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-B

Appearances:

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

Thomas P. Godar, Whyte Hirschboeck Dudek, S.C., One East Main Street, Madison, Wisconsin 53703-3300, appearing on behalf of Brown County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 4, 2006, Examiner John R. Emery issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, holding that Brown County (County) failed to maintain the status quo during a contract hiatus, in violation of Secs. 111.70(3)(a)4 and 1, Stats., by suspending an employee represented by the Brown County Shelter Care Employees, Local 1901F (Union) for three days, without just cause. The Examiner ordered the County to reduce the discipline imposed on the employee to a written "verbal" warning for one of the incidents at issue and a written warning for the other incident.

On August 21, 2006, the County filed a timely petition seeking Commission review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., and, on August 23, 2006, the Union also sought review. Both parties submitted written arguments in support of their respective positions, the last of which was received on November 2, 2006.

For the reasons set forth in the Memorandum that follows, the Commission substantially affirms the Examiner's decision. The Commission modifies the Examiner's conclusion by holding that the County did not violate the law by combining the two incidents for disciplinary purposes, but, similar to the Examiner, concludes that the County lacked just cause for discipline greater than a written warning. The Commission augments the Examiner's Order by adding 12 percent interest on the back pay remedy and the posting of a notice, both customary components of remedial relief in prohibited practice cases.

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 11 are affirmed.

B. The Examiner's Findings of Fact 12 and 13 are modified as follows and as modified are affirmed:

> 12. On August 11, 2004, Elliot submitted a time off request for four hours on September 20, 2004, specifying that she would be using vacation time, which was approved. On Friday, September 24, 2004, Elliot submitted her timecard for the period including September 20, indicating that the time off taken that day was credited to comp time. On Monday, September 27, after reviewing her records and before the timecard had been processed by the County's payroll department, Elliot corrected her timecard to indicate that the time off on September 20 should be vacation rather than comp time.
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> 13. Elliot's action of submitting an incorrect timecard constituted a violation of the County's TIMECARD POLICY.

C. The Examiner's Findings of Fact 14 through 26 are affirmed.

D. The Examiner's Finding of Fact 27 is set aside.

E. The Examiner's Finding of Fact 28 is affirmed.

F. The Examiner's Conclusions of Law 1 through 3 are affirmed.

G. The Examiner's Order is set aside and the following Order is issued:

The Respondent County shall:

1. Cease and desist from refusing to bargain in good faith with the Union by unilaterally changing the status quo during a contract hiatus by imposing discipline without just cause, in violation of Secs. 111.70(3)(a)4 and 1, Stats.

2. Immediately restore the status quo by reducing the discipline issued to Jean Elliot on November 4, 2004, from a three-day suspension to a written warning.

3. Immediately expunge the three-day suspension from Elliot's record and make her whole by paying her the three days' wages deducted during the suspension, with interest at 12 percent per year.[1]

4. Notify its employees in the bargaining unit represented by the Union, by posting in conspicuous places where those employees are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the County Executive and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the County to assure that those notices are not altered, defaced, or covered by other material.

5. 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 with this Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[1] As reflected in WILMOT ASSOCIATION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83) and BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/93), the Commission has long held that simple interest on back pay at the statutorily established rate of 12% is a standard part of a make-whole remedy. BROWN COUNTY provides guidance as to the applicable calculation methodology.

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES OF BROWN COUNTY
REPRESENTED BY BROWN COUNTY SHELTER CARE EMPLOYEES,
LOCAL 1901F, AFSCME, AFL-CIO**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employees in the bargaining unit represented by Brown County Shelter Care Employees, Local 1901F, AFSCME, AFL-CIO, that:

1. WE WILL NOT refuse to bargain in good faith with the Union by unilaterally changing the status quo during a contract hiatus by imposing discipline without just cause, in violation of Secs. 111.70(3)(a)4 and 1, Stats.

2. WE WILL immediately restore the status quo by reducing the discipline issued to Jean Elliot on November 4, 2004, from a three-day suspension to a written warning.

3. WE WILL immediately expunge the three-day suspension from Elliot's record and make her whole by paying her the three days' wages deducted during the suspension, with interest at 12 percent per year.

Dated this _____ day of _____, 2007.

BROWN COUNTY

_____
County Executive

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

Brown County

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The pertinent facts, set forth in full in the Examiner's decision and largely affirmed, can be summarized as follows.

At relevant times, Jean Elliot and Dale Anderson were employed by Brown County as child and youth care workers at the Brown County Shelter Care. As such, they were members of the bargaining unit represented by the Union. Jean Elliot, for many years, and Dale Anderson, more recently, were also Union stewards.

Prior to the events giving rise to this case, Mr. Anderson had encountered no disciplinary incidents. Ms. Elliot had three prior disciplinary events. On December 10, 2003, she had received a written "verbal" warning for submitting an incorrect timecard on which a different form of leave than that approved was noted. On August 26, 2004, she had received a written "verbal" warning for failing to respond to a co-worker's request to call law enforcement for assistance, which had occurred on June 16, 2004. On September 29, 2004, she had received a written warning for a breach of client confidentiality that had occurred on September 15, 2004. Pursuant to a provision in the collective bargaining agreement, the December 10, 2003 discipline expired six months later and hence was no longer "in effect" at the time of the events giving rise to this case. Hence, there were two prior disciplines of record at the relevant time.

The County's written personnel policies require employees to submit written requests for time off that specify what kind of leave they are requesting to use, e.g., vacation, comp, or personal. Those policies also require employees, when submitting their timecards, to specify the kind of leave they took, if any, which must match the kind of leave they had specified when they requested the leave.

The County's overtime policies specify the situations in which overtime will be permitted. Those situations include "holding over" until replacement coverage arrives; complying with a supervisor's request to stay past the end of a shift; staff meetings and required training that go beyond normal required hours; complying with a supervisor's call to a meeting that is outside normal hours; and "Emergency situations." The most pertinent provisions are set forth verbatim here:

> 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.
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> **Remember that when a manager is present in the building, you must always consult directly with that person for approval prior to starting over at overtime or offering hours at time and a half.**

(Emphases in original).

As set forth in modified Finding of Fact 12, above, Ms. Elliot submitted a timecard on Friday September 24, 2004, specifying that she had taken four hours of comp time, which was inconsistent with her earlier request for that leave, which had specified vacation time. She corrected the timecard the following Monday, before it had been processed for payroll but after it had been submitted to her supervisor.

On September 17, 2004, Ms. Elliot and Mr. Anderson were working the 8:00 a.m. to 4:00 p.m. shift at the Shelter Care. At about 3:30 p.m., three youths were delivered to the Shelter Care, requiring the staff to undertake "intake processing," including filling out paperwork and searching and inventorying the youths' personal belongings. It became apparent to Elliot and Anderson sometime before 4:00 p.m. that this processing could not be completed by the end of their shifts. Although their replacement for the next shift had arrived and had begun assisting the intake process, Elliot and Anderson decided to stay and finish the processing. Their immediate supervisor, Steve Felter, was not present at the time, but the institution's superintendent, Jim Hermans, was in a nearby office with the door closed. Hermans was frequently off-site at that time of day and Elliot and Anderson were not aware of his presence until sometime shortly after 4:00 p.m., when Hermans emerged for a cup of coffee, observed that Elliot and Anderson were still working, and engaged in a brief conversation with them about the overtime situation. Hermans instructed them to finish up quickly and go home. There is no dispute that the intake work could have been completed by the second shift personnel and that the situation was not an emergency. Elliot and Anderson both claimed 15 minutes of overtime on their timecards for that date.[2]

On November 4, 2004, the County issued a three-day suspension to Elliot for violating County policies, based upon both the overtime infraction of September 17 and the timecard infraction of September 24.[3]

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[2] The parties have conflicting views about the timing and content of Elliot's and Anderson's conversation with Hermans. There is general agreement that Hermans, once he observed the situation, made a comment to the effect that, as the manager on site, he could address the overtime situation and that it was not a situation calling for Elliot and Anderson to leave a voice message for Felter, which they nonetheless did. Elliot and Anderson took the impression from Hermans' comments that he was approving a brief amount of overtime for them, which in their view justified the 15 minutes they indicated on their timecards. Hermans' view was that he told them to leave as soon as he was aware they had held over and that his comment was intended to refer to the requirement in the overtime policy that Elliot and Anderson should have consulted him (a supervisor on the premises) before engaging in overtime. The Union also contends that the evidence does not support the Examiner's conclusion that the conversation occurred after 4:00 p.m., i.e., after Elliot and Anderson had already held over. We believe the evidence is sufficient to support the Examiner's finding that the conversation with Hermans occurred shortly after 4:00 p.m. For one thing, regardless of what Hermans said or meant to say, he would have had no occasion to notice or comment on the situation unless he had reason to question the continued presence of Elliot and Anderson. On the other hand, the fact that Anderson noted on his timecard that the overtime was "OK by Jim," supports the Union's claim that they believed they had obtained Hermans' approval. However, as discussed more fully below, neither the exact time nor the exact portent of Hermans' comments affect the principal element in the misconduct here, which is that the situation was not one authorized for overtime under the County's policy, despite Hermans' ambiguous reaction upon observing the situation.

[3] The County also imposed a written "verbal" warning on Mr. Anderson for the overtime incident, which has not been challenged in the instant proceeding.

Discussion

As the Examiner explained, the instant case essentially involves an allegation that Elliot was suspended without just cause in violation of the just cause provision in the parties' expired collective bargaining agreement. Elliot's claim normally would have been handled as a grievance and resolved through grievance arbitration. However, because the events occurred after the predecessor contract had expired and before the successor agreement was executed (the "hiatus"), the County was not obligated to arbitrate the grievance. SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). Accordingly, the Union invoked the Commission's jurisdiction under Sec. 111.70(3)(a)4, contending that, since just cause was a requirement under the expired contract, a mandatory subject of bargaining, and hence part of the status quo, and since the suspension was without just cause, the County had unilaterally changed the status quo during a hiatus. GREEN COUNTY, DEC. NO. 10208-B (WERC, 11/84); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). In such a unilateral change case, the "just cause" analysis, as the Examiner properly noted, is the same as what would be applied if the matter had been submitted to grievance arbitration. SEE BROWN COUNTY, DEC. NO. 31476-C (WERC, 6/06).

"Just cause" in labor arbitration parlance is a flexible concept that permits "an arbitrator" (or, in this case, the Commission enforcing just cause as part of the status quo) to review the public employer's [discliplinary] judgment and decision *de novo*. BROWN COUNTY, SUPRA, at 9. While there are many formulations of the "just cause" standards, the common ingredients are (1) whether the alleged misconduct occurred, and (2) if so, whether the penalty was commensurate with the offense given all the circumstances.

In addition to the generally applicable just cause concepts, the expired contract itself set forth some parameters. In Article 26, the contract stated:

> 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.
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> 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. . . .

Both parties find support in the foregoing language. The County contends that, since Elliot had received a written warning within the previous 12 months for violating County policies, and since that warning had been preceded within six months by an oral warning for violating policies, the County appropriately proceeded to the next step in the contractual disciplinary

progression, i.e., suspension, for her two September policy violations.[4] The Union, for its part, views the second above-quoted paragraph as permitting (barring exceptional circumstances) a higher level of discipline only where there has been a "repetition of an offense" for which a lower level of discipline had been imposed in the specified periods of time.

The Examiner first concluded that neither the overtime offense nor the timecard offense were serious enough to warrant discipline outside the normal progression set forth in Article 26, particularly since the County had no history of treating such offenses as that serious. The Examiner agreed with the Union that imposing a higher level of discipline progression normally required repetition of an offense within the contractual time limits. However, he construed "offense" to mean "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." Examiner's Decision at 14. The County challenges this interpretation, arguing that the term "offense" should be broad enough to cover policy violations in general, since "(O)therwise, Ms. Elliot or others like her could find ways to have several cracks at virtually every policy without ever progressing beyond a paper warning." County Br. at 16. Here, argues the County, Ms. Elliot had violated four different County policies within the contractually relevant period, only two of which did the Examiner find sufficiently similar to each other to warrant a progression from oral to written warning. As long as Ms. Elliot continued to demonstrate indifference to the "scores" of County policies that were not topically related to each other, argues the County, the Examiner's interpretation would prevent more than a series of oral warnings, each of which would die after six months.

If one assumes that Article 26 requires the repetition of an offense before the County may impose a higher level of discipline, then the Examiner's interpretation of "offense" is a reasonable compromise between the Union's view (which would have required repetition of literally the same misconduct) and the County's view (which would permit termination if an employee violated any of the "scores" of County policies, no matter how minor or unrelated, four times in 18 months). However, the Examiner's interpretation still constricts the flexibility in applying the just cause standard, because it requires a threshold inquiry into the meaning of "similar offenses" and implicitly precludes the County from bundling two or more minor offenses into a single disciplinary response that might warrant a higher level of discipline.

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[4] The County also argues in the alternative that the requirement of a repetition of an offense, as stated in Article 26, when considered in its grammatical context, applies only to moving from a suspension to a more severe discipline. In the overall context of the provision, which emphasizes that discipline should be progressive and that employees can cleanse their records by good behavior, we find the County's grammatical argument hypertechnical and not the most reasonable interpretation. The County also relies on the fact that Ms. Elliot had received some earlier non-disciplinary admonitions about the timecard policy in situations similar to the September 24 incident. Like the Examiner, we do not find it appropriate to rely upon such admonitions to support disciplinary action, where neither the County nor the contract treat such events as disciplinary. To do otherwise would elevate such non-disciplinary admonitions, which occurred well outside the six or 12-month time limit applicable to contractually-recognized oral and written warnings, to a greater impact than such contractually-recognized discipline. On the other hand, the fact that the County had previously responded to a timecard leave-type discrepancy in a non-disciplinary manner does support our conclusion that it was not the kind of serious misconduct that would normally warrant a suspension under the circumstances present here.

We do not think it necessary to interpret the second paragraph of Article 26 so closely. In our view, the contract (status quo) does not necessarily permit the County to increase a disciplinary step even if "an offense" is repeated, any more than the contract necessarily requires the County to start with an oral warning just because the offense is not a repeat of something for which there is an existing record of discipline. "Just cause" generally permits an employer to impose a level of discipline commensurate with the misconduct under all the circumstances, including the nature of the misconduct, whether the employee had been sufficiently warned previously (through progressive discipline) and whether the employee had a habit of repeating the misconduct. "Progressive discipline" is a generally recognized feature in all just cause arbitration. SEE GENERALLY, Discipline and Discharge in Arbitration (BNA 1998) at 29. Article 26 incorporates the general concept of progressive discipline, and *acknowledges* that repetition is generally an appropriate consideration in increasing discipline. However, given the centrality of progressive discipline in the concept of just cause, the contractual language seems less designed to establish a rigid progression than to set mutually-agreeable time limits for how old an offense can be before it is too stale to be used as a consideration for increasing discipline.

In this case, Elliot had violated disparate County policies recently enough to have two disciplinary events in her record at the time of the overtime and timecard incidents in September 2004. However, the September incidents themselves, particularly the timecard incident, were minor. Although we agree with the Examiner that Elliot did violate the policy, her conduct reflects an awareness of the importance of abiding by the policy, since she investigated her records and corrected the error promptly and before it had actually entered the payroll system. This marginal violation barely rises to the level of misconduct.

The overtime incident was more serious, in that, under any view of the evidence, it is clear that Elliot and Anderson had taken it upon themselves to decide that it was appropriate to "hold over" without having been asked to do so by a supervisor. Even if Hermans' remarks could have been interpreted as approving what he discovered, it is apparent that the overtime policy is intended to permit *supervisors* to inaugurate holdovers, based upon supervisory assessment of a situation. Clearly what occurred on September 17, even viewed in the light most favorable to the Union, was at best a tacit ratification of a decision already inaugurated by the employees on their own initiative. Nonetheless, the situation was both brief enough, ambiguous enough, and understandable enough, given the recent and hectic arrival of the three juveniles, that it does not reflect a serious flouting of supervisory authority or County policies.

Despite the relatively minor nature of the two infractions, the County reasonably could conclude that Elliot's four minor transgressions over a period of months showed an indifference to County policies sufficient to warrant more than an oral warning, whether or not the incidents were related to each other in some thematic way. In our view, however, like the Examiner's, the incidents, even taken together and even in the context of Elliot's other recent transgressions, simply lack a level of seriousness to warrant a suspension.

Accordingly, we conclude that the Examiner correctly held that the County lacked just cause for imposing a three-day suspension on Jean Elliot and thereby unilaterally changed the status quo during a contract hiatus in violation of Secs. 111.70(3)(a)4 and 1, Stats., for which we have directed the remedy set forth in the Order, above.

Dated at Madison, Wisconsin, this 21st day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner