

#1157

IN THE MATTER OF ARBITRATION

BETWEEN

**STATE OF OHIO
DEPARTMENT OF REHABILITATION & CORRECTIONS
OHIO REFORMATORY FOR WOMEN**

AND

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO**



Arbitration Date: November 16, 2016

Grievant Chad Sites: No. DRC-2016-00418-5 ⁰⁰⁸⁰⁷⁻¹⁴

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

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JAN 11 2017

OCSEA - OFFICE OF
GENERAL COUNSEL

I. HEARING

The hearing was held November 16, 2016 at the Ohio Reformatory for Women. The hearing commenced at 9:05 A.M.

The stipulated issue before the arbitrator is "Was the grievant, Chad Sites, removed from employment for Just Cause? If not, what should the remedy be?"

II. STATEMENT OF THE CASE

The Grievant was removed from his position as an Information Technician 2 (IT2) at the Ohio Reformatory for Women (ORW) February 29, 2016 for violation of the Employee Code of Conduct Rule 12A: Making obscene gestures or statements, or false, abusive or inappropriate statements.

The Grievant has a written reprimand and 2-DWs, Rules 10 and 12A on his record.

On March 2, 2016 the Union filed a Grievance and the matter is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's witness was Fouzi S. Haj Abed. Mr. Haj Abed read Joint Exhibit page 36, which is his Incident Report. Mr. Haj Abed said the Grievant called him "Camel jockey or Camel shit."

On Cross-Examination Mr. Haj Abed said his working relationship with the Grievant was no good. He said they had arguments before but he had never filed a complaint. Mr. Haj Abed said he had called the Grievant Jerry's kid and had also called him Jr.

Mr. Haj Abed testified the incident was on Tuesday, September 8 and he reported it

Monday, September 14. He then testified that he did not want the Grievant fired and that the Warden said she would not fire him.

The Employer's next witness was David Stockman. He is an Information Technologist II.

Mr. Stockman was referred to Joint Exhibit page 17, which is the Investigator's statement given by him. He testified that on September 8, 2015 Mr. Sites, Mr. Haj Abed, Mr. Travis and Mr. Oppy were present.

Mr. Stockman testified he was on the telephone and did not hear any name calling. He said when he was off the phone he heard an argument between the Grievant and Mr. Haj Abed. Mr. Stockman also testified that the prior week there was a dispute between the parties. He said the Grievant loses control when he gets mad.

On Cross-Examination Mr. Stockman testified that the Grievant and Mr. Haj Abed were arguing over work on installing a switch. It had nothing to do with camel jockey.

Mr. Stockman testified there were five (5) present September 8. There were some inmates there whom have all gone home. He said he was ten (10) feet away on the other side of a wall when the incident happened.

Mr. Stockman testified that he had trouble with Mr. Haj Abed over job responsibilities. He said there is shop talk and Mr. Haj Abed knows the Grievant used shop talk frequently.

On Re-Direct Examination Mr. Stockman said shop talk never got to this level.

On Re-Cross Examination Mr. Stockman testified he did not hear name calling.

The Employer's next witness was Ronette Burks. Ms. Burks has been employed by the State for sixteen (16) years. She became Acting Warden here in 2013 and then Warden. Prior to that she had been a Volunteer. Then Ms. Burks was in the Deputy Director's Office at Franklin

Pre-Release as Administrative Assistant to the Deputy Warden.

Warden Burks testified that the Appointing Authority issues fines and removals. She read Joint Exhibit Page 51 and said it is the Employee Standards of Conduct. Warden Burks read Rule 12A and testified that the penalty for a first offense is a WR to 2 days; a second offense is a 5 Day; and the third offense is Removal. There is no other discipline available.

Warden Burks testified that racial slurs are not permitted. She said Federal statues and Ohio statues say to investigate and not to have a hostile work environment.

Warden Burks met with Mr. Haj Abed and asked him if he was called a camel jockey. There was no incident report. She said Mr. Haj Abed said Sites was crazy and he was afraid. Warden Burks testified she told Mr. Haj Abed to do an Incident Report. She said Mr. Haj Abed was shaking and had tears in his eyes because he was afraid. Warden Burks testified she never said she wouldn't fire the Grievant.

On Cross-Examination Warden Burks testified that she issues discipline. She said the Grievant had a five (5) day suspension on record. The Union introduced Exhibit Union 2, which is a 5 day effective November 16, 2015.

Warden Burks read Joint Exhibit page 11 which is the Investigation Summary Report on Camel Jockey. She testified the Grievant was given a 5 day on November 6. She was asked: "Could Sites have taken any action between the November 6th 5 day and November 29th when he was removed. Warden Burks answered "NO".

The next witness was Roxanne Swogger. Ms. Swogger has been at ORW twenty (20) months as a Correctional Warden's Assistant. She was present when Mr. Haj Abed and Warden Burks spoke. Ms. Swogger testified she heard camel jockey and no more. She said Warden

Mr. Haj Abed to file an Incident Report. Ms. Swogger testified she did not hear Warden Burks say she would not fire the Grievant.

Ms. Swogger has had diversity training. Ms. Swogger testified that racial slurs are not shop talk. She said camel jockey is a hostile work environment.

On Cross-Examination Ms. Swogger testified that Mr. Haj Abed was upset but not on the verge of tears. She did not hear Mr. Haj Abed say he was in fear.

Ms. Swogger had supervised the Grievant and said he was a good worker. She had supervised Mr. Haj Abed also.

Ms. Swogger testified she was not in the room for the entire conversation between Warden Burks and Mr. Haj Abed as she was in the room about five (5) minutes.

The next witness for the Employer was Robert Travis. Mr. Travis is an Electrician II and has been at ORW since 2012.

Mr. Travis was referred to Joint Exhibit page 20, which is his Investigator's Statement. Mr. Travis read that on September 8, 2015 Mr. Sites, Mr. Fouzi, Mr. Stockman and Mr. Oppy were present. Mr. Travis testified that he heard the Grievant say "Camel Jockey".

Mr. Travis then read Joint Exhibit page 21 and said he had no knowledge of any prior disputes between Mr. Haj Abed and Grievant. Mr. Travis also testified he had no knowledge of Grievant using derogatory language. He also said camel jockey was not appropriate.

On Cross-Examination Mr. Travis testified that the Grievant's language was not threatening. He said the Grievant probably thought it was a joke. Mr. Travis said shop talk was used in the shop by both the Grievant and Mr. Haj Abed.

IV. UNION'S CASE

The Union's first witness was Jeff Oppy. Mr. Oppy is an Electrician II and has been at ORW for seventeen (17) years. Mr. Oppy recalls the incident in the shop on September 8.

Mr. Oppy testified that Mr. Haj Abed comes in and talks to Grievant. Mr. Haj Abed goes to cage. Everybody is talking. Mr. Haj Abed says "Don't say that" but Mr. Oppy doesn't know what was said. Mr. Oppy was about three (3) feet from the Grievant. Mr. Oppy testified that four (4) Inmates plus staff were present.

Mr. Oppy testified that he didn't file a report as he didn't know what happened.

Mr. Oppy then testified that Mr. Haj Abed was about thirty (30) yards away at first. Mr. Haj Abed goes in cage close to Grievant. He said he doesn't know of the Grievant's and Haj Abed's relationship. Mr. Haj Abed has never called him names. Mr. Haj Abed has called Grievant Jerry's kid. He never reported this. Mr. Oppy has a good relationship with the Grievant.

On Cross-Examination Mr. Oppy said everyone was talking, it was possible he didn't hear slur. Mr. Oppy testified Mr. Haj Abed comes out of cage and goes towards Grievant and says "What did you say?" He said there is no supervisor name Jerry.

On Re-Direct Examination Mr. Oppy said he never heard Grievant call Mr. Haj Abed a camel jockey before.

The Union's next witness was Lori Cagle, an Inmate. On September 8, 2015 Ms. Cagle was present in the Electrical shop. She works with Mr. Oppy. Ms. Cagle testified she did not hear Grievant call Mr. Haj Abed a camel jockey. She said she was on the other side of the room. Ms. Cagle testified she was asked to leave the shop.

Ms. Cagle then testified she has worked with Grievant and there was no inflammatory

language and she also worked with Mr. Haj Abed. Ms. Cagle said there were no issues between Grievant and Mr. Haj Abed.

On Cross-Examination Ms. Cagle said there were lots of people talking when Mr. Haj Abed was talking.

The Union's last witness was the Grievant, Mr. Chad Sites. The Grievant is an Information Technologist II. He had been promoted to Electronic Tech but they did away with the title.

The Grievant testified that on September 8 he was going with Inmate Cagle. Mr. Haj Abed was in a cage going over something. Grievant came in the room and said "Haj here". Mr. Haj Abed said "What did you call me?" The Grievant didn't say anything. He said all people present were interviewed. The Grievant testified that Mr. Haj Abed was at least eight (8) feet away when he spoke and Mr. Stockman was right beside him. Mr. Travis was six (6) or seven (7) feet away.

The Grievant testified he has know Mr. Haj Abed for thirteen (13) or fourteen (14) years and he is hard to get along with. He said Mr. Haj Abed called him Jerry's kid after a former supervisor. The Grievant testified he has trouble with Mr. Haj Abed over telling the Grievant to do Mr. Haj Abed's job.

The Grievant said shop talk is when you joke with each other. Silly stuff. He testified that supervisors are aware of shop talk and use it themselves. The Grievant said Mr. Haj Abed is lazy.

The Grievant was asked: "Why would Mr. Haj Abed say this?" The Grievant answered: "He is leaving and he doesn't like me."

The Grievant then read Joint Exhibit 8 which is his disciplinary record and said some discipline was thrown out.

On Cross-Examination the Grievant was referred to Joint Exhibit 26 which is his Investigator's Statement. The Grievant said he had no contact with Mr. Haj Abed on September 8, 2015. The Grievant said there is no evidence today that supervisors use shop talk. He was asked: "You deny you said Camel Jockey and Travis said you did. Why?" The Grievant said: "I can't answer for Travis".

The Grievant says he has training on Cultural Diversity and racial slurs are inappropriate. The Grievant says "I didn't say anything". He said I didn't regard the exchange with Mr. Haj Abed as confrontation. The Grievant does not want to get around Mr. Haj Abed

On Cross-Examination he was asked "Was Mr. Haj Abed loud when he approached you?" The Grievant said: "Yes".

The parties agreed to file written Closings by December 16, 2016.

The hearing adjourned at 11:30 A.M.

V. OPINION AND AWARD

The Employer argues that it is absolutely essential to the orderly operation of a correctional system that employees conduct themselves in a professional manner. The Employer cites the Ohio Revised Code and The Department of Corrections Policy in support of this contention. The Employer says "No one should have to be subjected to a racial slur such as camel jockey while in the work place."

The Employer provides extensive training to all employees, who are required to successfully complete training in cultural diversity and Equal Employment Opportunity before beginning their duties and further this is covered in annual in service training.

The Employer argues that in spite of all the training, an active 2 day working suspension

for discourteous treatment rule 12A, intervention, coaching and correction the Grievant received the Grievant elected to engage in behaviors that are unbecoming of a State employee and violated Federal/State Laws.

The Employer says the Union contends that because eight (8) people did not hear the comment it did not take place. The Employer argues that all witnesses testified some type of heated argument took place and just because the eight (8) testified they did not hear the racial epithet "Camel Jockey" does not mean it did not occur.

The Employer argues the Union offered no testimony as to why the heated argument took place between the Grievant and Mr. Haj Abed. The Employer says it provided two witnesses Mr. Haj Abed and Mr. Travis that gave affirmative testimony that the Grievant did call Mr. Haj Abed a "Camel Jockey". The Employer argues that the two witnesses, un-rebutted, did give corroborating testimony the heated argument took place as a result of the Grievant's racial epithet.

The Employer contends that employees would rather act as if they did not witness potential acts that could lead to discipline than to face ridicule and to be ostracized by the other co-workers.

The Employer argues that the Union could not discredit Mr. Robert Travis. Mr. Travis testified: "I heard him say "Camel Jockey".

The Employer points out that not one Union witness could affirmatively testify the Grievant did not call Mr. Haj Abed a "Camel Jockey". The Employer argues the Grievant gave only the self-serving testimony that he did not call Mr. Haj Abed a "Camel Jockey".

The Employer says the Grievant had active discipline on his record at the time of the

incident. The active second offence discipline was for rule violations 10 and 12A and this removal was for a third offence violation of rule 12A. The only measure that can be issued for a 3rd offence for a violation of rule 12A is removal.

The Employer says, the Union is attempting to convolute this simple progression by trying to enter a 5 day working suspension that was subsequently removed from the Grievant's disciplinary record through the Grievance procedure. The Union is arguing a clear merge and bar procedural objection.

The Union provided proof the Pre-Disciplinary hearing on the 5 DWs was on October 6, 2015; 76 days after the first Pre-disciplinary hearing. The date of issuance of the 5 DWs was November 6, 2015. The removal was issued on February 29, 2016. The Employer argues this was 84 days after the 5 DWs was issued to ensure a full and fair investigation had been conducted and that the employees had Union representation and due process was upheld.

The Employer cites Article 24.06 "The decision on the recommended disciplinary action shall be delivered to the employee; if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and Union within the sixty (60) day time frame; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation."

The Employer then argues that the agreed to language of the Contract requires the State serve discipline within the 60 day time limit. With 76 days between Pre-disciplinary hearings and 84 days between issuance dates, there was no possibility of merging these two disciplines due to the Union agreeing not to hold discipline over 60 days.

The Employer also argues that without the 5 DWs the Grievant had progressed to the 3rd performance violation offence. The last two offences being the same rule violation of rule 12A (making obscene gestures or statements, or false, abusive, or inappropriate statements) also merger and bar does not apply to bargaining unit discipline, by contract bargaining unit discipline is evaluated under the Just Cause standard.

The Employer further argues that with all the Federal/State Laws, company policies, mandatory postings and training hours, no reasonable person can believe it is appropriate to call a fellow employee of Middle Eastern descent a "Camel Jockey". The Union would have you believe that this racial epithet is acceptable by calling it "Shop Talk".

The Employer points out that the Union defined "shop talk" in the Hightower grievance as "shop talk" is common language used every day within the workplace to get the job done". The Employer argues the term camel jockey has nothing to do with getting a job done.

The Employer cites Arbitrator Pincus' decision in the Hightower case: "The shop talk argument was equally unconvincing because not one Union witness would qualify the statements as appropriate. The Employer argues that every witness that testified in the current arbitration at hand testified the term "camel jockey" was inappropriate, including the Grievant himself. The Employer cites a Dictionary definition of shop talk as "the specialized vocabulary having to do with work or a field of work". The Employer then argues "camel jockey" was not shop talk.

The Employer also reviewed the testimony of the witnesses.

The Employer cites the testimony of Warden Ronette Burkes. Warden Burkes testified that the Grievant's actions could not be tolerated. She said that using racial epithets such as "camel jockey" or any other racial epithets has great consequences in the working environment,

especially in a prison environment where other employees and inmates are in close proximity. Warden Burkes further testified that DRC takes great measures to educate, train and mentor employees to use appropriate conduct and to follow Federal, State guidelines and departmental policies. All employees know and understand the consequences when these Laws and Policies are not followed including the Grievant.

The Employer next points out that Warden Burkes testified that Mr. Haj Abed reported to her office and told her of the incident. She said Mr. Haj Abed was scared as his voice was shaking and he had tears in his eyes. She also testified that Mr. Haj Abed said he was scared of the Grievant and feared he would attack him or his family. The Employer argues this was corroborated by the testimony of Roxanne Swogger.

The Warden also testified that the removal was within the progression grid of the standards of employee conduct. She said the third occurrence offense was based off the second offence discipline the Grievant committed on 7/2/2014 and not based off the 5 DWs. The Warden denied having told Mr. Haj Abed she would not fire the Grievant. She said she would never make that statement as it would be inappropriate to discuss another employee's discipline.

The Employer says Mr. Haj Abed himself has left the Department of Corrections and was reluctant to give any testimony in front of the Grievant of which he feared, a testimony corroborated by Warden Burkes and Roxanne Swogger. The Employer also argues the incident report written by Mr. Haj Abed is credible.

The Employer further argues that based upon Warden Burkes personal liability, the liability of the State, the harm endured by the inmates/staff and the Grievant's inability to change, she chose to terminate the Grievant's employment.

The Employer also asserts that based on the Agency's work rules, she would not have been able to impose any discipline other than a Removal because the Department takes this type of behavior so seriously, a person only gets three (3) strikes at most sometimes only two.

The Employer next reviewed the testimony of Mr. Haj Abed. The Employer says Mr. Haj Abed was reluctant to testify as he has left the Department. He had great concern to testify with the Grievant in the same room. The Employer argues these actions are typical of a person who has experienced great fear. On Testimony he said "the Grievant said Camel Jockey or Camel Shit." The Employer argues his testimony was corroborated by Mr. Robert Travis.

Robert Travis was the next witness reviewed by the Employer.

Mr. Travis testified he heard the Grievant refer to Mr. Haj Abed as "Camel Jockey". The Employer argues that Mr. Travis is credible as he had nothing to lose or gain. He got along with both the Grievant and Mr. Haj Abed.

The Employer then reviewed the testimony of David Stockman.

Mr. Stockman testified he did not hear the Grievant call Mr. Haj Abed a "Camel Jockey" as he was on the telephone. He did hear a heated argument between the two parties.

Mr. Stockman testified he has never heard the Grievant use the term "Camel Jockey" in the past but has known the Grievant to lose control when he gets mad.

The Employer then reviewed the testimony of Jeff Oppy.

Mr. Oppy is a friend of the Grievant and was present during the incident. Mr. Oppy testified that he had no idea if the Grievant called Mr. Haj Abed a "Camel Jockey" as there were a lot of people talking at that time. The Employer argues that Mr. Oppy could not say the Grievant did not make the racial epithet only that he did not hear it. He did give testimony there was some

type of argument between the Grievant and Mr. Haj Abed. The Employer argues that this contradicts the Grievant's statement that he had no contact with Mr. Haj Abed.

The Employer then presented the Testimony of Inmate Cagle.

Inmate Cagle testified she did not hear the Grievant use the term "Camel Jockey". She said there was a lot of noise in the room and numerous people present.

The Employer argues that Inmate Cagle has everything to gain by giving testimony favorable to the Grievant as his friends have control of most aspects of her life. The Employer argues she only said she didn't hear it. Not that he didn't say it.

The last witness reviewed by the Employer was the Grievant Chad Sites.

The Employer questions the credibility of the Grievant. The Employer argues he was evasive as he did not "think" he was in the area and then recalls having lunch with Mr. Oppy.

The Grievant told the investigator he had no contact with Mr. Haj Abed. The Employer argues that Mr. Oppy said the Grievant had contact with Mr. Haj Abed. The Employer asserts this was corroborated by everyone, even the Grievant as he changed his testimony during arbitration.

The Employer says the Grievant would have you believe he never used derogatory or inflammatory language towards co-workers and admits to joking about being gay. The Employer further argues he has an active 2 DWs for violation of the very same rule 12A for which he was removed.

The Employer argues the Grievant has a pattern of self-preservation by lying to get himself out of trouble.

The Employer concludes by arguing the Grievant was neither forthcoming nor truthful. The Employer says his efforts to conceal his actions are indicated by his attempt to change his

at the arbitration. The Grievant acts outside law and policy. The Grievant has demonstrated an inability to correct his behavior as evidenced by previous active discipline. He should not work in a prison.

The Employer asked the Arbitrator to find the Grievant was removed for Just Cause and to deny the grievance.

The Union argues that Just Cause mandates due process and substantial proof; but management did not provide a full and fair investigation into the facts. The Union says Just Cause also mandates prior enforcement and equal treatment.

The Union also argues that evidence and testimony by both management and Union witnesses shows that a culture of shop talk existed wherein employees, including the accuser in this case, called each other derogatory names without fear of reprimand. Therefore, Management did not pass these tests of Just Cause either. Finally, Management failed the progressive discipline component of Just Cause.

The Union says it proved through the Warden's own testimony, the removal and previous five day discipline were for punishment purposes only. In other words, Management stacked discipline to progress the Grievant out the door.

The Union says that on September 8, 2015 several employees and inmate workers, altogether 10 people, were gathered in the ORW Electrical Shop around 9 A.M. Fouzi Haj Abed claims that the Grievant entered the room and called him a camel jockey or camel shit. According to the incident report Mr. Haj Abed wrote on September 14, he then walked up to Mr. Sites and told him that "I would really like for him not to say that to me". While the Grievant and Robert Travis corroborate that Mr. Haj Abed walked up to Mr. Sites and asked not to call him a name.

Mr. Travis is the only other individual in the room at that time that affirms a derogatory name was used.

The Union argues that eight other people could not corroborate the accusers story. Each of them, Jeff Oppy, David Stockman, the Grievant, inmates Cagle, Volgares, Briscoe, Marker and Hamilton were asked the same question during the investigation: "Did you hear Mr. Sites refer to Mr. Haj Abed as "Camel Shit or Camel Jockey?" Each of them denied hearing this.

The Union contends some of these eight people were standing right next to Mr. Sites when he allegedly used the derogatory term. The Union argues that Lori Cagle and Jeff Oppy were standing right next to Chad Sites and both testified that they did not hear the racial slur.

The Union argues that the testimony of Mr. Travis and Mr Haj Abed do not match up. Mr. Travis says Mr. Sites called Mr. Haj Abed a "camel jockey". Mr. Haj Abed could not confirm if Mr. Sites called him "camel jockey or camel shit".

Mr. Haj Abed claims Mr. Sites has called him this name many times in the past. However, the Union argues that Mr. Oppy, Mr. Travis and Mr. Stockman denied that these kinds of terms were ever used before in the shop.

Mr. Stockman was on the phone when Mr. Sites and Mr. Haj Abed began speaking to one another but when he hung up he was unable to hear what they were arguing about. Mr. Stockman said it was a heated discussion about a work assignment. The Union argues that neither Management nor Union found any corroborating testimony or evidence of Mr. Stockman's account. The Union says no one else present describes an argument over work that day. The Union argues that it doesn't make sense that the two would begin fighting about a racial slur and

in a matter of seconds switch to who was responsible for what work assignment.

The Union contends it is unclear whether Mr. Stockman is recalling some other day than September 8. The Union argues it is clear he was not talking about the same conversation Sites, Haj Abed and Travis said took place.

The Union says corroboration was quite an issue for Management's case. The Union argues that all of their witnesses gave accounts that could not possibly match up with one another, leaving one to wonder which testimony is credible enough to substantiate Just Cause.

The Union argues it has established that David Stockman's account of events is uncorroborated and has pointed out the differences between Travis and Haj Abed's testimony and says the confusion does not stop there.

The Union says Warden Burkes testified that Mr. Haj Abed was "very upset with tears in his eyes" and came to talk to her about the incident. She relayed that Mr. Haj Abed "feared for his and his family's safety" because of Mr. Sites behavior. He decided without any coercion on her part, to file an incident report on the matter. The Union argues the Warden's testimony is untrue.

The Union argues the Warden coerced Mr. Haj Abed into filing an incident report by telling him either "you file one or I will". The Union argues that during the arbitration Mr. Haj Abed failed to mention being upset, on the verge of tears, or being afraid for his and his family's safety.

The Union then argues that the Warden's story doesn't jibe with Roxanne Swogger's testimony who said Mr. Haj Abed was a little upset. Ms. Swogger also could not corroborate that Mr. Haj Abed had tears in his eyes. The Union argues that this alleged comment was a dangerous threat is in no one's narrative except the Warden's who needed to justify a removal.

The Union says Mr. Travis' testimony was the comment was a joke not a threat. The Union points out Mr. Haj Abed did not testify about a threat, general or specific. The Union also argues Mr. Haj Abed was concerned Mr. Sites would lose his job and the Warden assured him Mr. Sites would not lose his job. The Warden denies having said this. The Union argues it put up the most plausible possibility.

The Union cites the Grievant's testimony that he did not call Mr. Haj Abed a camel jockey or camel shit. The Grievant testified that he came into the shop and with some admitted snark said "Hey Fouzi's here". The Grievant said Mr. Haj Abed approached him and asked him not to call him that. The Grievant said to Mr. Haj Abed he didn't call him anything before leaving the shop to avoid further argument.

Management tried to make hay that Grievant changed his story. The Union argues the Grievant has been consistent all along. The Union says that the Grievant, in his investigatory interview, denied interaction with Mr. Haj Abed. The Union argues that he clarified this by saying the contact with Mr. Haj Abed was not unusual as the two didn't get along and so he did not think anything of it.

The Union contends it took care to show that Chad and Fouzi had a contentious relationship and that Oppy, Travis and Stockman support this.

The Union argues that it is not its burden to prove Mr. Haj Abed wrong, its Management's burden to show the Grievant violated disciplinary policy. The Union says Management has failed to meet its burden of proof.

The Union argues that Management chose to use shaky evidence to remove an employee with over 12 years seniority. The Union says look at Managements evidence. Fouzi writes an

incident report 6 days after he is allegedly called a derogatory name. Fouzi is unsure of what he was called and the two possibilities put forward, camel jockey and camel shit, are not similar in sound, which would make it hard for a person to confuse the two. Robert Travis said he heard camel jockey. Eight people denied that they heard camel jockey or camel shit. The Union argues this cannot be proof.

The Union says that one of Management's main arguments is the Department of Corrections "zero tolerance" anti-discrimination policy. The Union argues this was not substantiated by the evidence or case history. The Union says it provided testimony from several witnesses that show a lack of prior enforcement and equal treatment. The Union cites Elkouri as to consistency of a Rule.

The Union contends that Mr. Haj Abed is as guilty of violating the discrimination policy as Mr. Sites is alleged to be. The Union points out that Mr. Haj Abed testified that he would call Mr. Sites "Junior" and "Jerry's Kid". Both Mr. Sites and Mr. Oppy confirmed these names were used. Mr. Sites testified that he never reported any of these as there was a culture of shop talk.

The Union says it has shown a Culture of Shop Talk as a rebuttal to Managements straw man argument. Mr. Travis, Mr. Haj Abed and Mr. Sites all testified to shop talk being used at the ORW electrical shop. There was testimony by them and Mr. Oppy there was a contentious relationship between Fouzi and Chad. In Fouzi's investigatory interview he claims Chad called him an unspecified racial epithet "many times in the past". The Union argues Fouzi tacitly condoned the use of the term. The Union argues that even supervisors would engage in shop talk calling employees "lazy". The Union argues no one reported any of this until the Warden made Fouzi report it.

The Union says it has proven Management's complete and unapologetic disregard for the principles of progressive discipline including blatant contract language.

The Union argues that the time-line of this case speaks for itself. The Union says its Exhibit, Union 1, shows Management knew at the time they had given Mr. Sites a 5 day suspension that he would be receiving further discipline that would result in his removal.

The Union says the Grievant and Warden Burkes both testified that the Grievant had received a 5 day working suspension prior to being removed.

The record shows that the 5 Day was served on the Grievant November 6, 2015 for an alleged violation of the performance track (failure to complete a work assignment) the same track for the subsequent removal.

The investigation into the 5 Day was completed August 31, 2015, nine days before the alleged events that led to Grievant's removal. On September 14, Fouzi filed a report accusing the Grievant of using inappropriate language. The investigation into this matter began September 16, 2015, eight days after the removal investigation began.

The Union argues that the record shows the investigator's report for the removal was dated October 9, 2015 and the last interview of the termination investigation was held October 29.

The Union contends the investigation into the allegation that got the Grievant removed was largely completed prior to him receiving the 5 Day working suspension. The Union argues that Management stacked discipline and that Warden Burkes confirmed this on cross-examination.

The Union argues that progressive discipline must allow for the correction of behavior. The Union cites Article 24.02 of the CBA "The Employer will follow the principles of

progressive discipline” and Article 24.06 “Discipline ... shall not be used solely for punishment.”

The Union argues that when two incidents are within close proximity they are usually pursued as a single discipline. The Union says the Grievant was not able to correct his performance after the 5 Day before he was removed. The Union cites the Giddens’ arbitration in support of its position. The Union says the Giddens’ case had a tighter time-line than this case and the employee was returned to work.

The Union argues that Management admits it did not follow the principles of progressive discipline.

The Union argues there is no substantial proof since the majority of those present did not hear the alleged comment. The Union contends that the two employees who allegedly heard the comment are not credible as their accounts differ in important ways.

The Union argues Management’s evidence is not clear and convincing nor is it a preponderance of evidence. The Union says shop talk was used regularly and that Mr. Haj Abed admitted using language that violates policy. The Union argues that Mr. Haj Abed condoned the Grievant’s use of “camel jockey” or “camel shit” many times without reporting it. The Union also argues that Mr. Haj Abed was forced to report the incident.

The Union argues the Grievant is a 12 year employee with a 2 Day Working Suspension on his record and the removal is not justified.

The Union asks the grievance be granted and the Grievant be returned to work and made whole.

The Advocates have done an excellent job in setting forth the positions of their respective parties.

The Arbitrator has reviewed all the evidence and the arguments of the parties.

The Arbitrator is not convinced that a racial slur can even be justified as “shop talk”. Nor is the Arbitrator convinced that the Union’s argument about stacking charges is persuasive. The Arbitrator is persuaded that there is no corroboration of the alleged epithet.

The Grievant is a 12 year employee. The evidence required in a removal case for a long term employee is substantial. The Employer cites in its Closing Argument the Hightower Arbitration. In that case there were threatening, intimidating, coercing and abusive language to several inmates which were admitted by the Grievant. Here there is an alleged comment denied by the Grievant.

Further the Union is correct that Mr. Haj Abed could not say the slur was “camel jockey” or “camel shit”. As the Union points out these comments do not even sound alike.

The Employer has argued that just because some witnesses did not hear the alleged comment does not mean it didn’t happen. The fact that some witnesses didn’t hear the alleged comment also doesn’t prove that it did happen.

The Employer argued that fellow employees are reluctant to testify against a co-worker. While this may be true it doesn’t lessen the Employer’s burden of proving its’ case.

Despite the fact that the Grievant and Mr. Haj Abed don’t like each other, Mr. Travis, Mr. Oppy and Mr. Watson all say they never heard the Grievant use derogatory or inflammatory language towards his co-workers.

The Grievance is granted.

- 1) Chad Sites is to be reinstated to his position as Information Technologist II at ORW.
- 2) The termination is to be stricken from the Grievant’s work record including any

employee electronic record.

3) All lost wage, less any interim earnings and appropriate deductions including Union dues.

4) Wages for overtime opportunities missed.

5) All leave balances that would have accrued from the date of removal.


6) Missed Employer's matched payments to OPERS.

7) No loss of seniority.

8) Payment for any medical, vision or dental expense that the Grievant and his dependants have incurred since the date of removal that would have been covered under his insurance plan less appropriate deductibles and co-payments.

The Arbitrator will retain jurisdiction for 60 days.

Issued at Ironton, Ohio this 10th day of January, 2017.



Craig A. Allen
Arbitrator

