ARBITRATION DECISION NO.:
200

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation
and Correction
Ohio State Reformatory

DATE OF ARBITRATION:
September 27, 1989

DATE OF DECISION:
September 29, 1989

GRIEVANT:
Jerry Niswander

OCB GRIEVANCE NO.:
27-20-(88-08-02)-0152-01-06

ARBITRATOR:
Jerry A. Fullmer

FOR THE UNION:
Alyne Beach
Advocate
Butch Wylie
Second Chair

FOR THE EMPLOYER:
Richard Hall
Advocate
Joe Andrews
Second Chair

KEY WORDS:
Just Cause
Progressive Discipline
Abusive/Obscene Language
Disparate Treatment
Severity of Work Rule
Infractions

ARTICLES:

Article 24-Discipline

§24.01-Standard

§24.02-Progressive Discipline

FACTS:

The grievant. was an electrician at the Ohio State Reformatory and also acted as a union steward. On June 9, 1988, the grievant was doing electrical work in an outside garage. A supervisor and an inmate were in the rear of the garage changing a tire, although the grievant stated that he did not know they were there. The supervisor of the metal shop entered the garage wearing a white shirt and the grievant remarked that "anyone who wears a white shirt is a prick." This statement was heard by both supervisors in the garage and the grievant was issued a 5 day suspension. The grievant had previously received a 1 day suspension for telling a supervisor that he was "full of shit up to his ears." The employer's rule prohibits "willfully making false, abusive, obscene statements toward or concerning another employee, a supervisor or the general public." It provides successive penalties of a written reprimand to removal for the first offense, 5-10 day suspension to removal for the second offense, and removal for the third offense.

EMPLOYER'S POSITION:

The employer argues that the 5 day suspension was given for just cause. The employer maintains that the work rule applies to <u>any</u> type of offense and that the severity of the statement should not be taken into consideration. The employer argues further that even if the severity of the statement is considered the use of the word "prick" should be considered abusive and obscene enough to warrant the 5 day suspension. Additionally, the employer contends that the suspension was corrective discipline because a 5 day suspension is the minimum penalty for a second offense. The employer states that the suspension was not disparate treatment and that the cases cited by the union supporting a finding of disparate treatment can be distinguished from the present case. The employer emphasizes that the grievant's act was premeditated in the sense that it was not provoked in the midst of a heated argument as were the remarks in many of the other cases.

UNION'S POSITION:

The Union maintains that the discipline was not issued for just cause. The union argues that the use of the word "prick" is not such an "abusive" or "obscene" statement as to warrant a 5 day suspension. The union states that coarse and profane language is normally used by employees at the Ohio State Reformatory and that the use of the word "prick" is relatively mild compared to other profane language used regularly at the facility. Furthermore, the union contends that the suspension is disparate treatment by the employer. The union cites a number of other cases in which an employer received less than a 5 day suspension for a second violation of the obscene/abusive language work rule. In one instance, an employee only received a written reprimand for his second offense of the work rule. Consequently, the union argues that the grievant's 5 day suspension was disparate treatment by the employer and was not given for just cause.

ARBITRATOR'S OPINION:

Finding the grievant's remarks to be a borderline use of obscene and/or abusive language, the arbitrator held it to be a non-severe violation of the employer's work rule. However, the arbitrator

did state that the employer had a right to insist on some standards of civility in the comments made to its supervisors. The arbitrator further held that since the grievant's statement was a non-sever violation, a 5 day suspension (the minimum discipline for a second offense) was the proper discipline issued in terms of corrective discipline standards. However, the cases cited by the union do show disparate treatment by the employer. The employer issued another employee a written reprimand for his second offense of the abusive/obscene language work rule. The arbitrator said, that this tended to show some disparate treatment, although it is no doubt difficult to achieve mathematical exactitude. The arbitrator did not find the "emotional outburst versus premeditated" argument of the employer to be entirely persuasive or to entirely fit the facts. The arbitrator stated that the grievant did not lie in wait for the supervisor on June 9, 1988, and his comment was apparently a spur of the moment impulse of the moment, although a misguided one. In conclusion, the arbitrator held that because of the non-severity of the violation by the grievant and the evidence of disparate treatment by the employer, the discipline was not given entirely for just cause.

AWARD:

The 5 day suspension was reduced to a 1 day suspension with back pay and roll call pay for the 4 days in question.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
Between

STATE OF OHIO
The Employer

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11 AFSCME, AFL-CIO
The Union

OPINION AND AWARD

Jerry Niswander
5 Day Suspension
27-20-88-08-02-152-01-06

APPEARANCES

For the Employer:
Richard Hall, Advocate
Joe Andrews, Assisting
Lew Kitchen, OCB Observer

Harold Stitler, Witness
Ken Devinney, Witness

For the Union:
Alyne Beach, Advocate
Butch Wylie, Assisting
Joe Clark, Steward
Jerry Niswander, Grievant

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I. STATEMENT OF THE CASE

This matter was heard in Mansfield, Ohio on September 27, 1989. At the end of the hearing the advocates were able to agree that the case was one which was suitable for "a decision within five (5) days," within the meaning of Article 25.09 D. of their agreement rather than a "bench decision".[1]

II. FACTS

The Grievant works at the Ohio State Reformatory as an electrician. He is also a Union Steward. The Discipline Request Sheet in the case indicated the following "prior discipline":

"Date	Type of Misconduct	Discipline
Feb. 22, 1988	#25 and #39	3 Days Off
Aug 19, 1987	Sick Leave Abuse	Letter of Reprimand
Feb 23, 1988	Disrespect of Mr. Meeker	1-Day Off

The more or less undisputed and "bare bones" aspects of the facts indicate that on June 9, 1988 at about noon the Grievant was doing electrical work in the outside garage. A supervisor, Mr. Stitler and an inmate were in the rear of the garage changing a tire. The Grievant testified that he did not know they were there. The supervisor of the sheet metal shop, Ken Devinney, entered the garage looking for some keys. He was wearing a white shirt which was part of a relatively newly designated uniform for the supervisors. The Grievant said "anyone who wears a white shirt is a prick". Mr. Devinney and Mr. Stitler heard the statement. The former then began disciplinary proceedings against the Grievant which resulted in the imposition of a five day suspension under the Employer's Rule 10, which prohibits:

"Willfully making false, abusive, obscene statements toward or concerning another employee, a supervisor or the general public."

It provides successive penalties of written reprimand to removal for the first offense, 5-10 day suspension to removal for the second offense, and removal for the third offense. The case at issue proceeded to expedited arbitration under the labor agreement.

III. STIPULATED ISSUE

Was the Grievant disciplined with a 5 day suspension
for just cause and if not what shall the remedy be?

IV. DISCUSSION

A. Introduction

The evidence and argument at the hearing indicated the development of several sub-issues. The first dealt with some of the finer points of the facts as to whether they indicated any offense or whether they indicated a severe one. The second was whether corrective discipline had been followed. The third was whether there had been disparate treatment of the Grievant. We turn to these issues in the order stated.

B. The Facts as Indicating an Offense

The Grievant's testimony indicated that he was not sure whether he made the "white shirt" statement but that he probably did make it "if everyone said that I did". Grievant maintains though that if he did say it, he said it in the course of essentially muttering to himself while facing the wall doing his electrical work. Mr. Devinney testified that the remark was made in full voice while the Grievant was looking at him and directing it to him. On the credibility point, the arbitrator must credit the testimony of Mr. Devinney. His recall appeared to be definite and was consistent throughout the grievance and arbitration proceedings. The Grievant's version changed somewhat at the different steps and his powers of recollection on the stand did not appear to be sharp, e.g. having no idea who said what at which meeting and not being sure whether he made the statement or not. There were indications at some points that any such statement would have been intended as "kidding", but this assertion seems to the arbitrator to be inconsistent with the "muttering to the wall" version.

Even so, it appears to the arbitrator that this is a fairly borderline incident when measured against Rule 10 which covers "abusive" or "obscene" statements. There was a stipulation that coarse and profane language is in normal use by employees at the Ohio State Reformatory and the word "prick" strikes the arbitrator as being relatively mild on the coarse/profane Richter Scale. It amounted to one sentence repeated from a distance with a relatively mild word in front of only two other people who the Grievant claims he didn't know were there. Nevertheless, the Employer is entitled to insist on some standards of civility in the comments made to its supervisors (and the union as well for its members) and the arbitrator finds a non-severe violation.

2. Corrective Discipline

In the February 23, 1987 incident mentioned above, Grievant told a supervisor that he was "full of shit up to his ears". He said it twice and quite emphatically and was given a one day suspension. This is within the "grid" set out in the Rule 10. The Grievant indicated at the hearing

that he had learned a lesson from this incident, namely not to tell supervisors that they were "full of shit" anymore.

Similarly, the 5 day suspension meted out in this case is the minimum for the second offense. This is as it should be, in view of the arbitrator's discussion of relative lack of severity of the offense. The arbitrator finds no short-circuiting of the corrective discipline steps in these facts.

3. Disparate Treatment

The question here must be whether the Grievant has been treated disparately compared with bargaining unit employees with similar disciplinary records i.e. those involved in a second offense. The Employer on this subject emphasizes that the Grievant 's act was pre-meditated in the sense that it was not provoked in the midst of a heated argument as were the remarks in many other cases.

The "yardstick" incidents cited at the hearing involve the following:

a. Dave Lanier -- Mr. Lanier was involved in an unspecified insubordination offense in June, 1987. The grievance was settled by the reduction of a three day suspension to a one day suspension. Later, in June of 1989, he was involved in a cafeteria line argument and told a supervisor to "shut up and stop dipping in his business." Lanier was given a verbal reprimand under Rule 10 for his comments.

b. Brett Purdue -- Mr. Purdue was involved in an argument with a supervisor and told him "I am not going to take any of your shit anymore". He was given a written reprimand for violating Rule 6 b. "willful disobedience of a direct order of a supervisor". A summary of Mr. Purdue's other disciplinary offenses (Un. Ex. 9) was placed in the record, but none appear to involve a Rule 10 offense or even another Rule 6 b. offense.

c. Carl Purifoy -- Mr. Purifoy was involved in an incident on January 10, 1988 in which he "offered obscene and patently offensive statements directed toward the . . . fellow officer." He was given a three day suspension under Rule 10. In a second incident on September 13, 1988 Purifoy was "argumentative and loud and acted in an unprofessional manner" and concluded by saying "some supervisor, I could do a better job." He was given a written reprimand under Rule 10.

The arbitrator does not find the Purdue incident persuasive because it apparently only involved one offense of the type under consideration. The Lanier case can arguably be distinguished in that the incident involved insubordination rather than Rule 10, although these seem to the arbitrator to be related. The Purifoy incident involved two Rule 10s. It seems to the arbitrator that the giving of a written reprimand for the second creates problems in view of the grid's providing a minimum of a 5 day suspension. This tends to show some disparate treatment although it is no doubt difficult to achieve a mathematical exactitude. The arbitrator does not find the "emotional outburst v. premeditated" argument of the Employer to be entirely persuasive or to entirely fit the facts. For instance, the Grievant did not lie in wait for the supervisor on June 9, 1988 and his comment was apparently an impulse of the moment, although a misguided one.

V. CONCLUSION

Because of the elements detracting from the severity of the incident (discussed supra) and the problems with the disparity of the Purifoy case, the arbitrator is of the opinion that just cause standards require him to reduce the suspension from a five day to a one day suspension.

VI. AWARD

Five day suspension reduced to a one day suspension. Back pay and roll call for the four days in question.

Jerry A. Fullmer, Arbitrator

Made and entered this
29th day of September,
1989 at Cleveland, Ohio

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[1] The two cases presented following this one were the subject of bench decisions. The format followed by the arbitrator is essentially that suggested in the November 6, 1987 Brundige/Burgess memorandum re "Expedited Hearings" and its attachments.