#1050

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL

Re: Grievance 15-03-930618-0044-04-01
Eichenlaub termination

Hearing held May 3, 1995, in Columbus, Ohio

Decision issued May 25, 1995

APPEARANCES

Employer
Sgt. Robert Young, Advocate
Pat Mogan, OCB, Second Chair
Staff Lt. Rick Corbin, Observer

Union
Paul Cox, Esq., Chief Counsel
Ed Baker, Staff Representative
Cheryl Eichenlaub, Grievant
Ron Morning, Unit 1 Labor Rep.

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant was employed by the Ohio State Highway Patrol as a Dispatcher 2 and had been so employed for approximately 4 years when, on June 18, 1993, she was discharged. She was a member of a bargaining unit represented by the Fraternal Order of Police, Ohio Labor Council, Inc. The unit includes, among other classifications, both troopers and dispatchers of the Ohio State Highway Patrol. Grievant's discharge occurred after a series of events involving criminal charges filed against her by one of her two apartment roommates. The roommate, who testified at hearing, claimed that Grievant had used her ATM card to make various unauthorized withdrawals from the roommate's bank account. She claimed that her ATM card had been missing and that, when her bank account became overdrawn in February, 1993, she discovered at least $440 in unauthorized withdrawals from branches which she herself had never patronized. She claimed that she suspected Grievant because Grievant was the only person she had ever given her PIN number to and that, in the course of making authorized withdrawals for her, Grievant had memorized her PIN number. The other roommate, who was a co-worker of Grievant and also a Dispatcher 2, testified that, with the first roommate, she found the missing ATM card in Grievant's purse.

Charges were filed with the police and, after an investigation, on May 12, 1993, Grievant was indicted on two felony charges involving receiving stolen property and

misuse of a credit card. As part of the police investigation, the alleged victim's banking records were reviewed and the times of withdrawals compared to her work schedule to insure that the victim herself had not made the withdrawals.

The Employer placed Grievant on paid administrative leave effective May 15, 1993, pending a departmental investigation. After the completion of the investigation, Grievant was terminated on June 18, 1993. Arbitration was demanded September 14, 1993. Because of the pendency of criminal charges, arbitration was delayed pending their resolution.

On February 21, 1995, Grievant made a plea of no contest to two misdemeanor 1 charges involving receiving stolen property and misuse of a credit card. A judgment entry of conviction and sentence was entered that day. Grievant was sentenced to two sixty day terms of confinement which were suspended with defendant placed on one year's good behavior. Grievant was also ordered to pay restitution of $440 to the victim.

II. ISSUE

The parties stipulated the issue to be:
Was the Grievant terminated for just cause? If not, what shall the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the Agreement referred to by the parties and consulted by the arbitrator are:

Section 18.01, "Purpose," which provides in part that:

> The parties recognize that the State has the right to expect that a professional standard of conduct be adhered to by all Highway Patrol personnel regardless of rank or assignment. . . .

Section 18.09, "Off Duty Status," which states:

> Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

Section 19.01, "Standard," which provides:

> No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

## IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments during the course of the hearing. Their positions are only briefly summarized below.

### A. The Employer

The Employer argues that the termination was for just cause and asks that the grievance be denied. The Employer stresses that it was faced with a short term employee who had a felony indictment on two charges. The Employer views such charges as serious. The Employer argues that there was a nexus between the criminal activity and Grievant's job. Dispatchers wear uniforms, have access to confidential records and may appear in court. The Employer argues that the public expects dispatchers, like any other law enforcement officer, to meet a high standard. A hiring officer testified that an applicant with a conviction like Grievant's would not be hired. Grievant's co-worker and former roommate was involved and testified she would not

have been comfortable working with Grievant after the event. The Employer argues that trust is very important in its workplace and that an offense involving theft goes to integrity.

The Employer also argues that Grievant has harmed the Department by her actions, pointing to an evening news broadcast by a Cleveland television channel. Grievant's indictment had been mentioned on the broadcast and the Employer presented witnesses to establish that officers had received inquiries from members of the public after the broadcast.

The Employer argues that it followed proper procedures and that this was not a rush to judgment nor the result of hasty action. An investigation was conducted. The results were backed up, in the Employer's view, by the February, 1995, entry of conviction. With regard to other cases brought up at hearing where employees had not been discharged, the Employer stresses that Grievant was a relatively short term employee and was charged with felonies, unlike the bargaining unit members discussed who had long term service and were charged only with misdemeanors. In summary, the Employer asks that the grievance be denied.

B. The Union

The Union argues that the discharge was not for just cause. The Union stresses that an indictment is not an offense nor is it proof of a violation, arguing that there

is an issue as to whether Grievant committed the crime with which she is charged and that her plea was "no contest." The Union further argues that Grievant is not a law enforcement officer and should not be held to any standard related to law enforcement officers.

With regard to the charged offense, the Union notes that the alleged victim did not maintain financial records and did not balance her checkbook and asserts that her charges against Grievant are merely speculation and not evidence.

The Union also attacks the Employer's arguments about media coverage. The Union argues that Grievant's indictment would not have been mentioned at all on the broadcast had the station not been running a story at the same time about charges against a trooper. To give weight to such media coverage would be unfair in the Union's view because it would subject an employee's job security to the whims and chance of journalistic coverage. The Union notes that none of the other Cleveland television stations mentioned Grievant or her case.

The Union further argues that other persons guilty of misdemeanors have been reinstated by the Employer and that such reinstatement has been acceptable in the eyes of the Employer. The Union stresses that the instant case involves allegations of off duty misconduct and argues that they have no relationship to the job. The Union asks that the

grievance be granted and that Grievant be restored to duty with full back pay.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has considered the testimony and exhibits presented at hearing, the collective bargaining agreement and the arguments of the parties.

The first issue to be resolved is whether Grievant committed the offenses with which she has been charged. As the Union argues, her plea was "no contest," which plea is not always the same thing as an admission of guilt. The role of a no contest or nolo contendre plea in a subsequent arbitration was fully analyzed by arbitrator Dennis Nolan in U.S. Postal Service, 89 LA 495 (1987). In that case, the Grievant had entered a no contest plea to a reduced charge and the judge then entered an "Order Withholding Adjudication of Guilt and Placing Defendant in Community Control." Arbitrator Nolan held that such a no contest plea not followed by a conviction was not proof of guilt and that the employer's failure at hearing to prove guilt by independent evidence rendered the affected employee's discharge invalid. As arbitrator Nolan stated, "In short, pleading nolo does not amount to an admission of guilt."

The instant case, however, is distinguishable. Although Grievant submitted a plea of no contest to misdemeanor 1 charges of receiving stolen property and misuse of a credit card, the court entered a document

entitled "Judgment Entry of Conviction and Sentence." Thus, unlike the grievant in arbitrator Nolan's case, this Grievant has been convicted. Furthermore, the filed Entry states that Grievant "entered a plea of guilty." While this wording may have been an oversight, there is an entry of "conviction" signed by the judge.

Further, and unlike the U.S. Postal Service case, the Employer presented direct evidence to support the charges. Both the former roommate from whom the money was taken and the former co-worker and roommate who found the ATM card in Grievant's purse testified at hearing and were subject to cross examination. Although the Union's point is well taken that the roommate suffering the loss did not keep adequate or reliable records, the arbitrator finds that, considering all the testimony, the guilt of Grievant was established.

The second issue is whether the incident warrants discharge. As the Union argues, the case involves off duty conduct which means that the Employer bears an additional burden of relating it to the workplace before discharge or discipline will meet the just cause standard.

The relationship between off duty misconduct and members of the Ohio State Highway Patrol was discussed and analyzed by arbitrator Calvin Sharpe in State of Ohio, 94 LA 533 (1990), a case in which he upheld the discharge of a state trooper who had pled "no contest" and been convicted of driving under the influence of alcohol, receiving a 3 day suspended sentence and a $40 fine with a suspended $200

fine. As arbitrator Sharpe noted, arbitrators have generally held that discharge for off duty misconduct is generally impermissible unless:

"1.) behavior harms Company's reputation or product. . .

2.) behavior renders employee unable to perform his duties

3.) behavior leads to refusal, reluctance or inability of other employees to work with him. . ."

94 LA at 537 citing among other authorities, W.E. Caldwell Co., 28 LA 435, 436-437 (Kesselman 1957.)

Arbitrator Sharpe went on to note that the real issue, then, is the nexus between the employee's conduct and the employer's legitimate interests and that sufficient evidence of any one of the above listed consequences could support discipline or discharge.

Applying these standards, arbitrator Sharpe ruled that the state trooper convicted of an off duty DUI could be discharged under this contract's standards. There had been harm to reputation in that case in that there was extensive radio, TV and newspaper coverage of the arrest, conviction and sentence. The arbitrator also found that the arrest and conviction did impair the trooper's ability to perform since he could be vulnerable to credibility attacks when testifying in court and had diminished his ability to carry out the role modeling aspects of his job. Finally, the arbitrator credited testimony that co-workers would react negatively.

This case contains some of the same elements but not necessarily to the same degree. Here, too, there was

publicity in the form of television coverage of the indictment. There was no evidence, however, of media coverage involving the ultimate conviction and the initial coverage consisted only of one night's broadcast on one TV station. Thus, Grievant's involvement did harm the Highway Patrol but not to the extent in the case considered by arbitrator Sharpe. Publicity of an indictment is not as serious as publicity of a conviction.

The duties of a dispatcher are different from those of a trooper. A dispatcher does not have the direct law enforcement duties of a trooper and, arguably, is not seen to be a role model to the same extent that a trooper is. Thus, the ultimate conviction here does not interfere as directly with Grievant's ability to do her job. Although there was testimony that dispatchers may sometimes have to testify in court, there was no testimony that Grievant had ever done so or that her former roommate, also a dispatcher, had ever testified. Thus, a conviction does not seem to interfere as much with Grievant's ability to do her job as was the case in arbitrator Sharpe's decision.

Finally, here, too, there was testimony that co-workers might be uncomfortable working with Grievant. The former roommate testified that she did not want to work with Grievant and something to the effect that she would not leave her purse out when Grievant was around. Testimony indicated, however, that the former roommate no longer works at the same post where the two were once co-workers.

Thus, there is evidence here with regard to the three factors traditionally considered by arbitrators but it is less strong than that before arbitrator Sharpe in the above mentioned case. The reason for considering these factors is to determine whether there is a connection between the off duty misconduct and the job duties. This case also involves two other matters that may strengthen the connection somewhat. First, the theft was from one of two roommates. The other roommate was a co-worker. While a breach of trust among roommates would not generally have a job connection, there is more of a tie to the workplace when a co-worker is one of the roommates.

Second, the charge was that of a felony. While the Union correctly argues that an indictment is not proof and that there was no conviction for a felony, the involvement of felony charges does make this a more serious case. Although Grievant may not be a sworn law enforcement officer like a trooper, the Highway Patrol is a law enforcement agency and its effectiveness, prestige and reputation could well be affected by having convicted felons on staff. There was much testimony about lesser penalties meted out to those who were convicted of misdemeanors who had been returned to work but no testimony about persons involved in felonies.

Had Grievant been convicted of a felony under the circumstances of this case, the arbitrator might well be inclined to support the discharge. Whether fairly or not, the label "convicted felon" is a powerful one in our society

and it could impair the reputation and effectiveness of a law enforcement agency to have such persons on staff even where, as here, there is not as direct a connection between the off duty crime and the job. The fact that Grievant is not an employee of long tenure would, in the event of a felony conviction, also weaken the Union's case.

Similarly, had Grievant been merely indicted but not convicted of a serious offense (with substantiating evidence established at hearing), the arbitrator would have little trouble directing that Grievant be reinstated with back pay. If the Employer were wrong in its belief that Grievant was guilty, an indictment would not provide the ultimate proof of guilt.

What makes this case unique and difficult is that Grievant was charged with a felony but convicted of a misdemeanor. The misdemeanor conviction was a serious one in that Grievant's no contest plea contained an acknowledgment that she could be sentenced to 6 months imprisonment for each offense and fined $1000 for each offense. She was ultimately sentenced to 60 days incarceration for each of the two charges, suspended on one year's good behavior, and ordered to pay restitution. Thus, while the plea and conviction are not to minor offenses, the felony label has been removed.

Evidence presented at hearing establishes that there have been persons committing misdemeanors who have been returned to work. The Union introduced arbitration opinions

indicating that some persons had received only suspensions for acts which resulted in misdemeanor convictions. A 1993 decision in Case 15-03-921006-083-04-01 involved a dispatcher who had been involved in two incidents of off duty criminal activity involving driving under the influence and riding in a vehicle while possessing an open container of alcohol. Although the Employer argued in that case that dispatchers must be held to a high standard, the discipline the Employer itself imposed after the second offense was a 20 day suspension not a discharge. (The arbitrator then reduced the suspension to 15 days.) Among published decisions involving this bargaining unit is Ohio State Highway Patrol, 96 LA 613 (Bittel 1991) involving a DUI violation by a state trooper reinstated after his discharge was overturned in arbitration.

In this case, the arbitrator finds that there is not a significantly close relationship between Grievant's work and her off duty misconduct to warrant not reinstating her at this time. Had there been a felony conviction, this would be a different case. As it is, there is a misdemeanor conviction. Misdemeanants have returned to work. This arbitrator is not saying that all persons committing misdemeanors must be returned to work but, in this case, there is not a sufficient connection to the job. Grievant is not an on the street law enforcement officer whose conviction could affect her public acceptance or ability to effectively do her job. Further, there was no evidence

whatsoever of any similar on the job misconduct to which this incident can be tied.

The arbitrator believes that the proper remedy is to reinstate Grievant but without back pay. The arbitrator realizes that such a result will please no one. Looking at future contract enforcement, however, this result maintains the Union's position that just cause does not always allow discharge for off duty misconduct unless a strong connection to the job is shown, especially in the case of a misdemeanor. This result also recognizes the Employer's position that it could harm the Patrol's effectiveness and reputation to have convicted felons working in any capacity because the Highway Patrol is a law enforcement organization. As to the propriety of back pay, Grievant was convicted and found at hearing to have committed the acts of which she was charged at the felony level. The Employer's original investigation was not flawed. That it took two years for her criminal case involving felony charges to be resolved at the misdemeanor level is the fault of neither the Union nor the Employer. The arbitration was delayed to protect the criminal defendant's rights. Once the conviction was entered, the parties quickly took the case to arbitration. As noted above, had the Employer been found to be in error in its belief that Grievant had committed the offenses with which she was charged, the arbitrator would have no difficulty in awarding back pay. Here, a conviction was entered, however, and the charges established. Only the

reduction of charges to a misdemeanor level, which did not occur until 1995, removed the barrier to reinstatement in the arbitrator's view.

VI. AWARD

The grievance is sustained in part. The Employer is directed to reinstate Grievant without loss of seniority but without back pay.

May 25, 1995

Douglas E. Ray
Arbitrator