KATZ, J., with whom NORCOTT and PALMER, Js., joined, dissenting. I agree that, when a challenge to a voluntary arbitration award rendered pursuant to an unrestricted submission raises a legitimate and colorable public policy claim, the question of whether the award violates public policy requires de novo judicial review; see *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 429, 747 A.2d 1017 (2000); and that because the challenge in the present case raises such a claim, we should undertake de novo review of the award. I also agree that ''the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'' (Internal quotation marks omitted.) *Watertown Police Union Local 541* v. *Watertown*, 210 Conn. 333, 340, 555 A.2d 406 (1989). Applying the appropriate scope of review, I would conclude, however, that, based upon the undisputed facts of the present case, the award did

not violate the clear public policy against embezzlement because it was premised *solely* upon a conviction that followed a plea of nolo contendere.

The employment context ordinarily involves a number of legitimate expectations on the part of the employer that a conviction of embezzlement is likely to undermine. Therefore, as the majority states in its opinion, ''if [David] Warren's conviction for embezzlement of his employer's funds had followed either a guilty plea or a trial, the employer would have been justified in imposing appropriate discipline, including termination, and an arbitral award requiring his reinstatement to employment would have violated clear public policy. See, e.g., *Board of Education* v. *Local 566, Council 4, AFSCME*, 43 Conn. App. 499, 500–501, 683 A.2d 1036 (1996), cert. denied, 239 Conn. 957, 688 A.2d 327 (1997) (where grievant had pleaded guilty to and been convicted of fraudulently diverting union funds, award reinstating him to job with responsibility for publicly owned property violated public policy); see also *State* v. *Council 4, AFSCME*, 27 Conn. App. 635, 641, 608 A.2d 718 (1992) (where grievant admittedly had misused state funds by cashing falsely generated public assistance checks, award of reinstatement to employment violated public policy). In either instance, the record would be sufficient to establish that the employee had in fact stolen from his employer. The guilty plea would constitute an admission of guilt; see *Lawrence* v. *Kozlowski*, [171 Conn. 705, 711 n.4, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977)]; and the conviction after trial would be sufficient to establish the fact of the theft, under established principles of issue preclusion. See *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 296–307, 596 A.2d 414 (1991). In either of those instances, the public policy against theft also would include the policy that an employer should not be required to retain in a position of financial trust an employee who has been established to have stolen.''

The question posed by this appeal, however, is whether the arbitrator, as a matter of law, was required to determine that a conviction *after a plea of nolo contendere*, as opposed to a plea of guilty or a conviction after a trial, established just cause for Warren's termination. The majority concludes that an arbitral award requiring an employer to reinstate an employee who has been terminated following a conviction of embezzling the employer's funds violates public policy irrespective of whether his conviction followed a trial, a guilty plea or a nolo contendere plea. The decision in this case does not turn, however, simply on whether the threat to the employer's legitimate expectations are removed or significantly ameliorated by the fact that the conviction of embezzlement rests upon a plea of nolo contendere, as opposed to a plea of guilty or a trial. Indeed, the public policy against embezzlement

encompasses the policy that an employer should not be compelled to reinstate an employee who has embezzled the employer's funds, regardless of whether the employee even has been charged with, let alone convicted of, such an offense. Rather, the decision in this case turned on the arbitrator's finding that, because the employer had not sought to prove independently that Warren had embezzled its funds, relying exclusively on his nolo plea, the employer established ''little or nothing about [Warren's] guilt or innocence . . . .''

Although a conviction following a plea of nolo contendere has the weight of a final adjudication of guilt, and shares some characteristics of a guilty plea,[1] its limited evidentiary value is undisputed. As this court has stated, unlike a plea of guilty, ''a plea of nolo contendere is merely a declaration by the accused that he will not contest the charge, and even though followed by a finding of guilty and the imposition of a fine or other penalty, is not admissible, either as a verbal admission or an admission by conduct. *Casalo* v. *Claro*, 147 Conn. 625, 632, 165 A.2d 153 [1960]. Nor is it admissible to affect a party's credibility, as evidence of an arrest, or as res judicata establishing that the plaintiff was engaged in a criminal act. *Krowka* v. *Colt Patent Fire Arm Mfg. Co.*, 125 Conn. 705, 713, 8 A.2d 5 [1939]; see also Holden & Daly, Connecticut Evidence § 103f. Pleas of nolo contendere may be entered for reasons of convenience and without much regard to guilt and collateral consequences. McCormick, Evidence (2d Ed.) § 265, p. 636. Even though the plea may be regarded as a tacit admission, its inconclusive and ambiguous nature dictates that it should be given no currency beyond the particular case in which it was entered. *A. B. Dick Co.* v. *Marr*, 95 F. Sup. 83, 101 (S.D.N.Y. [1950]); *State* v. *Thrower*, 272 Ala. 344, 346, 131 So. 2d 420 [1961]; *Federal Deposit Ins. Corporation* v. *Cloonan*, 165 Kan. 68, 90, 193 P.2d 656 [1948]; *State* v. *Fitzgerald*, 140 Me. 314, 318, 37 A.2d 799 [1944]; *State* v. *LaRose*, 71 N.H. 435, 439, 52 A. 943 [1902]; *Honaker* v. *Howe*, 60 Va. (19 Gratt.) 50, 53 [1869]; see 4 Wigmore (3d Ed.) § 1066; annot., 18 A.L.R.2d 1287, 1314 § 5; annot., 152 A.L.R. 253; Fed. R. Crim. Procedure 11 (e) (6).'' (Internal quotation marks omitted.) *Lawrence* v. *Kozlowski*, supra, 171 Conn. 711–12 n.4.

In reviewing an arbitration award, even on a claim of a public policy violation, neither the trial court nor this court has authority to make findings of fact that the arbitrator did not make. See, e.g. *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 36–38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987); *New York State Correctional Officers & Police Benevolent Assn., Inc.* v. *New York*, 94 N.Y.2d , 1999 Slip. Op. No. 10737 (December 21, 1999). Notably, the arbitrator made a factual finding that Warren, the employee in the present case, had consulted an attorney, who, in reliance on *Lawrence*, had advised him that a plea of

nolo contendere was not an admission of guilt.

In the present case, there is, therefore, no factual foundation whatsoever for the assertion that Warren embezzled even one penny from his employer. As the arbitrator observed, for all anyone knows, Warren may have been accused falsely by a disgruntled landfill user or by someone else who harbored unfounded suspicions of misconduct. The arbitrator made a factual finding, which is binding on this court, that Warren, pursuant to the advice of counsel and "under the *Lawrence* decision" that his plea could not be used against him, pleaded nolo contendere because, for financial reasons, he had deemed such a plea a more convenient and cleaner way to resolve the charges against him.

Our case law does not permit the inference that a nolo contendere plea automatically fills in this gap in the factual findings made by the arbitrator. *Lawrence* v. *Kozlowski*, supra, 171 Conn. 711–12 n.4. The holding in *Lawrence* has not been questioned until now. Nor has that holding been limited until now. The majority in this case concludes that, although a plea of nolo contendere and a conviction based thereon may not be admitted into evidence in a subsequent civil action or administrative proceeding to establish either an admission of guilt or the occurrence of criminal conduct, it is unfair to expect an employer to set aside its legitimate expectations, solely because of the differences between a conviction based upon a guilty plea or a trial and a conviction based upon a nolo contendere plea. The employer, however, need not set aside these expectations by reinstating an employee convicted of embezzling its funds. The employer may vindicate these expectations by demonstrating the misconduct that undermines its interests. A conclusion that the award conflicted with public policy therefore requires a determination that Warren embezzled, a finding that, because of the employer's reliance on his nolo plea, was not made.[2] In the absence of this finding, the majority's decision distills to what is essentially a determination that the arbitrator's adherence to our well established jurisprudence that a nolo plea is of limited precedential value was itself a violation of public policy.

As the majority acknowledges, when a challenge to an arbitrator's award is made on public policy grounds, the reviewing court is not concerned with the correctness of the arbitrator's decision, but, rather, with the lawfulness of the award. *Board of Trustees* v. *Federation of Technical College Teachers*, 179 Conn. 184, 195, 425 A.2d 1247 (1979). That evaluation "is to be ascertained by reference to the laws and legal precedents . . . ." (Internal quotation marks omitted.) *New Haven* v. *AFSCME, Council 15, Local 530*, 208 Conn. 411, 417, 544 A.2d 186 (1988). In the present case, the arbitrator adhered to our laws and legal precedents. I therefore fail to understand how, by following that law, and by

failing to recognize the employment context exception announced today for the first time by the majority, the arbitrator violated any clear public policy.

Finally, other than relying on the legitimate expectations of the employer, the majority does not explain adequately why we now[3] should treat a conviction following a nolo plea in the employment context differently from the way we traditionally have treated it in the civil and administrative arenas where other equally important interests are at stake. The majority states in its opinion that the employment context is different because it is premised on the notion that "arbitration is essentially a private ordering scheme for resolving disputes . . . ." Although that is true, the arbitral process quite often becomes part of the public process of civil litigation. Additionally, not all arbitrations are unrestricted. Furthermore, not all employment cases are decided by arbitration. Nevertheless, according to the majority, Warren's nolo plea properly should have constituted substantive evidence in the arbitration proceeding, while, under *Lawrence* v. *Koslowski*, supra, 171 Conn. 712, his nolo plea could not have been used for substantive purposes had he been required to bring a civil action under his employment contract. Only if we were to overrule *Lawrence* in that context, a remedy that has not been sought, could the treatment be consistent. If it is, in fact, the employment context that is so significant, I fail to understand the disparate treatment of the evidence. There is certainly no indication in this case to even suggest that the expectations of the employer concerning the evidence upon which it could rely depended upon the forum in which Warren's termination could be litigated.

In conclusion, in deciding to treat a conviction following a nolo plea differently from a conviction resulting from a trial or a guilty plea, we have engaged in a balancing test and have determined that facilitating resolution of criminal cases is paramount. By relying on the private nature of arbitration as a basis upon which to create an exception to our jurisprudence regarding the limited use of the nolo plea, the majority, in essence, takes the first step toward the elimination of the nolo plea. While that step is certainly within its purview, I do not see its necessity.

Accordingly, I respectfully dissent.

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 35–36 n.8, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (plea of nolo contendere has same legal effect as plea of guilty on all further proceedings); *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (nolo contendere plea constitutes waiver of all nonjurisdictional defects).

[2] I recognize that the town's personnel rules provide that conviction of an offense involving the employee's duties may serve as a basis for discharge from employment. See footnote 5 of the majority opinion. To conclude, however, as the majority does, that the arbitrator violated public policy by reinstating Warren would require a finding that he had in fact stolen from the town, a finding that the arbitrator did not make.

[3] The majority focuses on the legitimate expectations of the employer, leaving no room for consideration of the legitimate expectations of the

employee. To assure a criminal defendant that his plea of nolo contendere will not be used against him, as in this case, and then to allow it to be the basis for his termination, particularly when the arbitrator has recognized the financial circumstances at play that induced the plea, is both unfair and, arguably, a violation of the plea agreement.