ARBITRATION DECISION NO.:
646

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

EMPLOYER:
Ohio Department of Rehabilitation and Corrections
Southern Ohio Correctional Facility

DATE OF ARBITRATION:
August 14 and August 20, 1997

DATE OF DECISION:
September 13, 1997

GRIEVANT:
David Scott

OCB GRIEVANCE NO.:
27 25 (96 07 10) 1093 01 03-T

ARBITRATOR.:
Marvin Feldman

FOR THE UNION:
Don Sargent, Union Advocate
Glenn Barlowe, Local Union President

FOR THE EMPLOYER:
Cynthia Sovell-Klein, Advocate
Rodney Sampson, Second Chair
Gabe Jiran, OCB Attorney

KEY WORDS:
Correction Officer
Counseling
Department Regulations
Progressive Discipline
Racial Slurs
Removal

ARTICLES:
Article 24 – Discipline
§24.01- Standard
§24:02 – Progressive Discipline

FACTS:

The grievant, a Correction Officer (CO) at the Southern Ohio Correctional Facility (SOCF) in Lucasville,

was hired in December of 1991. At the time the grievant was hired, he went through cultural diversity training at the SOCF. The grievant was the only CO in his class who had to be sent through the cultural diversity instruction two times.

On July 17, 1995, the grievant was found guilty of receiving stolen property, and was also found guilty of public indecency. As a result of those convictions, the grievant was sentenced to 30 days in jail; all of which was suspended. Additionally, the grievant was placed on five years probation. Moreover, as a result of his July 17, 1995 convictions, the Employer suspended the grievant for three days.

On May 16, 1996, the grievant made the following comment over the K Corridor intercom system at SOCF: "Hey J.J., do you know what you call a watermelon with a food stamp inside? A black man's fortune cookie." The Employer informed the grievant that the statement was in violation of Rules 13a and 38 of the Standards of Employee Conduct. Pursuant to the authority granted to the Employer in the collective bargaining agreement between the State of Ohio and AFSCME/OCSEA, the Employer issued a removal order against the grievant effective June 26, 1996.

Employer's Position:

The Employer argued that regardless of whether the comment was communicated over the entire institution or localized in K corridor, it was totally out of place. The racially oriented comment that was conveyed over the intercom was heard by several individuals who were offended by the remark.

The Employer recognized that similar comments had been made in the past by DR&C employees, but that none of those incidents occurred after the 1993 riot at SOCF. Following the 1993 riot, the Department of Rehabilitation and Corrections (DR&C) required all personnel to undergo cultural diversity training to eliminate precisely that type of behavior among its employees. Therefore, the grievant was well aware that behavior such as that exhibited on May 16, 1996, was not only offensive, but dangerous as well. It was the position of the Employer that the incident was so grievous that removal was the only appropriate discipline.

Union's Position:

Although the Union conceded that the grievant did indeed make the offensive statement over the K Corridor intercom system, the Union argued that the grievant's removal was in violation of the collective bargaining agreement because the discipline was neither progressive nor reasonable. The Union contended that progressive discipline mandated that the grievant should receive at least a last chance rather than termination.

Although the grievant had received a prior three day suspension, that suspension was invoked for a reason other than racial discrimination. The Union also presented evidence that other DR&C employees had made comments in the past that were similar to the one at issue here, but that the most serious discipline imposed in those cases had been a ten day suspension.

Furthermore, the grievant testified that he was profusely apologetic for the remark. He stated that he originally heard the remark made by an African –American correction officer and that he merely repeated it. The grievant said that he meant no harm, and that if the Employer allowed him to return to work he would not be fearful of retaliation by those who were offended by the remark.

ARBITRATOR'S OPINION:

The events of May 16, 1996 took place at SOCF, the scene of extensive rioting in 1993. Subsequent investigations revealed that racial discrimination was one of the significant reasons for the 1993 riot at SOCF.

As a result of those investigations, a committee was assigned to oversee the activity at SOCF, and the warden is now required to report every unusual event to the committee. The warden himself testified that he had zero tolerance for racial discrimination, and that the grievant's comment violated SOCF rules and was 'substandard of the behavior expected from CO's.

The Arbitrator found that. the grievant had knowledge of the sensitivity toward race relations at SOCF. The Employer sent the grievant through cultural diversity training twice, and, gave the grievant manuals concerning racial discrimination. In other words, the Arbitrator found that the grievant was fully knowledgeable of the rules concerning racial discrimination.

The Arbitrator did not find that there was any need for the Employer to use progressive discipline in this instance. The comment was made at. a prison which was the scene of Ohio's worst prison riot. There simply cannot be any tolerance for the type of activity in which the grievant engaged, and the Employer's zero tolerance policy for racially motivated incidents was entirely correct in this particular situation. The fact that the grievant had been disciplined for his criminal convictions in 1995 in no way could be seen as a reason to lessen the removal of the grievant.

AWARD:

The grievance was denied, and as a result the removal order was upheld.

TEXT OF THE OPINION: *** * ***

VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 27 25 960710 1093 01 03 T

STATE OF OHIO
The Employer

and

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
AFSCME LOCAL 11 AFL CIO

The Union

OPINION AND AWARD

APPEARANCES

For the Employer:

Cynthia Sovell Klein, Advocate
David Scott, Grievant
Glenn Barlowe, Local Union President
Syvilla Good, Witness
James Neal, Witness
Andrew Gliem, Witness

Floyd Johnson, Witness
James Minzelli, Chief Steward
Chaplain Warren Lewis, Witness
Larry Sheppard, Witness

For the Union:

Don Sargent, Union Advocate
David Scott, Grievant
Glenn Barlowe, Local Union President
Syvilla Good, Witness
James Neal, Witness
Andrew Gliem, Witness
Floyd Johnson, Witness
James Minzelli, Chief Steward
Chaplain Warren Lewis, Witness
Larry Sheppard, Witness

MARVIN J. FELDMAN
Attorney Arbitrator 1104 The Superior Building 815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781 6100
1

-
-
-
-

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was first scheduled and conducted on August 14, 1997, at the Southern Ohio Correctional Facility in Lucasville, Ohio, and the second hearing was conducted on August 20, 1997, at the conference facility of the union in Columbus, Ohio. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would be filed. The parties further and specially stipulated the following:

"1. Neither party has any procedural objections, and the parties agree that the instant grievance is properly before the Arbitrator for a final and binding resolution on the merits.

2. The parties agree that the Grievant, David Scott was hired on 12/6/93 as a Correction Officer at the Southern Ohio Correctional Facility.

3. The parties agree that the Southern Ohio Correctional Facility houses approximately 62% African American inmates.

4. The parties agree that the Grievant, David Scott admits that he told a joke over the KCorridor intercom System. The Grievant stated, 'Hey J.J., do you know what you call a watermelon with a food stamp inside? A black man's fortune cookie' .

5. The parties agree the Grievant, David Scott had a previous active three days suspension on the record

dated December 15, 1995."

It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS:

As a backdrop to this particular matter it might be noted that under the terms of the contract at paragraph 24.01 it is noted the following:

"24.01 Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action."

It is further noted at paragraph 24.02 that the following in pertinent part is stated:

"24.02 Progressive Discipline

The Employer will follow the principles of progressive discipline.",

There also was in use at the time of the instant incident Revised Standards of Employee Conduct. That handbook was disseminated to all Department of Rehabilitation and Correction employees including the grievant herein. It was dated January 4, 1996. The union never entered any evidence to indicate and state that the grievant did not receive it and that the grievant did not review the terms and statements and rules within the four corners of that handbook.

Nor was there any evidence in the record to reveal that the rules therein were allegedly unreasonable. It might be noted that certain language was found within the four corners of that handbook concerning progressive discipline for those correction employees. The important

and pertinent language that is particularly significant to the matter at hand is found on page 5 of that handbook and it revealed the following:

> "The consistency being sought does not require the Employer to administer the discipline indicated in the Standards of Employee Conduct exactly the same in every case. The ranges on the disciplinary grid provide a great deal of discretion. When the facts of a case are different and distinguishable, the disciplinary action may vary. However, when the facts are the same or very similar, then the discipline imposed should reflect consistency.

and

The penalty imposed for violating a rule must take into consideration all relevant circumstances. An employee may be disciplined for violating more than one (1) rule arising out of the same incident. In all cases the mitigating and aggravating circumstances along with the relationship of multiple offenses must be considered.

and

Corrective counseling is always an option and may be utilized prior to any disciplinary action as well as between various steps of progressive discipline. Corrective counseling is a tool used to communicate, define expectations and provide an opportunity to achieve success. A corrective counseling is not discipline."

-

It was also revealed in evidence that the grievant received the employer's anti discrimination policy. See the following receipt in that regard:

"I, David Scott, HEREBY ACKNOWLEDGE THAT I HAVE RECEIVED AND WILL READ THE 'ANTI DISCRIMINATION POLICY' AND THE 'SEXUAL HARASSMENT POLICY' FOR THE

David Scott
Signature

12 06 93
Date"

4

It might be noted that in this particular matter there were counselings indicated that the grievant was involved with concerning the very matter at hand. While the arbitrator read that material, it might be noted that 'counseling is not grievable under the collective bargaining agreement and that as such, does not form a disciplinary predicate for the backdrop of progressive discipline as indicated in this. particular matter. It might be noted that that is the general rule and is restated on page five in the indicated code and section and it is underlined that corrective counseling is not discipline. (See above)

It might also be noted that the grievant was the subject of several discussions with the Inspector of Inmate Grievances. Those grievances were filed because the inmate believed that excessive force was used by the correction officer. Again, no formal discipline was given to the grievant in that regard.

At any rate, the grievant's record at this particular facility revealed that he was hired in December of 1993, went through training including cultural diversity training and attended the schooling necessary to be placed in service as a corrections officer. The grievant had to be sent through the cultural diversity schooling on a second occasion and it was indicated that he was the only corrections officer to do so.

The record further revealed that at the time of the instant incident the grievant had received a prior discipline which included a three day suspension for the following event:

5

"Dear Officer Scott:

Pursuant to the authority. granted in the collective bargaining agreement between the State of Ohio and AFSCME/OCSEA this letter is to advise you that you are to be SUSPENDED THREE (3) DAYS from the position of CORRECTION OFFICER effective:

Wednesday, December 20, 1995, Thursday, December 21, 1995 and Friday, December 22, 1995. You are to return to work on Saturday, December 23, 1995.

You are to be SUSPENDED 3 DAYS for the following infractions:

On May 31, 1995, you were arrested and charged with public indecency. On July 17, 1995, you appeared in court and was found guilty on both charges. On each charge you were sentenced to 30 days in jail which was suspended, you were fined $100 court costs, placed on five (5) years probation, ordered to pay restitution in the amount of $101.80 to the railroad, and ordered to continue in a counseling program. Your five (5) years probation on the public indecency charged was filed as a Level 2 which mandates you to report to your probation officer twice a month. The receiving stolen property charge was filed as a M1.

Your actions are a violation of the Standards of Employee Conduct Rule 41, and I am therefore suspending you for three (3) days."

That event occurred two years after his hire date and approximately six months prior to the instant incident.

On June 26, 1996, the grievant received the following removal notice:

"Date June 26, 1996

David Scott

Dear Officer Scott: **6**

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and AFSCME/OCSEA this letter is to advise you that you are to be REMOVED from the position of CORRECTION OFFICER effective:

Wednesday, June 26, 1996.

You are to be REMOVED for the following infractions:

On May 16, 1996, while working K Corridor Control #4, several staff members heard you telling a racial joke over the K Corridor intercom system. You stated to a Correction Officer,

'Hey, J.J., do you know what you call a watermelon with a food stamp inside? A Black man's fortune cookie.' Although the Correction Officer told you to stop and that he did not want to hear it, you continued to repeat the racial statements.

Your actions are a violation of rules 13a and 38 of the Standards of Employee Conduct effective February 18, 1996. As a result of these rule violations, you are Removed from the position of Correction Officer."

That removal notice was as a result of the indication in the employee handbook section entitled, "Standards of Employee Conduct, Rule Violations and Penalties." Under rule 13 the languages used revealed the following:

"13. Discrimination

a. Acts of discrimination on the basis of race, color, sex, age, religion, national origin, disability, or sexual orientation

WR/R 5-10/R R"

It might be indicated that the discipline that was suggested under the first such activity of rule 13 was a written reprimand to a removal, for the second offense a five to ten day suspension to a removal and for **7**

the third offense, a removal. The grievant was also charged with a violation of rule 38. Rule 38 revealed the following:

"38. Actions that could compromise or impair ability of the employee to effectively carry his/her duties as a public employee

WR/R 1 3/R 3 5/R 5 10/R R"

It might be noted that for the first offense it is indicated that a written reprimand to a removal may be invoked; for a second offense a one to three day suspension up to a removal; for a third offense a three to five day suspension to a removal; for a fourth offense a five to ten day suspension to a removal and for the fifth episode a removal. Thus, the employer invoked violations of two rules for the same event as allowable under the write up of the employee handbook.

The evidence further revealed that the grievant was in the control center when he told the joke that was admitted to under the Stipulations in this particular matter. (See section 1) It might be noted that seven people, all of whom were employees heard the grievant state what he thought was a joke, through the loud speaker system. Some of the individuals were white, some of the individuals were black, but none of the individuals who heard the joke were inmates. Many of the witnesses to the event who heard the grievant tell what he thought was a joke over the loud speaker system wrote incident reports. One such incident report was written by corrections officer Floyd J. Johnson, Jr. His report revealed the following:

"Description of Incident:

Sir on the above date and time while I c/o F. Johnson, 087, was standing in front of K North and Capt. Redwood
was standing by the West Gate entering K Corridor and c/o D. Scott w as in CC4 talking on the speaker about a joke concerning something about a Black Man, it was specifically a joke concerning something about a watermelon. At this point I tried to tell c/o Scott to stop speaking on the intercom that I didn't want to hear it."

Another such incident report was written by Captain Redwood. His report revealed the following:

"Description of Incident:
On May 16, 1996 at 3:07 pm I (Capt. Redwood) was standing by the chapel gates waiting for it to open. Standing by the gates also were Chaplain Fletcher, nurse Good and c/o J. Neal.

I heard over the control center #4 (CC4) intercom system, 'Hey 'J.J. (F. Johnson) do you know what you call a watermelon with a food stamp inside', I did not hear c/o Johnson's response. C/o D. Scott who was working CC4 then came over the intercom again saying, 'A Black Man's fortune cookie'.

Action Taken:

Major Adkins informed c/o Scott relieved from CC4.

Description of Incident:

Chaplain Fletcher said, Redwood what are you going to do about that. I advised him that I would address it, but for him to write a report.

I asked nurse Good if she heard the statement she said yes, I directed her to write a report.

I asked c/o J. Neal if he heard the statement he said yes, I directed him to write a report.

I went to K corridor and instructed c/o F. Johnson to write a report on c/o Scott's statements to him (Johnson).

I asked c/o A. Glein who was assigned to K corridor also if he heard c/o Scott's statement. C/o Glein said some of it, I directed c/o Glein to write a report.

Note: As I was walking closer to CC4 c/o Scott kept repeating the statements, and c/o Johnson told him (Scott) to stop.

There was two (2) inmates in K corridor may have heard the statements. C/o Scott was the only person in CC4." (sic)

Chaplain Henry C. Fletcher also wrote an incident report and he stated the following:

"Description of Incident:

On 5 16 96 as I approached East gate in front of Chapel I heard c/o Dave Scott making a joke with a racist tone coming loud from CC4. He was talking to another c/o and said 'What do you call a watermelon with a food stamp inside?' He went on to laugh and said, it's called a Black Man's fortune cookie.'"

It might be noted that the Southern Ohio Correctional Institution was the scene of Ohio's worst prison riot. It occurred in 1993. Ten people lost their lives and there being others injured, too numerous to count. Ever since the riot the State of Ohio generally and the prison at Lucasville specifically made a detailed study concerning the reasons for the riot. According to the warden there were two major reasons for the riot, one being overcrowding of the jail and the other being racial tension. The prison has now adapted a zero tolerance to racial discrimination. The warden further stated by way of testimony that the grievant was trained for the second time on this very subject; that he had received a three day suspension prior; that he was a minimal employee at best and that his efficiency reports at best, did not reveal

any excellence in work. The grievant met all of his expectations readings but he was not above them in any of the categories. His reviewing officer merely indicated that the grievant performed his assigned duties.

At any rate, when the notice of removal was received, a grievance form was filed and that form revealed the following:

"On 6 26 96 c/o David Scott was removed from the position of correction officer for violation of rules 13a and 38 of the Standards of Employee Conduct."

When denying the grievance, the employer at step 3 revealed the following:

"STEP 3 RESPONSE

GRIEVANCE #27 25 (7/10/96) 1093 01 03 RE: David Scott
Correction Officer
October 24, 1996

A grievance was filed by the above named in accordance with Article 25 of the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME, Local 11. Therein, it is alleged that Article(s) and Section(s) 24.02 Progressive Discipline was violated.

A Step 3 hearing was held at Southern Ohio Correctional Facility on 8/l/96, and present were: Robert Clagg, Chief Steward for the grievant; J. Minzelli, Local President; D. Howard, Local Vice President; J. Woodard, Steward; J. Heineman, Deputy Warden; R. Crabtree, Management Participant; Capt. Phillips, Management Participant; V. Crum, LRO, SOCF; and Charles R. Adams, Step 3 Hearing Officer.

To the question of procedural objections, the Union/Management had none and the hearing was considered properly constituted.

11

Facts:

The grievant was charged with violation of rules 13A and 38 of the Standards of Employee Conduct when, on 5/16/96 while working the K Corridor Control 4 several staff members overheard the grievant tell a racial joke over the K corridor intercom system. The grievant was terminated from his position.

Union Contention:

The grievant, through the union contends that: A) The discipline of removal was not progressive, reasonable or progressive with the infraction.

The union seeks as remedy: A) That C.O. Scott be reinstated as a Correction Officer; B) Be paid for all lost wages.

Discussion and Findings:

The union did not deny that Officer Scott made the racial remarks in the form of a joke over the intercom at Southern Ohio Correctional Facility but did attempt to mitigate that the joke made that was racially motivated was made over a local intercom at K corridor control. It was not in fact, projected out over the entire institution.

It is the opinion of the Hearing Officer that regardless of whether the joke was communicated over the entire institution or localized in K corridor, the essence was that it was totally out of place particularly in view of the fact that the Department of Corrections has required all personnel to undergo sensitivity training or cultural diversity training to eliminate those kinds of abuses. The racially oriented joke that was conveyed over the intercom was heard by several individuals who were personally offended by the remark. Therefore, it is the opinion of the Hearing Officer that the incident is so grievous that a removal is the only discipline which can satisfy the act. Therefore it is the opinion of the Hearing Officer that the grievance can only be denied."

Also' placed into the record were prior activity notice of disciplinary actions in which no one received a removal for a similar rule type incident. Those prior incidents involved a five day suspension for a Daniel Riggs; a five day suspension for a Melvin Smith;

12

a five day suspension for a Jack Reagan; a two day suspension for Jack Reagan; a two day suspension for B.G. Seth. Also included in the evidence was a labor arbitration matter concerning a James Warrnock who received a ten day suspension for two violations, one being similar to the matter at hand and that suspension was made at Ross Correctional Institution. Another similar incident occurred at Marion Correctional Institution when a person with eight prior disciplines received a ten day suspension which was not disturbed by the arbitrator. That individual's name was J. Ludwick. None of those incidents occurred after the prison riot at Lucasville.

The grievant testified. He was profusely apologetic for the event. He stated he heard the joke from a black correction officer and merely repeated. He stated he meant no harm. He stated he needed the job and he further stated he has been unable to find a job. He stated that if allowed back, he would not be fearful because of this event.

It was upon this evidence that the matter rose to arbitration opinion and award.

III. OPINION AND DISCUSSION

In this particular case the activity of the grievant was noted and stipulated to by the union. Simply put, the grievant told a joke which he recited over the loud speaking system and seven employees of the prison heard the joke. No inmates were involved. This occurred at the Southern Ohio Correctional Institution at Lucasville. This prison houses about 1,100 inmates and over sixty percent of them are inmates from other institutions who were transferred because of the need of maximum security. The population of the prison is black in majority. **13**

The prison was the scene of extensive rioting in 1993. During the riots ten deaths occurred and many investigations occurred thereafter. All of the investigations for determining the purpose of the riot found that racial discrimination was one of the more meaningful triggers for the rioting. All in all there were probably nine reasons that were given for the rioting but the weighted reason was racial tension and discrimination.

It might be noted that the prison is still under the watchful eye of a committee to oversee the activity of the Lucasville situation. The warden described his duties as being heavily administrative, having to report every unusual activity in the prison. An inspector of inmate grievances testified that many grievances are filed over discriminatory allegations as well as alleged severe brutality of prisoners. The warden further testified that he had zero tolerance for race discrimination and that the grievant's activity was of such a nature so as to be severely violative and severely substandard of the expected behavior under the rules involved with race discrimination. The warden viewed the grievant's conduct of telling a racially discriminatory joke improper and found, in his opinion, that using the loud speaker system to voice that joke is entirely inappropriate and unacceptable.

There is no doubt that the grievant had knowledge of the sensitivity toward racial discrimination at the facility that he worked. The grievant was sent to sensitivity school_not only on one occasion but on two occasions. He was the only corrections officer to receive the benefit of the second schooling. The grievant was given manuals concerning racial discrimination and knew that the rules of conduct

14

disallowed that type of activity. In other words, the grievant was fully knowledgeable of the rules concerning racial discrimination. The grievant never denied that he was not knowledgeable of those rules. Nor did the union ever use lack of knowledge as a defense.

The contract provided for progressive discipline. The chargeable background infractions of the grievant included a prior three day suspension. The prior suspension was for an activity other than racial discrimination. The union contended that progressive discipline mandated that the grievant should receive at least a last chance rather than termination. If the termination were allowed to stand, the union stated, then the grievant would not be given the opportunity of progressive discipline mandated under the contract. The fact of the matter is, progressive discipline does not lie in each and every case. If the event is severe enough, then in that event, progressive discipline may not be used. In other words, termination may occur without progressive discipline if in fact the activity complained of by the employer is most severe.

The question raised by the union in this particular case is that the activity of the grievant was not severe enough to award termination to him at this particular time in this employment history at the facility. The grievant is a short time employee. His record at the facility is minimal. He met all of the qualifications of that which is expected of him but was not particularly noted as an exceptional employee. Based upon his record at the facility and his minimal seniority, the fact is that the grievant is not entitled to any particular mitigation.

15

> The violation of the rules in this particular matter was rather serious. The joke that was told occurred at a prison which was the scene of Ohio's worst prison riot. The joke that the grievant told was told over a loud speaker and the grievant indicated and stated that the reason for it being told over a loud speaker was because the lights on the speaker system weren't working. The fact is, that the joke should not have been told at all. There simply cannot be any toleration to the type of activity that the grievant engaged in at a prison facility that was the scene of rioting triggered by the very type of act that the grievant was involved in. This type of activity cannot be condoned and it is my opinion that zero tolerance for racial incidents as raised by the warden is entirely correct under this particular situation.

This is 1997 and race should not be victimized by story tellers. A human is a human is a human. That human is entitled to every privilege given in these United States. Serious racial indifference cannot be different for the incarcerated person than for those who are not. Prison correction officers must learn that also. Because of all of the evidence in this particular case and because of the type of conduct in this particular case, the termination of the grievant will stand, especially so in the Lucasville environment. There simply is no reason to change the termination of the grievant.

IV. AWARD

Grievance denied. There was just cause for termination.

Marvin J. FELDMAN, Arbitrator Made and entered this 13th day of September, 1997.

16