Muessig #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

This is an arbitration proceeding pursuant to the provisions of Article 15 of the Collective Bargaining Agreement (the "Agreement") between the Union and the Employer. A hearing was held on June 20, 2000. At that time sworn testimony was taken, exhibits were offered and made part of the record, and oral arguments were heard.

The Employee was not present at the hearing. The hearing was stenographically reported and a transcript was prepared. The exhibits introduced by the Union and the Employer during the hearing have been retained by the Arbitrator. Where relevant, references to these exhibits will be made in the following manner: Joint Exhibits are cited as "J," Employer Exhibits as "C" and Union Exhibits as "U," followed by the exhibit number.

The Union presented its case through the cross-examination of the Employer's witnesses and the introduction of numerous exhibits.

STATEMENT OF THE CASE

This case involves a grievance filed to protest the Employee's suspension without pay on January 16, 1998, subsequent to his arrest on a felony charge of child molestation.

The Employer contends that it has a uniform practice of suspending employees charged with a serious misdemeanor or a felony, pending the results of an Employer investigation. In

Employee's case, the Employer was unable to obtain any information about the underlying events in the case until the criminal proceedings were completed, and then moved expeditiously to complete its investigation. When the Employer decided that disciplinary action was not appropriate, this did not convert the suspension into an unjust suspension within the meaning of Section 14(E) of the Agreement.

The Union contends that, even though a jury rejected the criminal charges against the Employee and they were later dismissed by a district attorney, the Employer has refused to pay Employee any back pay for the 17 months he was held out of service, and such back pay is required by Section 14(E) of the Agreement.

ISSUE TO BE DECIDED

The parties did not agree on a formulation of the issue to be decided in this case. The Board has accordingly determined that the issue to be decided should be stated as follows:

(1) Did the Employer violate the Agreement when it suspended the Employee without back pay, pending an Employer investigation, after he was arrested and charged with child molestation?

(2) When the Employer decided to reinstate the Employee, was it obligated under Section 14(E) of the Agreement to provide him with back pay for any of the period of time he was suspended and held out of service?

STATEMENT OF FACTS

In January 1998, the Employee, a mechanic then assigned to the power plant shop in City 1, State 1, was arrested on a felony charge of child molestation. Person 1, Manager of Component Shops and the Power Plant at Airport 1, testified that, after learning of the arrest and after

consulting with Labor Relations, he suspended the Employee without pay on January 16, 1998. The suspension notice reads as follows:

> Based on available information concerning your recent arrest on charges constituting a felony or serious misdemeanor, you are being suspended without pay effective immediately pending the outcome of the Employer's investigation.

Person 2, Senior Arbitration Attorney, testified that the suspension without pay was consistent with Employer policy:

> The Employer's policy is to immediately suspend the employee upon learning of the arrest, and that is a policy that is applied across all employee groups. It is a policy that is designed to enable the Employer to take a quick look at the issues that I was just discussing and to make a determination as to whether the employee can be returned to work, pending the resolution of the matter, whether it's an arrest for a civil matter for example, bouncing a check that doesn't implicate Employer, does that have any implication on the Employer? Would it be appropriate to return that person to work?
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> But the person who is arrested or charged with a serious misdemeanor or a felony is suspended under corporate policy until the Employer has a chance to look at these preliminary matters.

Person 2 testified that she asked Person 3 in Security to gather as much underlying information as possible about the circumstances of the criminal charge, but that law enforcement officials refused to release any information since a minor child was involved. Person 3 also attempted to set up a meeting with the Employee, but the Employee declined to meet with the Employer unless his attorney could be present, a condition which was not acceptable to the Employer. Person 2 then concluded:

> So at that point we had basically no choice other than to continue the Employee on suspension until we were able to obtain additional information to resolve the underlying issues. And it was clear that we were not going to be able to do that until after conclusion of the criminal matter, most specifically after the trial itself.

The Employee's trial took place in January 1999 and resulted in a hung jury. Person 2 testified that the Employer was led to believe that the Employee would be retried on the charges:

> And Person 3, in his communications with the prosecutor and the law enforcement officers, had been informed that the trial resulted in a hung jury, and the prosecutor at that time communicated to Person 3 her intent to retry the case, because she believed that the evidence against Employee was quite strong.

The prosecutor, however, filed a dismissal notice on March 8, 1999. Person 2 testified:

> We were waiting to find what access we would have to the trial transcript, to the other information. We were still relying to a great extent on the prosecutor's personal assessment of the case against the Employee, and we were waiting for the case to be retried. And then we were eventually advised that it would not be retried. And it was at that time that we learned that, rather than a close call, if you will, in favor of conviction, the jury had been hung 10-to-2 in favor of acquittal.

Person 2 testified that she instructed Person 3 to obtain a copy of the trial transcript, which the Employer finally obtained in the second week of May after being required to secure a court order to do so. The Employer was also able to secure the investigative reports from the Sheriffs Office on April 7, 1999.

In the meantime, the Union, which had immediately grieved the Employee's suspension on January 16, 1998, pressed ahead with its grievance and sought to secure the Employee's immediate reinstatement during a Special Hearing on April 15, 1999. By letter of April 22, 1999, the request for reinstatement was denied "due to an on-going investigation by the Employer."

Person 2 testified that she reviewed the trial transcript on May 10, 1999, and concluded:

> There was a lot in the transcript that indicated possible other reasons for why this case may have gone forward. But there certainly was not enough, in the Employer's opinion, to suggest or to support a conclusion that the Employee was in fact guilty of child molestation.

Person 2 testified that the prosecutor had made reference in the transcript to his 1968 conviction for an unspecified offense, and the Employer hired an investigator to check out the reference. The investigator reported on May 24, 1999 that no conviction record could be found, and the Employee was eventually reinstated in early June 1999.

After failing to resolve the original grievance on the property, the Union invoked arbitration on July 9, 1999, and the matter was subsequently progressed to the Board for resolution.

POSITIONS OF THE PARTIES

The following is believed to be an accurate abstract of the parties' substantive position in this dispute. The absence of a detailed recitation of each and every argument or contention advanced by the advocates in this arbitration does not mean that the issue was not fully considered by the Board.

THE EMPLOYER'S POSITION

The Employer contends that its suspension of the Employee on January 16, 1998, after he was arrested on felony child molestation charges, was appropriate and just within the meaning of Section 14(E) of the Agreement. The testimony showed that the Employer has a uniform practice, whenever an employee is arrested on a serious misdemeanor or felony charge, of suspending that employee without pay, pending the conclusion of an Employer investigation, which takes into account the outcome of the criminal proceeding, but does not necessarily hinge solely on that outcome.

In the case of the Employee, the Employer was unable to take measures that it customarily takes in other cases. The Employer normally takes active measures to find out more about the

circumstances of a case and make an assessment whether it needs to keep an employee on suspension pending the outcome or not, but because of the involvement of a very young minor, law enforcement officials were unwilling to disclose virtually anything about the case.

Under these circumstances, the Employer had nothing to go on except that the charges were a felony involving sexual misconduct with a very young minor child, and the Employer had a considerable interest in making sure that an employee who may have engaged in such misconduct was not allowed on Employer premises.

When the Employee's case first went to trial, the first outcome was inconclusive with a hung jury. Until March 8, 1999, when a notice of dismissal was filed with the court, the Employer was under the belief that the case was going to be retried. When the Employer learned that was not going to be the case, the Employer immediately took measures to conclude its investigation and assess what, if any, disciplinary consequences would be appropriate in the case.

The Employer was able to obtain the underlying police reports on April 7, 1999, and was finally able to obtain the trial transcript in mid-May. Person 2 testified that she reviewed the transcript immediately upon its receipt, and determined that there was not enough evidence to terminate the Employee based on the transcript. However, the Employer still had to track down a reference in the transcript to an earlier conviction in 1968. It hired an investigator, who reported back on May 24, 1999 that he had been unable to turn up any relevant records, and Employee was reinstated in early June, 1999.

The record demonstrates that once the Employer had the information in hand that it needed to make its assessment, it moved expeditiously to gather all that information together and come to a conclusion about the disciplinary consequences. When the Employer decided that disciplinary

action was not appropriate, this did not convert the suspension into an unjust suspension within the meaning of Section 14(E).

For all of the foregoing reasons, the Employer requests that the grievance be denied.

THE UNION'S POSITION

The Union points out first that the Employee was suspended without pay on January 16, 1998 for an alleged violation of Employer Rule number 33, which reads: "Any action constituting a criminal offense, such as a felony or a serious misdemeanor, may lead to dismissal." At the time of his suspension, the Employee had been charged with the commission of a felony by local authorities.

In January of 1999, the Employee's case went to trial. The jury in the case reported to the judge that they were deadlocked 10-to-2 in favor of acquitting the Employee. The jury was then discharged, and the district attorney later dismissed the charge by filing a notice of dismissal with the court. The Union filed a grievance in an effort to secure the Employee's speedy return to work, and a special hearing under the Agreement was held for the Employee in April, 1999, but he was not finally returned to work until June, 1999.

The Employer has refused to pay the Employee any back pay for the 17 months he was out of service, even though a jury rejected the criminal charges against him and the charges were later dismissed by the district attorney. This constitutes a violation by the Employer of Section 14(E) of the Agreement, which reads: "In case it is found the suspension or discharge is unjust, the employee will be reinstated with full seniority, paid for time lost and records corrected."

The Union points out that this Agreement provision has existed for twenty years, and means exactly what it says. Accordingly, the Union requests that the Employee be awarded full back pay from the date of his initial suspension on January 16, 1998.

FINDINGS AND CONCLUSIONS

After a review of the entire record and having had an opportunity to weigh and evaluate the testimony, as well as the written evidence, a majority of the Board finds that the Employer did not violate the Agreement when it initially suspended the Employee without pay, but that the Employee should have been made whole after the Employer finally determined that no just cause existed for disciplining him.

Person 2 testified persuasively that the initial suspension was consistent with a uniform Employer policy of immediately suspending any employee charged with a serious misdemeanor or felony, in order to take a "quick look" at the underlying circumstances to determine whether the employee could be returned to work pending the resolution of the charge.

Since the Employee was arrested on a felony charge of child molestation, and unaccompanied minors are often passengers on Employer flights, the Employer had a substantial interest in protecting those passengers from potential sources of danger. Since a minor child was involved in the criminal proceeding, the Employer was unable to get any information about the underlying circumstances of the case, and it reasonably concluded that it would be prudent to maintain the status quo until a resolution of the legal proceedings was reached.

When the trial ended in a hung jury in January, 1999, the prosecutor informed the Employer that the evidence against Employee was "quite strong" and the case would be retried. When the

prosecutor filed a notice of dismissal on March 8, 1999, however, the Employer learned otherwise. As Person 2 testified:

> We were still relying to a great extent on the prosecutor's personal assessment of the case against the Employee, and we were waiting for the case to be retried. And then we were eventually advised that it would not be retried. And it was at this time that we learned that, rather than a close call, if you will, in favor of conviction, the jury had been hung 10-to-2 in favor of acquittal.

It is a close question as to whether the Employee, with a 20 year unblemished record of service with the Employer, should have been immediately reinstated at that point. The Union attempted to achieve this result during a Special Hearing on April 15, 1999 but was unsuccessful. Person 2 testified, however, that the Employer still knew nothing about the underlying circumstances of the charge, and, since a minor child was involved, had to get a court order to finally obtain a copy of the trial transcript. After reviewing the transcript on May 10, 1999, Person 2 concluded:

> ...there really was insufficient evidence to support the charges against the Employee, there were way too many open questions about the underlying allegations about the child's memory, about whether the child indeed recalled any of these incidents, or whether they were created in her memory by an adult, most specifically her mother and father.
>
> There was a lot in the transcript that indicated possible other reasons for why this case may have gone forward. But there certainly was not enough, in the Employer's opinion, to suggest or to support a conclusion that the Employee was in fact guilty of child molestation.

The Employee could have been reinstated at this point, but was not reinstated until the Employer had checked out the prosecutor's contention that he had a conviction for an unspecified offense dating back to 1968, a contention which could not be confirmed.

The Employer's conservative approach in the circumstances of this case is difficult to fault, and the Board finds no Agreement violation in the Employer's decision to suspend the Employee pending the outcome of the legal proceeding and its own investigation. The question then is

whether the Employer is now obligated under Section 14(E) of the Agreement to provide the Employee with back pay for any of the period of time he was held out of service. Section 14(E) reads as follows:

> In case it is found that the suspension or discharge is unjust, the employee will be reinstated with full seniority, paid for time lost and records corrected.

This Agreement provision has not been previously construed by the Board, and is thus a matter of first impression. The Employer correctly contends that the mere fact that the Employer eventually declines to take specific disciplinary action in a particular situation does not automatically convert a suspension into an unjust suspension under the terms of Section 14(E), and there will no doubt be factual circumstances where such will prove to be true. Such is not the case here, however, since the Employer's investigation essentially concluded that the initial allegations of misconduct were unfounded, and no just cause existed to discipline Employee. As Person 2 testified:

> ...there certainly was not enough, in the Employer's opinion, to suggest or to support a conclusion that the Employee was in fact guilty of child molestation.

An independent reading of the trial transcript by the Board confirms that this was not a marginal case of guilt or innocence, or an escape from guilt on a technicality, but instead was a case where a 5-year old child, perhaps under parental influence, apparently fabricated the entire incident. Since there is no probative evidence of any kind of any wrongdoing by the Employee, and thus no just cause for the issuance of any discipline, a majority of the Board concludes that the express terms of Section 14(E) require that, since the Employee's initial suspension was later found to have been "unjust," he must be "reinstated with full seniority, paid for time lost and records corrected."

AWARD

The grievance is sustained. The Employee is to receive full back pay, less outside earnings, with seniority unimpaired, from January 16, 1998 to the date of his reinstatement.