ARBITRATION

In the Matter of the Arbitration	:	No. 33-00-(92-11-07)-0450-01-05
Between	:	Grievance of William J. Smith
THE STATE OF OHIO, OHIO VETERANS HOME,	:	
And	:	
OCSEA, LOCAL 11 AFSCME, AFL-CIO	:	**DECISION AND AWARD**
	:	

This matter was heard on May 14, 1993, at the Ohio Veterans Home, Sandusky, Ohio.

Appearances:

For the Employer:
Edith L. Bargar, OCB Advocate
Dick Daubenmire
Pat Mogan, OCB
Tony Washington, Labor Relations Coordinator
Cynthia Turinsky,
Detective Timothy McClung, Perkins Township Police Dept.
Dorothy Fackler, Food Service Administrator

For the Union:
Sam Linville, President, Chapter 2200
John Frank Randleman, Cook II
William Jake Smith, Grievant

I. INTRODUCTION AND BACKGROUND

The State of Ohio, Ohio Veterans Home ("Employer") and OCSEA, Local 11 AFSCME, AFL-CIO ("Union) are parties to a Collective Bargaining Agreement from January 1, 1992 to January 31, 1994 ("Contract"). The Contract includes a multi-step grievance procedure which results in arbitration in the event the grievance is not resolved at one of the earlier steps. The grievance in this case was filed by William Smith on December 4, 1992 as a result of the Grievant's termination from employment by the Employer for engaging in acts of sexual harassment against a female co-worker. Specifically, the Grievant was charged with violations of several work rules issued by the Ohio Veterans Home: #1 Neglect of Duty - endangering safety of residents, staff or public; #4 Acts of discrimination on the basis of sex and, #12 Immoral or indecent conduct. In addition, the Grievant was charged with violation of Rule No. 28 which includes a violation of Section 124.34 of the Ohio Revised Code - Dishonesty. The Grievant denies the charges against him.

II. JOINT STIPULATIONS OF FACT.

The parties have voluntarily entered into the following stipulations:

1. The grievance is arbitrable and properly before the Arbitrator for decision.

2. The Grievant was appointed to an intermittent position as a Food Service Worker 1 on January 1, 1991.

3. The Grievant was appointed to a permanent full time position on September 22, 1991 pursuant to an Ohio Civil Rights Commission settlement.

4. Cynthia Turinsky (the prosecuting witness) filed a complaint with the Ohio Veterans Home Police Department on August 3, 1991.

5. Cynthia Turinsky filed a criminal complaint against the Grievant with the Perkins Township Police Department on September 14, 1992.

6. The Grievant was placed on administrative leave with pay on October 5, 1992.

7. The Grievant was terminated from employment on November 24, 1992.

III. ISSUE

The issue for determination by this Arbitrator is whether or not the Grievant was discharged for just cause. If not, the Arbitrator shall fashion the appropriate make whole remedy.

IV. PROCEDURAL ISSUES

The Union has objected to any finding that the Grievant committed the acts alleged against him based upon certain documents or statements which were offered into evidence in this Arbitration proceeding, but which were not presented to the Union prior to the pre-disciplinary hearing which took place in this case. Section 24.02 of the Contract requires that the Employer provide the Union with a list of witnesses to the event or act known of at the time and documents known of at the time used to support the possible pre-disciplinary action. Such documents must be provided pursuant to Section 24.04 when the documents are used to support a possible disciplinary action.

Local Union President Sam Linville testified that he received the pre-disciplinary packet of materials from the Employer on November 6, 1992, but certain witness statements which later were

relied upon by the Employer for the purpose of issuing discipline were not included. Also, certain witness statements which later were relied upon by the Employer for the purpose of issuing discipline were not included within the packet of materials that he received. These documents were identified as Union Exhibit 3, a report from John Cook dated May 24, 1991, Union Exhibit 4, a statement issued by John Cook dated May 30, 1991, Union Exhibit 5, a statement issued by John Cook dated August 2, 1991 and Union Exhibits 6, 7 and 8 which were written statements made by Dorothy Fackler on or about August 3, 1991. Mr. Linville also testified that he was not provided with a document identified as Joint Exhibit 6 which is a memorandum issued from John E. Cochran, Food Service Administrator to the Grievant and Cynthia Turinsky and which discusses the counseling issued to both parties arising out of the allegation of sexual harassment brought by Ms. Turinsky against the Grievant.

Mr. Frank Randleman, the Chief Steward of the Union in 1992 also testified that the pre-disciplinary packet received by the Union from the Employer did not include Union Exhibit 3 and Union Exhibit 9 in addition to the above mentioned documents. Union Exhibit 3 is another statement of Mr. Cook dated May 24, 1991 and Union Exhibit 9 is a memo issued by Mr. Randleman to Messrs. Faust and Bach. Presumably, Mr. Randleman is mistaken about Union Exhibit 9 or at least the Union was in possession of the memo because Union Exhibit 9 shows that copies were sent to Mr. Randleman, Mr. Linville and Mr. Hall.

The Union alleges that the Employer violated the Collective Bargaining Agreement by not providing the above mentioned documents to the Union prior to the pre-disciplinary hearing. Mr. Washington, the Labor Relations Coordinator for the Ohio Veterans Home testified that the above documents were included within the materials he issued for delivery to the Union. Mr. Washington did not, however, personally deliver the materials to the Union. This Arbitrator finds, on the basis of the evidence presented, that no procedures were in place by the Employer or the Union to inventory the specific documents being delivered and included within the pre-disciplinary packet for purposes of the pre-disciplinary hearing. The testimony of the Union witnesses is accepted. All or some of the above mentioned documents were not included within the materials that they received. Notwithstanding that this is a technical contract violation, a further inquiry must be made as to the damages, if any, which resulted to the Grievant or to the Union because of the omission of documents from the pre-disciplinary packet. It is unclear from the evidence presented that the identified missing documents played any significant part in the discipline which was issued to the Grievant regardless of whether or not they may have been used to support the possible disciplinary action.

The Employer's case was primarily based upon an investigation of the charges made by Cynthia Turinsky conducted by Tony Washington, identified as Joint Exhibit 5. Mr. Washington's investigation concludes with a finding that there was no probable cause to issue

discipline because there was no evidence to substantiate that Ms. Turinsky was sexually harassed by the Grievant. There were no witnesses to the alleged events other than the charging party and the Grievant. The termination of the Grievant's employment at a later date was not based upon any additional evidence other than a conviction of the Grievant of a misdemeanor charge in the Perkins Municipal Court after the Grievant pleaded no contest to attempted gross sexual imposition, based upon criminal charges brought by Ms. Turinsky.

Therefore, the fact that the above mentioned exhibits were not included within the pre-disciplinary packet did not materially harm the Grievant or the Union at the pre-disciplinary conference or at any stage through the grievance and arbitration process. The Grievant and the Union had available to them all material facts and information necessary to defend the charges against the Grievant.

The Union also makes the argument that the charges against the Grievant should be dismissed upon the principal of "double jeopardy." As a result of the investigation conducted by Mr. Washington, both the Grievant and Ms. Turinsky were counseled by Mr. Cochran, Food Service Administrator on August 10th and 11th, 1991. The counseling report states that the Employer finds that both parties were a contributing factor to the alleged offense and the facts alleged by Ms. Turinksy could be considered "horseplay" which is not permitted within the agency or department. Both parties were advised that the type of conduct alleged against the Grievant would not be tolerated in the future. Both the Grievant

and the charging party executed this counseling document which was issued on or about August 16, 1991. The Union argues that as a result of this counseling letter, the investigation against the Grievant had been completed and the matter was resolved once and forever. The further investigation and the subsequent termination amounted to another trial against the Grievant for the same charges which had earlier been resolved. According to the Union, these circumstances violate the principals of fundamental fairness and the discharge decision should be overturned on the basis that the Grievant was denied due process.

This particular issue was addressed by Arbitrator David M. Pinkus in a case involving OCSEA Local 11 and the State Highway Patrol, another case involving sexual harassment charges. Arbitrator Pinkus held that the issuance of the counseling session is not a form of discipline contemplated by Section 24.02 of the Contract. The Employer could counsel the parties and continue with its investigation, which could lead to subsequent disciplinary action without violating the principals of double jeopardy. The circumstances in the Highway Patrol case are nearly identical to what transpired in this case. The investigation of the Grievant's conduct and the charges of Ms. Turinsky continued with the investigation by the Ohio Veterans Home Police Department, the State Highway Patrol and the Perkins Township Police Department. Once all of the investigations were completed, the Employer could issue discipline based upon newly discovered evidence and the original counseling session is not to be considered dispositive of

the charges brought against the Grievant because the counseling did not rise to the level of disciplinary action taken against the Grievant as contemplated by Section 24.02 of the Contract.

IV. MERITS

A. FACTS

Ms. Turinsky was an interim food service worker who was employed for approximately one year prior to the events she alleges. She testified about two separate incidents involving the Grievant. The first incident was alleged to have occurred on August 3, 1991. The Grievant was employed as an interim food service worker on the second shift which began at 11:00 o'clock a.m. and concluded at 7:30 p.m. Ms. Turinsky was on the first shift or morning shift which began at 5:00 o'clock a.m. and concluded at 2:00 o'clock p.m. There was a two hour overlap between the shifts. During this overlap time period Ms. Turinsky was in the tank room or the dishwashing room of the facility working by the sink. She alleges that the Grievant approached her from the rear, grabbed her left hand and placed her in an armlock. He then pushed up against her buttocks and started to simulate intercourse against her buttocks. The Grievant allegedly turned her around and inquired as to whether or not she felt his erection.

Another incident allegedly occurred after August 3rd in the pot and pan room. When the parties were alone, the Grievant kissed Ms. Turinsky on the lips and hugged her. This occurred at approximately 1:00 o'clock p.m. There were no witnesses to either of the alleged events. Ms. Turinsky testified that she did not

consent to any of this conduct on the part of the Grievant. She told him to stop his activities. After the first incident, she told the Grievant to leave her alone. She complained to management about the Grievant's activities. After the counseling session with Mr. Washington, she was interviewed by the State Highway Patrol. On September 14, 1992 she filed a criminal complaint against the Grievant.

The Grievant denied the accusations of Ms. Turinsky. He testified that he was never alone with Ms. Turinsky at work. He testified that during the overlap time period on August 3, 1992 he was working on the floor near the wards and he was not in the dish room area. Likewise, on the date of the second incident he was not working in the same area as Ms. Turinsky. The Grievant testified that other employees were always working nearby and that Ms. Turinsky could have screamed or sought the assistance of other employees if she in fact was assaulted by the Grievant. The Grievant offered a motive for Ms. Turinsky to falsely accuse him. Both Ms. Turinsky and the Grievant were temporary or interim employees seeking to obtain full time positions. There was a limited number of full time positions available and both were competing for the same job. The Grievant believes that Ms. Turinsky falsely accused him of sexual harassment in order that she would have a better opportunity to obtain a full time position. Ms. Turinsky denied that she had these motives.

V. POSITION OF THE EMPLOYER

The Employer argues that the discharge should be sustained based upon subsequent evidence obtained by the Employer in connection with the criminal case brought against the Grievant by Ms. Turinsky. The Grievant was found guilty of attempted gross sexual imposition, a misdemeanor of the first degree on November 24, 1992. Notwithstanding that the Grievant pleaded no contest to the criminal charge, the Employer argues that the plea should be allowed as circumstantial evidence that Ms. Turinsky was telling the truth. At the time of the arbitration hearing, Ms. Turinsky was no longer an employee of the Ohio Veterans Home. Therefore, she had no ulterior motive and there was nothing for her to gain by testifying at the arbitration hearing. The issue for determination by the Arbitrator is whether or not the testimony of Ms. Turinsky should be believed over the testimony of the Grievant. Under the facts and circumstances of this case, the Arbitrator should accept the testimony of Ms. Turinsky and find that the Grievant is not being truthful.

VI. POSITION OF THE UNION

The Union argues that there is no reason not to believe the testimony of the Grievant. The Employer's case did not improve after the investigation of Mr. Washington concluded. The Employer should not be able to rely upon the criminal proceedings or the fact that the Grievant pleaded no contest to the charge of attempted gross sexual imposition. A plea of no contest is not to be admitted for purposes of any civil proceedings. It should not

be admitted for purposes of this Arbitration. The finding of guilty by the trial judge is based solely upon the no contest plea without the benefit of any adversary hearing or the testimony of any witnesses.

VII. DISCUSSION

The Employer has the burden of proof in this case. Many arbitration decisions have held that a higher degree of proof is required when charges of serious misconduct are made such as theft or other conduct amounting to a criminal offense. A prosecutor is required in a criminal proceeding to prove the case beyond a reasonable doubt. Ordinarily, the burden of proof in civil proceedings such as arbitration cases is that of a preponderance of the evidence. Nevertheless, many arbitrators have held that when a Grievant is charged with serious misconduct which may amount to criminal conduct, the burden of proof should be somewhat higher than merely a preponderance of the evidence and the Employer should at least meet the burden of proving its case by clear and convincing evidence. The forfeiture of a person's job and livelihood involves a penalty which may exceed a criminal penalty imposed against a defendant; and, therefore, Arbitrators should scrutinize the evidence to make sure that the charges of misconduct are fully proven in any particular case.

Cases such as this, which involve the sworn testimony and allegations of a charging party and the sworn denials of a Grievant are very difficult to prove because of the absence of third party witnesses or any corroborating evidence. Arbitrators may review

and analyze the testimony of each of the witnesses in order to determine their credibility and the charging party may prevail if the evidence is such that one person's testimony should clearly be credited over that of the other. The Arbitrator may examine the demeanor of the witnesses and the particular circumstances of the alleged acts. Discrepancies may appear with respect to certain material points and evidence may develop which would indicate that because of contradictory statements or improper motives one party's testimony should be favored over the other.

This Arbitrator carefully reviewed all of the documentary evidence and the testimony of each of the witnesses. Careful attention was paid to the testimony of Ms. Turinsky and the Grievant. Ms. Turinsky's testimony was very compelling and appears credible. However, the Grievant's testimony also appears credible. The Grievant's denials and defenses were not discredited upon cross-examination. There was nothing about the Grievant's demeanor or the surrounding circumstances which would cause him not to be believed. The Employer was not able to bring out any inconsistencies or contradictions in the Grievant's testimony. Therefore, on the basis of a comparison of the testimony of Ms. Turinsky and the Grievant, there is no basis to clearly accept Ms. Turinsky's version of the events over the denials of the Grievant.

This was the precise conclusion reached by Mr. Washington during his investigatory interview of the parties. Mr. Washington correctly found that Ms. Turinsky did not establish her case because it was one person's word against the other and there was no

other objective evidence which was presented. Mr. Washington handled the situation in the appropriate manner. Both parties were counseled about the charges and it was made clear to both parties that the type of conduct alleged by Ms. Turinsky would not be tolerated by the Agency.

Notwithstanding that continuous and extensive investigations were conducted by the Agency Police Department, the Highway Patrol and the Perkins Township Police Department, no further evidence developed with respect to the factual circumstances which were alleged to have occurred by Ms. Turinsky. The only additional evidence forming the basis to terminate the Grievant was the no contest plea of the Grievant and the finding of guilty by the Perkins Township Municipal Court that the Grievant had committed the act of attempted gross sexual imposition. The trial judge heard no additional evidence with respect to the facts.

There are specific reasons why the law has made distinctions between civil proceedings and criminal proceedings. A guilty plea will be considered an admission by the defendant and that admission may be used against the defendant in all civil proceedings. A plea of not guilty or no contest, however, as a matter of public policy will not be admissible in any subsequent civil proceedings based upon the same facts. Rule 11(B)(2) of the Ohio Rules of Criminal Procedure specifically states that a plea of no contest is not an admission of guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and the plea of no contest "shall not be used against the defendant in any

subsequent civil or criminal proceeding." The criminal court system has established the plea of no contest for administrative and efficiency purposes. Many crimes have comparable civil ramifications. The violation of traffic offenses have a direct relationship to civil court claims for personal injuries and damages. Other types of criminal conduct, including assaults and sex crimes, have comparable civil remedies for compensatory damages. Therefore, many criminal defendants, in order to avoid civil exposure to damages, will plead not guilty or no contest to the pending criminal charge. A defendant can dispose of the criminal case by pleading no contest, which means that the charges against him are accepted for purposes of the criminal case but his plea and the court finding as the result of his plea cannot be used against him in later civil proceedings. For example, Ohio courts have held that the State Board of Pharmacy could not suspend the license of a registered pharmacist solely because he plead nolo contendere (similar to the plea of no contest) and was accordingly found guilty to charges that he dispensed misbranded drugs and narcotics without records of sales. Herman v. State Bd. of Pharmacy, 270 Misc. 86 (Common Pleas, Cuyahoga Cty. 1971). This is precisely what occurred in this case. The Grievant, upon advice of his counsel, originally elected to plead guilty to the charges against him. Later, the Grievant and his counsel decided to enter into a plea bargain with the prosecution, wherein the felony charge was dismissed in exchange for a no contest plea to a misdemeanor. This plea bargain benefitted the Grievant by reducing his exposure

to a criminal felony. It also benefitted the prosecution by eliminating the need for a trial on the charges and avoided the possibility or risk that the defense would prevail because the prosecution could not prove its case beyond a reasonable doubt. This plea bargain is a rational and practical way of disposing of criminal charges but nothing in this particular criminal process should have anything to do with any related civil proceeding such as this Arbitration case in determining whether or not the Grievant should be discharged from his employment based upon the alleged facts.[1]

The finding of the criminal court of Perkins Township that the Grievant committed a criminal act based upon a no contest plea was

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[1] Judge Bacon briefly described the purposes for entering a plea of nolo contendere:

> It has value in criminal cases to avoid exacting an admission that would do the accused great harm in possible subsequent litigation, and to avoid trial with its attendant expense and publicity likely to be adverse regardless of the outcome. Surely there are many cases where a respectable citizen may become technically guilty of a violation of law through ignorance, lack of diligence or some thoughtless action. Is it not just that in a proper case a lawful solution be found to avoid extremely harsh consequences to less culpable misdemeanants? It is true some courts have limited the advantage the plea offers which prohibits its use as an admission of any fact at issue in the criminal charge in any subsequent action or proceeding, civil or criminal, to the formal declaration of the plea itself. Thus they have in later civil or criminal proceedings admitted into evidence the judge's finding of guilt following the plea. This would seem to destroy all reason for the existence of the plea 'nolo contendere' or 'no contest.' Nearly every case in which such a plea is entered a finding of guilt or conviction follows. When then would the prohibition the plea imports ever operate? Herman v. Board, supra, at 87. (emphasis added).

without a trial. There was no sworn testimony of any witness. Accordingly, the case against the Grievant should depend solely upon the testimony and evidence presented at this hearing. This Arbitrator, therefore, finds that the criminal case against the Grievant contains no additional probative evidence as to whether or not the Grievant committed the acts alleged against him by Ms. Turinsky. Notwithstanding that Ms. Turinsky's testimony is credible, she has not established by clear evidence that her testimony should be accepted over the denials of the Grievant, whose testimony was unshaken and also credible. Since the Employer has not met its burden of proof, the Grievant cannot be found to have violated the collective bargaining agreement by committing the acts of misconduct for which is he charged. His grievance must be sustained because the Employer has not met its burden of proof.

VIII. AWARD

The grievance is sustained. The Grievant shall be reinstated to his former position with full back pay and benefits, less any interim earnings, unemployment compensation payments or other income which may have mitigated his damages. This Arbitrator reserves jurisdiction to resolve all matters of back pay and benefits which cannot be agreed upon between the parties.

SO ORDERED:

Date: June 14 1993.

Mitchell B. Goldberg

Mitchell B. Goldberg, Arbitrator

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