not establish an existing practice defining what constitutes a repeat offense for the purposes of issuing progressive discipline pursuant to Article 26.

27. The infractions committed by Eliot on September 17, 2004 and September 26, 2004 are not sufficiently similar in nature or degree to those resulting in the disciplinary actions on August 28, 2004 and September 29, 2004 to justify additional progressive discipline.

28. The 3-day Suspension issued to Eliot for the September 17, 2004 and September 26, 2004 incidents was without proper cause and in so doing the County thereby failed to maintain the *status quo ante* in place during the contract hiatus.

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

CONCLUSIONS OF LAW

1. The Complainant, Brown County Shelter Care Employees Local 1901F, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

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

3. The County's failure to maintain the *status quo ante* during the contract hiatus constitutes a prohibited practice, contrary to Sec. 111.70(3)(a)1 and 4, Wis. Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner herewith makes and issues the following

ORDER

The County is hereby ordered to reduce the discipline issued to Jean Eliot to a Written "Verbal" Warning for working unauthorized overtime on September 17, 2004 and a Written Warning for making an incorrect leave entry on her timecard on September 26, 2004. The County is further ordered to expunge the 3-day suspension from Eliot's record and to make her whole by paying her the 3 days' wages deducted during the suspension. The County is further ordered to cease and desist from deviating from the *status quo ante* during the contract hiatus.

Dated at Fond du Lac, Wisconsin, this 4th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

BROWN COUNTY (SHELTER CARE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The factual basis for this complaint grows out of two incidents involving Shelter Care Caseworker Jean Eliot in September 2004. One incident involves very little factual dispute, whereas in the other the parties are in wide disagreement about what occurred. They will be referenced, respectively, as the timecard incident and the overtime incident. At the time of the incidents, the parties' 2002-2003 collective bargaining agreement had expired and a successor agreement had not yet been completed, thus the parties were in a contract hiatus.

The timecard incident grew out of a request by Eliot on August 11, 2004 to use four hours of vacation on September 20, 2004, which was approved. On September 20, Eliot did take 4 hours off, as scheduled, but when filling out her timecard noted the time off was comp time, rather than vacation. This discrepancy was discovered when Eliot turned in her timecard on September 26. This was not the first time the County had addressed this issue with Eliot. On December 10, 2003, the County issued Eliot a Written "Verbal" Warning for an essentially identical infraction committed on November 28 in violation of the County's Time Off and Timecard policies. Previously, Eliot had received written summary notes, which are not disciplinary, for similar conduct on August 4, 2003 and June 9, 2003. The June 9 summary note indicates that the problem is one of even longer standing. In this instance, Eliot acknowledged that she made a mistake and testified that when she filled out her timecard for September 20 she was in a hurry and, thus, mistakenly put comp time on her timecard instead of vacation.

The overtime incident occurred on September 17, 2004. On that day, Eliot and her co-worker, Dale Anderson, were working their regular day shift at Shelter Care, which runs from 8:00 a.m. to 4:00 p.m. At approximately 3:25 p.m., three teenagers were delivered to Shelter Care to be housed pursuant to a court order. Eliot and Anderson were required to do the intake for the youths, which included processing their paperwork, searching and inventorying their belongings and finding rooms for them. At some point prior to 4:00, Eliot and Anderson concluded they could not complete the intakes before the end of their shift, so they decided to stay beyond their shift, thereby incurring overtime, to complete the intakes, rather than leave them for the next shift. The Unit Supervisor, Steve Felter, was not on site, so Anderson and Eliot decided to leave a message on his voice mail explaining the situation resulting in their working overtime.

Shortly after 4:00, Shelter Care Superintendent Jim Hermans came out his office to get coffee and saw Eliot and Anderson. A conversation ensued wherein Hermans asked why they were still there and Eliot and Anderson explained the situation. Anderson also told Hermans that he was going to leave a message for Felter, whereupon Hermans said that was unnecessary

and that he was able to deal with the situation himself. He then told Eliot and Anderson to complete their work as soon as possible and go home. Anderson and Eliot left a message for Felter anyway. When they left work both Eliot and Anderson indicated on their timecards that they quit at 4:15. Anderson also indicated on his timecard that he had left a message for Felter and received approval from Hermans.

On September 21, 2004, Felter met separately with Eliot and Anderson to discuss the overtime incident. Both Eliot and Anderson related a consistent version of the events as set forth above and essentially agreed that they could have left the completion of the intake for the next shift. On November 4, 2004, Anderson was issued a Written "Verbal" warning for the overtime incident. On the same day, Eliot was issued a 3-day Suspension for the combination of the timecard incident and the overtime incident. The suspension was served on November 5, 8 & 9. The complaint alleges that Eliot's suspension was issued without proper cause, as required by the contract, and that the County's action, therefore, violated the *status quo ante* during the contract hiatus.

POSITIONS OF THE PARTIES

The Complainant

The Union asserts that the County did not have proper cause to suspend Eliot, as required by contract and, therefore, violated the *status quo ante* during the hiatus by suspending her. It further contends that a two-part analysis is required in a suspension case, inquiring both into whether Eliot had engaged in wrongful conduct and whether the level of discipline was appropriate.

The testimony of Eliot and Anderson regarding the sequence of events was corroborated by co-worker Norb Short, who came on for the 4:00 shift. Short recalled that Hermans came out of his office for coffee and that Anderson and Eliot approached him about the overtime situation, rather than vice versa. Short also recalled that Hermans said he could handle the situation and it was his impression that Hermans thereby authorized Eliot and Anderson to work beyond their shift. This was also Anderson's understanding, leading him to put "Okay by Jim" on his timecard. Eliot recalled Hermans thanking them for their teamwork and willingness to help out on a busy day. Thus, Eliot and Anderson were justified in believing that the overtime was authorized.

The issuance of a suspension in this case resulted from a disregard of progressive discipline. The normal disciplinary progression is 1) oral, 2) written, 3) suspension, 4) discharge, but the progression may be deviated from depending on the severity of the offense. There is no evidence that Eliot's offenses merited deviation from the progression. She had received an oral warning on August 26 and a written warning on September 26 for unrelated offenses. The contract states that progressively greater discipline may only be issued for repeat offenses. Neither the August 26 discipline, nor the September 26 discipline involved timecard or overtime infractions. Her most recent discipline for a timecard infraction was an oral

warning on December 10, 2003, which, pursuant to the contract, expired and was to have been removed from her record on June 10, 2004. Therefore, for purposes of the contract, the infractions of September 17 and September 26 were "first offenses" and did not merit suspension.

Eliot was also subjected to disparate treatment. Anderson only received an oral warning for his overtime violation. Even considering Eliot's additional timecard infraction, there was no basis for her receiving a suspension. Disparate treatment occurs when one employee receives greater punishment than another under the same or similar circumstances. Under the circumstances, imposing substantially greater punishment on Eliot than that issued to Anderson was disparate treatment.

The Respondent

The County asserts that Eliot's suspension was justified in light of the fact that she violated two separate County policies and had been previously counseled and disciplined by the Employer. With respect to the timecard violation, Eliot does not dispute her wrongdoing. The policy is clear and Eliot had been disciplined previously in December 2003 for violating it. She had also been spoken to about previous violations in August 2003 and June 2003. The County's previous interventions reveal the importance it attaches to adherence to the policy. Further, Eliot had received an oral warning on August 26, 2004 and a written warning on September 29, 2004 for two other violations of policies, so it should not come as a surprise that the next step would be suspension. The contract does not require that progressive discipline be for the same conduct, but only that the offense occur within a prescribed time window. Given Eliot's previous disregard for the timecard policy and her recent disciplinary history, suspension was justified on the timecard violation alone.

Suspension was also merited by her violation of the overtime policy. Jim Hermans' testimony on the incident is clear and credible and contradicts Eliot's in several key respects. He recalled talking to them after 4:00, that he did not authorize overtime and that he told them to go home. There was not an emergency at the time which would have justified overtime and both Eliot and Anderson were aware that the County was concerned about overtime costs. By comparison, Eliot's explanations of her actions and inconsistencies with the testimony of other witnesses and her own former testimony are not credible. Given her previous disciplinary history, a suspension for this offense was justified, as well.

The discipline given to Eliot was also not disparate in comparison to that given to Anderson. Although he only received an oral warning, unlike Eliot he had no previous disciplinary history, nor had he previously been counseled for policy violations. Employers are entitled to take work history into account when determining the appropriate level of discipline and Eliot had a poor work history. That, in conjunction with the additional timecard offense, justified greater discipline.

The Complainant in Reply

The Union reasserts the fact that Eliot, Anderson and Short all testified that Hermans had given permission to work the overtime. If overtime wasn't warranted, therefore, the fault was Hermans', because he authorized it. Further, the County did not use lack of an emergency as a basis for the discipline, therefore any reference to such a circumstance should be disregarded.

The County is also wrong in its assertion that the type of previous infractions is irrelevant in progressive discipline, but that only timing matters. The County presented no evidence to support this contention and the contract contradicts it by stating "a repetition of an offense can result in more serious disciplinary action." The County's proposed interpretation would lead to an absurd result. Arbitral precedent supports the position that progressively greater discipline is predicted on a basis of similar conduct.

The Examiner should also take into account the fact that there is a pattern of bias by the County against Eliot, evidenced by its disparate treatment of her and its conduct in past hearings. Eliot did not intentionally violate County policy, but believed she had permission to work overtime. Given her good faith efforts to comply with policy and the degree to which Hermans' testimony is discredited by multiple witnesses, the complaint should be upheld.

The Respondent in Reply

The County reasserts the fact that Eliot does not deny the timecard violation, a habit which has been addressed with her on multiple occasions. As to the overtime infraction, much of the testimony of the Union witnesses is inconsistent and contradictory. Further, there is no evidence supporting the Union's argument that Hermans authorized the overtime. There is no reason in the record to believe that Hermans is not truthful and the fact of the violation is also supported by the fact that Anderson did not grieve the discipline given to him, which is, in effect, an admission of guilt. Thus, the overtime violation has been sufficiently established.

The suspension was also consistent with progressive discipline. Eliot had received oral and written warnings within the contractual time frame prior to the timecard and overtime infractions. It is ridiculous for the Union to argue that progressive discipline can only occur for identical offenses. Each violation of a separate work rule within the proper time frame merits progressively greater discipline. Further, the disciplines issued to her were for violations of County ordinance Sec. 4.94: "failure to follow duly established work rules, policies and procedures," thus the County was consistent and Eliot was aware that future infraction could result in greater discipline. The repetition of an offense referenced in the contract was the repeated violation of work rules.

One of the underlying bases of the just cause doctrine is reasonableness, which encompasses the concept of forewarning. Eliot was well aware that further violations of County policy could result in greater discipline. She also knew that her conduct in both

instances constituted violations of policy. She cannot argue that she was not forewarned or was unaware of what she was doing. Finally, the fact that she had two violations, compared to Anderson's one, and had two previous disciplines within a matter of weeks undercuts any suggestion of disparate treatment. The complaint should be dismissed.

DISCUSSION

Ordinarily, this case would arise within the context of grievance arbitration, pursuant to Article 26 of the parties' collective bargaining agreement. In this instance, however, the parties' last agreement had expired on December 31, 2003 and at the time of the events referenced herein the parties had not ratified a successor agreement and were in a contract hiatus. Grievance arbitration is a creature of contract and during a contract hiatus there is no duty to arbitrate. However, Sec. 111.70(3)(a)4, Wis. Stats. makes it a prohibited practice for an employer "(t)o refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit." One recognized aspect of that duty is to maintain the status quo as to all mandatory subjects of bargaining during a contract hiatus. Employee discipline has been held to be covered by the status quo where a just cause standard exists. BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis. 2D 43 (1976)

It is the Union's contention that in its suspension of Jean Eliot the County breached the *status quo ante* and thereby violated the statute. Ordinarily, it would be the Examiner's first step to determine what the *status quo ante* is and the burden is typically on the Complainant as to that issue. Here, however, the parties have acknowledged that the status quo with respect to a disciplinary suspension is just cause. Thus, the question before me is whether the County had just cause to suspend Jean Eliot on November 4, 2004.

A just cause analysis usually involves the consideration of two factors. First, it must be shown that the employee committed an offense for which discipline is warranted. Second, if the allegations of the offense are established, the ensuing punishment must be appropriate in degree to the wrongdoing. [See: WOOD COUNTY, Case 162, NO. 63666, MA-12663 (Emery, 5/10/05)] Here, Eliot is alleged to have committed two violations of County work rules. First she is alleged to have requested to use vacation for four hours of leave on September 20, 2004, but when she turned in her timecard for the pay period she indicated the leave as comp time, which is a violation of the County Timecard Policy and Time Off Policy. Second, she is alleged to have worked beyond her shift, thus incurring overtime, on September 17, 2004, without proper authorization, in violation of the County Overtime Policy.

As to the timecard infraction, there is little dispute. Eliot testified to having made the error in haste, but did acknowledge her wrongdoing. Furthermore, the record establishes that such infractions are subject to discipline, as evidenced by the fact that Eliot received a Written "Verbal" Warning for a similar incident in December 2003. The overtime incident is not as clear cut, but I find that here, too, the County has established that Eliot violated the stated policy. Much of the testimony and argument regarding this issue centers on whether Eliot and her, co-worker Dale Anderson, received proper authorization from the Shelter Care

Superintendent, Jim Hermans, to work the overtime, or, in the alternative, whether they properly followed County Policy by leaving a voice message for their supervisor, Steve Felter, explaining their need to stay beyond their shift. I find the answer to both those questions is no. First, as to the message left for Felter, the policy is clear that this procedure is only available in an emergency situation, which is specifically defined as being one where law enforcement has been called to deal with a client situation, the employee has pertinent information for the incident report and the replacement employees cannot be relied upon to finish up. These conditions did not exist. Rather, Eliot and Anderson decided to complete the intake on three youths who arrived in the late afternoon instead of leaving the completion of the work for the next shift, which they both admitted to Felter they could have done. Eliot and Anderson did not have discretion to decide for themselves if staying beyond their shift was necessary and the conditions which existed on September 17 did not meet the policy guidelines. Second, as to the supposed authorization by Hermans, Hermans' comments to Anderson and Eliot were ambiguous, at best, and it is not clear that they constituted permission. What is clear, however, is that the conversation with Hermans did not occur until after their shift ended at 4:00. Again, the policy clearly states that when a manager is on site, authorization must be received before staying over. This was not done and the fact that Eliot and Anderson did not know Hermans was there is not an excuse in this case. Thinking that no manager was present, and in the absence of an emergency, their only option at that point was to leave on time and let the next shift complete the intake process. To do otherwise was a violation of the policy.

The second prong of the just cause analysis is to determine whether the degree of discipline issued is consonant with the severity of the offense. Here, the standard for the appropriate degree of discipline is set out in Article 26, which calls for a progression of discipline from oral warning to written warning to suspension to termination, except in the case of serious offenses, in which case the County may deviate from the progression. At the outset, we may dispense with the notion that either of Eliot's infractions warrants deviating from the standard progression. As to the timecard infraction, Eliot had received Written "Verbal" Warning for a similar offense in December 2003. The discipline provision calls for the expiration of Written "Verbal" Warnings after six months, so that discipline could not be considered for progressive discipline purposes with respect to the September 26, 2004 incident. It is instructive, however, in determining the parties' historical view of the seriousness of such an offense. Accordingly, I find that the timecard infraction is not sufficiently egregious to merit deviation from the normal disciplinary progression. Likewise, the overtime infraction is not one that would normally merit discipline outside the normal progression. This is established by the fact that a Written "Verbal" Warning was issued to Anderson for the September 17 incident for committing the identical infraction. The record establishes that the distinguishing factor between the discipline issued to Anderson and that issued to Eliot was Anderson's clean disciplinary history. It should also be noted that the record reveals that the County has in the past counseled Eliot for similar overtime infractions, most recently on August 26, 2004, without issuing discipline. Thus, it does not appear that Eliot's actions on September 17 are serious enough to warrant discipline outside the normal progression.

The question that remains, therefore, is whether, by issuing a suspension to Eliot for the combination of the September 17 and September 26 incidents, the County acted within the proper disciplinary progression as defined by Article 26 of the contract. I find that it did not. It should be noted that Article 26 expressly states, with respect to progressive discipline, "…a repetition of an offense can result in more serious disciplinary action." Clearly, how one defines a repeat offense is central to whether a particular sequence of infractions is appropriate for progressive discipline.

The Union takes the view that the phrase "repetition of an offense" should be interpreted literally. Thus, progressive discipline is only appropriate when one commits the same infraction twice within the prescribed time period. The County takes the opposite view. It asserts that multiple violations of the code provision regarding failure to follow duly established work rules, policies and procedures constitutes a repetition of an offense and views the suspension as being the next step in progressive discipline following the August 26, 2004 Written "Verbal" Warning and September 29, 2004 Written Warning. In fact, Felter asserted at the hearing that the suspension was considered progressive when it was issued and that either of the infractions was adequate to merit suspension under the circumstances. Felter testified that the County was being lenient in not treating the infractions separately and, thus, terminating Eliot.

In my view, a literal interpretation of the contract could lead to the absurd result feared by the County that unless infractions are identical they cannot be subject to progressive discipline, which could make the progressive discipline scheme unworkable. On the other hand, to hold that any infraction may result in progressive discipline because all infractions may be lumped together under an overbroad rubric would work an injustice in the other direction. The County has a panoply of policies procedures and work rules setting forth the expected behavior of its employees. It does not seem unreasonable to me to interpret the language of Article 26 as calling for progressive discipline for multiple violations of the same policy, or violations that have some tangential similarity, although not necessarily identical, such as attendance related infractions, or timekeeping and time management infractions.

Here, the August 26 warning was issued for a failure to call law enforcement when requested and the September 29 warning was issued for a breach of the County's confidentiality policy. These infractions are wholly unrelated in kind and degree to Eliot's actions on September 17 and September 26. Furthermore, despite Felter's testimony, there is no evidence that Eliot was ever told that the discipline issued to her was part of a contractual progression. For that matter, there is no evidence that the Written Warning she received on September 29 was considered progressive. Certainly, nothing in the Corrective Action Reports issued to her indicate that the level of discipline issued was based in any degree upon previous discipline. While Eliot should have known her actions on September 17 and 26 were violations of County policy and could subject her to discipline, therefore, she had no reason to suspect they could result in her suspension, much less termination. I do not find that Eliot's infractions leading to her suspension were similar enough in kind or degree to the infractions that led to her previous discipline to qualify for progressive discipline. The County, therefore, breached

the *status quo ante* by imposing a suspension on her for those infractions. I do find the respective violations to have sufficient similarity, however, to warrant progressive discipline with each other. Therefore, a Written "Verbal" Warning for the overtime infraction and a Written Warning for the timecard infraction are appropriate.

Dated at Fond du Lac, Wisconsin, this 4th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

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31511-A