Frankland #4

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between:

Union

-and- Re: Employee 1/Discharge

Employer

OPINION AND AWARD

The undersigned, Kenneth P. Frankland, was mutually selected by the parties under the auspices of the American Arbitration Association to render an Opinion and Award in its case number XX XXX . Hearing was held at Union offices in City A, Michigan, on February 20, 2007. The parties presented witness testimony, introduced exhibits, and filed briefs with AAA on March 13, 2007 and thereafter the record was closed on March 30, 2007

ISSUE:

Should the Grievance be dismissed for failure to file the grievance within 15 week days of notice of discharge as required by Article 8, Section A, 4 of the contract?

PERTINENT CONTRACT PROVISIONS:

Article 8, Section A, 4

STATEMENT OF PROCEEDINGS

After a grievance was filed in this matter on December 4, 2006, the Employer, on January 25, 2007 requested that the arbitrator bifurcate the hearing that was scheduled on February 20, 2007 and limit the hearing to the issue of the timeliness of the grievance. The Union concurred in that request and filed a document entitled," Response of Union to the Employer's Motion to Bifurcate the Arbitration Hearing and Union's Request That the Arbitrator Rule That the Grievance Is Timely. At the hearing on February 20, 2007, the Employer filed a written opening statement and the Union relied upon the previously filed response, as well as oral argument. Additionally, the Employer submitted the testimony of Person 1, a steward with Union. Six joint exhibits and one Union exhibit were introduced into the record. At the conclusion of the hearing, the parties were afforded the opportunity to submit written briefs and did so and those were received by the arbitrator through the auspices of AAA and the hearing declared closed as of March 30, 2007 and this Opinion ensues.

STATEMENT OF FACTS

Employee 1 was an employee of the Employer, as a conservation officer. On October 16, 2006 the Grievant attended a disciplinary conference, along with his Union representative Person 1. The result was Grievant was discharged, effective October 16, 2006 at 5 p.m. (J.-4). One or more grievances were filed by the Union and received by the Employer on December 4, 2006 (J-2, 3). The Employer contends that Article 8, Section A. paragraph 4 states that all Grievances shall be presented promptly and no later than fifteen (15) weekdays from the date the Grievant new or could reasonably have known of the facts or the occurrence of the events giving rise to

the alleged grievance. In this case, the Employer asserts since the discharge occurred on October 16, 2006 and the Grievance was received on the 31st weekday after October 16, 2006 excluding four November holidays it was untimely and the Grievance should be dismissed.

The Union has responded that an employee may not be required to file a Grievance challenging a termination while the employee is subject to a criminal investigation surrounding the facts that are the same or similar to those related to the investigation. This position is based upon a Michigan Supreme Court decision that holds the time in which an employee has to process a grievance is tolled until such time as the criminal investigation is completed. See, **Michigan State Employees Association v Civil Service Commission, 406 Mich 313 (1979).** This case is also often referred to as the "Gilliard", case, as he was the employee in question**.**

The factual background of Employee 1's circumstance is obtained from the Union brief, information obtained at the hearing as well as exhibits attached to the Union brief. In the summer of 2006, Employee 1's wife was prosecuted by the County A Prosecutor's office for embezzlement of a substantial sum of money from her employer. She was ultimately convicted in August 2006 of that offense. Employee 1 apparently took $25,000 from a joint account in order to pay for the services of an attorney for his wife. Prior to doing so, he was advised by local law enforcement authorities that those funds were the product of the embezzlement of his wife. When this information was presented to the County A Prosecutor, he ultimately declined to present charges against Employee 1. However, the prosecutor regularly worked with Employee 1 in his capacity as a conservation officer and being concerned that he was "too close" to the situation and that his objectivity might be questioned, he referred the matter to the County B Prosecutor for another perspective and possible criminal action. The County A Prosecutor's

letter dated October 5, 2006 was attached as Exhibit A to the Union brief. The County B Prosecutor has yet to make a determination whether any charges will be filed against Employee 1 (Union brief, Ex. B.)

Person 1, the Union steward who attended the disciplinary conference on October 16, 2006 was called as a Employer witness. He testified that after the disciplinary conference and when the Grievant received the termination notice that day, he prepared a Grievance within a day or so. He faxed the Grievance to Union in City A but did not send anything to the Employer. He called Union and they verified the fax was received. He came to City A on November 18 to discuss the matter with Union. Union filed the Grievance on December 4, 2006.

POSITIONS OF THE PARTIES

EMPLOYER

This Grievance filed on December 4, 2006 is untimely, not being presented within 15 weekdays of the Grievant's termination notice, in violation of Article 8, Section A paragraph 4 of the contract. Although some extension of the time line may have been granted if requested, no request was made. The contract is clear, and lists no exceptions for late filing of a Grievance. Filing on the 31st weekday after termination is grossly untimely. As to the *Gilliard* case, it was decided before collective bargaining began in Michigan and was under Civil Service Rules. The employee had no exclusive representative and had to make the filing; here, the Union had to file and did not on time. In *Gilliard* the Grievant was told at his discharge that the matter was being referred for criminal prosecution; in this case, no such information was presented to the Grievant; he is being discharged for violation of Employer rules not a criminal offense. It is

unreasonable to ask the Employer to wait indefinitely as prosecution decision is out of its control and may never occur.

Assuming *Gilliard* is applicable, the Union's failure to file a timely Grievance is not based upon *Gilliard*. If *Gilliard* is controlling, the Union has two choices, one to file within the contractual time frame and request the hearing be held in abeyance pending disposition of criminal charges or two, waiting to file a Grievance until after the final disposition of criminal charges. The Union did neither in this case which leads to the conclusion that *Gilliard* was simply an afterthought.

UNION POSITION

An employee may not be required to file a Grievance challenging his wrongful termination when the employee is subject to a criminal investigation surrounding facts that are the same as those related to his termination. The Michigan Supreme Court in *Gilliard* v *Michigan Civil Service Commission*, 406 Mich 313, (1979) ruled that the time in which the employee has to process a grievance is tolled until such time as the criminal investigation is completed. This decision has not been overruled and is the controlling law in Michigan.

Civil service employees have a right to continued employment absent just cause for dismissal and this is a property interest protected by federal and state constitutional due process clauses.

The Employer's attempt to distinguish *Gilliard* is uncompelling. It is irrelevant that Mr. Gilliard was discharged at a time when there was no collective bargaining agreement. There was no obligation for the Union to include language in the collective bargaining agreement that

recognizes the *Gilliard* holdings since it is a matter of constitutional rights being protected and a Union does not have an obligation to pursue for its members what the member possess independently of the collective bargaining agreement.

It does not matter that the Union did not file a Grievance within the 15 days because the Grievant's right was personal to him and was not affected in any way by any actions taken by the Union.

DISCUSSION

Resolution of the issue in this case raises a threshold question regarding the role of an arbitrator; specifically whether an arbitrator would have recourse to substantive law and to decisions of the highest court of the state when determining a specific Grievance. The extent to which an arbitrator may consider factors not enumerated in the collective bargaining agreement generally depend upon how the parties may have restricted the arbitrator in the interpretation and application of their agreement.

The fundamental question is whether an arbitrator is constrained by the very terms of the collective bargaining agreement or may consider substantive law including case law. Some arbitrators believe the parties have asked the arbitrator to construe their agreement rather than apply external law and feel the arbitrator is constrained to ignore external law and only consider the words in the contract. This essentially is the position of the Employer in this case that the language is clear, there are no stated exceptions, and therefore, the arbitrator should ignore external law and apply the contract.

Conversely, other arbitrators accept the position espoused by arbitrator Robert G. Howlett, that arbitrators are bound and subject to law, whether constitutional or statutory, and that all contracts are subject to statutes and common law, and each contract includes all applicable law. Those arbitrators who believe the contract is subject to external substantive law argue that the "law" includes judicial precedents and most particularly, if that judicial precedent is the highest court of that state. Under this view, such court decisions are certainly of significant value in guiding the arbitrator in a decision and assuming such court decision is the final authoritative ruling on a particular issue it ought to be followed. Just as lower courts of the State would be mandated to follow precedents established by the highest court of the state, in this view so should arbitrators. This is essentially the argument advanced by Union.

In resolving this dilemma, I have carefully read the contract and particularly Article 8 paragraph B that outlines the grievance steps and most particularly discusses the role of the arbitrator. I do not see any language in Article 8, or otherwise in the contract, that specifically limits the arbitrator from utilizing external substantive law in deciding a case, nor has the Employer in its brief directed the arbitrator or referenced any such limitation. And I do not believe that by applying substantive law to the facts of this case, that the arbitrator would be amending, modifying, nullifying or ignoring the agreement and by applying such substantive law would not be granting to Union or the Grievant any privileges which were not obtained in the negotiation process. The Employer does not cite any reference to what may have been bargained and denied relating to the time limits and how a decision adverse to its position would obtain something that should have been bargained. I accept the Union position articulated in their brief that no term of the contract is being altered or amended, simply, the filing time line is being

interpreted utilizing substantive law.

It is this writer's belief, that an arbitrator would have the inherent authority to consider substantive law, including case law when deciding a case in which an allegation has been raised that constitutional issues of due process are raised and that a Michigan Supreme Court case might be controlling. Accordingly, I believe that this arbitrator may consider substantive law including case law in deciding this case.

I now turn to the application of the Gilliard case to the facts in this case. As I review Joint Exhibit 4, the Employer alleges that the grievant violated several Employer work rules. In particular, the Employer alleged, " these charges are based on an investigation findings that you engaged in a conflict of interest by spending money you were told by local law enforcement officials was stolen. "As a law enforcement officer yourself, you should have taken their warnings of the law enforcement officials at face value and not spent the money." It seems apparent from other documents in evidence that this allegation is also at the crux of the dilemma faced by the County A Prosecuting Attorney. Although he decided not to pursue criminal charges against Employee 1, he has referred that matter to the County B Prosecuting Attorney for his consideration of whether criminal charges should be brought. This prosecutor has yet to make a determination and accordingly a criminal investigation is still ongoing.

Although Mr. Gilliard had been charged with criminal fraud at the time of his discharge and he was later acquitted, he did not file a request for reinstatement until after the applicable time contained in the civil service rules. When the Michigan Supreme Court reviewed the case, it relied upon a United States Court of Claims decision as well as a federal second circuit Court of Appeals decision regarding civil administrative proceedings in criminal charges. The

Supreme Court ruled:

> We hold that the time for processing the plaintiffs grievance under the Civil Service Grievance and Appeal Procedure was tolled from the point of the plaintiff's discharge until the acquittal on all criminal charges. The plaintiff was informed at the time of his discharge that the matter was being referred for possible criminal prosecution. **Once investigation is begun with an eye toward potential criminal prosecution, the time for processing a grievance is tolled, at least until the investigation is completed. If a criminal prosecution results, the tolling continues until the prosecution terminates.**
>
> (Emphasis Added.)

The Employer has correctly noted some factual differences between *Gilliard* and this case; most notably that Mr. Gilliard was informed at the time of his discharge that the matter was being referred for possible criminal prosecution and was in fact charged with a criminal offense. However, the Supreme Court did not limit its fundamental ruling to the specific facts of *Gilliard*, but rather made the broader ruling that once the investigation is begun with an eye toward potential criminal prosecution, time lines for filing a grievance are tolled until the investigation is complete. It does not matter whether the Employer referred the matter for prosecution nor does it matter whether a criminal prosecution has already commenced.

I find that this Michigan Supreme Court decision is applicable to the facts in this case. The parties have not found any other decision that contradicts, reverses or in any other way distinguishes this Supreme Court precedent. Accordingly, under my view of an arbitrator's access to substantive law, including case law, I believe this decision should be followed, and the time line for filing a grievance was tolled until such time as the criminal investigation is concluded. An analogy may be appropriate. Assuming this matter gets to Circuit Court, by way of appeal of this decision or otherwise, Union, would undoubtedly raised the same issues and

present the Circuit Court with the *Gilliard* decision. In the absence of any other controlling authority, the Circuit Court judge would be bound to apply the holding of our highest court. I suggest this arbitrator is subject to the same standard, and why I do not hesitate to apply this case precedent to the facts of this case.

I have done additional research and have found no decision in Michigan that in any way negates the *Gilliard* ruling. However, I have found an additional case, which applied the *Gilliard* holding; a time line is tolled from the time investigation is begun toward possible criminal prosecution until any prosecution terminates. In *Glover v City v of Kalamazoo*, 98 Mich App 465 (1980) a veterans preference case, criminal charges were pending, an individual was suspended, he was dismissed and after acquittal he ultimately requested a hearing under the Veterans Preference Act. The Court of Appeals ruled that the 30 day requirement in the Veterans Preference Act for filing a request for hearing was tolled while the criminal charges were pending; specifically citing *Gilliard* and reiterated the bolded portion of the quotation cited above. I find this citation to be indicative that the principle should be applied in a quasi-administrative forum where only rudimentary due process is required. No less should be the case here where the matter arises under a CBA.

For the foregoing reasons, I must deny the Employer's request that the Grievance is untimely filed. Since the criminal investigation was in progress at the time of the discharge and continues at least to the date of the bifurcated hearing, the time limit in Article 8 is tolled.

I also believe that this matter should go to hearing on the merits and deny the Union explicit request that a hearing also be held in abeyance until the criminal investigation is completed. Although this aspect was not briefed at length, Union in it's responsive pleading and

post hearing reply brief ask, “hold in abeyance a hearing on the merits of the Grievance until the criminal investigation or criminal proceedings are completed.” No argument or theory is presented to support this request. One can only assume that they rely on a procedural due process theory as a corollary to the *Gilliard* holding, that Employee 1 ought not be subjected to defend himself in the arbitration while some or all of the information in such a hearing might jeopardize him in a criminal prosecution or even lead to a criminal prosecution.

I do not find potential due process issues compelling as I understand the facts of this case. *Gilliard* is limited to the legal issue presented namely whether a time limit is tolled for filing a Grievance. The case says nothing about hearings. I do recognize that the Michigan Supreme Court cited *Finfer v Caplin*, 344 F2d 38 (CA 2,1985) and seems to have adopted the procedural due process analysis in that case to reach its tolling decision. One can only speculate if that rationale would be applied to hold a hearing in abeyance.

One, I agree with the Employer that one alternative under *Gilliard* was to do nothing until after the criminal investigation was completed. I would rule the same if that was the scenario. However, Union chose to file the Grievance and has given an explanation why it was late in the brief. Be that as it may as to the rationale, Union has invoked the Grievance process which normally means the Grievant wants the matter resolved expeditiously. The Employer, not prevailing on the time limit argument, would want an expeditious hearing for the very reasons it advanced that it has no control over the criminal prosecution and when if ever it will be done. It may take weeks, months or years. Having filed the Grievance, and having resisted the Motion for dismissal, the case should now go forward.

Two, there appears to be little risk of any jeopardy to Employee 1 should a hearing be held as was the *Finfer* case rationale. In *Finfer* there was a pending charge and the court was concerned an administrative hearing could well compel a Grievant to testify in order to rebut testimony and thus put himself at jeopardy in a criminal trial. The facts in this case and the legal position that Employee 1 has already taken in his wife's case are very different and negate the possibility of legal jeopardy. I am very impressed with the facts stated in Exhibit A, County A Prosecutor's summary and his rationale for not prosecuting Employee 1. In particular, at page 3, he states;

> **At the trial, Karla waived her spousal privilege so that Employee 1 could testify and Employee 1 waived his 5th amendment right to not testify knowing that he was under investigation. I had the chance to cross examine him. He was placed under oath to tell the truth.**

This quotation in my view distinguishes the potential due process rationale espoused in *Finfer* from this case. The Employer must establish its rationale for the dismissal. Some Grievant's do not testify believing that the charging party has not sustained the burden of proof. The Grievant may or may not testify in this case; a hearing should not be postponed indefinitely on the if come that a Grievant may testify.

But more and most importantly, the Grievant has already testified, under oath, well knowing that what ever he said could well be used in a criminal investigation against his best interests. His testimony is already on the record. He waived his 5th amendment protections during his wife's trial. It seems hard to believe that whatever comes up in this hearing could possibly be subject to due process objections; that have not already been waived, assuming the Grievant would testify in the arbitration hearing. The Employer has alleged several reasons for

the dismissal in Joint Ex 4; some independent of the facts that may be involved in the criminal investigation. A hearing should not be delayed on all charges because some facts in the dismissal charges may be under investigation and most if not all of the material underling facts have already been disclosed in the Grievant's testimony.

In the absence of a stipulation by the parties not to proceed to hearing, the parties should consult with each other and determine a time when a hearing can be set that is mutually convenient to the parties and the arbitrator.

AWARD

The request of the Employer for dismissal of the Grievance as untimely is DENIED. The Union request that a hearing be held in abeyance until the criminal investigation is completed in this case, is DENIED. The parties are directed to obtain a hearing date that is mutually convenient to the parties and the arbitrator.

RESPECTFULLY SUBMITTED

Kenneth P. Frankland

Arbitrator

Dated April 25, 2007