ARBITRATION AWARD SUMMARY

OCB Award Number: 134

OCB Grievance Number: 87-1703; 87-79B

Union: OCSEA/AFSCME

Department: R+C

Arbitrator: Love

Management Advocate: Menedis

Union Advocate: Persinger

Arbitration Date: 12-9-87

Decision Date: 12-17-87

Decision: modified; denied

ARBITRATION

MARION CORRECTIONAL INSTITUTION

AND

O.C.S.E.A. LOCAL 11 A.F.S.C.M.E. A.F.L.-C.I.O. (James Fox Grievance)

ARBITRATOR: Andrew J. Love

CASE NUMBER: G87-1703

DECISION AND AWARD

The issues presented in this proceeding are whether the three day suspension of the Grievant by the Marion Correctional Institution (hereinafter "MCI") on June 24, 1987 through June 26, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective Bargaining Agreement; whether the disciplinary action taken was commensurate with the offense; and whether the grievance was improperly filed, pursuant to Section 25.02 of the contract between the State of Ohio and OCSEA Local 11 AFSCME AFL-CIO.

The following joint exhibits were admitted into evidence:

1. Contract between the State of Ohio and OCSEA Local 11 AFSCME.
2. Employee rules and standards.
3. Grievance trail.
4. Disciplinary trail.
5. Signed receipt of standards by Grievant on August 14, 1986.

It should be noted that, although joint exhibit 5 has been admitted into evidence, the Grievant, through his representative, states that the labor organization did not agree with such standards and rules because said labor organization was not a party to the development of such standards and rules.

The facts are as follows:

On April 24, 1987, during the third shift, the Grievant, a Corrections Officer II for approximately twenty-two months, was observed by his supervisor, Captain Joseph Ustaszewski, apparently sleeping in the day room, which is his area of assigned responsibility over inmates at MCI. The Grievant admitted that he was asleep while on duty. A departmental hearing was held on the matter, and the hearing examiner recommended a three day suspension. Such suspension was approved. A grievance was timely filed.

Turning to the issue raised by MCI that the grievance should be withdrawn due to improper filing, this Arbitrator determines that said grievance form (joint exhibit 3) was properly filed. Section 25.01(B) states, in pertinent part:

> Grievances may be processed by the Union on behalf of a Grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s).

The grievance form itself allows for the Grievant or Union representative to sign and date the form. Therefore, this grievance is subject to arbitration.

This Arbitrator finds that "just cause" existed for finding that the Grievant was neglectful of his duties by sleeping while on duty. The applicable standard of employee conduct for the Ohio Department of Rehabilitation states, pursuant to Rule No. 5, that sleeping on duty is a violation of such standards. Captain Ustaszewski, who has been employed for twenty-five years in corrections and has been a Captain since 1980, testified that, on April 24, 1987, he and his staff were taking the routine count, which requires the correction officers on duty to call in their inmate body count in their assigned area. When the Grievant's telephone call was not made, Captain Ustaszewski went to the Grievant's assigned area. There he found the Grievant sleeping in his chair.

He awakened the Grievant at that time. The Grievant admitted to Captain Ustaszewski that he had been asleep. He then reported the incident to John Morgan, Deputy Superintendent of Programs, who subsequently recommended disciplinary action.

John Morgan, who has been employed for eighteen years in corrections, testified that he reviewed the discipline reports by Captain Ustaszewski. As a result of his investigation, Mr. Morgan determined that the Grievant admitted that he was asleep and recommended further action. He testified that he recommended that the Grievant be suspended for a period of five days, pursuant to the disciplinary penalty under Rule No. 5 of the previously stated standards. He testified that, upon departmental hearing, the hearing examiner felt that there were mitigating circumstances due to the medication that the Grievant was taking. That hearing examiner also took into account the Grievant's lack of any prior discipline. At that point the hearing examiner reduced the suspension to a period of three days.

Mr. Morgan stated that the reasons employees must not sleep while on duty are because they could be harmed or inmates could take them hostage in a violent situation. Furthermore, inmates themselves may be harmed or their belongings may be stolen. He further stated that MCI is a close security institution, which contains inmates who have committed violent crimes, and therefore correction officers must be alert at all times.

Mr. Morgan was advised of a case involving another officer who was apparently caught sleeping while on duty, but that officer received only a written reprimand. Mr. Morgan stated that, true enough, this officer (an Officer Soper) was observed apparently sleeping. When that officer was approached, he denied that he was sleeping. Based on the hearing, MCI determined that not enough evidence was available to clearly establish that

Office Soper was sleeping, because he had made his normal call just moments before he was seen with his eyes closed. As a result, the hearing examiner in that case found that Officer Soper was guilty of being inattentive to his duties and issued a written reprimand.

James Harris, a Union Steward and a Corrections Officer II, stated that Captain Ustaszewski observed another officer (Officer Schaffer) apparently sleeping while on duty, but the Captain, to his knowledge, did not recommend discipline. On cross-examination, however, Mr. Harris stated that he did not know whether disciplinary action had been taken against Officer Schaffer.

The Grievant stated that he was sleeping while on duty, however it was not an intentional act. The Grievant stated that he was on medication for high blood pressure. He stated that the medication prescribed by his physician was a new type of medication, and that not much testing had been done on it to determine its possible side effects. The Grievant stated that he had been on this medication for approximately two years. He further stated that he was not clearly aware of the side effects of this medication, because the changes in his condition were gradual. Over time, however, the Grievant discovered that he was constantly tired. This was due, apparently, to this medication's propensity to make his neck muscles and other muscles tense. Approximately one month before the date of this hearing (December 9, 1987), the Grievant went to his doctor about his constant fatigue. The doctor advised him that the medicine's side effect was indeed making the Grievant tense. The doctor then changed the prescription to one which enables the Grievant to relax. The Grievant states that he has not been drowsy due to fatigue ever since the new medication was prescribed.

In finding that "just cause" existed for the imposition of disciplinary action against the Grievant, this Arbitrator does not find that the evidence relating to other employees possibly sleeping on the job to be sufficient to show that there is disparate treatment as to Grievant. In one instance, one employee was disciplined to a lesser extent than the Grievant because of the lack of sufficient evidence as determined by MCI personnel. The other example of disparate treatment put forth by the Grievant does not indicate through the testimony whether that Grievant was disciplined.

This Arbitrator does, however, recognize (and is persuaded by evidence rendered by the Grievant) that the Grievant was unaware that his medication was causing muscle tension. The Grievant did take steps to resolve that problem with new medication. In weighing the need for the Grievant to remain alert on duty in an area housing inmates who may be violent offenders, and balancing that with the Grievant's lack of knowledge of the effects of his medication, this Arbitrator finds that the disciplinary action commensurate with this offense is more appropriately a two day suspension rather than a three day suspension. Even though MCI considered the fact that the Grievant was taking medication, it was not aware of the medication's side effects. That information was not known until long after the suspension was ordered. This additional evidence should be considered regarding the matter of the appropriate penalty.

Accordingly, the grievance is DENIED, but the Grievant shall receive back pay in the amount of one day's pay.

December 17, 1987
DATE

Andrew J. Love
ANDREW J. LOVE, ARBITRATOR

COUNTY OF MARION
STATE OF OHIO

ARBITRATION

MARION CORRECTIONAL INSTITUTION

and

O.C.S.E.A. LOCAL 11 A.F.S.C.M.E. A.F.L.-C.I.O. (William Weatherbee Grievance)

GRIEVANCE NO. 87-79B

For MCI: Nicholas Menedis For Grievant: Brenda Persinger

DECISION AND AWARD

The issue presented in this proceeding is whether the one day suspension of the Grievant by the Marion Correctional Institution (hereinafter "MCI") on June 8, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective Bargaining Agreement; and whether the disciplinary action taken was commenserate with the offense. The following joint exhibits were admitted into evidence:

1. Contract between the State of Ohio and O.C.S.E.A. Local 11 A.F.S.C.M.E.
2. Grievance trail.
3. Security screening procedures for employees.
4. Ohio Department of Rehabilitation and Correction standards of employee conduct.

The facts are as follows:

The Grievant, a Corrections Officer II classification with 14 years of corrections experience at MCI, was suspended for one day based on allegations of violations of the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct for the use of discriminatory language, for jeopardizing the security of the MCI facility, and insubordination and failure to follow written procedures.

Sergeant Walter Sayler, who has been employed for 15 1/2 years in corrections, testified that on April 10, 1987, he was involved with a plan to search an inmate suspected of having received drugs or other contraband. When Sergeant Sayler went down the hall, which contained the Grievant, several other corrections officers, and inmates who had arrived in this particular cell block area after having left the dining room, he heard the Grievant yell, "6/5 down the hall" and "6/5 in six dorm." The term "6/5" is an inmate term alerting other inmates to discontinue certain acts which could be punishable. It is a warning to inmates that a corrections officer is nearby. Sergeant Sayler testified that he was just a short distance from the Grievant when he heard the Grievant utter what seemed to this witness to be an alerting signal to the inmates nearby.

On March 27, 1987, Sergeant Sayler testified that he observed the Grievant with a black inmate and heard the Grievant say to said inmate, "if you would wash your face, you would be white like me." It should be noted that the Institution (MCI) is under a court order to refrain from the use of racial comments by corrections officers and other employees of the Institution to inmates. This is embodied in the Standards of Conduct for Institution Personnel.

On cross examination, as to the April 10, 1987 incident, Sergeant Sayler acknowledged that he had never discussed a strip search of an inmate with the Grievant. Therefore, the Grievant could not have known the purpose for Sergeant Saylor's presence in the Grievant's assigned cell block area. Sergeant Sayler stated that he has never heard officers announce the term "6/5". He did state, however, that corrections officers sometimes pick up inmate slang. The witness

further stated that the Grievant used "poor judgment" in speaking the inmate term "6/5". He stated that it did not appear that the Grievant was warning inmates. As to the March 27, 1987 incident alleging racially disparaging remarks, Sergeant Sayler stated that he did not talk to the inmate regarding the racial comment.

Sergeant Andrew T. Wilson, whose experience includes 9 years in corrections, testified that, on April 10, 1987, he observed the Grievant leaving the premises due to the end of the Grievant's shift through the exit in the A building of the MCI facility. At that particular location, there is a sign that requires all MCI personnel to show their identification badges. Sergeant Wilson testified that the Grievant's badge was turned up, thereby concealing his photograph and social security number. Sergeant Wilson stated that he requested that the Grievant show him his badge, because he could not see it. He stated that the Grievant refused to comply with this request. Sergeant Wilson stated that he requested to see the Grievant's badge a second time. He stated that the Grievant cursed at him and refused to show him his badge. He stated that Lieutenant Newland was present during this episode. Sergeant Wilson acknowledged that statements contained in joint Exhibit 2 (Lieutenant Newland's account of the events that occurred at building A, including foul language made by the Grievant to Sergeant Wilson) were correct and accurate.

On cross examination, Sergeant Wilson testified that one of the purposes of displaying an identification badge is to prevent inmates, who may have obtained a badge, from escaping from the Institution. He also stated that it is a departmental rule that all employees display their badges if required. Sergeant Wilson stated that one of his duties is to assure that such badges are displayed by personnel. He stated that, in the event an employee forgets or loses his

or her badge, MCI supplies a temporary badge to that employee, and that employee shall turn in the temporary badge at the end of the shift.

Sergeant Wilson was asked whether he had had any previous confrontations with the Grievant, to which he responded that he never had any prior confrontation.

Roger McNamara, Corrections Officer II, stated that he was approximately 100 feet away from the Grievant when the Grievant used the term "6/5" on April 10, 1987 in the previously discussed cell block area. He stated that corrections officers and even supervisors occasionally use the term in a joking manner. He testified that the Grievant was not using the term (6/5) as a warning to inmates on April 10, 1987; rather, he was using it in a "joking around" manner. Even though Sergeant Sayler had previously testified that the Grievant yelled this term twice in the hallway of the cell block area, Mr. McNamara stated that he only heard the Grievant say the term once; furthermore, the Grievant did not yell the term. He further stated that no inmates were near either the Grievant or himself at the time the term was used. There were inmates farther down the hall.

Frances Risinger, Corrections Officer II, Chief Steward, and EEO Officer for her union, testified that management has given verbal reprimands for racially derrogatory remarks. She cited two employees who were reprimanded in this fashion. As to the incident of racial remarks in the instant matter, the witness stated that she was advised by the Grievant of the incident and that the inmate in question responded by laughing. Ms. Risinger stated that she did not talk with the inmate, who was not known to her, during the course of her own investigation.

As to the use of the term "6/5", Ms. Risinger testified that it is occasionally used by corrections officers.

As to the incident involving Sergeant Wilson, Ms. Risinger stated that she has knowledge of a confrontation between the Grievant and Sergeant Wilson regarding tires belonging to Sergeant Wilson having been slashed. She was aware of the Grievant's grievance against Sergeant Wilson for intimidation.

Ms. Risinger stated that her duties include working in the mail section and visiting area of the lobby, which is the A building. She stated that she knows that a Sergeant or a Lieutenant is there to check identification badges. The purpose for such identification check is to prevent inmates from escaping the facility. She also stated that proof of proper identification is required. She stated that she sometimes carries her identification badge in her billfold and that she has never been stopped by anyone to show proof of identification.

The Grievant testified that, on March 22, 1987, he was asked by a black inmate for soap to wash up. The Grievant stated that he advised the inmate that there was no soap due to a shortage at the time and "if there was some, you could have as much soap as you wanted and you could be as white as me." He testified that the inmate laughed and stated, "I understand what you mean." The Grievant further stated that Sergeant Sayler said nothing to him until the day after this incident. The Grievant advised this Arbitrator that nothing malicious was intended by his statement to the inmate. He was trying to state in a somewhat joking manner that if there were soap available, the inmate could wash as much as he wished.

As to the "6/5" incident on April 10, 1987, the Grievant testified that Officer McNamara had stepped out of one area in the cell block and asked the Grievant, who was across the hall, "where is the 6/5?". The Grievant answered "the 6/5 is in the hall." Apparently, this was meant as a reference to the Grievant himself. The Grievant stated that several inmates were present about 30 to 40 feet away and they were coming from the dining hall.

As to the matter of the incident involving Sergeant Wilson, the Grievant stated that, as he was leaving, he had his identification badge flipped up so that inmates on the floor could not see his social security number. This is often done to protect the corrections officer from reprisals from inmates who would have additional information in which to harass these employees. As the grievant was leaving the A building, his badge was still flipped up. Sergeant Wilson asked to see the Grievant's identification badge, and the Grievant stated that he flipped it down. Sergeant Wilson then said that he did not see the badge. The Grievant stated that he showed Sergeant Wilson the badge again and said to him, "If you can't see it get some glasses." Sergeant Wilson asked again to see the Grievant's badge. The Grievant stated that he again flipped the badge down and then said, "get an optomitrist." The Grievant stated that at no time did he use foul or profane language to Sergeant Wilson.

The Grievant stated that he and Sergeant Wilson were friends at one time. He stated that the friendship ended when he had borrowed money from Sergeant Wilson and Sergeant Wilson did not like the manner in which he was to be repaid. Later, Sergeant Wilson accused the Grievant of being a participant in the slashing of a number of tires at Sergeant Wilson's residence. The Grievant

stated that he reacted to Sergeant Wilson's request to see his badge in the manner he described, because Sergeant Wilson had been harassing him. He testified that he had filed at least four or five incident reports on Sergeant Wilson. The Grievant states that it was not his intention to be insubordinate.

This Arbitrator is satisfied that MCI has established evidence sufficient to fine "just cause" in the imposition of disciplinary action against the Grievant. In finding for MCI, this hearing examiner determines that at least two of the acts of misconduct are primarily acts of poor judgment and not intent to commit violations of the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct. There was no evidence to show that the Grievant knew of any unannounced strip search of an inmate suspected of having contraband on his person on April 10, 1987. Furthermore, although the racial remark to an inmate on March 22, 1987 falls in the catagory of Rule 19 of such Standards of Employees Conduct, this hearing examiner agrees with the decision of the Departmental hearing officer, who stated that the remark was essentially poor judgment as well. The evidence is clear, however, that the conduct in which the Grievant engaged with Sergeant Wilson was without question intentional and provocative. This hearing examiner is satisfied from the evidence that the Grievant, by his language and conduct toward Sergeant Wilson was inexcusable. Even if the Grievant has a personality conflict with Sergeant Wilson or vise versa, Sergeant Wilson is a supervisor. The evidence disclosed shows to this Arbitrator's satisfaction that, on at least two occasions, the Grievant refused to show Sergeant Wilson his badge, in violation of Rule 3a of the Standards of Employee Conduct. All three incidents, when taken cumulatively, constitute "just cause" for disciplinary action.

The evidence shows that the Grievant has no history of prior disciplinary action. In this Arbitrator's view, a one day suspension imposed is commenserate with the sum total of the offenses committed by the Grievant.

DATE: December 16, 1987

Andrew J. Love
ANDREW J. LOVE, ARBITRATOR

COUNTY OF MARION
STATE OF OHIO