ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 559

OCB GRIEVANCE NUMBER: G87-0750 AND G87-1590

GRIEVANT NAME: BROWN, SHARON and McCREEDY, SANDRA

UNION: OCSEA/AFSCME

DEPARTMENT: MR/DD

ARBITRATOR: COHEN, HYMAN

MANAGEMENT ADVOCATE: WAGNER, TIM

2ND CHAIR: BUTLER, VALERIE

UNION ADVOCATE: HOKE, ANNE LIGHT

ARBITRATION DATE: DECEMBER 10, 1990; BRIEF DATE JAN. 9, 1991

DECISION DATE: FEBRUARY 18, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: DOES AN EMPLOYEE HAVE THE RIGHT TO UNION REPRESENTATION DURING A CRIMINAL INVESTIGATION?

HOLDING: "SINCE THE EXPRESS TERMS OF (MR/DD POLICY) SECTION III.D 4 PROVIDE THAT THE INVESTIGATORY INTERVIEW WILL NOT RESULT IN DISCIPLINE AGAINST THE EMPOYEE WHO IS INTERVIEWED, I FIND THE EXPRESS TERMS OF THAT SECTION DO NOT VIOLATE SECTION 24.04 OF THE AGREEMENT."

ARB COST: $888.22

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration -between- STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, GALLIPOLIS DEVELOPMENTAL CENTER -and- OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO	ARBITRATOR'S OPINION Grievants: SHARON BROWN 687-0750 SANDRA McCREEDY 687-1590

#559

FOR THE STATE: TIM WAGNER, Chief
Arbitration Services,
OHIO DEPARTMENT OF
ADMINISTRATIVE SERVICES
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FOR THE UNION: ANNE LIGHT HOKE, Esq.
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1680 Watermark Drive
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DATE OF THE HEARING: December 10, 1990

PLACE OF THE HEARING: State of Ohio
Office of Collective Bargaining
Columbus, Ohio

ARBITRATOR: HYMAN COHEN, Esq.
Impartial Arbitrator
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* * * * *

The hearing was held on December 10, 1990 at the State of Ohio, Office of Collective Bargaining, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:00 a.m. and was concluded at 3:15 p.m. The closing date of the hearing was January 9, 1991 when the post-hearing briefs by the parties were received.

* * * * *

The **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local No. 11, AFSCME, AFL-CIO**, the "**Union**" claims that by its promulgation and implementation of various provisions of GDC (Gallipolis Developmental Center) Policy #122-87 and ODMR/DD Labor Relations Policy Directive No. 86:2.03, dated May 22, 1987 and January 23, 1987, respectively, the **STATE OF OHIO, DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (ODMR/DD)** violated the right to union representation terms of Article 24, Section 24.04 of the Agreement which provides:

> "S 24.04 - Pre-Discipline
>
> "An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her."

The parties have agreed upon the consolidation of two (2) grievances which protest the various policies and their implementation by the State.

FACTUAL DISCUSSION

I.

"Investigation" on December 31, 1986

Sharon L. Brown has been employed as an Activity Therapy Specialist for twelve (12) years by the GDC . At the time of the events giving rise to the instant dispute she was Chief Steward and an Executive Board Member of the Union at the GDC. One of the two (2) grievances that were filed involves an investigation of at least two (2) employees at the GDC on December 31, 1986.

According to Sandra McCreedy, the Union Steward at the time, Susan Klinger called her on December 31 and requested that she accompany her to the Security or Police Office at GDC. When they entered the security office they found a State Highway Patrol Officer and Don James a GDC Policeman in the office. At the time of the hearing James was Police Chief of the GDC. McCreedy introduced herself to the State Trooper who was very angry because she had accompanied Klinger to the office. McCreedy told the State Trooper that Klinger requested that she accompany her to the office. According to McCreedy, the State Trooper said that she did not have the right to be there and that he was conducting an investigation. McCreedy went on to state that she told him that she "was not leaving" and that it was her "job to be there". The State Trooper then told

Klinger that he would be asking "questions that were very embarrassing" and since her answers might be very embarrassing she would probably not want McCreedy to hear the questions or the answers. The State Trooper suggested that McCreedy could wait outside to which Klinger replied that she wanted McCreedy to remain with her in the office. At that point the State Trooper decided not to ask Klinger any questions.

Later that day, McCreedy accompanied Thelma Sloan, another bargaining unit employee, who was called for questioning by the same State Trooper. As occurred previously with Klinger, when she and Sloan entered the room for questioning, James was in the room. When the State Trooper saw Klinger, he came around the table and according to McCreedy, he "verbally attacked" her. McCreedy said that she raised a question about James again being in the room as she had previously raised when she accompanied Klinger to the office. According to McCreedy, the State Trooper said that he was conducting an investigation of "abuse" and by her failure to leave the room, she "was contributing to abuse". McCreedy said that the State Trooper did not answer her concern about James being in the room.

Afterwards, McCreedy was called to the office of Richard Hauck, the Operations Director. McCreedy indicated that Hauck told her that he was aware of the two (2) episodes. He also said that she should not

be giving the State Trooper any difficulty. McCreedy indicated that she accompanied both Klinger and Sloan on legitimate Union business. McCreedy acknowledged that there was no discipline imposed against Klinger or Sloan.

Klinger indicated that on December 31, 1986, she was called for questioning by the Supervisor of Security. When she was called by the Supervisor, he did not indicate the purpose of the questioning. Since Klinger "felt intimidated" she called McCreedy and told her to meet her at the security office. When she saw the State Trooper and James in the room of the Security Office, Klinger believed that she "would be disciplined". Although the State Trooper said that he would have to ask her "an embarrassing question", he never asked her any questions at all.

Klinger acknowledged that the State Trooper left it up to her to determine whether or not McCreedy should leave. Klinger further acknowledged that McCreedy was not forced to leave. Under the circumstances, Klinger said that her rights were not violated.

Sharon L. Brown, had been employed by the State for twelve (12) years as an Activity Therapy Specialist I. She is both Chief Steward and an Executive Board Member of the Union. Brown indicated that she filed a grievance over the incident which occurred on December 31, 1986 involving Klinger, Sloan and McCreedy. Brown

related the events which have already been set forth concerning Klinger and Sloan.

James indicated that on December 31, 1986, he was in the room at the same time that Klinger was there. He said that the reason why he was in the room was that it was one of his offices. At the time that Klinger was called to the Security Office of Police Office in December 1986, James was a Police Sergeant. James said that the investigation by the State Trooper was prompted by the family of the patient rather than by the State. He said that the only times that he had been present when a State Trooper called upon employees for the purpose of conducting an investigatory interview were occasions when Klinger and Sloan on December 31, 1986 were called for questioning.

II.

"Investigation" on May, 1989

In May 1989 Brown related that she was called to report to Hauck's office. When she arrived at his office and knocked on the door, a State Trooper opened the door. She stated that she instantly thought that the questioning by the State Trooper would lead to discipline. According to Brown, the State Trooper told her that a Management representative reported that she and another employee had committed sexual misconduct. Brown said that she had "no idea

what it meant" and that she figured she "was doomed". She testified that she asked for a Union representative to be present but she "did not get one". She added that no employer representative was in the room with the State Trooper.

Brown, however, noticed that employer representatives and a secretary were standing outside of the room. She was very upset and talking loudly. She indicated that the persons outside of the room were facing her. The State Trooper indicated to her that although the Management representatives had given him a statement, he felt that there was no basis for any of the charges. The State Trooper told her that he "would recommend to the appointing authority that they should deal with the lady who had accused her of the misconduct" and not to pursue any discipline against her.

William M. Blanton is a Custodial Worker at the GDC. He is also President of the Local Union. He indicated that he and Brown were accused of abuse and sexual misconduct. When he was called to Hauck's office he was told that "all of the charges were unfounded". Blanton acknowledged that he was not called for questioning. Hauck was in the room along with the State Trooper. He did not ask for a Union Representative since the State Trooper said that "there was nothing to it at all". Afterwards, Hauck told Blanton that the allegations were unfounded. Blanton added that this was the second

time that he had been accused of abuse and sexual misconduct "by the same lady".

III.

CRIMINAL TRIAL - 1990

In 1990, D. Brown and M. Cleary, were accused of patient abuse. They were questioned by the State Highway Patrol "at the Post or the barracks". Blanton, who was at the trial of "D. Brown and M. Cleary" said that the City Solicitor used GDC documents at the trial. He said that the jury ruled that the evidence did not support the criminal charges against "D. Brown and M. Cleary".

DISCUSSION

I.

a. Article 24, Section 24.04, ODMR/DD Labor Relations Policy Directive No. 86:2.03, and GDC Policy # 112-87.

The instant dispute is over the interpretation and application of the right to union representation during an investigatory interview, which is provided in Article 24, Section 24.04 of the Agreement. The applicable terms, contained in the first paragraph of Section 24.04 provide as follows:

> "An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her."

Thus, Section 24.04 provides that an employee's right to union representation during an investigatory interview will arise only if the employee requests representation and if the employee "has reasonable grounds to believe that the interview may be used to support the disciplinary action against him/her".

Narrowing the focus of the dispute even further, the parties attribute different meanings to the phrase "investigatory interview" in Section 24.04. In the State's (ODMR/DD) Labor Relations Policy Directive, No. 86:2.03, which was issued on January 23, 1983 and in G.D.C.'s Policy #112-87, the State distinguishes between "Internal Administrative Investigations" and "External Investigation" for alleged workplace misconduct. Pursuant to the policies, the right of union representation is provided to employees, in accordance with Section 24.04 of the Labor Agreement in "Internal Administrative Investigations". Such investigations are to be contrasted with "External Investigations" which in ODMR/DD, Labor Relations Policy Directive, No. 86:2.03, Section II, provide as follows:

"II. External Investigations

> An employee who is the subject of an investigation conducted of persons other than ODMR/DD employees does not have the same rights of union representation accorded by the internal investigation process. The right to union representation as accorded by relevant labor agreements, labor law and consequent judicial opinions as described previously arises only in interviews where administrative action is taken or is contemplated as a result of the interview. For example, should the Ohio State Highway Patrol arrive on developmental center grounds to conduct a criminal investigation of alleged resident abuse, employees interviewed by the Patrol have no inherent right to union representation, and requests for such representation are properly denied as not accorded by Labor agreements, labor law or consequent judicial opinion. * *"

The same terms are contained in G.D.C. Policy #112-87, Section E. 1. Thus, in "external investigations" or where an employee "is the subject of an investigation conducted by persons other than ODMR/DD employees", the employee "does not have the same rights of union representation accorded by the internal investigation process."

The evidence indicates that the "external investigations" referred to, are criminal investigations conducted by State Patrol Officers. The Union contends that the disciplinary interview terms of Section 24.04 do not distinguish between internal administrative investigations and external investigations. The Union argues that so long as the employee has reasonable grounds to believe that the investigatory interview may be used to support disciplinary action against the employee, the employee is entitled to the presence of a union steward. Thus, pursuant to Section 24.04 the critical factor in determining whether an employee is entitled to union representation at an investigatory interview is whether the employee has reasonable grounds to believe that the interview will be used to discipline the employee. The Union goes on to assert that State Police and in-house investigations are related. According to the Union, the investigation of criminal charges at the employer's facility, in the usual case will be based upon employee misconduct which also leads to disciplinary action by the employer.

c. Investigatory Interview

The initial issue to be addressed concerns the meaning of "investigatory interview" provided in Section 24.04. After carefully examining the evidence I have concluded that the phrase in question refers solely to an investigatory interview conducted by an employer

which might lead to discipline; the phrase is not intended to cover a State Police investigation which might lead to conviction for a criminal offense.

First of all, the terms of the Labor Agreement are negotiated by, and binding upon the parties to the Agreement. The terms are not binding upon parties external to the Agreement. Section 24.04 refers to the presence of a Union Steward and that the "interview may be used to support disciplinary action" rather than criminal charges. Thus, by its terms, Section 24.04 does not contemplate a criminal investigation. Indeed, the title of Article 24 is "Discipline" and Section 24.04 which is headed "Pre-Discipline" constitute the pre-discipline procedures which must be followed by the employer. The Agreement contemplates private rights rather than public rights which are implicated in criminal law.

The right to union representation at an investigatory interview that is provided in Section 24.04 was established in *NLRB v. J. Weingarten*, 420 U.S. 241 (1975) which was decided by the United States Supreme Court. In *Weingarten*, the Supreme Court interpreted the applicable provisions of the National Labor Relations Act, [NLRA] as providing employees with the right to union representation if the employee requests representation and only if the employee reasonably believes that the investigation will result in disciplinary

action. According to the Supreme Court, the denial of representation in these circumstances constitutes illegal interference with the right of employees to act in concert, which is guaranteed under Section 7 of the NLRA. The Supreme Court stated:

> "The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that [e]mployees shall have the right * * to engage in * * concerted activities for the purpose of * * * mutual aid or protection". (quoting Mobil Oil Corp. v. NLRB, 482 F. 2d. 842, 847 (C.A. 7, 1973).

Thus, like the Labor Agreement, the *Weingarten* rule applies solely to the employer-employee relationship. The language of the NLRA which was interpreted by the Supreme Court in *Weingarten* is also contained in §4117.03 (A) (2) of the Ohio Collective Bargaining Law, which provides that: Public employees have the right to: "* * (2) Engage in other concerted activities for the purpose of * * mutual aid or protection". I find that the evidence is convincing that the "investigatory interview" contained in Section 24.04 of the Agreement applies solely to the parties to the Agreement, and to the bargaining unit members represented by the union.

II.

"INVESTIGATION" ON DECEMBER 31, 1986

The evidentiary record indicates that on December 31, 1986 Klinger and Sloan were called upon to attend an investigatory interview which was to be conducted in the Security Office of the G.D.C. by a State Patrol Officer in the presence of James. The investigation concerned "abuse" of patients. It may very well be that the State Patrol Office was angry when McCreedy introduced herself as the Union Steward and had accompanied Klinger because she, (Klinger) wanted her [McCreedy] to represent her. Furthermore, it may very well be true that the State Patrol Officer was angry at McCreedy because of her insistence that she would not leave the room and that as Union Steward, it was her job to be there. The fact is that the State Patrol Officer called upon Klinger to report to the Security Office in order to conduct an interview as part of a criminal investigation. The State Patrol Officer's conduct is outside the scope of the Labor Agreement and outside of my jurisdiction. In any event, no interview was conducted by the State Patrol Officer.

The Union expressed serious concern about the presence of James who was in the office with the State Patrol Officer. During the period of time that the Officer indicated to McCreedy that she leave the office, he never requested that James leave the office. James

indicated that on December 31, 1986 he had two (2) offices, one (1) of which was the office used by the State Highway Patrol Officer to conduct an investigation. In any event, the only times he was present when employes have been called upon to be interviewed during a criminal investigation were the occasions with Klinger and Sloan on December 31, 1986. Again, it should be underscored that no investigative interview within the contemplation of Section 24.04 occurred on December 31, 1986. However, if James had been present during such an interview and had the Union representative left the office at the urging of the Officer and the employee had disciplined the employee based upon information obtained at the interview, the issue of whether the State had violated Section 24.04 might then have to be squarely faced and resolved. Since these events did not occur, I believe it unwise to resolve such a hypothetical scenario at this time.

Klinger indicated that with Brown present in the office, she had a reasonable belief that the information obtained from the interview would result in discipline. However, McCreedy did not leave the office; nor was an interview conducted by the State Officer. Based upon the circumstances, I find that the State did not violate Section 24.04 on December 31, 1986.

III.

"INVESTIGATION" IN MAY 1989

On separate occasions Brown and Blanton were called to Hauck's office in May 1989 as part of a criminal investigation concerning "sexual misconduct". Brown stated that she knocked on Hauck's door, to find a State Highway Patrol Officer opening the door. Upon entering the office the Officer informed Brown that a management representative had reported that she and "another worker" were involved in "sexual misconduct". Brown said that she requested a "Union representative but did not get one". It is undisputed that the Officer indicated to both Brown and Blanton separately that there was no basis for the charge of "sexual misconduct". No interview of Brown and Blanton was conducted by the Officer.

I cannot conclude that calling upon Brown and Blanton to report to Hauck's office where a State Highway Patrol Officer indicated that charges of sexual misconduct against them did not have any basis does not constitute a violation of Section 24.04 of the Agreement. Moreover, both Brown and Blanton were requested to report to Hauck's office where a State Highway Patrol Officer was present, ostensibly for the purpose of conducting a criminal investigation. As I have already established, a criminal investigation is not within the intent and meaning of Section 24.04 of the Agreement.

Brown indicated that in Hauck's office, she reasonably believed that the information that would be elicited from her during the interview would be used to discipline her. However, no such interview occurred. In any event, had such an interview occurred, as I have already established, the interview would have been part of a criminal investigation. Brown further indicated that she looked through a window in the office and observed employer representatives outside of the office who were "facing" her. She was talking loudly to the State Officer but she could not conclude that the employer representatives listened to her. Again, it must be underscored that I find no violation of Section 24.04 inasmuch as Brown and Blanton were called to Hauck's office in furtherance of a criminal investigation.

The Union contends that the State did not discipline Brown because "it * * appears" that the State relied upon the State Police investigation which found that there was no merit to the charges. As a result the Union contends that the State was required to consent to her request for a Union representative. Again, it should be underscored that Brown was requested to report to Hauck's office pursuant to what was apparently a criminal investigation. I have concluded that a criminal investigation is beyond the four (4) corners of the Agreement between the parties. That the State did not discipline Brown because "it * * appears" that reliance was placed

upon the State Police investigation does not constitute a violation of Section 24.04. As no criminal investigation was undertaken, there was also no investigatory interview conducted by the State from which Brown could reasonably believe that the interview may be used to support disciplinary action against her. Accordingly, the State did not violate Section 24.04 in May, 1989.

IV.

CRIMINAL TRIAL - 1990

Blanton referred to the criminal trial of "D. Brown and M. Cleary" in 1990. He observed that the City Solicitor used GDC documents at the trial. In supplying the City Solicitor with GDC documents, the State did not violate Section 24.04 of the Agreement.

V.

"INFORMATION" OBTAINED FROM CRIMINAL INVESTIGATION

The crux of the Union's position is that alleged misconduct by an employee might prompt a criminal investigation which will elicit information from an employee that would also be used by the State to discipline the same employee. There are established protections for a person accused of a crime which have been established as constitutional rights. Among the protections are freedom from

compulsory self-incrimination, including the right to remain silent, the right to counsel, the right to be informed of these rights and freedom from arbitrary search or seizure of the suspect or of the suspect's belongings. These matters are beyond the scope of the Labor Agreement and thus beyond the Arbitrator's jurisdiction. Indeed, these rights appear to be within the scope of GDC Policy #112-87, Section III, E 2 and the last sentence of Section II of ODMR/DD Labor Relations Policy Directive No. 86:2.03 which provides as follows:

> "* *The employee may have other representation rights arising from other areas of law or consequent judicial opinion; it is not the responsibility of ODMR/DD to safeguard these rights, but properly the responsibility of the investigating officer * *."

Sgt. Richard Corbin, of the Ohio Highway Patrol is currently assigned to conduct investigations. There are thirteen (13) full time investigators on his staff. He indicated that when the Ohio Highway Patrol conducts an investigatory interview based upon a complaint of misconduct by an employee of an agency of State, the State Officer is prohibited by the Fifth Amendment of the Constitution from compelling the employee to answer questions. Furthermore, it is the policy of the State Highway Patrol, according to Sgt. Corbin, that the

employee does not have a right to the presence of a "Union Steward" during the investigatory interview. However, the employee, he noted, has the right of having "counsel" present during the interview. Sgt. Corbin added, that the employee has a right not to answer the questions which are asked at the interview.

Sgt. Corbin testified that the State Highway Patrol does not share information with State Agencies, which is obtained from criminal investigations. He said that under the Public Records Act the State Agency, as well as the Union and public may obtain information that is received from the State Highway Patrol investigations. Sgt. Corbin added that public access to its records "depends upon whether it can be received" which is made on a case by case basis. In this connection, "trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law" are excepted from Ohio Revised Code Section 149.43, otherwise known as The Public Records Act. Sgt.. Corbin said that when an investigation is pending the information obtained from the investigation is not released.

After an investigation is completed, Sgt. Corbin indicated that no information is given to the Agency as to whether a decision has been made to prosecute or no prosecute. He said that the evidence obtained

from the criminal investigation is given to the local prosecutor who decides whether or not to proceed with prosecution

Sgt. Corbin said that when a person is interviewed at the location of the Agency, the person is under custodial arrest. However, where a person is requested to be interviewed at the site of the Agency, the person does not have to comply with the request by the State Officer.

Sgt. Corbin said that Management representatives have no right to be present during an investigatory interview conducted by a State Officer. He indicated that the State Highway Patrol is not called upon to conduct administrative or non-criminal internal investigations.

There is one aspect of Sgt. Corbin's testimony which is confusing. He indicated on direct examination that an employee is not entitled to the presence of a "Union steward", during an investigatory interview conducted by a State Highway Patrol Officer. On cross-examination, he said that such an employee is entitled "to have counsel present". It may very well be that Sgt. Corbin distinguished between prohibiting the presence of a "union steward" but permitting the presence of "counsel" during a criminal investigatory interview. In any event, whether the State Highway Patrol permits "counsel" but prohibits a "union steward" during its investigatory interview is irrelevant. As I have already established, Section 24.04 of the

Agreement contemplates an investigatory interview by the employer, where the employee has reasonable grounds to believe that the interview will be used for discipline rather than prosecution for a criminal offense.

In its post-hearing brief, the Union raises various concerns over "external" or criminal investigations as opposed to "internal investigations", which is contemplated by the right to representation requirement contained in Section 24.04. The Union contends that the "interaction" between the State police and the employing Agency which is permitted by the Agency's investigatory interview policies "serves to weaken the safeguards established to protect the rights of the accused". The Union points out that in a criminal investigation the accused is required to report to the police station for questioning provided that the police have probable cause to believe that the accused has committed the criminal offense. The person questioned at the police station has the right to have an attorney present during the interview. These procedural requirements are to be contrasted with the State Police interviewing employees on the premises of the Agency about a possible workplace crime. The State police according to the Union can question any employee about possible abuse without a showing of probable cause that the employees who are subjected to the interview committed the criminal offense or have knowledge of the offense. In doing so, the Union indicates that employees are

denied union representation during these "fishing expeditions". The Union concedes that the employee who are called to the interview are not required to answer the questions asked by the State Police. However, it adds, few employees, if any, would refuse to answer questions, even though their answers would be incriminating, because they would be intimidated. The Union argues that "the Constitution has established certain protections for the accused and these [protections] must be protected and not circumvented by clever manipulation such as the internal/external investigation dichotomy created in the employer's policies".

I have no authority to indicate to the State Highway Police where it may or may not conduct its investigations. Furthermore, the Union indicates that there is an "interaction between the employer (the Agency) and the State". The Union posits a "worst case scenario which could occur" by stating that the State Police, which constitutes the enforcement arm of the State will investigate the charges, without contractual or constitutional provisions in place and the employer will use the information gathered for disciplinary purposes".

Moreover, the Union refers to Section F.2 of GDC Policy #112-87 which provides:

"F. Restraints and Limitations

* * *

> 2. Employee statements made without union representation in the course of an "external" investigation, cannot be directly used to support "internal" disciplinary actions. However, a positive determination of guilt in a criminal activity charge, as pronounced by a court of law, can certainly be used as a basis for discipline when used in conjunction with an administrative disciplinary investigation."

The Union contends in its post-hearing brief, that "[A] possible result of this policy based on a confession made in a SHP [State Highway Patrol] interview without a union representative and that this finding may be used as the basis of discipline. The Union goes on to state that "[E]ven though the employer's policies require that it makes its own investigation, Section III.F.2 of GDC's policy allows an employer to rely on evidence which was gathered contrary to Section 24.04 for disciplinary purposes".

The scenario presented by the Union under Section III F. 2, as it acknowledges if a "possible result". I belive it unwise to rule on "worst case scenarios which could occur" and "possible results" from policies unilaterally promulgated by the State. At this juncture of the discussion, it might be useful to state that "[A]rbitrators generally are

reluctant to issue advisory opinions or 'declaratory judgments'". Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition, (BNA, 1985) at page 233. In refusing to issue a declaratory judgment, the Arbitrator in *Trans World Air Lines*, 47 LA 1127 (Platt, 1967) stated:

> "Grievance determination, in order to be effective, should rest on facts or conclusions drawn from facts and not on speculative and hypothetical situations. Especially in cases like this [challenge as to reasonableness of revised company rule concerning th status of any flight hostess who becomes pregnant or adopts a child], factual differences weigh heavily. The question of whether a rule is fair and reasonable cannot be confidently determined except in the context of a concrete case and upon consideration of the specific circumstances of a particular case in which the rule is invoked and applied. Even a so-called policy grievance should be made as concrete as possible in terms of an actual case rather than in vague and general terms. For, as has often been said, general principles do not decide concrete cases. And equally important is the fact that where a decision is made on a specific grievance or a concrete factual setting, the chances are minimized of the Board reaching unintended

conclusions or indulging in generalization." At page 1130.

Although the considerations contained in the *Trans World Airline* case weigh heavily in my determination not to issue an advisory opinion with respect to the hypotheticals raised by the Union my reluctance to do so is reinforced because the law enforcement agency of the State, namely, the State Highway Patrol is not a party to the Agreement. Only at such time when a grievance is filed based upon facts or conclusions drawn from facts, rather than on speculative or hypothetical situations, would it be appropriate to resolve the dispute. Otherwise, unintended conclusions and generalization are reached which are premature and unwise.

VI.

SECTION III D.4 OF GDC POLICY #112-87

Section III D.4 of GDC Policy #112-87 provides as follows:

"D. Internal Administrative Investigations

4. Where an employer is conducting an investigation and is only questioning an employee about another employee's misconduct, the employer should tell the employee that the meeting is not an

> investigatory interview of him/her and that it will not result in discipline to him/her. This will only apply when the employer is absolutely positive the employee being questioned is not responsible for the misconduct in question. The employee is not entitled to union representation in this instance.
>
> Should an employee begin to incriminate him/herself under these circumstances, the interviewer should immediately cease the investigation and advise the employee that he/she is now entitled to union representation in that indications are now such that misconduct charges may result from the employee testimony."

This Section applies to "internal investigations". The Union challenges the terms of Section III, D. 4, which provide that an employee is not entitled to Union Representation in situations where the questioning during an internal investigation is about another employe's misconduct. The State agreed at the hearing that the failure of an employee to report abuse by another employee is grounds for discipline. The Union contends that "practically" the State has used the Administrative Code to discipline employees for "absence of action". The Union further contends that "the employee can be disciplined" for failure to report abuse by another employee even

though the employer knows positively that the employee is not responsible for misconduct.

It should be underscored that the Union refers to an employee who is disciplined for "absence of action" under Section III D. 4 of G.D.C. Policy #112-87. It may very well be that an employe "can" be disciplined under Section III D.4. However, in order to discipline an employee, given the position of the Union, the State would have to violate the clear terms of its own policy contained in Section III. D. 4 of G.D.C. Policy #112-87. Since the express terms of Section III. D. 4 provide that the investigatory interview will not result in discipline against the employee who is interviewed I find that the express terms of Section III. D. 4 do not violate Section 24.04 of the Agreement.

THE AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: February 18, 1991
Cuyahoga County
Cleveland, Ohio

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