STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT JOHNSON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0172
Case Type: PA

DECISION NO. 36747

Appearances:

Jim Parrett, AFSCME Wisconsin Council 32, N14436 – 17th Avenue, Necedah, Wisconsin, appeared on behalf of Robert Johnson.

Cara J. Larson, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appeared on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On September 6, 2016, Robert Johnson filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that he had been suspended from his employment for ten days without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Examiner Karl R. Hanson who conducted a hearing on October 18, 2016, in New Lisbon, Wisconsin. The parties made oral arguments at the conclusion of the hearing.

On November 4, 2016, Examiner Hanson issued a proposed decision affirming the suspension. No objections were filed and the matter became ripe for Commission consideration on December 5, 2016.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. Robert Johnson is employed by the State of Wisconsin Department of Corrections and had permanent status in class at the time he was disciplined.

2. On March 3, 2016, Johnson was arrested for and then charged with a second offense of operating a vehicle while intoxicated.

3. Johnson was disciplined with a ten-day suspension on May 26, 2016, by the Department of Corrections for violating a criminal statute.

4. At the time of the suspension, Johnson had not been convicted of the charged violation.

5. At the time the suspension was imposed, DOC did not have independent evidence aside from the arrest record to verify that Johnson drove while intoxicated.

6. Contrary to Executive Directive #42, there was no evidence that the circumstances of the pending charge were substantially related to Johnson's job.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to discipline Robert Johnson.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The ten-day suspension is rejected and the State of Wisconsin Department of Corrections shall remove this matter from Robert Johnson's file and make him whole for any lost pay and benefits.

Signed at the City of Madison, Wisconsin, this 13th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

We reject the discipline imposed in this case for multiple reasons. First of all, the work rule in question provides that "violating a criminal statute, ordinance, or other regulation or rule having the force and effect of law" will result in discipline. DOC interprets the work rule as applying to persons charged with violating statutes, ordinances, etc. In its view, the agency gets to investigate alleged wrongdoing and make its own determination as to the appropriate punishment before the charges are resolved in legal proceedings.

DOC in its Executive Directive #42 has adopted the provisions of the Wisconsin Fair Employment Act as its official policy with regard to arrest and conviction records of applicants and employees. Specifically, the policy provides that DOC may "consider" a pending charge only when the circumstances of the pending charge are "substantially related to the job." Here, there is scant evidence of any job relatedness of a driving under the influence charge. The warden testified that Johnson might at some point in the future be assigned to drive a state vehicle but that driving was not a part of his regular duties. One charged with driving under the influence does not lose his driving privileges until after conviction. Generally, after first and second convictions, occupational permits are available. The warden also asserted that all DOC employees should avoid arrests and convictions because it sends the wrong message to inmates. That generalized concern does not meet the specific standards for job relatedness.[1] There is insufficient evidence to conclude that the charge was substantially related to Johnson's employment as a corrections officer.

We note also that generally employers are forbidden from punishing an incumbent employee for his arrest even if there is a substantial relationship unless the employer makes its decision based upon an independent investigation of the facts underlying the arrest. Merely relying on police reports (as DOC did here) does not constitute an independent investigation. *Betters v. Kimberly Area Schools* (LIRC 7/30/04).[2]

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[1] The Labor and Industry Review Commission has described the employer's burden as follows:

> "However, the law requires an analysis of whether and how a specific offense is related to the circumstances of the job, and it does not permit an employer to deny an individual an employment opportunity based upon generalized conclusions about his character gleaned from a broad reading of his arrest and conviction record. As virtually all convictions for either criminal or civil offenses demonstrate to some degree an unwillingness to follow rules and a failure in judgment, while virtually all jobs require employees to follow some rules and to exercise reasonable judgment, the effect of such interpretation would be to eliminate most individuals with conviction records from consideration for most jobs. Such a result would be inconsistent with the goals of the Fair Employment Act as well as with its plain language."

Weichert v. City of Shawano Housing Authority (LIRC 7/22/15).

[2] DOC policy as reflected in Executive Directive #42 also provides that current employees who have been charged or convicted may be disciplined if the conduct meets the "just cause threshold." The standard may well beg the question and likely does not meet the WFEA substantial relationship test.

One of the other problems with investigating criminal charges prior to conviction is the government's responsibility to address issues arising under *Garrity v. New Jersey*, 385 U.S. 493. A public employee cannot be coerced into giving a statement regarding his involvement in a pending criminal matter under a threat of loss of his employment. DOC mindful of *Garrity* has created a form to advise employees being interviewed about conduct which could give rise to criminal charges. It presents two alternative choices. The employer may compel answers to its questions under threat of discharge if the employee is advised that the answers cannot be used against him in subsequent criminal proceedings. The employer alternatively has the option of advising the employee that answers are voluntary but that any response may be used against him in subsequent criminal proceedings. Here, the investigator checked both boxes on the form thereby creating a completely confusing scenario for Johnson. *See* R.Ex.117, p.8.[3]

Concern over potential violations of the WFEA and procedural due process problems could have been avoided by simply awaiting the outcome of the criminal proceeding. There would appear to be little urgency or need to quickly punish an employee for a first or second DUI committed off duty. While we are reluctant to second guess agency decisions regarding the wisdom of specific work rules, the need to punish an employee for an off duty drunk driving conviction escapes us. If substantial fines, jail sentences, and greatly increased insurance costs do not constitute a deterrent, we are not sure how the loss of pay from suspensions helps deter such behavior. The policy in place at DOC for many years provided for a verbal warning, written warning, and a written warning with last chance warning for each successive conviction. A fourth conviction resulted in termination. R.Ex.107. That would suggest that DOC was able to function without the need to punish people prior to conviction.

It would appear that giving an employee a short ten-day disciplinary suspension (as opposed to an indefinite suspension pending trial on the charges) would suggest that the alleged criminal behavior is not work related. How would suspending a bank teller charged with off duty theft for ten days address the obvious concerns of her employer?

None of this should be read as condoning driving motor vehicles under the influence of alcohol or other substances. It remains a serious problem for all of us. Here, however, there were serious problems with the manner in which DOC handled this matter to a degree that we are convinced there was not just cause for the suspension.

[3] The failure to correctly advise Johnson of his rights prior to the start of the disciplinary interview coupled with its failure to delay action until after the criminal case was resolved may constitute a separate due process violation. *Franklin v. City of Evanston*, 384 F.3d 538, 844 (7th Cir. 2004).

Signed at the City of Madison, Wisconsin, this 13th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner