ARBITRATION

IN THE ARBITRATION BETWEEN:	:	
THE STATE OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTION (Northeast Prerelease Center)	:	Griev. No. 27-17 (3-23-92) 238-01-03
Public Employer	:	Grievance of David Tokar
and	:	**AWARD AND OPINION**
OHIO CIVIL SERVICE EMPLOYEES ASSOC. LOCAL 11, AFSCME/AFL-CIO	:	
Union	:	

This matter was heard on the 18th day of November, 1992 in Columbus, Ohio.

APPEARANCES:

FOR THE EMPLOYER:

Joe Shaver, Chief-Labor Relations, DR&C
Lou Kitchen, OCB Second Chair
Eric Pierson, DR&C NEPRC
James L. Schotten, Warden

FOR THE UNION:

Dennis A. Falcione, Staff Advocate Representative, AFSCME/OCSEA
David Tokar, Grievant
Ted Williams, Witness

I. INTRODUCTION AND BACKGROUND

The State of Ohio, Department of Rehabilitation and Correction ("Employer") and the Ohio Civil Service Employees Association, AFSCME Local 11 AFL-CIO ("Union") are parties to a collective bargaining agreement effective from January 1, 1992 through January 31, 1994. The grievance procedure under the contract is set forth in Article 25 and contains five steps leading to arbitration. The parties have stipulated that the provisions under the grievance procedure have been complied with and that the matter is properly before this Arbitrator for decision. Section 25.03 specifically provides that the Arbitrator "shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement." The expenses and fees of the Arbitrator are to be shared equally by the parties.

The grievance in this case was filed on March 23, 1992 by David Tokar who was employed as a corrections officer at the Northeast Prerelease Center. The grievance was filed as a result of the termination of the Grievant's employment by the Employer. Specifically, the Employer discharged the Grievant pursuant to certain standards of employee conduct which establishes certain rule violations and penalties. The Employer cited Rule 15 which prohibits any immoral or indecent conduct on the part of an employee, Rule 39 which prohibits actions on the part of an employee that could compromise or impair the ability of the

employee to effectively carry out his/her duties as a public employee, and Rule 41 which prohibits any act by an employee that would bring discredit to the employer. Rule 15 provides for discipline ranging from an oral reprimand to removal from service, depending upon the circumstances. Likewise, Rules 39 and 41 provide for discipline in the range of written reprimands to removal from service, depending upon the circumstances.

II. PROCEDURAL ISSUES

The Union contends that the Grievant was denied his procedural rights under the contract and was otherwise denied due process because of the Employer's alleged failure to comply with the pre-discipline procedures set forth in Sections 24.04 and 24.05 of the contract, and because the Employer allegedly failed to timely respond to the third step grievance hearing which was held on April 27, 1992.

Section 24.05 clearly provides that "the acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible, but no more than forty-five (45) days after the conclusion of the pre-discipline meeting." (emphasis added) However, that section goes on to specifically provide that "[a]t the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges." In joint Exhibit 3, Mr. Schotten, the Warden, notified the Grievant in writing on September 16, 1991 that the Employer had

decided not to issue discipline until after the disposition of the criminal charges against the Grievant in accordance with the provisions of Section 24.05. Thereafter, on January 16, 1992, a second pre-disciplinary conference took place for the purpose of considering the Grievant's plea of guilty to the criminal charge of attempted gross sexual imposition, in violation of Sections 2907.05 and 2923.02 of the Ohio Revised Code. It is noteworthy that the pre-disciplinary hearing report by hearing Officer Valerie E. Aden issued on January 24, 1992 sets forth the acknowledgement of both the Union and the Employer representatives that "there were no procedural errors and everyone was prepared to present their case." Accordingly, this Officer finds that the Employer was within its rights under Section 24.05 to withhold the imposition of discipline until after the disposition of the criminal charges against the Grievant. This right was acknowledged by the Union on January 24th at the pre-disciplinary hearing and any objection on the part of the Union after that date must be considered waived.

Once the discipline was imposed in the form of termination, on March 11, 1992, the Grievant properly filed his grievance through his Union representative on March 23, 1992. A step three meeting was held pursuant to the grievance procedure on April 27, 1992. The contract provides, however, that the step three grievance response shall be issued by the Agency Head or designee within thirty-five (35) days of the meeting. The step three response, however, was not prepared by the step three hearing officer until July 31, 1992, more than thirty-five (35) days after the step three

meeting. Notwithstanding the untimely response on the part of the Employer, the Union did not raise this procedural objection at the time. Instead, the Union requested arbitration on July 1, 1992. Therefore, there was not a timely objection by the Union to the failure of the Employer to comply with the procedural requirements of step three. Procedural objections of this type must be raised in the first instance, or they are considered to be waived. Furthermore, there was no prejudice to the Union or to the Grievant because the Union filed for arbitration before it had received the step three response from the Employer.

III. **FACTS**

The facts in this case are undisputed. On or about July 16, 1991, the Grievant was indicted by a grand jury in Cuyahoga County, Ohio pursuant to a charge of gross sexual imposition under Section 2907.05 of the Ohio Revised Code. The indictment alleged that the Grievant had sexual contact with a female inmate by compelling such person to submit by the use of force or threat of force. Thereafter, on or about December 17, 1991, and pursuant to a journal entry filed on January 8, 1992 in the Court of Common Pleas for Cuyahoga County, the Grievant entered a guilty plea to the misdemeanor criminal charge of attempted gross sexual imposition pursuant to Sections 2923.02 and 2907.05 of the Ohio Revised Code. The Grievant was sentenced to a jail term of six months and required to pay court costs. The execution of the sentence was suspended and the Grievant was placed on two years probation with a requirement

that he pay for the airline expenses of witnesses who were required to attend the trial.

IV. POSITION OF THE UNION

The Union contends that the Employer removed the Grievant from service without just cause in violation of the collective bargaining agreement. The discipline grid under the standards of conduct issued by the Employer provides for a wide range of discipline from a warning to termination. Under these circumstances, where lesser discipline is provided for, an employee may reasonably expect that lesser discipline will be imposed. An employee is at least required to be notified or warned in advance if more severe discipline is going to be applied for the specified misconduct. The Grievant, in this case, had a clean record without any prior discipline for three and a half years. The imposition of discharge violates the principles of progressive discipline and is too harsh under the circumstances.

Furthermore, the Employer has not applied discipline in a consistent manner under like circumstances. There was at least one other employee who was convicted of a misdemeanor and that employee was not terminated.

V. POSITION OF THE EMPLOYER

The Grievant has been convicted of a serious offense involving sexual conduct with a female inmate. The charge directly relates to the responsibility of the Grievant and his job performance. The Employer cannot, under these circumstances, be expected to keep the Grievant in its employ.

VI. DISCUSSION

The consideration of the evidence presented in this case is complicated by the fact that the hearing officer at the first pre-disciplinary conference found, based upon the evidence presented at that hearing, that there was no just cause for a finding that the Grievant violated the standards of employee conduct. The charges against the Grievant were not sustained. This finding was based upon testimony that the Grievant could not operate the computer which he allegedly used to type the message to the female inmate. The hearing officer further discredited the testimony of the female inmates and credited the testimony of the Grievant. This, however, did not terminate the proceedings.

The Employer decided to defer the issuance of discipline until the criminal charges against the Grievant were concluded. The Grievant entered into a plea bargain wherein he withdrew his not guilty plea to the felony charge and entered a guilty plea to the misdemeanor charge of attempted gross sexual imposition. It was made clear from the testimony of the Grievant at the hearing in this case that he was knowledgeable about the consequences of his guilty plea. He was represented by counsel at the criminal proceeding and he was aware that the had the option to enter a plea of guilty, not guilty, or nolo contendere (no contest). A not guilty plea would have brought the matter to trial. The prosecution witnesses were in attendance and the State was ready to proceed with trial. This Arbitrator finds that the Grievant was specifically advised about the meaning of a no contest plea. This

was undoubtedly explained to the Grievant by the Court and by his lawyer. Further, because the Grievant was employed in the business of law enforcement, he was undoubtedly aware of the consequences of a guilty plea, rather than a plea of no contest. A plea of no contest admits the facts alleged in the indictment, but lets the court determine whether the law was violated based upon the stipulated facts. The no contest plea may not be used against the accused in a civil proceeding. Under ordinary circumstances, this Arbitrator would not consider a no contest plea for purposes of resolving a grievance under a collective bargaining agreement. Arbitrators will normally hear the underlying facts and decide the issues de novo.

Nevertheless, the Grievant with full knowledge entered a plea of guilty to the criminal charge of gross sexual imposition and he voluntarily waived his right to enter a plea of no contest. A guilty plea is and of itself evidence of the underlying factual allegations; and, accordingly, this Arbitrator finds that the Grievant committed the acts alleged on the basis of his voluntary guilty plea and his conviction.

Because of the seriousness of the misconduct on the part of the Grievant, and its direct relation to the Grievant's responsibilities and his job performance, this Arbitrator finds that the Employer did not abuse its discretion in applying the discipline of termination rather than some lesser discipline. This is not the type of case for the application of the principles of progressive discipline. The purpose of progressive discipline is to provide

notice to employees of discipline violations as a form of corrective management so that the employee may correct the problem and regain satisfactory employment status. The misconduct in this case, however, is so serious that the ability of the Grievant to perform the duties of a Correction's Officer is irreparably impaired. Furthermore, the Employer would be exposed to continued liability in the event the Grievant committed another similar violation. The Employer's decision not to retain in its employ a person who has been convicted of a sex related offense with an inmate is not unreasonable. Accordingly, there was just cause for termination and the grievance is therefore denied.

VII. **AWARD**

The grievance is denied.

Date: December 1, 1992

Mitchell B. Goldberg, Arbitrator