STATE OF WISCONSIN PERSONNEL COMMISSION

**JEFFREY JELINEK,**
***Appellant,***

**v.**

**Secretary, DEPARTMENT OF CORRECTIONS,**
***Respondent.***

Case No. 96-0161-PC

INTERIM DECISION AND ORDER[1]

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(c), Stats., of a suspension without pay.

FINDINGS OF FACT

1. At all relevant times appellant has been employed in the classified civil service with permanent status in class in an unrepresented Supervising Officer 2 (Lt.) position at Taycheedah Correctional Institution (TCI).

2. Appellant was suspended without pay for five days effective December 3-7, 1996. The letter providing notice of this disciplinary action (Respondent's Exhibit 23) included the following: "you violated the reporting requirements of the DOC Arrest and Conviction Policy. In August of 1996, you failed to report the receipt of a criminal complaint/summons for issuing a worthless check. You also failed to report your conviction on October 15, 1996."

3. On June 9, 1996, appellant wrote a personal check for $20 which bounced due to insufficient funds. Appellant received a notice from the payee to pay the check in five days and did not comply.

[1] Pursuant to §227.485, Stats., this decision is being promulgated as an interim decision. The prevailing party may submit an application for fees within 30 days after the date of service of this interim order, in accordance with §227.485(5), Stats.

4. On August 8, 1996, the Fond du Lac County District Attorney issued a county ordinance complaint and summons (Respondent's Exhibit 12) charging appellant with a county ordinance violation with respect to the issuance of the aforesaid worthless check. This document in essence informed appellant that he either could appear in intake court to answer the complaint or plead no contest to the ordinance violation by signing a stipulation on the document and submitting it with the sum of $183.27 (constituting a forfeiture, restitution, fees, and costs). Appellant eventually pursued the latter course.

5. Appellant never informed management of any of the matters set forth in the preceding finding.

6. Respondent's departmental policy on reporting arrests and convictions is set forth in its "EXECUTIVE DIRECTIVE 42" (Respondent's Exhibit 16) (a copy of which had been given to appellant prior to the events here in question) which includes the following:

> IV. B. CRIMINAL ACTIVITY OF CURRENT EMPLOYES
>
> If an employe is charged or arrested, convicted or sentenced for criminal conduct, the employe shall notify his or her supervisor before the start of the employe's next shift. Failure to notify shall be considered a work rule violation. . . .
>
> III. A. 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. (See s. 111.32(1), Stats. . . .
>
> II. POLICY STATEMENT
>
> To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act, it is Department policy that records of pending criminal charges and convictions be considered in employment decisions only when the circumstances of the pending charge or conviction are substantially related to the job. Municipal ordinance violations may be considered. . . .

7. On October 23, 1996, a local paper published appellant's name in a court records column among a list of people with forfeitures for issuing worthless checks (Respondent's Exhibit 13).

8. On or about October 25, 1996, Capt. Schomisch (who was not appellant's supervisor) mentioned to appellant at TCI that he had seen appellant's name in the aforesaid column in the newspaper. Appellant replied that it must have been a mistake, and that it was not him. The other supervisor then said to appellant that if it were him (appellant), he should report it to someone.

9. Appellant still did not inform anyone in management about the ordinance violation charge.

10. On October 28, 1996, Associate Warden for Security Steven Beck, appellant's immediate supervisor, became aware of the aforesaid newspaper article, and commenced an investigation of the matter. During the predisciplinary process, appellant asserted that he had not reported the charge against him because he did not think respondent's policy requiring the report of arrests, charges, etc., applied to the county ordinance violation charge in question.

11. TCI Warden Kristine Krenke effected appellant's five day suspension without pay.

12. At the time of the imposition of this discipline, appellant had no record of any previous discipline.

13. Warden Krenke originally determined that a suspension of two to three days was warranted by the circumstances. One of Warden Krenke's considerations with respect to deciding the level of discipline to impose was her conclusion that appellant's failure to have reported the bad check charge was an intentional violation of respondent's policy requiring that such matters be reported to management. Her conclusion was based at least in part on the facts that appellant had received a copy of respondent's arrest/conviction policy, he had been advised by Capt. Schomisch that he should report the matter, and he was aware that one of his own subordinates had reported to him she had been charged with respect to underage drinking.

14. Warden Krenke eventually decided on a five day rather than a two or three day suspension after having been advised by respondent's Bureau of Personnel and Employment Relations (BPER) that, due to a federal court decision (*Mueller v. Reich*, 54 F. 3d 438 (7th Cir. 1995)[2]) concerning the Fair Labor Standards Act (FLSA), an exempt employe such as appellant could not be suspended for less than five days.

15. Pursuant to §230.34(1)(c), Stats., the Secretary of the Department of Employment Relations (DER) issued a bulletin on July 6, 1995 (Respondent's Exhibit 22), in response to the *Mueller* decision which directed all agencies to revise their disciplinary policies in certain ways, including the following:

> 1. Most state agencies currently use some form of a **progressive discipline policy** which is based on the model of: oral reprimand, 1-day suspension without pay, 3-day suspension without pay, 5-day suspension without pay, sometimes a 30-day suspension without pay, and termination. (Under any progressive discipline policy, the nature of misconduct or work rule violation dictates what level of discipline the employer uses first.)
>
> **If your agency's current discipline policy provides for disciplinary suspensions of "exempt" employes for less than 5 full work days for work rule violations, the agency is directed to amend its policy immediately to reflect a revised progressive discipline model for FLSA "exempt" employes which uses any or all of the following steps: oral reprimand(s), written reprimand(s), 5-day suspension(s) without pay, suspensions without pay of 2 or more full work weeks, and termination. . . .**
>
> 2. When the employer determines that an exempt employe's misconduct merits the imposition of progressive discipline, the employer should consider the following points before imposing discipline:
>
> > A. State agencies should no longer give FLSA exempt employes disciplinary suspensions of less than one full work week. (That is, employers should no longer use 1-day, 2-day, 3-day or 4-day

[2] On February 24, 1997, the United States Supreme Court entered an order which granted certiorari, vacated the judgment below, and remanded this case to the Seventh Circuit "for further consideration in light of Seminole Tribe of Florida v. Florida, 517 U. S. ____, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) [a case involving the issue of the states' immunity from suit under the Eleventh Amendment]." *Wisconsin v. Mueller,* 137 L. Ed. 2d 212 (1997).

suspensions without pay as part of their progressive discipline policy for FLSA exempt employes.)

B. Depending on the nature and severity of the employe's misconduct and work rule violations (for example, a first incident of tardiness compared to a first, but serious, incident of insubordination or a third or fourth incident of unexcused absenteeism), the employer must decide what level of discipline (or combination of levels of progressive discipline) is/are most appropriate under the circumstances.

C. If the employer determines that a **written reprimand** is appropriate, the letter of reprimand should specify that the infraction is the first, second, third, etc., time that this conduct has occurred within a specified time period. Depending on the nature of the work rule violation, the employer may decide to issue a second or third written reprimand before imposing a 5-day suspension without pay.

D. If in the past the employer would have imposed a 1-day or 3-day suspension without pay upon the employe for the misconduct, but can no longer do that for exempt employes (because of the recent decision from the Seventh Circuit Court of Appeals), in the reprimand letter the employer might want to consider indicating to the employe something along the following lines: "Although we believe your conduct would merit a 3-day suspension without pay under our previous discipline policy, this second letter of reprimand is being issued instead of a 3-day suspension in order to maintain the FLSA status of your position. However, you are advised that any future violations of the department work rules may result in a full work-week suspension without pay, or other discipline, up to and including termination."

E. If the use of written reprimands does not result in the desired positive behavior changes by the employe, the employer should consider imposing a **suspension without pay**, or even possible termination (depending upon the nature of the misconduct and work rule violations). Any suspensions without pay for FLSA exempt employes must be in consecutive five-day increments and must coincide with the employe's full scheduled work week.

## CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof. *Reinke v. Personnel Board,* 53 Wis. 2d 123, 191 N. W. 2d 833 (1971).

3. Respondent has satisfied its burden of proof with respect to establishing just cause for the imposition of some discipline.

4. Respondent has not satisfied its burden of proof with respect to establishing that an appropriate degree of discipline was imposed.

5. The discipline imposed should not have been more than a written reprimand.

## OPINION

There is very little disagreement about the factual aspects of this case. The essential facts concerning appellant's involvement with the legal system with respect to his bad check, and his failure to report it to management, are undisputed. However, the parties do not agree as to the underlying facts with respect to one of the factors relied on by management in deciding on the degree of discipline. Respondent asserts, and appellant denies, that he knowingly violated the policy.

Appellant had a copy of the directive setting forth the policy (Respondent's Exhibit 16), but he claims that it was unclear whether it required reporting county ordinance violations of the kind with which he was charged. From an overall standpoint, the language of the directive is consistent with respondent's interpretation that it encompasses local ordinance violations. It states under para. II ("POLICY STATEMENT") that "it is Department policy that records of pending criminal charges and convictions be considered in employment decisions only when the circumstances of the pending charge or conviction are substantially related to the job. *Municipal ordinance violations may be considered.*" (emphasis added). Para. III. includes the term "felony, misdemeanor or other offense pursuant to any law enforcement . . . authority." The

inclusion of the emphasized language in the statement of policy is consistent with respondent's interpretation that a local ordinance violation preferred by the district attorney is included in the kinds of charges that must be reported to management. On the other hand, as appellant argues, the policy could have been more clearly written to explicitly require the report of local ordinance violations. If the only evidence on the question of whether appellant knowingly violated the directive was the language of the directive itself, appellant possibly could prevail on this point. However, there is other evidence that supports respondent's showing.[3]

Captain Schomisch advised appellant to inform management of his pending charge. Appellant chose to ignore this advice. Even if appellant simply had been unsure or unaware of the reach of the departmental directive before this conversation, after this exchange he essentially chose to ignore a warning flag and to remain misinformed. There is no substantial difference between this kind of conduct and a decision to deliberately ignore the directive. Thus the Commission concludes that respondent has sustained its burden of proof to establish a knowing violation of the directive.

While respondent has established that there was just cause for the imposition of discipline, there is also a question as to whether the amount of discipline imposed—a five day suspension—was excessive. This is an unusual case. The appointing authority (Warden Krenke) initially determined that a suspension of two or three days was appropriate. After consulting with Madison, she was advised that because of the principle set forth in *Mueller v. Reich,* 54 F. 3d 438 (7th Cir. 1995), it would be inappropriate to impose a suspension of less than five days. Because she believed that the work rule violation was so serious that it was important to impose *some* time off, she elected to proceed with a five day suspension rather than a letter of reprimand, which as a practical matter was the only other alternative.

---

[3] While, as set forth below, the Commission finds that the fact that Capt. Schomisch advised appellant to report the charge carries considerable weight, it places no weight on the fact that that appellant previously had handled a report by a subordinate charged in connection with underage drinking. There is no evidence that that situation involved a local ordinance violation, which is the aspect of the agency directive that is in controversy.

The record reflects that at least *but for* the FLSA consideration, the five day suspension would be considered excessive. This conclusion is based on the following factors:

1) Respondent has the burden of proof.

2) There is no evidence that the five day suspension was commensurate with other cases involving similar work rule violations.[4]

3) While there is just cause for discipline on the basis of the demonstrated work rule violation, there is nothing inherent in that violation from which it can be inferred that as substantial a penalty as a five day suspension was warranted.

4) The warden's opinion, laying to one side the FLSA consideration, was that a two to three day suspension would have been an appropriate level of discipline.

5) The deputy warden for security, who also was appellant's immediate supervisor and who had conducted the predisciplinary investigation for the warden, stated that in his opinion[5] a two day suspension would have been appropriate, and that he disagreed with the five day suspension.

6) Appellant had no prior disciplinary record.

Therefore, the question is whether what otherwise would be a conclusion that there was an excessive penalty should be avoided because the basis for respondent's action involved the FLSA definition of exempt status employes. This is a difficult question. Obviously respondent was placed in a predicament as a result of the Department of Labor's arbitrary (from a supervisory standpoint) restriction on the use of suspensions of less than five days for exempt employes. Basically, respondent had three choices, each of which, in the context of this record, was to a greater or lesser extent unsatisfactory:

1) Respondent could have imposed a suspension of two or three days suspension. This would have been commensurate with respondent's personnel manage-

---

[4] This is not to imply that such evidence is *necessary* in order for the employer to prevail on this issue; rather, it is an observation that what would be positive evidence for respondent is not present.

[5] His statement was not made in the context of the effect of the FLSA.

ment goals and progressive discipline philosophy. However, to have done so would have been inconsistent with respondent's categorization of appellant as an exempt employe, might have jeopardized its ability to continue him in that status, and possibly have caused liability under the FLSA.

2) Respondent could have issued a written reprimand. This course of action would not have involved any potential FLSA problems, but would have been inconsistent with management's assessment of the situation from a personnel management and progressive discipline standpoint, because it was less than the two or three day suspension management deemed most appropriate in isolation from FLSA considerations.

3) Respondent could have issued a suspension of five days or more. This would not have involved any potential FLSA problems, but would have been inconsistent with management's assessment of the situation from a personnel management and progressive discipline standpoint, because it was more than the two or three day suspension management deemed most appropriate in isolation from FLSA considerations.

In the event, Warden Krenke chose the third option. The reason for this choice was essentially the belief that appellant's infraction was sufficiently serious that *some* time off was necessary. In the Commission's opinion, this disciplinary action should be modified pursuant to §230.44(4)(c), Stats., to a written reprimand.

In this case, the employer was not *required* by the FLSA to impose an excessive degree of discipline. In lieu of imposing the suspension of five days, respondent had the other options set forth above. As a practical matter, the first option (two or three day suspension) was not viable because of the potential impact this would carry with respect to appellant's FLSA status and the employer's liability. However, the second option (written reprimand) would not have created any potential FLSA problems and would not have resulted in an excessive penalty. Furthermore, this course of action would have been more in keeping with the DER bulletin (Respondent's Exhibit 22) issued in the wake of the *Mueller* decision. The only suggestion in the bulletin for situa-

tions which normally would have called for a suspension of less than five days is a reprimand letter which advises the employe as follows:

> 'Although we believe your conduct would merit a 3-day suspension without pay under our previous discipline policy, this second letter of reprimand[6] is being issued instead of a 3-day suspension in order to maintain the FLSA exempt status of your position. However, you are advised that any future violations of the department's work rules may result in a full work-week suspension without pay, or other discipline, up to and including termination.'

In conclusion, the impact of the FLSA on this case does not lead to a determination that a disciplinary action which now has been found to be excessive (in isolation from the FLSA) should be affirmed. The FLSA removed from practical consideration respondent's preferred option of a two or three day suspension. However, it left two options which were non-problematical with respect to the FLSA. The option of the written reprimand, would have been more attuned to the DER disciplinary guidelines and would have protected the employe's interests in avoiding being overly penalized for his work rule violation.

[6] The bulletin indicates that in the course of the normal progressive discipline process, a suspension typically would be preceded by a written reprimand.

ORDER

Respondent's action suspending appellant for five days without pay is modified to a written reprimand, and this matter is remanded to respondent for action in accordance with this decision.

Dated: July 2, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT
960161Adec1.doc

Parties:
Jeffrey Jelinek
14 East Follett Street
Fond du Lac, WI 54935

Michael J. Sullivan
Secretary, DOC
149 East Wilson Street, 3rd Floor
P. O. Box 7925
Madison, WI 53707-7925