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-D

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 Godar, Whyte Hirschboeck Dudek S.C., One East Main Street, Suite 300, Madison, Wisconsin 53703-3300, appearing on behalf of Brown County.

ORDER ON REHEARING

On June 21, 2007, the Wisconsin Employment Relations Commission issued an Order on Review of Examiner's Decision in the above matter. Both Complainant and Respondent timely filed a petition for rehearing. On July 26, 2007, the Commission granted rehearing in order to determine whether it made any material errors of fact or law as alleged in the petitions.

Having reviewed the record and being fully advised in the premises, and for the reasons set forth in the accompanying Memorandum, the Commission makes and issues the following

ORDER

The Commission reaffirms its Order issued on June 21, 2007.

Given under our hands and seal at the City of Madison, Wisconsin, this 20th day of August, 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

Brown County

MEMORANDUM ACCOMPANYING ORDER

In its June 21, 2007 decision, the Commission found that Ms. Elliot had engaged in two "relatively minor" incidents of misconduct that, even taken together, "simply lacked a level of seriousness to warrant a suspension." Accordingly, the Commission overturned the three-day suspension that the County had imposed upon Ms. Elliot and reduced the penalty to a single written reprimand for the combined minor infractions.

The Complainant Brown County Shelter Care Employees Local 1901, AFSCME, AFL-CIO (Union) has sought rehearing, contending that the decision was based upon erroneous findings of fact, which in turn were based upon an incorrect allocation of the burden of proof. According to the Union, the County has not met its burden to establish that any misconduct actually occurred. The Respondent Brown County (County) has also sought rehearing, arguing that the Commission should not have "second guessed" the County's determination that a three-day suspension was the appropriate penalty and that the Commission erred in ordering the County to pay interest on the back pay and post a notice.

Turning first to the County's arguments, as the Commission stated in its June 21 decision, a fundamental element in a "just cause" analysis is whether the penalty imposed is commensurate with the misconduct. See. e.g., BROWN COUNTY, DEC. NO. 31476-C (WERC, 6/06), and cases cited therein. The Commission (like the Examiner) concluded in this case that the penalty was excessive given the minor nature of the infractions. We see no error in that conclusion. As to the remedy, the County is certainly correct that, had this been a grievance arbitration, it is unlikely that interest would have been awarded on the back pay or that the County would have been ordered to post a notice. However, since the grievance arose during a hiatus between collective bargaining agreements, the County was not obliged to arbitrate and apparently chose not to. Accordingly, the matter came before the Commission as a prohibited practice case. The standard order in prohibited practice cases, including those like this one that are premised upon a unilateral change during a hiatus or a breach of contract, includes both interest on back pay and posting a notice. See BROWN COUNTY, SUPRA; NEW BERLIN SCHOOL DIST., DEC. NO. 31243-B (WERC, 4/06), at 22. We see no reason to depart from that standard remedy in this case.

The Union's contentions are also without merit. We agree with the Union that the County bears the burden of proof in a "just cause" case, including one that is before the Commission in the guise of a prohibited practice. See, e.g., TOMAHAWK SCHOOLS, DEC. NO. 18607-D (WERC, 8/86). The Union is also correct that the Commission's review of an examiner decision is "de novo" regarding both the facts and the law. See, e.g., MILWAUKEE VTAE, DEC. NO. 26459-G (WERC, 12/92). Nothing in our June 21 decision was intended to undermine either of these propositions.

Regarding the overtime incident on September 17, 2004, the Union argues that the County did not meet its burden to show that Elliot had failed to obtain overtime approval before 4:00 p.m., when her shift ended, as required by the County's work rule. On this

subject, the Commission's June 21 decision had stated, "We believe the evidence is sufficient to support the Examiner's finding that the conversation with Hermans occurred shortly after 4:00 p.m." The Union views this statement in the Commission's decision as an indication that the Commission had not undertaken an independent de novo review of the record on the issue of whether Elliot had properly obtained permission to stay over, but instead had subjected the Examiner's finding to an inappropriately deferential "substantial evidence" standard. To the contrary, however, the statement reflected the Commission's agreement with the Examiner's conclusion, based upon a thorough review of the entire record and fully mindful of the County's burden of proof.

The County's policy required Elliot to obtain permission from the supervisor on the premises (in this instance, Mr. Hermans) before her shift ended at 4:00 p.m. It is undisputed that Hermans was present before 4:00 p.m., whether or not Elliot was aware of that. It is also undisputed that Elliot knew that Hermans generally was present at that point in the afternoon, that she made no effort to look for him or call him before deciding to work overtime, and that the situation was not an emergency.[1] Thus, even if Elliot's chance encounter with Hermans occurred before 4:00 p.m., and even if Hermans made comments at that time that could be construed as approving her overtime, it is clear that Elliot had not followed the approval protocol by affirmatively seeking Hermans' approval in a timely fashion. Despite the County's general burden of proof, therefore, Elliot bears some culpability for failing to take appropriate steps to obtain prior approval.

As it happens, however, the weight of the evidence satisfies us that the encounter with Hermans in fact occurred after 4:00 p.m.. Elliot's own testimony was confused, at best, about the sequence of events that afternoon. Even leaving aside Hermans' straightforward testimony that the conversation with Elliot and Anderson occurred at about 4:20 p.m., we are persuaded by other evidence of record, including, *inter alia*, supervisor Felter's contemporaneous notes of his contemporaneous interviews with Elliot and Anderson, which indicate that both employees told Felter that the conversation with Hermans occurred after 4:00 p.m.; Union witness Anderson's acknowledgment at hearing that the conversation with Hermans could have occurred after 4:00 p.m.; and Union witness Short's testimony that he arrived about 10 minutes before 4:00 p.m., that the conversation with Hermans occurred about 10 minutes after his arrival, and that he (Short) was not sure whether the conversation happened a few minutes before or a few minutes after 4:00 p.m. Accordingly, the preponderance of the evidence leads us to conclude that the conversation with Hermans occurred after Elliot had already entered overtime, and that the Examiner's and the Commission's finding of fact on this point is correct.

The Union also argues that the Commission erroneously found that Elliot had submitted an incorrect time card on September 24, 2004. The Union asserts, instead, that, since Elliot

[1] Elliot's testimony could be read to indicate that she was in fact aware of Hermans' presence by about 3:30 p.m., well before the decision to enter overtime.

promptly corrected the time card the following Monday before it had been submitted to

payroll, she had not done anything wrong and deserved no penalty. If the record reflected that Elliot, at the time she submitted the time card, affirmatively had brought to Felter's attention the possibility that the time card was in error and that she intended to investigate and correct it, we would agree with the Union that the incident would involve no misconduct. However, the record does not so reflect. To the contrary, Felter testified credibly that it was he who brought the possible time card discrepancy to Elliot's attention after she had submitted it and after he had reviewed it on Friday afternoon. Only after Felter's inquiry about a discrepancy did Elliot indicate she would check her records and make any appropriate correction. As we said in the June 21 decision, "This marginal violation barely arises to the level of misconduct," but, given Elliot's previous counseling on the very same problem, it did warrant some disciplinary response.

In sum, the Commission correctly concluded that Elliot engaged in two relatively minor incidents of misconduct that together warranted the relatively minor discipline of a written reprimand. The June 21 decision is therefore affirmed.

Dated at Madison, Wisconsin, this 20th day of August, 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

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