

BEFORE THE IMPARTIAL HEARING OFFICER

In the Matter of the Grievance of

THOMAS HOLM

Under the Grievance Procedure of

CLARK COUNTY

Case ID: 334.0015

Case Type: IHO

DECISION NO. 37934

Appearances:

Thomas Holm, W10263 Capital Road, Thorp, Wisconsin, appearing on his own behalf.

Jenifer Binder, Law Office of Jenifer Binder, 3133 Church Street, Suite A, Stevens Point, Wisconsin, appearing on behalf of Clark County.

DECISION OF THE IMPARTIAL HEARING OFFICER

On January 28, 2019, Thomas Holm and Clark County requested that the Wisconsin Employment Relations Commission appoint Raleigh Jones, a member of the Commission's staff, to serve as the Impartial Hearing Officer (IHO) in a proceeding involving Mr. Holm's termination. A hearing was held on March 26, 2019, in Neillsville, Wisconsin. The hearing was not transcribed, and no briefs were filed in this matter. Having considered the evidence, the arguments of the parties, and the record as a whole, I issue the following decision.

ISSUE

The County's grievance procedure mandates the IHO answer the following question:

Was Holm's termination arbitrary or capricious? If so, what is the remedy?

FACTS

In 2015, Thomas Holm was hired as a maintenance supervisor. He did maintenance work in the courthouse and the jail.

Almost from the beginning of his employment, Holm had work performance issues that involved carelessness and lack of attention to detail. Some of his work performance issues involved his work in the jail. Other issues involved his work performance elsewhere.

Holm's work performance issues in the jail are memorialized first. In order to get access into the jail, one has to first go through security to be searched. Holm would oftentimes go through security and be in the jail, only to discover he had not brought the right tools or equipment with him for the repair job in question. When that happened, Holm would leave the jail, get whatever items he needed, and then go through security again. He would repeat this process numerous times each day. Holm's repeated action of coming into the jail and then going back out became very frustrating to the jail staff who had to deal with it. Additionally, on numerous occasions, Holm had to work where prisoners were housed or located. When that happened, jail staff had to move prisoners. Moving prisoners in the jail from one location to another is a labor-intensive process. Because of the foregoing matters, plus others that are still to be identified, Holm became very unpopular with the jail staff he interacted with. Some of the other incidents that led to Holm's unpopularity with jail staff were the following. Many times, after Holm finished a repair job, he would leave behind a mess without cleaning it up. When that happened, jail staff had to clean it up. Once, a drain needed repair, and Holm told jail staff he was not going to fix it that day because he did not have time to do it. When Holm walked away from this work, he still had 45 minutes left on his shift. Someone else handled the drain repair and fixed it in less than 45 minutes. Once, Holm left a screw driver in a cell. Doing that constituted a breach of security. Holm also left screws and wrappers in jail cells. Also, he left a pressurized spray can in the jail but could not remember where he left it. After Holm reported the spray can was missing, jail staff searched the entire jail for it to no avail. The record shows that after these various incidents occurred, the affected jail staff complained to their supervisors about Holm's actions. One of the supervisors who got these complaints about Holm was Sergeant Campbell. On her own volition, Campbell relayed these complaints about Holm to Holm's supervisor, County Maintenance Engineer Harold Dillenbeck. This happened numerous times. Campbell ultimately became so frustrated with Holm's carelessness and inattention to jail security that she took the following action: she twice told Dillenbeck that Holm was banned from the jail. That action was obviously problematic for Dillenbeck and Holm because there were still repairs that needed to be made in the jail, but Campbell did not want Holm performing them. After Campbell took this action (i.e. banning Holm from the jail), the captain who was in charge of the jail countermanded Campbell's directive on the grounds that Campbell was not empowered to do that (i.e. ban Holm from the jail). After that happened, Campbell took a different approach to Holm: she simply would not allow Holm to come into the jail while she was working. This action effectively banned Holm from coming into the jail while Campbell was there. If Holm had work to perform in the jail, he had to do it when Campbell was not working.

Another matter involving Holm and his conduct in the jail warrants special attention. For the purpose of context, it is noted that knives are prohibited in the jail. Notwithstanding that prohibition which Holm knew about because it is posted at all jail entrances, Holm once brought a knife into the jail along with his tools. An officer happened to see the knife on Holm's work cart and admonished him about it. Specifically, that officer told Holm that knives were prohibited in the jail and he was not to bring one in again. However, several days later Holm did the very same thing again (i.e. he took a knife into the jail again) and was caught with it by the same officer who

had caught him doing it previously. That officer then reported the incident to the captain who ran the jail. Later, a different officer caught Holm trying to bring a knife into the jail for the third time. Following that incident, the jail captain – who was aware of the difficulties Sergeant Campbell was having with Holm – decided that Holm’s third knife incident warranted formal action. To that end, the captain and the department’s chief deputy sent a written notice to Dillenbeck that Holm was officially banned from the jail. After Dillenbeck received this directive, he immediately went and discussed the situation with those two sheriff’s department officials. They worked out a compromise whereby Holm was allowed to come back into the jail to do repair work, but he could not bring his own tools into the jail anymore; instead, certain tools would be kept in the jail in a certain room for his use. When Holm used those tools, he had to sign them out and later sign them back in. After this compromise was reached, Holm’s ban from the jail was lifted and he was allowed to go back into the jail to perform needed repair work.

* * *

In addition to having those problems in the jail, Holm also had these problems elsewhere. On one occasion, Holm lost his County identification badge. He lost it outside the building where it was run over by a lawnmower. The remnants of the chopped-up badge were later turned in. Also, on two occasions, Holm lost his work entry access card. On both occasions, his lost access card was found and returned to him.

* * *

As the instances noted above occurred, and Dillenbeck subsequently heard about them, he discussed what had happened with Holm in short meetings. While none of those meetings were memorialized in writing, there is no dispute about what happened in them. Specifically, Dillenbeck counseled Holm to improve his work performance. While the record does not identify how many of those short meetings occurred, Holm acknowledged it happened “repeatedly.” In two of those meetings, Dillenbeck told Holm he was close to getting fired. Dillenbeck admitted that, as these meetings continued over time, he became increasingly frustrated with Holm’s inability to perform his job. At times, he showed his frustration by raising his voice when talking to Holm. Dillenbeck also admits that on several occasions when he was frustrated with Holm, he used the work “fuck” in the phrase: “What the fuck are you doing?” While the foregoing shows that Dillenbeck was frustrated with Holm in these meetings, Holm came to be exasperated and frustrated with Dillenbeck as well. Holm thought Dillenbeck’s extensive criticism of his work constituted verbal abuse.

In April 2018, Holm filed a complaint with the County’s personnel manager alleging that Dillenbeck was verbally abusing him. After receiving this complaint, Personnel Manager Joe Dupont convened a meeting with Holm and Dillenbeck. In that meeting, two separate topics were addressed. The first was Holm’s complaint that Dillenbeck had verbally abused him. In the discussion that ensued, Dillenbeck admitted he had repeatedly raised his voice with Holm in past conversations. In the course of discussing why that happened, Holm disclosed to Dillenbeck and Dupont that he (Holm) had a hearing loss. After learning that, Dupont opined that Holm’s hearing loss explained why Dillenbeck found it necessary to raise his voice to Holm (i.e. to ensure that Holm heard what Dillenbeck said). Dillenbeck also admitted in this meeting he had used the word

“fuck” in conversations with Holm and promised he would not do so in the future. This portion of the meeting ended with Dupont telling Holm his (Holm’s) claim against Dillenbeck lacked merit, and he (Dupont) did not consider Dillenbeck’s behavior toward him (Holm) to be in violation of any County policy. The focus of the meeting then shifted to a second topic, namely Dillenbeck’s frustrations with Holm’s job performance. In the discussion that ensued, Dillenbeck first reviewed Holm’s numerous problems in the jail that had resulted in his being banned from the jail. Dillenbeck then reviewed other work performance problems Holm had aside from his work in the jail. After listening to same, Dupont told Holm that he (Dupont) understood Dillenbeck’s frustrations with Holm’s job performance because it was unsatisfactory. The meeting ended with Holm and Dillenbeck shaking hands. Afterwards, Dupont did not memorialize this meeting in writing.

* * *

On September 22, 2018, Holm lost a very important set of work keys known as the grandmaster keys. The only two County employees who possessed the complete grandmaster keys were Holm and Dillenbeck. The grandmaster keys open most doors in the courthouse, the sheriff’s department, and the jail. Losing those keys was a very big deal because it precluded Holm from access to the places where he needed to go to do his work. When Holm was hired, he was told to never take his grandmaster set of keys home with him, but to instead leave them at the courthouse. Holm disregarded this directive.

On Monday, September 24, Holm went to Dillenbeck’s office (while Dillenbeck was not there) and opened up a cabinet which contained extra keys. Holm took a set of the grandmaster keys out of the cabinet. Holm did that without Dillenbeck’s knowledge or permission. Later that day, Holm told Dillenbeck he had lost his grandmaster set of keys over the weekend. Dillenbeck told Holm that was a very serious matter. Holm then told Dillenbeck he had gotten the extra set of grandmaster keys out of Dillenbeck’s office. Upon hearing that, Dillenbeck asked Holm for those keys back. Holm complied with that directive and gave Dillenbeck the keys he had taken earlier that day.

On October 8, 2018, Dillenbeck wrote a memorandum which memorialized that Holm had lost his grandmaster set of keys. Dillenbeck had Holm sign that memo.

About that same time, Dillenbeck discussed Holm’s employment status with the County’s corporation counsel and the County’s interim personnel manager. Both concluded that Holm should be terminated. Their joint recommendation to terminate Holm was then taken to the County’s Personnel Committee and the Public Property Committee. Both those committees concurred with that outcome.

On October 11, 2018, Interim Personnel Manager Kelly Mathis convened a meeting with Holm. At that meeting, Mathis told Holm he was being terminated for (1) losing his grandmaster set of keys; (2) twice losing his entry card to the building; (3) losing his identification badge; and (4) the cumulative problems he had in the jail which resulted in him being banned from the jail three different times. Holm was also given a termination letter written and signed by Mathis. That letter accused Holm of violating two County work rules which proscribed the following conduct:

- Careless, negligence, misuse or abuse in the handling or control of County property; and
- Negligence, incompetence or inefficiency in the performance of duties.

Holm grieved his discharge and it was appealed per the County's grievance procedure to an IHO.

* * *

After Holm was fired, another County employee found the grandmaster set of keys which Holm had lost. The keys were found on that employee's property. That employee gave the missing keys to Holm, who in turn returned them to the County.

DISCUSSION

The Standard of Review

I begin my discussion by first addressing the standard of review that is going to be used herein.

The County's Employee Handbook specifies in Section 13.3 that "the Impartial Hearing Officer must answer the following question: Based on the preponderance of the evidence presented, has the Grievant proven the decision of the Administration was arbitrary or capricious?" This sentence says in plain terms that the IHO is to apply an "arbitrary or capricious" standard.

Having just identified what the relevant standard is, the next question is to determine what that means. Said another way, what does the phrase "arbitrary or capricious" mean. I've decided to begin my discussion by first addressing what it is not. It is not a just cause standard. The just cause analysis traditionally involves addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of misconduct is made, did the employer establish that the discipline it imposed on the employee was commensurate with the offense given all the relevant facts and circumstances. Subsumed into this second element are the notions of due process, progressive discipline, and disparate treatment. It should be apparent, just from a listing of these steps and/or hoops, that a just cause standard sets a very high bar for an employer to clear. For example, if an arbitrator or hearing examiner found some flaws in an employer's investigation or found, say, disparate treatment, the arbitrator or hearing examiner could overturn the employee's discipline on that basis alone. Not surprisingly then, a just cause standard affords a high level of protection to employees.

The reason I just elaborated on what a just cause standard involves is because an arbitrary or capricious standard affords a lower level of protection to employees. In the context of employment law, it is generally understood that an arbitrary or capricious action occurs when the action is unreasonable or does not have a rational basis. Additionally, while normally the burden

of proof is on the employer in discipline cases, the County grievance procedure shifts this burden to the employee. Thus, for County employees to have their discipline overturned, they have to prove that the administration's decision to discipline them was arbitrary or capricious. Said another way, the employee must show that the County acted in an arbitrary or capricious manner. That is a very high bar to clear. The employee handbook goes on to say that "if the employee does not satisfy his burden of proof, the Impartial Hearing Officer shall deny the grievance."

The Merits

At his discharge meeting, Holm was told he was terminated for the following conduct: (1) losing his grandmaster set of keys; (2) twice losing his entry card to the building; (3) losing his identification badge; and (4) the cumulative problems he had in the jail which resulted in him being banned from the jail three different times.

I begin by addressing the charges that Holm lost his ID badge once and his building access card twice – numbers (2) and (3) above. Holm admitted at the hearing he lost those items. When one compares those two charges against the other two charges in terms of seriousness, charges (2) and (3) referenced above can fairly be said to be the least serious. Building on the premise that those two charges were the least consequential of the charges made against Holm raises the following rhetorical question: Why were they included? In my view, it can fairly be surmised that the County lumped those charges in with the others to enhance the total number of charges. In and of itself though, there is nothing wrong with that. It's a relatively common employer tactic in imposing discipline. That said, just because those two charges were included with the other charges does not mean the IHO must weigh them equally. I'm not. As a result, charges (2) and (3) above don't carry the same weight as the other two charges do.

Having said that, there is one small part about Holm losing those two items that fits into the overall narrative here. It is this. The record shows that for the entire time Holm worked for the County, he had a recurring performance problem. That recurring performance problem can fairly be characterized thus: Holm had a pattern of being careless and inattentive when performing his work.

That was particularly the case in the jail. That was problematic because security in the jail is taken seriously. In plain terms, jail security is a big deal. Because of that, jail staffers go to great lengths to keep contraband away from inmates and keep the inmates and staff safe. Holm repeatedly did things while he was working in the jail that confounded jail staff and compromised security. The following shows this. On numerous occasions, Holm left items behind in jail cells. Some of the items he left behind were a screwdriver, screws, wrappers, and a spray can. None of those items should have been left behind in a jail cell, but they were. In each instance, it was subsequently determined by jail staff that it was Holm who left those items there (as opposed to someone else).

From the perspective of jail staff, there was one matter that showed how oblivious Holm was to jail security. I'm referring, of course, to the times Holm brought a knife into the jail. For the purpose of context, it is noted that everyone who goes into the jail is searched for contraband before getting inside. One well known example of contraband for a jail is a knife. Holm was

inexplicably caught bringing a knife into the jail not once, not twice, but thrice. That was inexcusable and should not have happened one time, let alone three times. That's because Holm was specifically told not to do it after he was caught the first time, but he violated that simple directive two times thereafter.

Not surprisingly, as Holm committed the various infractions identified above, the jail staffers who were personally affected by Holm's carelessness, inattentiveness, and breach of security complained to their supervisors about it. One of the jail supervisors who received these complaints – Campbell – then sought out Holm's supervisor (Dillenbeck) and complained to him about what Holm had done in the jail. Campbell did this repeatedly (i.e. complained about Holm to Dillenbeck). It can be surmised from the record that Campbell felt her complaints to Dillenbeck were unavailing, because she ultimately took unilateral action. Her unilateral action was this: she twice told Dillenbeck that Holm was banned from the jail. While Campbell's supervisor later countermanded her directives banning Holm from the jail, Campbell found another way to achieve the same result; she simply would not allow Holm to come into the jail while she was working. Thus, Holm was effectively banned from the jail while Campbell was there. Later, the same supervisor who had countermanded Campbell's banning of Holm from the jail took the same action as Campbell had and banned Holm from the jail. The foregoing establishes that Dillenbeck was told three different times – by different jail management officials – that Holm was banned from the jail. That was obviously a problem for both Dillenbeck and Holm because there were ongoing repairs that needed to be done in the jail and, if Holm was not allowed in the jail anymore, that meant the repairs could not be made. What happened each time after Holm was banned from the jail was that Dillenbeck would mediate with the complaining jail officials and get the ban lifted so that Holm could go back into the jail to work. Ultimately, certain conditions were imposed on when and how Holm could do his work in the jail. That obviously negatively impacted his usefulness to the County.

As Dillenbeck received these ongoing complaints from jail officials about Holm's work performance in the jail, he counseled Holm about what was necessary to perform his job at a satisfactory level. While normally supervisors document counseling sessions in writing so there is a written record of exactly what occurred, Dillenbeck did not do that. In this case though, that is not a problem because both Holm and Dillenbeck testified about what happened in these counseling sessions and their testimony coincided. Their testimony established that Dillenbeck repeatedly talked to Holm about the problems Holm was having in the jail. More specifically, Dillenbeck gave Holm feedback on what he was doing wrong, and guidance on what he could do to correct the problem. As an example, when Holm left something behind in a jail cell, Dillenbeck would give Holm strategies to prevent it from happening again. The work expectations which Dillenbeck set for Holm were intended to get Holm to change his existing work behaviors and habits. The IHO finds that the work expectations which Dillenbeck set for Holm were work related, legitimate and, given the circumstances, entirely reasonable. Additionally, it is noteworthy that these counseling sessions did not happen just a few times. Instead, by Holm's own admission, they happened "repeatedly." Because of that, Holm knew what was expected of him. Dillenbeck also told Holm that if he failed to meet these expectations and continued to be careless and inattentive when performing his work in the jail, he was going to be disciplined. The level of discipline Dillenbeck specifically referenced twice was discharge. Because of that, Holm knew he was on thin ice, so to speak, jobwise. Aside from what Dillenbeck told him in these counseling sessions,

Holm also knew that being banned from the jail was a huge problem for him. That's because a big part of his job was doing repairs in the jail, and he could not do that work if he was banned from the jail.

Then, in late September, 2018, Holm lost his grandmaster set of keys. While Holm had lost things like his ID badge and building access card before, this was different. This was far more serious. While the cost of replacing an ID or building access card was small, that was not the case with replacing the grandmaster set of keys. As previously noted, the grandmaster set of keys opened most doors in the courthouse, the sheriff's department, and the jail. As a result, the lost keys posed a security risk and created a liability issue. Consequently, it was a very big deal for those keys to be lost. After the County's Public Property Committee learned the grandmaster keys had been lost, it considered rekeying all of the locks in the courthouse, sheriff's department, and the jail. If that had happened, and all those locks had been rekeyed, the cost would have been significant.

From the County's perspective, the lost grandmaster set of keys was the proverbial straw that broke the camel's back. The County concluded that Holm's carelessness and inattentiveness had reached a new level which it considered intolerable. The IHO is hard pressed to disagree with that conclusion.

I therefore find – just as the County did – that Holm engaged in workplace misconduct via the conduct referenced above.

The focus now turns to the discipline which the County imposed on Holm for that misconduct. The County decided the misconduct noted above warranted discharge. I concur with that finding for the following reasons. First, when employees engage in workplace misconduct, employers have a variety of ways they can discipline the employee for it. As an example, under the concept of progressive discipline, they can suspend the employee. Here, though, the County went to the last step of the progressive disciplinary sequence (i.e. discharge), even though Holm had not been previously disciplined. Nothing in the County's employee handbook requires that a lesser form of discipline had to be issued in this particular case. As a result, the County had the right to impose the penalty of discharge here. Second, in some discipline cases, the employee makes a disparate treatment argument that attempts to show other employees engaged in the same type of misconduct but received lesser discipline (than was imposed here). In this case, Holm tried to show that one of his predecessors once brought a knife into the jail (just like he did). However, Holm did not prove it. Even if that employee had once brought a knife into the jail though, that was the sole act of misconduct which Holm tried to attribute to that employee. For comparison purposes, it is noted again that Holm brought a knife into the jail not once, but three times. The inference which can be made under the circumstances is that no other employee had ever engaged in the same type of misconduct that Holm did or committed it in the quantity that Holm did. I therefore find that Holm was not treated unfairly or subjected to disparate treatment in terms of the punishment imposed. Finally, in those cases where I have overturned a discharge or reduced discipline, one common reason why I've done that is because charges made against the employee were not substantiated. Here, though, I found the County substantiated all of the charges it made against Holm. Since those charges were substantiated, I have no objective factual basis for overturning the discharge.

The final matter which I'm going to address is this: Holm claims the real reason he was fired is because he had filed a claim with HR that Dillenbeck verbally abused him. This retaliation claim is rejected for these reasons. First, it would be one thing if the HR director who reviewed Holm's verbal abuse claim against Dillenbeck found it had merit. However, the HR director did not find that, and instead found that Holm's claim against Dillenbeck lacked merit. Second, even if Dillenbeck did hold a grudge against Holm for filing that claim with HR, it's important to note that Dillenbeck did not make the decision to fire Holm; that decision was made by the County's corporation counsel and the interim HR director. Additionally, Dillenbeck did not write Holm's discharge letter or sign it. Under these circumstances, Holm simply did not prove he was fired because he filed a complaint with HR about Dillenbeck.

As was noted in the ISSUE section, the County's grievance procedure mandates the IHO decide whether the employee's termination was arbitrary or capricious. For the reasons set forth above, I find the County's discharge of Holm was not unreasonable and had a rational basis. Accordingly, I issue the following:

DECISION

Thomas Holm's termination was not arbitrary or capricious. Therefore, his discharge stands, and his grievance is denied.

Dated at Madison, Wisconsin, this 29th day of April, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Impartial Hearing Officer