STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES RUSSELL,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 95-0175-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of arrest/conviction record discrimination with respect to discharge. The stipulated issue for hearing is: "Whether complainant was discriminated against based on his arrest record when he was terminated by respondent effective October 18, 1995." Conference report dated July 31, 1996.

FINDINGS OF FACT

1. Prior to the termination of his employment effective October 19, 1995, complainant had been employed in a represented classified civil service position as a correctional officer (CO) at the Kettle Moraine Correctional Institution (KMCI) since 1990.

2. Complainant's married daughter moved into complainant's residence after she became separated from her husband. At about 3:00 a. m. on August 19, 1995, complainant's daughter was arrested at complainant's house on a charge of having violated the terms of a bail bond by having communicated with her husband.

3. At about 6:00 a. m. on August 19, 1995, complainant proceeded to the residence of his daughter's estranged husband. Complainant was accompanied by his wife, who was also employed at KMCI as a nurse. They became involved in an altercation with their son-in-law. At that time, complainant was scheduled to begin work at 7:30 a. m., and was wearing his CO uniform.

4. Complainant's son-in-law complained about this incident to the Sheboygan County Sheriff's Department, and an arrest warrant and criminal complaint charging complainant with intimidation of a victim and criminal trespass to property were issued. Complainant was arrested later in the day on August 19, 1995, and released from custody on bail on August 21, 1995, at about 4:00 p. m. Complainant's wife also was arrested on criminal charges.

5. Captain Steve Hafermann of KMCI was informed on August 21, 1995, of the arrests, and was directed by management to conduct an investigation.

6. Complainant reported to work for the first time after his arrest at about 2:00 p. m. on August 22, 1995. At about 3:00 p. m. he was summoned to a meeting with Captain Hafermann and others. Upon being asked if he had been arrested, complainant replied "yeah, so what?" or words to that effect. Upon being asked why he did not report the arrest to management,[1] complainant replied "what for?" or words to that effect. At this point, he was advised he was suspended with pay pending further investigation.

7. Captain Hafermann proceeded with his investigation, which included perusal of the police report of the incident which led to complainant's arrest and other documents related to the criminal proceeding, including statements given by complainant's son-in-law and another witness. Captain Hafermann also interviewed two witnesses, complainant's son-in-law, and law enforcement officers who had been involved. He did not interview or attempt to interview complainant. On the basis of his investigation he recommended disciplinary action.

8. Respondent then provided complainant with a copy of Capt. Hafermann's report and scheduled a predisciplinary hearing for October 12, 1997. Complainant attended the hearing with a union representative. Management advised complainant that he would not be disciplined for failing or refusing to answer their ques-

[1] Respondent's work rules, a copy of which had been given to complainant when he commenced employment at KMCI, require employes to report arrests to management.

tions. Based on the advice of his attorney for the pending criminal proceedings, complainant declined to comment on the charges against him.

9. By letter dated October 19, 1995 (respondent's exhibit 6), complainant was advised of his discharge, effective that date. This letter included the following:

> Based on an investigation conducted between August 21 and September 28, 1995, it has been determined that on August 19, 1995, you violated Department of Corrections work rules 2, 5, 7, and 8 when you went into the home of [complainant's son-in-law] at 6:20 a. m. without his permission and assaulted him while you were in uniform. After being arrested for this incident, you failed to report the arrest to your supervisor upon returning to work on August 22, 1995.
>
> Department of Corrections (DOC) work rules listed below prohibit employes from committing the following acts:
>
> > DOC work rule #2 - "Abusing, striking, or deliberately causing mental anguish or injury to clients, inmates or others."
> >
> > DOC work rule #5 - "Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling."
> >
> > DOC work rule #7 - "Failure to provide accurate and complete information when required by management or improperly disclosing confidential information."
> >
> > DOC work rule #8 - "Inappropriate dress, grooming, or personal hygiene including, but not limited to, the improper use of a prescribed uniform, badge, or other article of clothing or identification."
>
> You have no previous disciplinary action on your record within the past 12-month period; however, based on the severity of these work rule violations, I find it necessary to take this disciplinary action.
>
> If you believe that this action was not taken for just cause, you may appeal through the grievance procedure under Article IV of the collective bargaining agreement.

10. Respondent did not discharge complainant because of his arrest record.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against him on the basis of his arrest record when it discharged him from employment.

3. Complainant has not sustained his burden.

4. Respondent did not discriminate against complainant on the basis of his arrest record when it discharged him from employment.

OPINION

As applicable to this case, §§111.322(1) and 111.321, Stats., prohibit an employer from discharging an employe because of his or her arrest record. Section 111.32(1), Stats., defines "arrest record" as follows:

> "Arrest record" includes, but is not limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

The only question before the Commission here is whether respondent discharged complainant because of his arrest record. The Commission does not have jurisdiction over, and cannot decide, other issues related to the discharge—whether complainant committed the conduct with which he was criminally charged, whether there was just cause for his discharge, and whether his due process rights were violated by respondent. Since complainant was in a represented position, the question of whether there was just cause for discharge must be resolved through the contract grievance/arbitration process. *See*

§111.93(3), Stats. Due process issues related to the predisciplinary procedure would have to be resolved under the contract, or conceivably in a judicial forum.[2]

This does not mean there is no place in the case for evidence concerning the disciplinary charges against complainant. If these charges could be shown to be relatively flimsy, this would be probative of pretext. *See, e. g., Paxton v. Aurora Health Care, Inc.*, LIRC, 10/21/93.[3] A conclusion that there was no just cause for the discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext.

There is little evidence of pretext. Complainant has not been able to show that the allegations of work rule violations were so specious as to have been "trumped up" as a means of getting at complainant because of his arrest record. The information respondent had before it when it acted to discharge complainant, which included the law enforcement records as well as interviews Capt. Hafermann had conducted with witnesses, provided substantial evidence that complainant had acted in the manner respondent alleged. Complainant asserted that the investigation was one-sided. However, respondent did give complainant an opportunity for input at the predisciplinary hearing, but complainant essentially declined to participate on the advice of counsel.[4] Further-

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[2] While the Commission can address due process issues ancillary to its jurisdiction over appeals pursuant to §230.44(1)(c), Stats., of disciplinary actions against nonrepresented employes, *see, e. g., Showsh v. DATCP,* 87-0201-PC, 11/28/88; rehearing denied, 3/14/89, represented employes' recourse is under their collective bargaining agreement, *see* §111.93(3), Stats.; *Walsh v. UW,* 80-0109-PC, 7/28/80.

[3] "Whether Paxton did in fact rape Sivolka or otherwise subject her to unwelcome sexual contact is not an issue that needs to be decided in this case What matters is the question of what the employer's motivation *was,* not whether it was objectively correct. Notwithstanding this, there is some relevance in considering the question of whether Paxton was culpable, because the more reasonable such a conclusion appears on the basis of what the employer's investigation showed, the more reasonable is the conclusion that the employer's investigators came to genuinely believe, in good faith, that Paxton was culpable." p. 3.

[4] As mentioned above, any question of whether complainant's due process rights were violated by the predisciplinary procedure are not before the Commission.

more, this case did not involve solely an incident of off-duty misconduct which the employer determined should be subject to discipline.[5] Rather, there was a nexus between the charges and complainant's employment. Complainant was in uniform at the time of the incident, and one of the charges against him involved improper use of a uniform. Also, he was charged with failing to have reported the arrest to management in violation of a specific DOC policy.[6]

In addition to the pretext issue, complainant contends in essence that, regardless of intent, respondent violated the FEA per se when it relied on the police reports and other documents associated with the criminal proceeding against him. While the FEA (Fair Employment Act) prohibits the discharge of an employe because of his or her arrest record, it is clear that this prohibition does not extend to prohibiting an employer from discharging an employe because the employer determines that the employe engaged in conduct which is inconsistent with continued employment, merely because the conduct happened to result in an arrest. A relatively clear illustration of this principle would be a case where an employe strikes a supervisor, is arrested on a battery charge, and then discharged for a work rule violation. Notwithstanding that the underlying

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[5] An employe's strictly off duty misconduct can be the basis of discipline under certain circumstances. *See State ex rel. Gudlin v. Civil Service Comm.*, 27 Wis. 2d 77, 87, 133 N. W. 2d 799 (1965):

> [C]onduct of a municipal employe, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the municipal service. In such case the conduct can reasonably be deemed cause for suspension or discharge even though it has no direct bearing on the performance of his duties. Because arbitrary and capricious action must be avoided, the concept of "cause" should be the more strictly construed the less the relevance of the conduct complained of to the performance of duty.

[6] The FEA prohibition against arrest record discrimination contains an exception which permits the employer "to suspend . . . any individual who is subject to a pending criminal charge if the circumstances of the charge relate to the circumstances of the particular job." §111.335(1)(b), Stats. Thus an employer can suspend an employe solely on the basis of a pending criminal charge if there is the requisite relationship between the charge and the job. In this case, the

conduct is the subject of criminal charges, the employer does not violate the FEA so long as the disciplinary action is taken *because of* the underlying conduct and not *because of* the arrest and accompanying criminal charge. For example, in *City of Onalaska v. LIRC,* 120 Wis. 2d 363,367, 354 N.W. 2d 223 (Ct. App. 1984), a police trainee was discharged because the city determined that he had engaged in illegal automobile racing. At the time of the discharge, he had not been arrested but he had been questioned and a criminal charge was imminent. LIRC (Labor and Industry Review Commission) concluded that the FEA had been violated because the statutory definition of arrest record included "information indicating that a person has been questioned." However, the reviewing Court held as follows:

> To discharge an employe because of information indicating that the employe has been questioned by a law enforcement or military authority is to rely on an assertion by another person or entity. If, as here, the employer discharges an employe because the employer concludes from its own investigation that he or she has committed an offense, the employer does not rely on information indicating that the employe has been questioned, and therefore does not rely on an arrest record, as [statutorily] defined.

Complainant asserts that respondent's handling of his discharge involved a per se violation of the FEA because as part of its investigation of complainant's actions, respondent relied on police reports and other law enforcement records. Complainant has cited *City of Onalaska v. LIRC,* but this case is not direct precedent for this proposition because it did not directly address this question. An attorney general's opinion on the applicability of *City of Onalaska* to an employer's reliance on information received from law enforcement agencies conflicts with complainant's position. The attorney general commented as follows:

> Although *City of Onalaska* may be read narrowly as protecting an employer from a finding of arrest record discrimination only where the employer conducts its own investigation of an individual's conduct and only where it questions the individual about such conduct, it is my opinion that the employer is protected if it bases its employment decision on the

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employer did not suspend complainant because of the pending charge. Rather, as discussed above, it discharged him because it determined that he had violated work rules.

> individual's conduct (as opposed to the individual's status as an arrested person), even if the employer bases its conclusion concerning the individual's conduct upon information which the employer receives from others (even including law enforcement agencies). The purpose of the WFEA prohibition against arrest record discrimination is to protect individuals from employment discrimination based upon the stigma of an arrest record *per se, cf. Miller Brewing Co. v. ILHR Department,* 103 Wis. 2d 496, 504, 308 N. W. 2d 922 (Ct. App. 1981); it was not intended to prevent an employer from reaching its own conclusion as to whether the employe engaged in the conduct underlying the charge and from basing employment decisions upon such conclusion.

79 Op. Att'y. Gen. 89 (1990). The Commission relied on this opinion in *Whitley v. DOC,* 92-0080-PC-ER, 9/9/94, p. 9:

> [W]ith respect to arrest record, respondent is not liable merely because in its investigation into complainant's conduct it relied to some extent on information from the police department that had been developed in connection with complainant's arrest. Therefore, in the case before this Commission, respondent will not be liable for arrest record discrimination unless the record establishes that respondent's assertion that it discharged complainant for his actions on the night in question is a pretext and that its true motivation was complainant's arrest record. (citations omitted)

Other agencies also have followed this approach. *See, e. g., Springer v. Town of Madison,* LIRC, 9/22/87 (employer relied on police report and questioning of employe); *Wolf v. City of Milwaukee Fire and Police Commission,* ERD, 11/15/96 (employer relied on all available law enforcement records and gave complainant the opportunity to explain what had happened).

Finally, the Commission will address an evidentiary ruling that was made at the hearing. The hearing examiner sustained respondent's objection to complainant's attempt to introduce evidence of his acquittal of the underlying criminal charges. This ruling is consistent with basic evidentiary principles and the law pertaining to this kind of case. *See, e. g., Paxton v. Aurora Health Care, Inc.,* LIRC, 10/21/93, p. 3:

> "[A]n acquittal does not mean that the event did not happen. Nor would it mean that the defendant is necessarily innocent. Rather, it means that the jury did not find proof of the event *beyond a reasonable doubt.*"

> *State v. Bobbitt,* 178 Wis. 2d 11,17, 503 N. W. 2d 11 (Ct. App. 1993) (emphasis in original). The employer in this case came to a good faith belief based on its investigation that Paxton had committed some kind of sexual assault against Sivolka. It is simply irrelevant to the issue presented here that a jury, which may have heard different evidence, and was required to apply a stringent burden of proof, arrived at a different conclusion.

ORDER

The Commission having concluded that respondent did not discriminate against complainant on the basis of arrest record, this complaint is dismissed.

Dated: April 24, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95