



reinstatement with back wages and benefits or, in the alternative, an order compelling the submission of the discharge grievance to binding arbitration.

The Commonwealth Court has original jurisdiction over this matter under 42 Pa. C.S. §761.

### ISSUES

Two issues are raised by the pleadings. First is the question whether the union breached its duty of fair representation to petitioner. Second is the issue whether the Commonwealth and the union conspired to deprive petitioner of his rights under the collective bargaining agreement.

### FINDINGS OF FACT

#### Background

Michael Kissell is a high school graduate in his mid-40's who served as a military policeman in the United States Army. (Tr. A 40). He lives with his wife and two minor daughters in Greensburg, Pennsylvania. Since his termination with the Commonwealth, he has not been fully employed (Tr. A 278). His earnings while working for the Commonwealth were in the \$35,000 to \$40,000 range (Tr. A 292).

Kissell was hired by the department in January, 1988, as a Corrections Officer Trainee at the State Correctional Institution in Greensburg, was later in 1989 promoted to Corrections Officer I and was employed at the facility until June 29, 1994 (Tr. A 47, 51-52, 810-811; B 15, 87, 88, 500). His supervisor, Major Louis Folino, and his union representative testified Kissell was a competent employee as to the care, custody and control of inmates under his supervision (Tr. A 932; B 578).

After training at the departmental Camp Hill facility he underwent on-the-job training at Greensburg (Tr. A 48, 812-818). During training he signed a receipt for a copy of instructions in the departmental Code of Ethics (Tr. A 334-335, 688-689; B 7, 89-90).

During his employment at Greensburg, Kissell was represented for collective bargaining by the respondent union and its affiliates, District Council 83 and Local 2498 (Tr. B 309-311, 376-379, 654-655). The Commonwealth and the union were parties to a collective bargaining agreement governing the terms and conditions of Kissell's employment (Tr. A 53; B 151-162, 312-313; Ex. U-2). Council 13, its eight affiliated district councils and over 300 affiliated local unions represent about 60,000 Commonwealth employees (Tr. B 308-311, 378; Ex. U-48, p.5). The local unions within Council 13 are closest to the membership, representing generally employees at a certain work site (Tr. B 310). Within the Department of Corrections, local officers and stewards service their members in the issues arising at the work site, preparation of grievances, investigation and presentation at hearings and meetings (Tr. B 310). Local 2498 is composed solely of the Greensburg institution. It files grievances, provides union representation locally and communicates with District Council 83 and with Council 13, the certified bargaining representative for Commonwealth State Correction Officers (Tr. B 377-378).

John Massari, a non-paid volunteer, is president of Local 2498 and works as a Corrections Officer I at the State Correctional Institution, Greensburg (Tr. B 311-312, 373-374, 376-377, 387-388, 576-577). Employed at Greensburg since 1988, he has been local president since 1988 (Tr. B 374, 377, 576). Massari,

or his designee, files grievances, represents employees at fact-findings and predisciplinary conferences and deals with local labor relations issues (Tr. B 379).

The relevant collective bargaining agreement has a four-step procedure for processing grievances alleging violations of the agreement (Ex. U-2, pp. 107-114). Corrections officers also have civil service status and can challenge suspensions and terminations or their personnel actions through appeal to the State Civil Service Commission (Tr. A 47; B 200, 350, 566; 71 P.S. §§741, 950, 741, 951). An employee may not pursue both an appeal to the commission and a collective bargaining grievance (Tr. B 350, 516; Ex. U-2 p. 107). Union staff will neither represent a member nor provide a lawyer for an appeal to the commission (Tr. B 351, 567).

The four-step or accelerated grievance procedure was designed to expedite grievance resolution while giving both sides a full opportunity to present their arguments and to fashion remedies (Tr. B 330-334; Ex. U-48 pp. 36-37). Under the agreement grievances must be filed within fifteen days of the alleged violation or be rejected as untimely (Tr. B 391, 414, 678-679; Ex. U-2 p. 108). The individual employee as well as a union representative may file grievances. Tr. A 560; B 379-380).

Upon the filing of a grievance, a first step meeting is held among union and management representatives from the particular institution involved. Union and management must exchange all information supporting their positions, including the grievances, witness statements, applicable policies and other information (Tr. B 151-152, 333-334, 337, 393, 396-397, 445). Although the grievant has no right to testify in the grievance procedure, it is customary at the

first step at the Greensburg facility for the grievant to testify as was the case with petitioner (Tr. B 364-365, 612).

If either the union or the department fails without just cause to exchange information at the first step, it may be precluded from introducing that information at later steps in the accelerated procedure (Tr. B 339-340, 608). After information is exchanged, the parties discuss the facts, debate their positions and try to resolve the grievance. Upon failing of resolution, the union may proceed to the second step (Tr. B 339).

The second step is a hearing conducted before one of two Joint Area Committees, one for the East and one for the West. There the parties can present evidence exchanged at or acquired after the first step if provided to the opposing party 48 hours prior to hearing (Tr. B 152-153, 334, 342, 393, 397).

The third step is heard before the State Committee and the fourth step is arbitration before a neutral arbitrator (Tr. B 160-162, 394; Ex. U-2 pp.110-11, U-48 P.8). The accelerated grievance procedure rules are set forth in Appendix F to the collective bargaining agreement (Tr. B 333; Ex. U-2 pp. 182-190).

Second step grievances arising at Greensburg are heard by the Western Joint Area Committee panel made up in 1994 of four representatives of the Commonwealth and four from the union (Tr. A 138; B 152-154, 181, 399, 696; Ex. U-2 p. 183, U-48 pp. 6, 28-29, 36). Management representatives on the panel may not be current employees of the institution from which the grievance arises, nor may panel representatives be members of the district council from which it arose (Tr. B 335-336, 696-697). In discipline hearings before the panel, the Commonwealth presents its case first followed by the union. Each presents documents and witnesses statements and has an opportunity for rebuttal. After

rebuttal, the panel members may ask questions of the presenters. A short summary by each side ends the proceeding (Tr. B 154-155; 340-341, 668; Ex. U-48 pp. 11-12).

After summation, the panel conducts a private executive session to debate the merits of the grievance. Someone will present a motion to sustain, deny or modify the grievance followed by a vote. Each panel member has an equal vote and a majority vote prevails (Tr. B 155-156, 183, 342-344, 698-699, Ex. U-48 pp. 37-38).

Each side during executive session advocates its respective position but ultimate decisions are based upon the merits of the grievance and its likelihood of success at later stages of the process. Thus, union members may vote to deny a grievance and Commonwealth members to sustain it (Tr. B 698-699). A decision of the panel is final and binding (Tr. B 162-163, 343-344, 362, 403).

The step two panel meets each month and resolves up to 80 per cent of cases. If there is a deadlock, the grievance moves to three-step (Tr. B 160, 696; Ex. U-2 p.110, U-48 pp. 7-8). Each party is entitled to one postponement at each level of the grievance procedure and may for cause receive a postponement from the committee co-chairs (Tr. B 347, 349). A panel postponement moves the hearing to the next month's meetings (Tr. B 347-348).

The local union handles a grievance at the first step; the district council is responsible at the second step; thereafter, Council 13 processes and presents the grievance (Tr. B 394).

All new employees undergo orientation conducted by the State Correctional Institution at Greensburg management, including receipt of rules and regulations of the departmental Code of Ethics (Tr. B 7, 90, 324-325; Ex. U-3).

New employees also receive training in the Code of Ethics during their three or four week training at Camp Hill, Pennsylvania (Tr. B 144-145). All department employees must follow the Code of Ethics (Tr. B 8).

Before discipline is imposed, an employee will have a predisciplinary conference at which he is entitled to union representation. (Tr. B 380-382, 600-601). At Greensburg, John Massari generally represents the employee. (Tr. B 387). At the predisciplinary conference, a management panel (two deputy superintendents and the personnel director) hears the charges reported by the investigating management official (Tr. B 383, 385, 595). There is no document exchange (Tr. B 607-608). Within ten days the panel makes a recommendation to the superintendent who sends written charges and an explanation of imposed discipline to the employee with copies to the local union and district council (Tr. B 392).

In the case of a discharge, the superintendent submits his recommendation to the Secretary (formerly Commissioner) of Corrections. The Secretary (Commissioner) submits it to the Secretary of the Office of Administration who approves or disapproves the decision (Tr. B 74-75, 302).

Under the progressive discipline concept, the department begins at the lowest possible level of discipline in a salvage effort (Tr. B 67-68, 617). The lowest level is a reprimand followed by suspensions of increasing lengths (Tr. 68-69, 365-366). If progressive discipline fails, the employee is terminated (Tr. B 70-71). The discipline level depends upon the severity of the offense and some offenses are so serious that they will not warrant progressive discipline (Tr. B 111, 707). On occasion an employee has been discharged for a single incident of refusal to obey a superior's order (Tr. B 366-367).

If an employee is successful in the disciplinary procedure, the record of discipline is removed from the file (Tr. B 115).

The Department of Corrections is a part of the executive branch of the Commonwealth of Pennsylvania. It is a para-military organization and an employee of the department cannot disobey direct orders of a superior (Tr. B 816-818).

### Kissell's Employment History

Kissell became a union member in 1989 rising to a union steward's position in 1990. (Tr. A 51; B 403-405). His only action as steward was for himself (Tr. A 76; B 598-599).

The facility had 950 inmates and 200 Corrections Officers (Tr. A 819). The guards worked three shifts, 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m. and 10:00 p.m. to 6:00 a.m. (Tr. A 819-821). Forty officers worked the 6:00 a.m. and 2:00 shift and twenty the 10:00 p.m. shift (Tr. A 826, 843, 855; B 230, 456).

Although Kissell was generally well-liked and had many friends among and socialized with both management and union employees off-work, from 1988 on bad relations developed between him and a few co-workers on the 10:00 p.m. shift (where the majority of his employment was spent) (Tr. B 571-573, 578-580, 590-591).

On the 10:00 p.m. shift in 1988, he worked with 19 other officers. From that year on he had a pattern of reporting to his shift commander hearsay tips received from inmates concerning improper possession or distribution of dispensary drugs by guards or of his own discovery of drug packets at times and places believed to be improper (Tr. A 173-188).



John Massari, president of the union local, learned of the drug allegations much later and found them vague (Tr. B 498). He said that on occasion contraband drugs like marijuana have been found in the possession of inmates (Tr. B 585). Kissell's only non-hearsay evidence were the packets he had found and years later reluctantly turned over to Massari (Tr. B 585). The packets were the containers in which lawful drugs were dispensed to the inmates by the guards and were not of themselves evidence of illegal drug distribution (Tr. B 585).

Kissell also reported incidents of masturbation by guards in front of inmates (Tr. A 172-180, 348-350, 842, 843). He passed along information about the institution nurse although he did not suspect her of wrongdoing (Tr. A 355).

Shortly after this reporting began in 1988, he also began to report to his superiors incidents of harassment toward him or his property (Tr. A 163, 165-169, 177-180, 260-261). There were seven acts of vandalism committed by persons unknown against his vehicle while parked in the employee's lot (Tr. A 253-257, 259, 1026). He reported anonymous telephone calls to his home suggesting he was homosexual, which he is not (Tr. A 163, 165-166, 171). Anonymous calls came to him at work from females seeking affairs (Tr. 257). A guard told inmates that Kissell got erections from seeing them (Tr. A 167). One officer sometimes suggestively rubbed Kissell's arms in the presence of inmates (Tr. A 169). Another officer told him he was "queer" (Tr. A 165-166). Other guards poked him in the buttocks with their badge pins (Tr. 169).

Massari was not made aware of sexual harassment but would have upon receipt of such information referred Kissell either to the union affirmative action officer or to the EEOC (Tr. B 424, 426).

Major Louis Folino, a management employee, was assigned by the superintendent to investigate the drug and masturbation reports. On November, 1991, Folino reported in writing that the allegations were unfounded (Tr. A 843-850, 925-926, 940-945, 951-953, 965-968; B 15-19, 21, 26-27, 30-31, 409, 599-600). A second management investigation in 1993 reached the same conclusion (Tr. A 873-875). However, despite these findings, changes were made and an officer identified by inmates as involved with drug infractions “disappeared” or was “fired” and the nurses, rather than the guards, later dispensed dispensary drugs (Tr. A 260; B 585, Ex. U-17).

In the course of Folino’s 1991 investigation, he interviewed Kissell (Tr. A 844-845). Because Kissell said that maybe he “just should have brought a gun in and shot everybody in sight” and that he needed “help” and that if he had “to take somebody out” he would and because he pounded on his legs and because of his shift behavior, Kissell was relieved of duty pending psychiatric evaluation (Tr. A 857-865, 933, 938-939, 948-950, 959-966, 1014-1022; B 405-406; Code of Ethics B-21). John Massari told Kissell, who was on leave, that he should be paid for the fitness for duty evaluation (Tr. B 409-410).

Kissell returned to work in early 1992 with no disciplinary action (Tr. A 867; B 603). Management charged him with accrued leave time for the evaluation periods and he successfully through the union grieved the decision in a non-precedential first step settlement which returned his accrued leave to him (Tr. A 868; B 201-202, 354-355, 410-413, 658, Ex. U-4, U-5).

Upon his 1992 return to work, management says that it advised him of the results of the drug investigation but within a month he approached staff reasserting the same drug allegations and questioned other officers about drug

activity from years before (Tr. A 869, 871; B 417). Deputy Superintendent L.P. Benning thereupon ordered him to cease his independent investigations and to submit reports of incidents (Tr. A 402, 868, 969; B 39, 417). In about 1992 petitioner followed a Corrections Officer, Robert Emert, out of the Greensburg parking lot, pulled in front of Emert's car and twice forced him to stop. He ran to Emert's car and asked the key to the drug problem. Emert reported the incident to police and prison management (Tr. A 1011—10277).

Kissell also continued into 1993 to report instances of harassment (Tr. A 412). Management (Lt. Speicher) directed him to make written, not oral, reports (Tr. A 414). The first written report of harassment was filed February 16, 1993, followed by nine other reports up to August 13, 1993 (Tr. A 410, 414-415). They complained that an officer told him two inmates were in a place that they were not (Tr. A 417-418), that he was called by another officer's name when telephoned accidentally (Tr. A 419-421), that an officer blinked the lights off and on (Tr. A 422-424), that an officer told him how to do his job (Tr. A 426), that Lt. Speicher refused to accept one report (Tr. A 428-429) and that an unknown person wrote an obscene comment about another officer (Tr. 430-431).

In the summer of 1993, Kissell told management that he intended to file a Final Summation Report with someone outside the institution (Tr. A 878-879; B 417-418). Although he initially agreed to an order to give a copy to management, he refused to do so for a year. (Tr. 879-880, 922, 926). Through the friendship of Joseph Rolino, a friend of Executive Deputy Commissioner Lawrence Reid, he submitted his report of this twice-investigated incident to Reid (Tr. 290, 506, 507, 927-928; B 299, unmarked department exhibit).

Management did not pursue disciplinary actions for the continued investigations and failure to turn over the report but rather scheduled an administrative review meeting to afford Kissell an opportunity to turn over his report (Tr. B 133-134, 418). Given the required one-day's notice, he was unable to secure union representation and management refused a postponement (Tr. A 430, 436-438). Kate Lechman, local union financial secretary, took notes of the meeting for him (Tr. A 630, B 418). Thereafter, Kissell was, without a predisciplinary conference, suspended pending investigation and medical evaluation. Such suspension being neither an administrative nor a disciplinary action is allowable under Civil Service law for up to 30 days (Tr. A 569; B 355-358, 419, 606; 4 Pa. Code §101.21(c); Ex. U-7).

Kissell drafted a grievance alleging suspension for reporting sexual harassment but Massari and a union steward convinced him to revise it to allege improper suspension without formal charges or without predisciplinary conference or just cause or due process (Tr. A 570, 573-574, 576; B 419-423; Ex. U-9, U-10). The notice of suspension pending investigation advised Kissell that the union agreed to his using accrued leave during suspension but Massari advised the superintendent of his dissent from this (Tr. B 427-428; Ex. U-7, U-8).

On September 15, 1993, the first step hearing in the grievance took place (Tr. B 428). Management provided the union with documents supporting the suspension including Civil Service regulations allowing suspension pending investigation and a copy of a precedent-setting third step decision affirming that report (Tr. B 442-445; 4 Pa. Code §101.21(b)). Other documents earlier requested of Kissell were not supplied on the grounds of irrelevancy to the issue of suspension (Tr. B 445-448, Ex. U-10). In camera, Massari and District Council

Representative William Stouffer reviewed documents in support of the allegations against Kissell (Tr. 445-448, B 450-451).

Because the regulations provide that an employee should be paid for time not ultimately included in a disciplinary suspension, Massari believed the Commonwealth should pay Kissell for days off work in excess of the seven-day suspension (Tr. B 443-445; 4 Pa. Code §101.21(b)).

The department initially denied the grievance at the first step (Ex. U-15) but ultimately paid Kissell for the time he was suspended for evaluation (Tr. A 582-583; B 412, 437; Ex. U-18). Kissell requested a copy of Massari's notes and was furnished a summary letter showing the defenses raised by the union (Tr. B 442; Ex. U-17).

In the meantime, the Commonwealth conducted a predisciplinary conference on September 7, 1993, concerning the conduct underlying the suspension pending investigation (Tr. A 584; B 428, 430; Ex. U-12). Kissell was charged with violations of the Code of Ethics in leaving his post without proper authority, disobeying orders not to conduct his own investigations, intimidating, harassing and stalking co-workers, refusing to turn over the report given the deputy commissioner and failing to cooperate with internal investigations (Tr. A 876-878; B 69, 429-430, 438-439, 701; Ex. U-12). On September 16, 1993, he was suspended for all but two of the charges (Tr. A 876-878; B 437; Ex. U-14). The suspension notification informed Kissell that he had committed "serious offenses, which normally demand severe discipline," and that "continuation of such actions ... may result in further disciplinary action ... concluding dismissal ...." (Ex. U-14). Upon his return to duty September 17, 1993, Kissell was ordered to report in writing unusual incidents or concerns of a serious nature (Tr. A 973-974).

The union contested the suspension by grievance and made the same arguments at the first step meeting on October 20, 1993, as made on September 15, 1993; namely, that Kissell had gone through a disturbing period two years before when he brought his drug and harassment allegations to management's attention, that he had been suspended for evaluation, found fit for duty, returned to work and "recently" learned of the results of Major Folino's 1991 investigation. The argument raised the issue of vandalism to Kissell's vehicle and harassment "by anonymous telephone calls, inmates out of their cells when he relieved the ... shift ..., lights flashing on and off, ... threatening notes ... a confrontation with another CO over a missing inmate; he felt harassed and 'set up'. ... [H]e came to Management, appealing for help" and was suspended without "just cause" (Tr. A 584; B 452-453; Ex. U-17). The Commonwealth released documents in support of the suspension and Stouffer sent copies to Kissell (Tr. A 592-593; B 449-450, 453, 547-548). All Kissell's incident reports were not included because they were undated (Tr. B 453; Ex. U-21).

Upon denial of the grievance, it advanced to second step before the Western Joint Area Committee panel (Tr. A 593; Ex. U-18). Because of two postponements it was heard February 1, 1994 (Tr. B 480-482; Ex. U-22, U-23). (Kissell had rejected a settlement reducing the suspension to three days (Tr. B 482-483, 490-491; Ex. U-27)). Stouffer and Massari argued for Kissell that discipline had been imposed without good cause and that management was not responding to Kissell's concerns about his problems with staff (Tr. B 491, 493-494, 612, 664, 666; Ex. U-27 pp. 13-14). Kissell testified over one-half hour for himself but addressed improper staff conduct going back to 1990 rather than the allegations leading to his suspension (Tr. A 597-598; B 491, 494-495, 612, 666-667, 702; Ex.

U-27 p. 14, U-48 pp. 12-13, 29-35). He admitted his continuing investigation and justified disobedience of orders on the ground of a “coverup” by his superiors (Tr. B 702; Ex. U-27 p. 14).

The panel in a final and binding decision denied the grievance because the Commonwealth proved his disobedience of orders and because the panel believed the union could not have prevailed had the grievance proceeded to arbitration (Tr. A 602, 703, 721; U-27, U-48 pp. 13-14, 23). The seven-day suspension stood without recourse (Tr. B 496-497).

On November 24, 1993, a second predisciplinary conference was held concerning allegations that Kissell in October, 1993, had engaged in unacceptable conduct, creating a hostile and intimidating work environment in violation of the Code of Ethics by accusing fellow officer Karen Wunder of standing in his space at roll call (Tr. A 608). Massari argued that Kissell was merely complaining that Wunder was in his three-foot “comfort zone” (applicable to dealings with inmates) since there were no assigned places at roll call (Tr. A 609, B 457-459, 463; Ex. U-21).

Management found meritless Kissell's complaint about invasion of his space (Tr. B 462; Ex. U-21); Kissell alluded to harassment, perhaps sexual, by Wunder but despite Massari's urging would not elaborate (Tr. B 116, 462-464, 466-468, 476-475; Ex. U-21 p. 3). Had Massari been given facts supporting sexual harassment of Kissell he would have referred him to the EEOC or to the affirmative action office of the union but Kissell was secretive as to the name of his alleged harasser (Tr. B 424, 426).

On November 24, 1997, Major Folino instructed Kissell to file no more incident reports (Tr. A 193).

Kissell was reprimanded and removed from the 10:00 p.m. shift because of continued investigation and also to separate him from Wunder (Tr. A 611, 883-884; B 39, 456-458, 475-476; Ex. U-23).

The union grieved the reprimand as without just cause and the shift change as a violation of the collective bargaining agreement, which permitted senior employees to bid into shifts (Tr. A 612; B 477-478; Ex. U-24). At the first step meeting in January 1994, in Kissell's presence the Commonwealth turned over its supporting documents (Tr. 478-479).

Settlement talks ensued (Tr. B 479, 483, 486-487). On January 31, 1994, Massari attempted to reduce the seven-day suspension so that Kissell could be taken back a step in the progressive discipline continuum so that termination would not be the next step (Tr. B 483-486; Ex. U-20). Kissell rejected the settlement because he believed he was in the right and also because he would have lost four days of accrued leave (Tr. A 454, 602-606; B 484-485, 487-488, 656, 683). The union could have accepted without Kissell's consent but adhered to its practice of allowing the grievant to decide the use of leave time (Tr. B 488-489, 679-680).

#### The Facts Concerning Petitioner's Discharge

By reason of a management proposal, made May 24, 1994, the reprimand and shift change grievances were settled. Kissell was to return to the 10:00 p.m. shift on June 1, 1994 (Tr. A 614, 905, 915; B 997-560; Ex. U-28). The day of the proposal, May 24, 1994, events occurred which precipitated Kissell's discharge on June 29, 1994.

At 11:00 a.m. on the fateful day, Kissell was standing outside the institution with other officers, among them Major Folino, waiting to go to the



firing range (Tr. A 56, 58-59, 296). While he was waiting he heard Folino direct some derogatory remarks at him but he “wasn’t listening” (Tr. A 57, 60-61). Sergeant Walker came up to Kissell, who was standing away from the others, and grabbed his buttocks, causing Kissell to say, “Ooh, baby, sweetmeat” and he asked Walker to repeat the gesture so that others could see it (Tr. A 57, 305, 308, 311). From 1989 to May 24, 1994, Kissell had been grabbed over four times (Tr. A 58). Other people again grabbed him on May 24, 1994 (Tr. A 64).

The record is devoid of any evidence that from 1988-1994 the Commonwealth ever disciplined any officer who harassed Kissell. Kissell went to the range but at 2:50 p.m. he went in an upset condition to shift commander Captain Daniel Keeney’s office and told Keeney to tell Walker that, if he repeated the grabbing, Kissell would put him in a “come-along-hold” (Tr. A 63-66, 452; B 224-225). Keeney’s reply that he would not get involved angered Kissell who told Keeney to report the matter to the 6:00 a.m. shift commander (Tr. A, 452; B 228-229). He told Keeney that Folino had seen the incident (Tr. 458). Kissell returned to his assigned post (Tr. A 67).

Keeney then reported the conversation to Folino who said he was unaware of the incident and told Keeney to get more information (Tr. A 985-988; B 234). Keeney summoned Kissell and directed him to file a written report. At first Kissell refused on the grounds he had been ordered not to file any more written reports (Tr. A 56, 67-68, 71, 459, 464, 469, 614; B 234-231). Keeney reminded him he must follow the last order given which was Keeney’s (Tr. A 470; B 234, 237-238). There is no evidence that at the time of this conversation Kissell asked for union representation.

Keeney reported the second Kissell encounter to Folino (Tr. B 239). They both reported to the superintendent their concern for Kissell's fitness for duty that day (Tr. B 239-241).

In the meantime, Kissell went to the staff lounge and began to write the report (Tr. A 70-71). Keeney, having come back from his meetings with Folino and the superintendent, ordered Kissell to stay in the lounge and directed the main control staff not to allow Kissell back into the institution (Tr. A 474-475, 990-991). Captain Schultz came to the lounge and directed Kissell to finish the report and to give it to Keeney (Tr. A 72). Kissell could not finish the report because at 3:45 p.m. he was called to a meeting (Tr. A 72-73). (He later tried to file the report at the predisciplinary conference held May 31, 1994, but was prevented by management (Tr. A 988-989; B 528)).

Dr. Judy Gettle, staff psychologist, Major Rolino, Captain Keeney and union steward, Jeffrey Ribblett, attended the meeting on May 24, 1994 (Tr. A 74-75, 478; B 241). Kissell objected to Ribblett's representation and asked for Kate Lechman (Tr. A 627, 631). Folino said that Lechman (who was not a steward) could not represent Kissell (Tr. A 634-635, 993-994). Kissell, during the 15 minute meeting became upset, spoke of the Walker incident, accused Keeney of jeopardizing him by having Karen Wunder replace him at his post and discussed his military experience (Tr. A 79, 480, 491; B 246). He poked Ribblett in the knee, saying, "To be forewarned is to be warned" and "if you don't write everything down that they are saying here I will know it" (Tr. B 241). He was directed to return to the lounge for further instructions and did so (Tr. A 80, 491; B 247).

Keeney, Folino and Gettle told the superintendent that Kissell had been very upset and agitated and was not fit to go back to the cell blocks but

should be sent home pending review (Tr. 247, 248). The superintendent ordered that Kissell be sent home pending investigation into his fitness for duty (Tr. A 991, 994; B 248).

Folino then asked Kissell to accompany Folino and Lieutenant Christopher to the locker room (Tr. A 80-81, 491). In the locker room Folino told Kissell he was suspended and gave him the telephone number of the State Employees Assistance Program, which afforded help to troubled Commonwealth employees (Tr. A 81, 439-440, 492, 672). No union representative was present but none is required in a meeting in which the employee is notified of a disciplinary decision. Mayview State Hospital, 18 PPER §18096 at p. 279 (PLRB 13, Final Order, 1987); Pa. Fish Commission, 18 PPER §18029 p. 89 (PLRB Final Order, 1986).

Because of the suspension, Folino ordered Kissell to leave the institution (Tr. A 496, 501, 503). Kissell protested he should be given a reason, relying on advice given him by former employee, Joseph Rollins (Tr. A 495-496, 709; B 268). Officer Ronald Landers (management personnel officer) testified he heard Kissell refuse to leave but did not report the refusal in his incident report (Tr. B 62, 212). Kissell left the locker room and tried to go back to the institution to go to the superintendent's office (Tr. A 108, 497, 500, 889-899). Folino four times ordered him to leave while Kissell repeated his requests to go into the facility (Tr. A 889-899; B 55-56, 61-63).

Kissell called Ribblett and secured the meeting notes and asked him to have Massari file a grievance over the suspension (Tr. A 88, 94, 108, 897; Ex. P-1). When Folino and Christopher escorted Kissell out and he drove off the grounds

(Tr. A 106, B 64). Kissell reported by telephone the day's events to Massari (Tr. B 506).

Kissell received a notice dated May 26, 1994, revised May 27, 1994, advising him of a predisciplinary conference to be held May 31, 1994, concerning his conduct on May 24, 1994 (Tr. B 508; Ex. U-29). In the interim, Massari spoke with Kissell, prepared questions to ask management at the conference and drafted an opening statement (Tr. B 509-510, 513-520, 627).

Massari represented Kissell at the May 31, 1994, conference (Tr. A 110-111; B 510-511). Kissell asked for Lechman but Massari explained she had no official representational status but that Kissell could have any available steward (Tr. B 511-512). Kissell asked Massari to act for him (Tr. B 512, 514; Ex. U-30).

At the conference Massari argued that management's inappropriate handling of Kissell's attempt to report sexual harassment was the cause of his agitation. He portrayed Kissell as a worker "crying out for help" not for discipline and said management should have helped Kissell by implementing Article B-21 of the Code of Ethics (Tr. A 640; B 519-524; Ex. U-30). Kissell raised no objection to the argument and was pleased with it (Tr. A 110-111, 638-639; B 522). Kissell also spoke giving his version of the events of May 24, 1994 (Tr. B 528-533, 540-541).

On June 28, 1994, the superintendent notified Kissell by letter that he was discharged (Tr. A 116, 652; B 534-535, 538; Ex. U-32).

Kissell's later application for unemployment compensation was denied (Tr. A 277-278, 661-664). No union representative attended the hearing although Massari told him he would testify if subpoenaed so that he would get

work time off (Tr. A 118, 122; B 573-574). No subpoena issued (Tr. A 122; 738; B 574).

Three grievances filed concerning the suspension/discharge were consolidated for processing (Tr. A 640-641; B 542-543; Ex. U-31, U-33).

Massari during the predisciplinary conference secured names of witnesses to the May 24, 1994, events who mostly would prove unhelpful to Kissell's cause (Tr. B 526, 554-556, 638; Ex. U-30). One confirmed Kissell's agitation and management's version of his demeanor when being escorted from the institution (Tr. B 527-528). Officer Paul Baker had seen Walker grabbing or patting Kissell's buttocks (Tr. A 223; B 552-553, 650-651; Ex. U-37). Kissell refused Stouffer's request to give a witness statement for the Western Joint Area Committee hearing, saying "No. Do your job." (Tr. B 454, 549, 666, 684-685, 688-689).

The first step meeting was held in mid-July 1994 (Tr. B 544, 630, 659; Ex. U-34, U-35). The union presented the first arguments as made by it at the May 31, 1994, disciplinary hearing (Tr. B 660-663; Ex. U-34). The union and management exchanged documents supporting their positions (Tr. A 642-643; B 544). Kissell voiced no objection to the union arguments (Tr. B 663).

Management denied the grievance at the first step (Tr. B 544; Ex. U-35). The union moved the matter to step two where they were heard before the Western Joint Area panel on October 4, 1994 (Tr. A 118; B 544-545, 548, 664; Ex. U-38). Kissell was not called to testify because his prior February panel testimony had addressed irrelevancies (Tr. A 131-132; B 429, 546, 612, 688). Massari and Stouffer re-presented Massari's arguments from the predisciplinary conference, that Kissell's agitation was caused by management's failure to address the

harassment and Kissell should not have been disciplined but rather evaluated under Article B-21 of the Code of Ethics (Tr. A 646-647, 918-919; B 164, 549-550, 613, 667-679; Ex. U-36, U-48 at pp. 27-28, 33-34). They also argued that Keeney's order for a written report of sexual harassment violated policy and that Kissell was interrupted before he could finish the report (Tr. B 184, 549-560, 622-625, 629-630, 637-638, 669-671).

The union also submitted Baker's eyewitness account of the Walker incident (Tr. A 233; B 552, 651, 669; Ex. U-37). Management presented a later written partial recantation by Baker (Tr. A 134; B 553-554, 651, 673; Ex. U-37). In rebuttal, Kissell's father, Edward Kissell, testified that, at the unemployment compensation proceeding, Baker had testified he saw Walker grab Kissell's buttocks (Tr. A 124-125, 134, 751-752, 754-755; B 552-554, 673). The union argued that Baker's recantation resulted from duress exercised against Baker by the Greensburg management (Tr. B 553-554).

Management presented evidence of prior suspensions for disobedience of orders in order to show that discharge was appropriate (Tr. B 185-186). The union could not present evidence of the three favorable settlements of prior grievances because they were without prejudice and non-precedential and could not be used later (Tr. B 201-202, 354-355; Ex. U-8, U-21).

#### Failure to Arbitrate Grievance

At least two union panel members believed that, in light of Kissell's continued failure to obey orders, the union would not prevail if the grievance were taken to arbitration because continued disobedience is just cause for discharge (Tr. B 707, 721; Ex. U-48 pp. 18, 23, 25-26). In executive session, however, the union panel members tried to convince the Commonwealth to sustain the grievance (Tr.

708). They failed and so proposed that Kissell be returned to work undergoing evaluation. The Commonwealth countered that the evaluation should determine whether underlying medical factors caused Kissell's May 24, 1996, insubordination (Tr. B 709). The union members agreed as the only way to save Kissell's job (Tr. B 709-710; Ex. U-48 p.50).

The panel issued its decision ordering Kissell's evaluation by a Commonwealth-selected psychiatrist who would be furnished with Kissell's relevant employment records. Management was to schedule the evaluation within 30-days and, if Kissell failed to appear at the appointment, his discharge stood. If the psychiatrist found his conduct not the result of a medical condition, the discharge would stand. If it were found his conduct was the result of a medical condition making him unable to work as a corrections officer, then he was to be placed on medical leave retroactive to suspension (Tr. A 138, 148; B 163, 557-559, 674-675, 710-711, 715; Ex. U-38). The selection of the psychiatrist by the Commonwealth was mandated by section B 21 of the Code of Ethics (Tr. B 712-713; Ex. U-3 pp. 8-9; Ex. U-48 p. 20). The 30-day limit was an effort to resolve the matter promptly in light of Kissell's long unemployment (Tr. B 713).

The union panel co-chair explained the decision to Stouffer, Massari and Kissell (Tr. B 557-558, 675, 676, 715). If a medical condition covered the pre-discharge behavior, Kissell could be treated and returned to work, which Kissell interpreted to mean he had to pretend to be crazy to keep his job (Tr. A 137; B 559, 674-675, 715). Kissell disagreed with the decision but Massari told him it was fair and could not be taken further in the grievance process (Tr. A 136, 137, 141).

Union Failure to Process  
Kissell's Last Grievance

The institution personnel officer, Ronald Landers, handled scheduling of the examination ordered October 4, 1994 (Tr. A 1007). On October 28, 1994, Kissell telephoned Massari that no appointment had yet been scheduled. The matter was out of Massari's hands and he referred Kissell to District Council 83 (Tr. B 563, 634). Kissell telephoned Stouffer who got in touch with the union panel co-chair, Gary McCaulley, who contacted the Commonwealth panel chair to learn why there was a delay scheduling Kissell's evaluation (Tr. B 676-677, 716). Management faxed the chair a summary of their difficulty in scheduling an appointment (Tr. B 716-717; Ex. U-39). A Dr. Patrick Condo and a Dr. Monsour had been contacted but not selected (Tr. B 736; Ex. U-39). The union panel member, Gary McCaulley, telephoned Richard Lindsey, then Director of the Grievance Department at AFSCME Council 13 (Tr. B 728-729). Lindsey was concerned about the delay and looked at the faxed information and told McCaulley to keep on the Commonwealth so the matter would not languish (Tr. B 729-731). Lindsey believed the faxed packet showed a good faith effort (Tr. B 717-718; Ex. U-39).

The Commonwealth, after failing, between October 11-14, 1994, with Condo and Monsour, was referred by Steven Miller of the Bureau of Human Resources of the central office of the Department of Corrections to Dr. David Spence (Tr. 736-737; Ex. U-39, U-40). On December 20, 1994, Landers learned that Dr. Spence refused the case because he did not perform independent examinations. (Tr. B 737; Ex. U-39, U-40). Dr. Marvin Stewart was contacted October 20, 1994, and he unacceptably wished to evaluate without the case files, but after a private interview with Major Folino on November 7, 1994, Stewart



wrote a summary of the meeting regarding Kissell's recent actions including that "he reported that Sergeant Walker had 'grabbed his ass' and ... [t]his climaxed a long series of behaviors ... refusing to obey orders, stalking .... [T]elling an untruth and ... [r]esponding as if it is a fact .... [Y]our detailed episodes of angry outbursts and menacing behavior" led Dr. Stewart to opine that Kissell might have a "serious thought disorder" and made a referral to Dr. Robert Wettstein (Ex. U-39).

On the basis of a prior psychiatric examination, the report of the Unemployment Compensation Board of Review, the decision of October 4, 1994, Kissell's personnel file, records of the institution including grievance and disciplinary papers, psychological testing of Mr. Kissell, interviews with Mr. Kissell and his wife and an interview with Major Folino, Dr. Wettstein, on January 24, 1995, concluded that "there is no history of nor evidence for a medical or psychiatric disorder in May, 1994, or earlier that would explain ...his ... behavior at that time .... There was evidence ... of ... current stress and decreased capacity to deal with that stress ....". Kissell, however, was not suffering from a psychiatric disorder (Ex. U-40).

As a result, Kissell was not returned to work (Tr. B 719). Kissell received upon request a copy of Dr. Wettstein's report (Tr. A 242; B 677; Ex. U-42).

#### The Failure to Process Post-termination Grievances

In January and February, 1995, Kissell attempted to file two grievances contesting the untimely scheduling of the psychiatric examination, the fact he was not allowed to produce paperwork to Dr. Wettstein, denial of due

process “as in past reports of sexual harassment instigated by Major Folino” and the superintendent’s refusal to allow Kissell to report sexual harassment or to utilize an “open door chain of command” (Tr. A 154; B 563-564, 635; Ex. U-42, U-43). These grievances were not processed because the 15-day time limit for filing had expired (Tr. B 635-636, 677, 679; Ex. U-2 p. 108).

The present lawsuit followed.

### SUMMARY OF FACTS

Michael was a Corrections Officer who well performed his job with respect to the inmates in his custody. He became obsessed from 1998 on with reporting hearsay or observed instances of drug violations by guards, which resulted in the termination of one guard and a change in drug distribution protocol. Mostly the charges were vague and hearsay. Two management investigations in 1991 and 1993 found nothing substantial in the allegations. Kissell was ordered to cease independent investigations but instead aggressively pursued them. He had also reported other guard infractions such as masturbating before inmates.

He still was friendly with most management and guard employees but his investigative/reporting actions led to harassment – sometimes sexual – by a few other employees, none of whom was ever disciplined by management.

Kissell was disciplined several times for bizarrely agitated behavior or for failing to obey orders about investigations or refusing to turn over a copy of his report to the deputy commissioner. Whenever the union was required to represent him, it did so vigorously and advanced all arguments which were made known to it by Kissell who was somewhat secretive about incidents such as Karen Wunder’s alleged sexual harassment of him.

His discharge came about after Sergeant Walker and other inmates grabbed his buttocks on May 24, 1994, resulting in his extreme agitation. After conversations with the shift officer which led to a meeting with management and a management decided that he should leave the institution immediately under suspension for evaluation. Unable to finish a report he was ordered to write, he four times disobeyed orders to leave the institution and was escorted out

Later, after leaving, he was discharged June 29, 1994. At every step of his May 24, 1994 – June 29, 1994, suspension/discharge proceedings he was vigorously defended by the union which argued his agitated behavior on May 24, 1994, was due to management's continued ignoring of acts of harassment directed against him. However, Kissell had had a pattern of disobeying orders and disobeyed the orders to leave the institution until escorted out and the Western Joint Area Committee panel of union and management representatives believed in good faith that sending grievances to arbitration had little likelihood of success for Kissell. He had disobeyed orders. The union members of the panel tried to save his job by agreeing to the medical evaluation of the causes of his behavior on May 24, 1994. If medically caused, he might hope to return to work after treatment. The union members agreed to this only after failing to receive sustaining of the grievance or a return to work pending suspension.

The union took an active role in making sure there was nothing sinister in the delayed evaluation and in hurrying it along. The union did not participate in management's peculiar role in speaking with both the referring and examining physicians in presenting management's position. The union played no part in the decision of the psychologist to report Kissell's May 24, 1994, behavior as not the result of a medical condition.

So, the June 29, 1994, discharge stood. Kissell's grievances filed in 1995 about the delayed examination, past harassment and his inability to give reports to the psychiatrist were all untimely and the union had no duty to process them.

Thus, this Court cannot find that the union discriminated, acted arbitrarily or in bad faith with respect to any of his grievances including those arising before May 24, 1994. There was also no evidence of any conspiracy by the Commonwealth in any acts of bad faith by the union or by the Commonwealth and AFSCME to deprive Kissell of his rights under the collective bargaining agreement. The unilateral actions of the Commonwealth with regard to the thorn in its side, Michael Kissell, were done without any union collaboration.

#### THE LAW APPLIED TO THE FACTS

Michael Kissell, a public employee, was covered by the Public Employee Relations Act. 43 P.S. §1101.101 et seq. Under the case law Kissell was required to meet the burden of proving that the union breached its duty of fair representation to him. Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 480 A.2d 242, 245 (1984). The duty is breached only if the union's refusal to carry a grievance through to arbitration is due to arbitrariness, discrimination or bad faith; Falsetti v. Local Union No. 2026 United Mine Workers, 460 Pa. 145, 161 A.2d 882, 894 (1960). Broad discretion is given the union in determining whether to pursue a grievance to arbitration. Falsetti v. Local Union No. 2026, United Mine Workers, 400 Pa. 145, 161 A.2d 882, 894 (1960).

In every stage of the suspension/discharge proceeding growing out of the May 24, 1994, the union not only vigorously defended Kissell but also engaged

in no acts of bad faith or abuse of discretion to prevent the grievance from going to arbitration. Therefore, the remedy of an order compelling arbitration of the underlying grievance is not available in this Court proceeding to Kissell. Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 480 A. 242, 262 (1984).

Kissell, of course, asked as an alternative to arbitration his back pay, benefits and reinstatement. However, an award of damages in this court would be allowable only if Kissell had met his burden of proving specific facts showing that the Commonwealth actively participated in the union's alleged bad faith or conspired with the union to deprive him of his employee's rights to protection under the collective bargaining agreement. Martino v. Transport Workers' Union of Philadelphia, 505 Pa. 391, 480 A.2d 242, 251-252 n.16 (1984). In this case, there is not a shred of, let alone full, clear and satisfactory, evidence of complicity between the respondents to terminate Kissell or of any agreement by the respondents with malicious intent to do an unlawful act or to do a lawful act lawfully. Skipworth v. Lead Industries Association, Inc., 547 Pa. 224, 690 A.2d 169, 174 (1997); Fife v. Great Atlantic & Pacific Tea Company, 356 Pa. 265, 52 A.2d 24, 27 (1947).

The union tried at every stage of every discipline to save Kissell's job, to present his point of view in argument and to take him back a step in progressive discipline.

Therefore, the Court must find Kissell is not entitled to an award of damages because he failed to meet his burden of proving any conspiracy between the union and the Commonwealth to deprive him of his rights under the collective bargaining agreement.

Eunice Ross  
Eunice Ross, Senior Judge

