#1170

THE STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

In The Matter of the Arbitration Between:

The State of Ohio, Department of Public Safety, Division of State Highway Patrol

-and-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: James R. Gilmore
Case No: 15-03-95-11-0104-01-07

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: November 7, 1996

Appearances

For the Employer	
Connie Barber	Witness
James C. Hartsell	Witness
Larry Banaszak	Lieutenant
Carol Mason-Scott	Observer
Robert Young	Sergeant
Allan Roberts	Witness
Colleen Wise	Office of Collective Bargaining
Richard G. Corbin	Advocate
For the Union	
James R. Gilmore	Grievant
Mark Irmscher	Witness
Rebecca Gilmore	Witness
Sheree D. Weaver	Witness

Dolly Radel	Supervisor
Louella Jeter	Chapter President & Chief Steward
William Anthony	Second Chair
Ronald H. Snyder	Advocate

Introduction

This is a proceeding under Article 25, entitled Grievance Procedure, Section 25.03 - Arbitration Procedures, Section 25.04 - Arbitration/Mediation Panels of the Agreement between The State of Ohio, Ohio Department of Public Safety, Division of State Highway Patrol, hereinafter referred to as the "Employer," and Ohio Civil Service Employees Association, AFSCME, Local 11, hereinafter referred to as the "Union," for the period March 1, 1994-February 28, 1997. The arbitration hearing was held on September 4, 1996. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

Issue

> Was James R. Gilmore, the Grievant, removed for just cause? If not, what shall the remedy be?

Pertinent Contract Provisions

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from a separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

24.02- Progressive Discipline

The employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

A. One of more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
D. one or more days(s) suspension(s);
E. termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an performance evaluation report without indicating the fact that disciplinary action was taken. Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article.

An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

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(Joint Exhibit 1, Pgs. 68-69)

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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.

An employee has the right to a meeting prior to the imposition of a suspension, a fine or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make such a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct

the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

24.05-Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, 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. At 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.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted except

that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

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(Joint Exhibit 1, Pgs. 70-72)

Case History

James R. Gilmore, the Grievant, was employed as a Driver's License Examiner 2 at the time of his removal in November of 1995. He began his employment with the State Highway Patrol in July of 1985. As a Driver's License Examiner 2, he performed the following duties: set-up traveling testing sites at various businesses; monitor the performance of third party testers; and enter computer data documenting tests given on a daily, weekly and monthly basis.

The Grievant's recent job assignments involved a number of locations. On or about December of 1989, the Commercial Driving Testing team (CDL) was established at Obetz. The Grievant and up to ten (10) other individuals were involved in administering tests in anticipation of an April 1, 1992 cut-off date. The Grievant and Connie Barber, the Claimant, worked together during this time period. The number of full-time Commercial License Examiners was cut to three (3) individuals on or about June of 1992. Barber, the Grievant and Reggie Harris were retained in this capacity, with other former co-workers filling in on an as-needed basis. At some point during July of 1995, the operation moved to

Scioto Downs. When the move took place, Barber, the Grievant and Allen Roberts, who replaced Harris, worked out of a trailer at the new location. Again, co-workers from the other previously specified locations filled in for attendance-related coverage.

The record clearly indicates that all of the previously mentioned facilities were loosely supervised with contact taking place on an infrequent basis. The record, moreover, evinces that a great deal of sexual banter was engaged in by co-workers, especially during the Obetz phase of the certification process.

On September 28, 1995, Captain K. L. Morckel was visiting the CDL facility which is located at the Scioto Downs parking lot. During the visit, Barber noted the Grievant was directing sexually harassing behavior towards her.

An investigation was immediately initiated by Sergeant K. L. Henderson. Based on this investigation, a predisciplinary meeting was conducted on Tuesday, November 14, 1995. The meeting officer concluded just cause existed for discipline.

On or about November 9, 1995, the Grievant and Roberts were alone in the trailer at approximately 8:30 a.m. Roberts testified he overhead the Grievant tell someone "the post office scenario is not out of the question." After the conversation, the Grievant purportedly walked over to the window and while looking out the window stated: "I could go home and get my AK-47." Subsequent to this statement, a Sheriff's

cruiser pulled into the parking lot. The Grievant purportedly uttered "I could go out there and borrow his."

Roberts claimed these statements caused him significant concern so he advised his supervisor, G.E. Erwin, of their occurrence. A criminal investigation was eventually initiated by Trooper R. E. Nichols on November 21, 1995.

On November 14, 1995, Charles D. Shipley, Director, issued a removal order. It contained the following relevant particulars:

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> Please be advised that for disciplinary reasons, you are being removed from your position as a Driver's License Examiner 2, Department of Public Safety Division of the State Highway Patrol, effective at the close of business on November 14, 1995.
>
> This removal is the result of your violation of the Department of Public Safety Work Rule Section (A)(6), Failure of Good Behavior, to wit: it is charged that over a period of years through September, 1995, you sexually harassed a female co-worker.

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(Joint Exhibit 3)

On November 15, 1995, the Grievant formally contested his removal. The Statement of Facts contained the following information:

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> Termination for alleged violation of Adm. Rules was too harsh as other people by their own admission were involved.

> Ms. Barber gave no indication that any conduct by myself or anyone else was offensive.
>
> ***

(Joint Exhibit 2)

It should be noted the Union and the Grievant were advised that the threat-related misconduct would be proffered at the forthcoming arbitration hearing. This expectation was tendered at the third step of the grievance procedure held on December 12, 1995 (Joint Exhibit 2).

With respect to the collateral criminal proceeding, the Grievant was charged on January 25, 1995, with Aggravated Menacing, a 1st Degree Misdemeanor. As part of a plea bargain, the charge was reduced or amended to Disorderly Conduct, a Minor Misdemeanor. There is some confusion, however, whether the Grievant entered a plea of "no contest" as opposed to a plea of "guilty." (Union Exhibit 1, Employer Exhibit 3).

The parties were unable to resolve the disputed matter during subsequent portions of the grievance procedure. Neither party raised substantive nor procedural arbitrability concerns. As such, the matter is properly before the Arbitrator.

The Merits of the Case

The Employer's Position

It is the position of the Employer that it had just cause to remove the Grievant for violating work rules dealing with sexual harassment in the workplace. His actions, moreover, produced a hostile work environment

constituting hostile environment sexual harassment. Barber, the victim, never welcomed his behavior which was readily supported by the record. The Employer strongly urged the inclusion of after-acquired evidence into the record. This evidence should be considered by the Arbitrator in determining the specific remedy.

The Employer charged that the Grievant was guilty of a pattern of blatant and offensive sexual harassment carried out over a period of three (3) years. Any reasonable person reviewing the record would conclude the Grievant's behavior or conduct created a hostile working environment for Barber. He engaged in verbal and physical conduct which one could view as abusive. The conduct, moreover, was frequent and took place over a considerable period of time.

This conclusion surrounding the Grievant's conduct was so blatantly obvious that the Grievant, himself, helped corroborate the Employer's version. He admitted that his conduct could be viewed as sexually harassing, unless they were welcomed and encouraged by Barber.

The record fails to support the Union's welcomed behavior hypothesis. Barber's conduct cannot be viewed as creating an atmosphere of welcomeness. She never acted in a sexually aggressive manner, used sexually oriented language, or solicited the sexual conduct. Even if Barber engaged in some sort of sexual banter, her conduct was

never directed at the Grievant. She never acted in any way which could be viewed as reciprocating or encouraging the Grievant's behavior.

Three (3) co-workers offered evidence which conflicted with the Union's theory. Allen Roberts, Jim Hartsell and Mark Irmsher described some of the Grievant's conduct as one of a jealous suitor. An individual so obsessed with Barber that he would become sullen and angry when he felt that Barber paid too much attention to other male employees or customers. They intentionally modified their interactive style to avoid, as much as possible, the uncooperative behavior that would follow once the Grievant held such an impression. Otherwise, the Grievant would fail to interact or even talk to his co-workers for a considerable period of time.

Barber's failure to aggressively react to the Grievant's harassing overtures does not establish a legal basis that she created a welcome environment. She engaged in other actions in an attempt to thwart his conduct. Barber ignored his behavior or attempted to "laugh it off." On several occasions, moreover, she told him to "knock it off" and merely walked away hoping these actions would extinguish his conduct. Both Roberts and Barber stated they had to get along in a highly "controlled" environment, believing they could "handle" the situation themselves. Barber maintained the Grievant's mood swings and unusual conduct were primarily directed toward her and became unbearable. This situation caused her to discuss the matter with her supervisor.

Clearly, the time period she is complaining about began in 1992 and continued through her discussion with Morckel in late September, 1995. As such, much of the evidence and testimony utilized by the Union to rebut the complaint was based on observations prior to the time frame in question. Their witnesses, more specifically, rarely worked with the CDL team of Roberts, Barber and the Grievant after early 1992.

The Employer argued that this Arbitrator should consider certain after-acquired evidence in fashioning a remedy. This evidence deals with the verbal threats uttered on November 9, 1995 against co-workers. These threats took place on two (2) occasions, and dealt with the post office scenario. The first time took place when he referred to the scenario in the presence of Roberts, while the second expression took place later in the afternoon in the presence of Polly Radel, Supervisor, and Louella Jeter, Local President and Chief Steward. During the initial incident, the Grievant also made reference to obtaining an AK-47 assault rifle or borrowing a Deputy Sheriff's weapon.

These threatening statements were made with a specific motive in mind. The Grievant knew of the pending sexual harassment charge and the various participants who provided evidence during the investigatory stage. His remarks, in Roberts' presence, were initiated for the sole purpose of intimidating a potential witness by threatening his life.

The timing of these threats clearly minimize the Grievant's attempt to clothe the statements as jokes meant to reduce his stress level.

Roberts testified these utterances took place after an extended period of silence following the Grievant's knowledge of a pending investigation. Based on Roberts' long-term experience with the Grievant's mood swings, especially his unwillingness to talk when angry, his remarks were viewed as purposeful and non-flippant. Also, the remarks carried a great deal of thoughtful force considering this was his last day of scheduled work prior to a scheduled pre-disciplinary meeting.

Roberts' recollection and assessment need to be given significant weight when one considers the varying motives held by Roberts and the Grievant. Roberts had nothing to gain by raising these accusations, while the Grievant had his livelihood on the line. The Grievant's version is also discredited as a consequence of a statement he made to Roberts which raises serious questions regarding his general credibility. Roberts testified that during the pendency of the investigation the Grievant noted "I'll do anything I have to do to get my cushy job back." In the Employer's opinion, the Grievant lied throughout the investigation and arbitration hearing in an attempt to cover and misrepresent his obviously egregious behavior.

Probably the most glaring evidence regarding the Grievant's propensity to stretch the truth involved the sequencing of the threats and their content. The record clearly indicated he expressed the threats on two (2) occasions on November 9, 1995. Roberts testified he uttered veiled threats earlier in the morning regarding the post office scenario, the

AK-47 assault rifle and the Sheriff's gun. Radel and Jeter, moreover, reported the Grievant made the post office scenario remark in Radel's presence, in the trailer, while he was on the phone with Jeter. The Grievant also remarked "I'm just joking." He never discussed the AK-47 assault rifle or the Sheriff's gun during the discussion with Radel and Jeter which took place at approximately 2:00 p.m.. Roberts, purportedly, was not in the trailer during this discussion.

Roberts' version appeared far more credible that the one offered by the Grievant. Most damaging to his recollection is the testimony provided by Radel. She had a meeting with Erwin one hour after the discussion with the Grievant. And yet, he already knew about the threat. She, herself, wondered "how could he already know about the threat if Gilmore had not yet said it at some other time?" The answer to this question is obvious and clearly supports Roberts' version.

This review of the after-acquired incident dealing with the threatening behavior, clearly justifies the application of guidelines contained in the Supreme Court's McKennon v. Nashville Banner[1] decision. The wrongdoing in question was clearly so severe that the Grievant would have been terminated on these grounds alone had the Employer known of it at the time of the discharge. As such, the evidence should be allowed and reviewed in conjunction with any remedy considered in this case.

The due process arguments proposed by the Employer regarding the after-acquired incident are not supported by the record. The Employer did not have all the information available to charge the Grievant prior to his November 13, 1995 pre-disciplinary meeting. Given the nature of the threats, the concern for workplace safety and the fact the Grievant was already removed from the workplace, the Employer maintained it acted quite properly.

The Union's surprise allegation was also misplaced. The Union was forewarned on December 12, 1995, during a Step 3 grievance meeting that after-acquired evidence would be submitted. Prior to and after the Union's request for documents on July 19, 1996, the Employer provided copies of the criminal investigation and related statements. The parties, moreover, were able to cure any potential due process defect as a consequence of their ability to present and cross-examine witnesses at arbitration.

The Union's Position

The Union opined that the Grievant was not removed for just cause. Several due process defects tainted the propriety of the removal decision. The Grievant, moreover, did not create a hostile work environment nor was he aware his conduct was unwelcome or unwarranted. The Union argued an alleged "threat" made by the Grievant

[1] McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879; 130 L.Ed. 2d. 852; 63 U.S. L.W. (1995).

was not admissible, and, if it was, the alleged "threat" does not justify the discipline imposed.

The Union noted Section 24.04 was violated because of defects dealing with the specificity and timeliness of the charges. Neither the pre-disciplinary notice nor the removal notice (Joint Exhibit 3) provided the Grievant with sufficient specificity to properly respond to the allegations. These notices failed to specify the duration of the misconduct and when it started, the nature of the misconduct, whether Barber tired of the activity and whether Barber ever told the Grievant to cease and desist.

The lack of specificity regarding the misconduct in question is especially critical considering the Employer acknowledged other employee engaged in sexual banter. As such, if the Grievant "crossed the line", which conduct was not condoned by the Employer?

Section 24.02 was violated as well because the disciplinary action was not initiated as soon as reasonably possible. Based on the charges in question, and the serious nature of the resultant consequence, the Employer did or should have known about them if they took place over a period of years.

The Union viewed these various defects as extremely significant. As such they warranted modification of the imposed discipline.

The Grievant's conduct did not create a hostile environment because it was not unique to the environment in question and was welcome. The record clearly established that the work environment was

highly sexually oriented. The environment, however, was not solely due to the Grievant's conduct. Also, no one ever told the Grievant nor any other co-worker that the conduct was unwelcome. The Administrative Investigation Report (Joint Exhibit 5) clearly established this conclusion. It appears that all employees viewed the banter as "normal", and it was not viewed by participants as sexually harassing.

Not only did the Grievant and other employees create the questionable work environment, but so did Barber. Barber maintained she did not participate in sexual banter. This assertion, however, is contradicted by a number of sources including Barber's own testimony. Several witnesses testified Barber engaged in sexual banter and frequently initiated the banter. Barber, herself, admitted she would occasionally say she "had to give it up last night" and that other co-workers would make similar comments. She also stated she discussed her husband's vasectomy and his infected testicles with co-workers. Barber conversed about the testicles of a bull or sheep she had seen at the State Fair, and sometimes remarked that customers had "nice butts."

Especially concerning were comments made by Barber to co-workers about the "nipometer." Even though she was reluctant to admit to this comment, the Grievant, Hartsell and Irmsher testified she would use this phrase when standing outside in cold weather.

Barber's comments not only undermine the theory that the Grievant's conduct was unwelcome, but her actions minimize her

accusations. Up to the time she raised these harassment allegations she continued to take smoke breaks with the Grievant outside of the office. These breaks were often taken alone and initiated at Barber's request. A reasonable person would not have engaged in this conduct if she truly felt harassed.

The Employer's management or supervisory team played a critical role in creating the questionable work environment. Employees at the CDL facilities testified they rarely saw their supervisors and were mainly unsupervised. Their work schedules had substantial periods of down time which resulted in considerable social opportunities for sexual banter. Even though they received some sexual harassment training, supervisors never spoke to them about this topic.

The record clearly indicated the Grievant did not notice his conduct was unwelcome or unwanted. Over a period of approximately three (3) years, Barber testified she told the Grievant to "knock if off" two or three times but could not remember the conduct in question. Barber, if one believes her claim, never rebuked the Grievant in an aggressive manner; never told him about potential negative ramifications; and never informed him that his actions made her feel uncomfortable.

Based on the training Barber received, she should have known how to respond and how to report the harassing conduct. Prior experience in a previous sexual harassment case, where she was the

victim and the harasser was disciplined, provided sufficient awareness of the proper reporting protocols.

What is additionally troubling are the observations made by fellow employees versus those held by Barber. Only one employee witness got the impression that Barber was offended or made uncomfortable by the Grievant's conduct. They, moreover, maintained they never heard Barber tell the Grievant to stop his conduct. Based on these recollections, the Grievant could have never known that his conduct was offensive.

A review of the prior propositions clearly established the Employer violated Sections 24.04 and 24.05. The Employer never followed the principles of progressive discipline, and the disciplinary measure imposed was not commensurate with the offense and was used solely for punishment.

Some lesser form of discipline is appropriate based on the Grievant's conduct after he became aware of a potential disciplinary action. The Grievant's behavior changed immediately; he did not make a single sexual gesture or comment toward Barber. His behavior changed even through the disciplinary outcome appeared uncertain.

Any potential discipline should further be mitigated by the Grievant's prior disciplinary record. His record indicated no active prior discipline. Also, the Grievant never received any prior discipline or counseling for sexual harassment. As such, nothing in the record would

indicate a corrective disciplinary action might not have led to positive results.

Much of the Employer's case in attempting to prove the matters asserted was based on erroneous conclusions contained in Henderson's Report of Investigation (Joint Exhibit 5). Nothing in the record supports a number of his conclusions. Why some comments crossed the line and others did not was not properly answered. The allegation that the Grievant's activities escalated was not supported by Hartsell's statement nor Barber's testimony. Hartsell, moreover, was the sole Examiner that said he witnessed Barber stating the Grievant should "knock it off". But even Hartsell's observations should be minimized since he left Obetz in 1992; obviously this observation did not take place over the past three (3) years. Unlike the report's conclusion, many of the Grievant's allegations were substantiated by other witnesses.

The Union argued that evidence of an alleged "threat" made by the Grievant on November 9, 1995, is not admissible. This conclusion is based on the premise that the issue in dispute is whether the Grievant sexually harassed Barber. The inclusion of this allegation would tend to prejudice the outcome of the present proceeding.

Article 25.04 provides the Employer with discretion in cases where criminal investigation may occur. It may delay the pre-discipline meeting until after the disposition of the criminal charges. The Employer decided not to exercise this option. And yet, the Employer knew of the alleged

threat on November 9, 1995, chose to do nothing about it, and proceeded to remove the Grievant for sexual harassment on November 14, 1995.

Security arguments raised by the Employer appear to be unpersuasive. The Employer knew of the alleged threat on November 9, 1996, and yet, allowed the Grievant to continue to work from November 9 until November 14, 1995. Concern for security was so lax that the formal investigation of this incident did not begin until November 21, 1995, and the Grievant was not charged until January of 1996.

The Supreme Court case submitted by the Employer does not dictate the admission of the after-acquired evidence. The case in question can be readily distinguished from the matter in front of the Arbitrator. Here, the Employer did not discover after-acquired evidence. Rather, the threat-related evidence was acquired prior to the Grievant's removal, but the Employer refused to act upon the allegation. The Court's reference to the "gravity" of the charge requiring immediate discharge is not applicable in this instance. Again, the Employer had the information and refused to act on it.

Even if the after-acquired evidence is allowed for the purpose of fashioning a remedy, the evidence still does not justify the imposed discipline. Roberts' testimony regarding the matter is not credible. No reasonable person would have believed that the Grievant was going to borrow the Sheriff's gun. Based on several contradictions, Roberts had to

have heard the Grievant noting he was "just joking" while he overheard the conversation with Jeter.

The disposition of the collateral criminal case diminishes the "serious matter" allegation proposed by the Employer. The charge was amended to a Minor Misdemeanor, punishable by a maximum of $100 fine and no jail time.

As previously mentioned, the Employer's handling of the threat allegation indicated it did not perceive the incident as a real or serious threat. The timing of the investigation, including all pertinent investigatory interviews, and the submission of charges to the prosecuting attorney indicate a serious threat was not contemplated.

The Arbitrator's Opinion and Award

Some procedural aspects of the case need to be dealt with prior to a ruling on the merits. These matters deal with the potential application of arbitral and McKennon v. Nashville Banner[2] guidelines, and some contractually based due process concerns raised by the Employer.

It is axiomatic that in a discharge case, arbitrators expect that the charge for which an employer offers proof will be the charge for which discipline was originally imposed.[3] As such, the addition of post-discharge complaints are typically disallowed by most arbitrators.[4]

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[2] Supra, note 1.
[3] Golden Grain Macaroni Co., 86 LA 1260 (Armstrong, 1986).
[4] Yellow Cab Co. of California, 44 LA 175 (Jones, 1965); U.S. Steel Corp., 55 LA 677 (Wolff, 1970).

There are a few exceptions to the general rule. New complaints have been allowed to be added to the original cause for discharge when: due process issues have been substantially cured because the employer has raised the new matter in advance of the arbitration hearing to avoid or minimize surprise allegations; or the parties as a matter of custom and practice have previously taken post-discharge complaints into account.[5] If complaints, or charges, of this sort are accepted they are usually applied when considering appropriate remedy specifications.[6]

Post-discharge evidence cases deal with situations where an employer produces evidence acquired after an employee has already been removed. These cases follow two different scenarios: attempts to introduce evidence that supports the charge for which the grievant was discharged and evidence that relates to a different charge. Clearly, the latter category of cases is normally excluded unless an arbitrator decides to apply one of the previously described exceptions.[7] Later discovered evidence falling in the former category will be sometimes admitted depending on: whether the arbitrator is acting as if he is a receiver or trier of fact; whether admitting the evidence would raise equity concerns for either party; the character of the evidence; whether the evidence is

[5] Safeway Stores, Inc., 75 LA 430 (Winograd, 1980); Lyon, Inc., 24 La 353 (Alexander, 1955).
[6] Gardner Denver Co., 51 LA 1019 (Ray, 1960); Rotor Tool Co., 49 LA 210 (Williams, 1967).
[7] Vermont Department of Social Welfare, 86 LA 324 (Cheney, 1986); San Gamo Electric Co., 44 LA 593 (Sembower, 1965).

adverse or favors the Grievant; and whether due diligence by the party seeking to submit would have resulted in disclosure prior to removal.[8]

In McKenna v. Nashville Banner[9], the Supreme Court ruled that an employee discharged in violation of the ADEA is not barred from all relief when, after her discharge (Arbitrator's Emphasis), her employer discovered evidence of wrongdoing that, in any event, would have led to her termination on lawful and legitimate grounds had the employer known of it. The Court did, however, note that after-acquired evidence must be taken into account in determining the specific remedy.

From the evidence and testimony introduced at the hearing, and a complete impartial review of the Agreement, case law and arbitral principles, it is my opinion that the present set of circumstances do not fall within any principles previously specified and can be readily distinguished. This Arbitrator does not in any way minimize the threat allegations and its impact on workplace violence. These are legitimate and worthy concerns. And yet, I am disallowing this allegation for specific remedy purposes, and as a separate and distinct cause of action. Although the two charges are linked in terms of circumstance and involve some of the same protagonists, the charges are not identical and the evidence fails to support the specific cause of action specified by the Employer as the reason for removal.

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[8] M.F. Hill, Jr. and A. V. Sinicropi, Evidence in Arbitration 305-333 (2d Ed. 1987).
[9] Supra, Note 1.

This particular matter, moreover, can be distinguished from the previously referenced cases in terms of fact pattern differences and specific contract language negotiated by the parties. The threat-related claim or evidence did not deal with post-discharge activity. The Employer, or its agents, knew on November 9, 1996, that an alleged threat had taken place. As such, knowledge of this event took place during the investigation stage of the harassment charge and prior to the Grievant's formal removal.

This particular disputed matter can also be readily distinguished based on language contained in the Agreement (Joint Exhibit 1). Section 24.04 provides the Employer with an opportunity to delay the pre-discipline meeting "until after disposition of criminal charges" where a criminal investigation may occur. This discretion was obviously negotiated in an attempt to "cure" any potential due process violations similar to one presently under review.

Section 24.02 was not violated by the Employer. Certain types of socially disapproved misconduct are viewed as malum in se rather than malum prohibitum conduct. Corrective discipline is intended to be applied to the latter, as opposed to the former category of misconduct, because of the less serious nature of the infraction and the possibility of a corrective intervention. Most arbitrators consider sexual harassment charges so onerous and detrimental to a productive work environment that they typically place infractions of this sort in the malum in se category. As

such, progressive discipline within the circumstances surrounding this case is not viewed as a viable option by this Arbitrator.

Another Section 24.02 violation was raised dealing with the tardy initiation of the disciplinary action. Again, the record fails to support this proposed violation. One cannot assume that the Employer should have initiated disciplinary action more quickly just because the alleged misconduct was significant and took place over a substantial period of time. The Employer acted expeditiously once Barber raised her concerns. Nothing in the record, moreover, indicates the Employer overlooked, or was aware of, the alleged sexually harassing environment in its various CDL facilities. As such, the record clearly fails to support any capricious or arbitrary dealings regarding the disputed affair.

The notice concerning the pending charge did not violate Section 24.04. It was sufficiently explicit in terms of the work rule violated and gave some indication that the offenses in question were not isolated but extended over a period of years. As such, the reason for removal was articulated. The degree of specificity required by the Union's interpretation was never contemplated by the parties.

From the evidence and testimony introduced at the hearing it is my opinion that the Employer had just cause to remove the Grievant for sexually harassing Barber. Actions and conduct specifically directed at Barber, and no other employee, by the Grievant, contributed to the creation of a hostile work environment. The Grievant's overtures and

conduct were unwelcomed by Barber. Her own conduct did not invite nor sanction the Grievant's conduct.

Several United States Supreme Court decisions provide guidance concerning what is actionable as abusive work environment harassment. In Meritor Savings Bank[10], the Court established that Title VII is violated when the workplace is permeated with discriminating behavior that is significantly severe or persuasive to create a discriminatorily hostile or abusive work environment. The specified standard requires that a reasonable person would find the workplace hostile or abusive, as well as the victim's subjective perception that the workplace environment is abusive or hostile.

A subsequent Supreme Court case, Harris v. Forklift Systems,[11] helped articulate the standard to be used when determining whether an environment is hostile or abusive. A determination of this sort requires looking at all the circumstances. Some of the factors specified by the Court include in pertinent part:

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> These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while

[10] Meritor Savings Bank v. Vinson, 477 U.S. 57; 106 S.Ct. 2399 (1986).
[11] Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

> psychological harm, like any other relevant factor, may be taken into account, no single factor is required.[12]
>
> ***

Several recent lower court decisions have dealt with the issue of what constitutes welcomed sexual advances. The fact a complainant used crude language and engaged in sexually-related behavior at the workplace does not establish welcomeness.[13] Rather, whether the particular conduct was welcomed seems to be the focal point of recent decisions.[14]

These various principles are readily applied to the present dispute, and quite adequately support this Arbitrator's previously articulated conclusions. At the hearing, during cross-examination, the Grievant admitted to the following conduct:

> E: In your testimony you admitted that in fact you did simulate cupping Ms. Barber's breast on at least 1 or 2 occasions, is that true?
> W: Yes.
> E: You also admit at one point having a golf club between your legs and indicating that that was your penis?
> W: Yes.
> E: You also admit that you put your head on her shoulder, you say, one time?
> W: Yes.
> E: You admit that you blew on her neck because it gave her goose bumps?
> W: Yes.
> E: How many times?
> W: 2 or 4, 1 or 2. . .

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[12] Id. at 371.
[13] Carr v. Allison Gas Turbine Division, General Motors Corp., 32 F.3d 1007 (7th Cir. 1994); Galloway v. General Motors, 78 F.3d 1164 (7th Cir. 1996).
[14] Hatley v. Stage Kraft Mfg. Co., 859 F.Supp. 1257 (D. Neb. 1994); Kimzey v. Wal-Mart Stores, Inc., 907 F.Supp. 1306 (W.D. Mo. 1995).

E: You admit that in your mind a "hoot" was a blow job?
W: Not only in my but a couple. . .
E: . . .that's what it was, and you admit there was some discussion about blow jobs in the workplace?
W: Yes.
E: Some of which was initiated by you in regard to a card game?
W: I'm unclear.
E: Did you ever tell Connie Barber that she needed to pay up on the blow job?
W: I believe I said "she needed to honor her gambling debts."
E: Insinuating what?
W: Basically, what you were saying but in a different way.
E: And it's also your testimony here today that you recognize that these behaviors are in fact indicative of sexual harassment in a different setting?
W: No, oh, in a different setting. Yes, possibly.
E: And its is basically your testimony that all of this behavior was welcome from Connie Barber and therefore it was not sexual harassment?
W: If you're laughing and joking. . .
E: Just answer your question, yes or no?
W: Repeat your question.
U: Objection, perhaps the answer is not yes.
A: No, he just asked him if he felt these activities were not of a sexual harassing character because they were welcome, so he- - -
E: I can rephrase the question.
A: Why don't you do that.
E: We've gone through this litany of behaviors and you admit that at least once or twice you did them and in fact directed them at Connie Barber?
W: Yes.
E: And you've also testified, I believe, that it was your understanding of sexual harassment that in a different environment where it was unwelcome, that this behavior would in fact be, indicative of sexual harassment?
W: Where it was unwelcome?
E: Yes sir.
W: Yes.

Several hostile environment factors are readily supported by these admissions and other portions of the record. The litany of conduct

admitted to by the Grievant indicates, to some degree, that the conduct was quite frequent. Other witnesses and Barber testified that much of this behavior continued over a number of years. This conduct, in my view, exceeds the threshold of a mere offensive utterance. Rather, the Grievant's conduct is severe and humiliating. Any reasonable person evaluating this conduct would readily conclude that it adequately, and sufficiently, characterized the work environment as hostile.

In addition to this conduct, other conduct establishes that Barbers' work performance was interfered with as a consequence of the Grievant's conduct. Barber, Roberts and others testified that the Grievant acted as a jealous lover when he perceived Barber as providing customers and other co-workers with too much attention. He became sullen, quite and generally uncooperative. This caused Barber to modify her interactive style with her co-workers in an attempt to minimize his possessive behavior.

Barber, moreover, engaged in conduct which attempted to discourage the Grievant's conduct. She told him to "knock it off" a number of times, which was supported by testimony provided by a co-worker. For the most part, however, Barber engaged in passive non-aggressive attempts to show the Grievant that his conduct was unwelcome. Barber normally ignored him or walked away. Nothing in the record suggests that Barber's conduct in response to the Grievant's behavior in anyway suggested an acquiescence or acceptance of his

conduct. One can readily ascertain why some witnesses noted that Barber did not appear to be bothered by the Grievant's conduct. Yet, the legal standards do not require an aggressive response to sexually harassing conduct. Passive responses, in by view, fulfill the legal requirements. Especially when the Grievant, himself, never testified that Barber condoned, nor ever appeared to appreciate, his conduct. Never once during the entire hearing did he allege that Barber somehow seduced him to believe that his behavior was welcome.

Barber, the victim, also adequately supported her subjective perception that the environment was abusive. Often times she did not know how to react fearing the Grievant's wrath if she raised an outward obvious concern about his misconduct. She did not, however, view this conduct as complementary, and was often embarrassed when it occurred in front of co-workers.

AWARD

The grievance is denied

November 12, 1996

Dr. David M. Pincus
Arbitrator