BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME LOCAL 995**

and

**COLUMBIA COUNTY**

Case 200
No. 58192
MA-10871

*(Grievance of James S. Voightlander)*

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Appearances:

**Mr. David White**, Staff Representative, AFSCME, Council 40, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, on behalf of the Union.

**Attorney Joseph Ruf, III**, Columbia County Corporation Counsel, 400 DeWitt Street, P.O. Box 256, Portage, Wisconsin 53901, on behalf of the County.

## ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Portage, Wisconsin, on May 16, 2000. The hearing was transcribed. Both parties filed briefs and the record was closed on August 14, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

## ISSUE

The parties agreed to the following issue:

Did the County have just cause to discharge grievant James S. Voightlander and, if not, what is the appropriate remedy?

## BACKGROUND

This case centers on the heads-on credibility clash between temporary summer employee Jaimie Heaps and grievant Voightlander, with Heaps claiming, and Voightlander denying, that Voightlander in the summer of 1999 on four separate occasions sexually harassed her.

Thus, Heaps testified that Voightlander, who headed her work crew, told her in June, 1999, when she got in his truck: "Oh good, I got the woman with the nice ass." No one else, she said, was present at that time. The second incident arose near the end of the summer when Heaps indicated she wanted to go on a rafting trip. She said that Voightlander then said – in the presence of fellow employe Nate Davis (who did not testify) – that she could go if she slept in his tent "with no clothes on the whole weekend." She said that Voightlander on a third occasion told her he would throw money at her if she got on a table and danced. She said that he on a fourth occasion showed a pornographic magazine to Davis in her presence out on a painting job and that she then walked away. She added that Voightlander's comments made her feel "Very uncomfortable, very, very uncomfortable to be around him"; that she mentioned Voightlander's remarks to fellow employees Davis and Ann Deich; that Deich told her to report them to management; and that she finally did so.

Deich said that Heaps in the summer of 1999 told her that Voightlander was sexually harassing her; that she was upset and crying when she did so; and that she, Deich, then reported it to Assistant Highway Commissioner Wayne Cornford. On cross-examination, she acknowledged she never saw any interaction between Heaps and Voightlander.

Employee Daniel Barden testified about an incident in about 1997 or 1995 where Voightlander supposedly put his arm around his wife when he went to the store where she worked. (Voightlander was never disciplined at the time over this incident, which is why it is not discussed in detail and why it cannot be given much weight in this proceeding.)

Employee Thomas E. Killoran testified about the sexual harassment allegations involving Voightlander and Barden's wife, and said that employees are not allowed to bring pornographic magazines to work under the County's sexual harassment policy.

Summer employee Carrie Kidd testified that Voightlander in the summer of 1999 once told her the guys would throw one dollar bills at her if she danced on a table; that such dancing for money referred "to like the strip club type deal. . .giving us dollars for it or dancing lewdly for money"; that Heaps told her that Voightlander once made the same remark about dancing for money; that she found his remark very offensive; and that pornographic magazines were kept in the back of the shop.

Assistant Highway Commissioner Cornford testified about the incident involving Voightlander and Barden's wife, wherein Voightlander supposedly touched her shoulder in July, 1997. Cornford said that he discussed the incident with Voightlander. Cornford also testified about the sexual harassment training that was once offered to all Highway Department employes and said that employees are prohibited from keeping pornographic materials under the County's sexual harassment policy.

Highway Commissioner Kurt Dey testified about the County's sexual harassment policy (County Exhibits 4 and 5), and said that employees receive annual training on that policy. He said that he has torn down "generic pin-ups, calendars or pictures from time to time"; that employes are not allowed to have pornographic materials in their vehicles or in the work place; that he once took down one of Voightlander's pin-ups; that Voightlander at an August 13, 1999, meeting (unless otherwise stated, all dates herein refer to 1999), was given the opportunity to resign and to sign a "Separation Agreement, General Release and Waiver" (Union Exhibit 1), but refused to do so on the ground he had not engaged in any sexual misconduct; that Voightlander was terminated for sexually harassing Heaps; and that then-County Human Resources Director David A. McLean decided to terminate Voightlander after he, Dey, recommended Voightlander's termination.

On cross-examination, Dey said that McClean on August 13 explained the sexual harassment charges to Voightlander without mentioning Heaps' name; that he could not recall whether Voightlander was given the opportunity to give his side of what happened; and that he could not answer why Voightlander was not given that opportunity.

Union Steward Steve Mael testified that Highway Commissioner Dey in the past had expressed animosity against Voightlander; that McLean had refused to provide him with any information regarding the sexual harassment charges against Voightlander when he asked for it; that there were pornographic materials in the shop before the County ordered them banned; and that the County earlier had ordered all pornographic materials and calendars removed from the premises.

Highway Department employee Tom Jones testified that pornographic materials were prevalent in the shop and that said material "wasn't [Voightlander's] anymore than anybody else's"; that Cornford knew about the pornographic materials in the back of the shop; that he once saw a management person examine a pile of pornographic magazines in the office; that he never heard Voightlander make any inappropriate comments to Heaps; that he was present when Kidd stated she had once danced on tables for money; that he did not "hear every word that was said" between Voightlander and Heaps after Heaps mentioned she wanted to go on a camping trip; and that there was no mention of Heaps being naked or sleeping in a tent. He also said that he was not "100 percent sure" that Voightlander did not say anything about Heaps being naked; that if Voightlander mentioned dancing on tables "I did not hear it"; that it

was improper under the County's policy to say a female had a "nice ass" and to ask a female worker to dance on a table for money; and that he could not see what kind of magazines the management person he earlier testified about was looking at.

Voightlander, employed since 1987, denied all of the sexual harassment allegations levied by Heaps and claimed that he was not in charge of the pornographic materials kept in the shop.

After initially suspending him on August 13 pending its investigation, the County by letter dated September 14 terminated Voightlander because of his "continuing, ongoing violation of the County's policy against sexual harassment, as set forth in the County's Personnel Policies and Procedures Manual ("Manual"), which is incorporated into the County's ordinance by reference." (Joint Exhibit 3).

Section 7.02 of the Manual states:

**Section 7.02 Sexual Harassment**

(a) Sexual harassment is illegal and unprofessional and will subject the employee committing such activities to disciplinary action.

(b) No employee shall be penalized or punished for rejecting or objecting to behavior that might be construed as sexual harassment.

(c) Sexual harassment, for purposes of this Section, which may involve a person of either sex against a person of the opposite or same sex, may consist of unwelcome sexual advances, requests for sexual favors, or other forms of a verbal or physical nature when:

(1) Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to such conduct by an individual is used as the basis for employment decisions affecting such individuals; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(d) Other forms of harassment in employment may consist of repeatedly addressing or directing epithets, comments or gestures, or displaying or altering visual elements that explicitly demean an employee's gender, race, cultural background, ethnicity, or sexual orientation.

. . .

Section 7.18 of the Manual states that employees can be disciplined if "The employee has violated the Sexual Harassment regulations as set forth in this Manual."

## POSITIONS OF THE PARTIES

The Union argues that "Due process considerations militate for a ruling favorable to the grievant" because the County never asked for Voightlander's side of the story, thereby compromising his ability to defend himself and because the County's investigation was "highly biased". It also contends that "The veracity of the allegations against the grievant is, at best, questionable." The Union requests a traditional make-whole remedy that includes Voightlander's reinstatement and a backpay award.

The County asserts that it had just cause to terminate Voightlander because he sexually harassed Heaps and because it met all of the so-called "seven tests" enumerated in ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966).

## DISCUSSION

As related above, this case turns on the heads-on credibility clash between Voightlander and Heaps as to whether Voightlander sexually harassed Heaps by: (1), telling her she had a "nice ass"; (2), showing her the cover of a pornographic magazine when they were out on a job together; (3), telling her she could go on a camping trip if she slept naked in his tent; and (4), asking her to dance on a table so that she could take her clothes off when money was thrown at her.

The Union argues that Heaps' testimony cannot be credited in part because fellow employee Jones testified that he never heard Voightlander tell Heaps that she could go camping if she slept naked in his tent and that Voightlander similarly never suggested that she, Heaps, get on the table and dance for money by taking her clothes off.

While that was Jones' initial testimony, he added that he did not "hear every word that was said" between Voightlander and Heaps and that he was not "100 percent sure" that Voightlander did not say anything about Heaps being naked. In addition, Jones flatly contradicted Voightlander's claim that: "I don't. . .ever recall [Heaps] asking about going

camping with us on this trip. That was just between Nate and myself." Jones testified: "It was about that time that [Heaps] jumped into the conversation and wanted to know if she could go camping as well."

Given all this, I find that Jones' testimony was tentative at best, and that it is insufficient to discredit Heaps' testimony. However, Jones' testimony directly contradicted Voightlander's claim that the subject of camping never came up between him and Heaps.

I therefore credit all of Heaps' testimony on these issues, as she testified in a highly credible manner. In addition, I find it inherently improbable to believe (as the Union urges), that she has made up all of these accusations, as Deich testified that Heaps was crying and upset when she recounted to Deich what had happened. Hence, I find that Voightlander engaged in four separate acts of sexual harassment against Heaps.

There is only one possible valid reason for not sustaining his discharge and that centers on the County's failure to give Voightlander a chance to respond to the charges levied against him at the time of his discharge and the County's failure to inform Union Steward Mael about those charges so that the Union could properly defend Voightlander after he was discharged. These failures are simply inexcusable and in other circumstances might well warrant setting aside an employer's disciplinary action on this basis alone. For, it is well recognized that: (1), an employer must give an employee the chance to defend himself before discipline is imposed; and (2), the specific nature of any alleged wrongdoing must be spelled out in detail in order for an employee to properly mount his/her defense. See *How Arbitration Works*, Elkouri and Elkouri, pp. 919-920 (BNA, 5th Ed., 1997); ENTERPRISE WIRE, supra., p. 363-364.

Contrary to the Union's claim, however, that does not automatically mean that Voightlander's termination must be overturned because of the County's failure to follow these two important procedural safeguards of the just cause standard. Rather, the determinative test is whether such failures unfairly prejudiced Voightlander's case. See *How Arbitration Works*, supra, pp. 919-920; AMAX COAL CO., 85 LA 225 (Kilroy, 1985). If they did, his discharge must be overturned. If they did not, his discharge must stand.

Since Voightlander chose in this proceeding to falsely deny the sexual harassment charges levied against him, it is fair to assume that he would have made the same false denials had he been asked for his defense before he was terminated. That being so, he would not have offered any new evidence that could have had a material effect on the County's discharge decision. Hence, he was not prejudiced by the County's actions and his termination must stand.

Lastly, and pursuant to the County's request, I am mailing back to the County all of the pornographic materials gathered from the shop and provided at the hearing (County Exhibit 3). It is difficult to describe all of the filth depicted therein, which is why it is highly unfortunate that some of the "men" in the Highway Department found it necessary to indulge their juvenile fantasies by reading and keeping such filth on County property. Indeed, one wonders if any of the "men" would ever show such garbage to their mothers, wives, sisters, daughters or partners. I mention this only because any employee caught with such filth can be subjected to discharge. That is something the "men" may want to ponder before they ever again bring such filth on County property.

In light of the above, it is my

**AWARD**

That the County had just cause to terminate grievant James S. Voightlander; his grievance is therefore denied.

Dated at Madison, Wisconsin this 17th day of October, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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