

IN THE MATTER OF ARBITRATION
UNDER THE CONTRACT

Between:)
The State of Ohio)
(Ross Correctional Institution))
THE EMPLOYER)
-and-)
Ohio Civil Service Employees)
Association, Local 11,)
AFSCME, AFL-CIO)
THE UNION)
Two Grievances:)
Grievance No. 27-23-(4/23/88)-)
19-01-03; ND 660)
Grievant: James Warnock)
Grievance No. 27-23-(4/23/88)-)
20-01-03; ND 694)
Grievant: Floyd Smith)

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD:

October 31, 1988

CASE DATA**SUBJECTS**

Grievant James Warnock protests his ten day suspension for allegedly violating Rules of Conduct Numbers 11 and 17. No. 11 prohibits "intentional acts of discrimination on the basis of race, color,..."; No. 17 forbids "threatening...another employee for personal gain or satisfaction". Grievant Floyd Smith challenges his ten day suspension for allegedly violating Rule of Conduct No. 18 which prohibits "fighting with another employee ... during working hours, on state property, or in uniform."

APPEARANCES**FOR THE EMPLOYER**

Thomas E. Durkee, Labor Relations Officer, Department of Rehabilitation & Recreation, Presenting the Cases

Freddie Sharp Matthews, Training Coordinator, Office of Collective Bargaining, Co-Counsel

Jack Burgess, Chief, Arbitration Services, OCB

Christopher C. Duty, Correction Officer, RCI Witness

Homer L. Hubbard Jr., Correction Officer, RCI Witness

Richard Pense, Correction Supervisor IV, (Major) Witness

Larry Brown, Labor Relations Officer DR & C

Ron Carnein, Deputy Superintendent of Programs, DR & C

FOR THE UNION AND GRIEVANTS

John T. Porter, Associate General Counsel, Presenting the Case for Grievant Warnock

Donald Sargent, Field Representative, OCSEA, Presenting the Case for Grievant Smith

James Warnock, Correction Officer II, Grievant in ND 660

Floyd Smith, Correction Officer II, Grievant in ND 694

BACKGROUND

This arbitration considers two suspensions issued after an altercation between two employees -- Correction Officers Warnock and Smith-- at Ross Correctional Institution.

Both employees came to Ross at about 3:15 P.M. March 5, 1988 to work the 3:30 P.M. to midnight turn. For a few minute before the turn began they discussed some working condition changes at the institution which the Local Union had been advocating. Then they went to work. At midnight they were in the time clock line with other employees. At that time they engaged in an altercation with each other.

After an investigation, Supervision suspended each employee for 10 days but for different charges. Officer Warnock was suspended "for the following infractions":

Violation of Rule 11 - You have admitted to making the remark "Your Mama" to Officer Floyd Smith who is black. This remark was made during a heated exchange and was witnessed by other staff members. Though while not admitting that the remark was racial you did state that you have incorporated black language into your vocabulary. I feel that this remark was made as a racial slur and was directed toward a black officer with the intent to continue the altercation between yourself and Officer Smith.

Violation of Rule 17 - You have admitted to conveying an invitation to Officer Smith to meet you at Camp Sherman Park to 'finish it'. This was in reference to Officer Smith striking you. This was described as a challenge by a witness, C.O. Dailey and was perceived as having 'an intent to fight'. You have also admitted to going directly to Camp Sherman Park after leaving R.C.I.. I feel it was your intent to physically resolve the matter that began while going off shift.

The statements made above were made in front of other staff members on state property and while in uniform. It is expected of Officers to conduct themselves in a professional manner at all times. Remarks exchanged between employees should not have any racial or ethnic overtures to them. The behavior you portrayed during this incident will not be tolerated and therefore according to the Employee's Standard of Conduct you are being suspended for (10) days.

The reason stated for Officer Smith's suspension was:

Violation of rule 18 of the Employee Standard of Conduct:

You have admitted that you did in fact strike Officer Warnock in the jaw. This altercation was in response to a verbal exchange between yourself and C.O. Warnock. In order to strike Officer Warnock it was necessary for you to physically travel approximately 30 ft. to reach him. This action was witnessed by other staff members during shift change.

As a correctional professional, you must maintain the proper attitude and conduct yourself in a professional manner at all times. This incident did take place on state property and while you were in uniform. This is a serious offense and will not be tolerated at Ross Correctional Institution. In accordance to the employee's Standard of Conduct you are being suspended for (10) working days.

Separate grievances were filed protesting each discipline. After denial in the grievance procedure both were appealed to arbitration. On joint motion by the State's Counsel and each Grievant's Counsel, the Arbitrator approved a consolidated hearing for the two grievances because some events and evidence are germane and material to both two cases. The Parties stipulated that neither Grievant has any prior discipline, there are no procedural problems in either case and the grievances are properly before the Arbitrator. Both Grievants were present throughout the entire hearing.

POSITIONS OF THE PARTIES

THE EMPLOYER'S POSITION

At the time clock Officers Warnock and Smith engaged in a heated, profane altercation. Grievant Warnock committed an intentional act of discrimination on the basis of race and color against Officer Smith, thereby violating Rule 11 of the Rules of Conduct. For that infraction, the Department imposed the penalty prescribed for a first offense. On hearing the insulting racial slur Officer Smith struck Officer Warnock thereby violating Rule 18 which prohibits

"fighting with another employee...on state property, or in uniform." He too was issued a suspension as stipulated for a first violation of Rule 18. After being struck, Warnock invited Smith to Sherman Park to fight; that was a violation of Rule 17 whose published penalty for a first offense includes a suspension for 10 days.

These offenses are serious. Management has a duty to maintain order and a safe working environment. The State considers both employees to be equally culpable. Therefore, although neither employee has prior discipline a ten day suspension was appropriate for the offenses each committed. Under the circumstances there was just cause for the discipline of each employee and his ten day suspension was appropriate.

UNION'S POSITION FOR OFFICER WARNOCK

Officers Warnock and Smith were engaged in conversation that included language commonly used and accepted by Correction Officers. Officer Warnock did not state or intend any racial slur or insult. Without provocation Officer Smith assaulted Officer Warnock. The latter does not remember inviting Mr. Smith to Sherman Park but Warnock says if he did make the invitation it was for the purpose of helping Mr. Smith by planning a course of action to avoid or minimize the consequences of Smith's attack on Warnock.

Warnock says he is a peaceful man and would not engage in a fight or threaten or challenge anyone to fight. Actually Officer Smith had been provoking Officer Warnock for several months and that very day by using insulting terms and judgments about Warnock, but the latter did not respond in kind or heatedly. Instead Warnock approached Smith politely at the time clock and asked Smith to discontinue the name-calling and insults. Warnock said four words to Smith after leaving the time clock but those words were not a racial

slur and Smith did not react to any racial meaning. He did not invite Smith to fight. Therefore Officer Warnock did not violate either rule 11 or rule 17 so there was no just cause to discipline him. Accordingly the suspension should be rescinded and expunged from Officer Warnock's record and he should be made whole for lost pay. The Arbitrator should note that Officer Warnock has good evaluations and no discipline record. Thus, if the Arbitrator finds any just cause for discipline the suspension should be reduced to a written reprimand.

UNION'S POSITION FOR OFFICER SMITH

While it is true that Officer Smith struck Officer Warnock, the ten day suspension of Officer Smith was harsh and excessive -- not consistent with the progressive discipline principles in Section 24 of the Agreement. Also, under the rules, a first violation of Rule 18 should only be five days, not ten. Article 24.04 was not observed in that Management did not supply the Grievant with Union representation at the State Highway Patrol investigation.

Furthermore there were mitigating factors. The work environment is very stressful and tense so that a correction officer understandably might overreact to a comment which touches a tender point. In this regard Officer Smith is extremely sensitive to comments about his mother because he was orphaned at the age of six years and momentarily reacted without conscious control when she was mentioned. Officer Smith has a good record during his four years of service.

ISSUE FOR EACH CASE

Was there just cause to suspend Grievant for ten days and if not, what remedy is appropriate?

RELEVANT PROVISIONS OF THE LABOR AGREEMENT

ARTICLE 24 - DISCIPLINE

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. . . .

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. Verbal reprimand (with appropriate notation in employee's file)
- B. Written reprimand;
- C. Suspension;
- D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report....

24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

24.05 - Imposition of Discipline

...Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

**RELEVANT PROVISIONS OF STANDARDS OF EMPLOYEE CONDUCT - OHIO
DEPARTMENT OF REHABILITATION AND CORRECTION**

RULE VIOLATIONS AND PENALTIES

Steps in Progressive Discipline

- (OR/WR) - Oral/Written Reprimand
- (WR/1) - Written Reprimand/1-day suspension
- (1-3) - 1 to 3-day suspension
- (5-10) - 5 to 10-day suspension
- (R) - Removal

Offenses

	1st	2nd	3rd	4th	5th
11. Intentional acts of discrimination on the basis of race, color, sex, age, religion, national origin, or handicaps.	WR/R	5-10/R	R		
17. Threatening, intimidating, or coercing another employee for personal gain or satisfaction.		5-10/R	R		
18. Fighting with another employee or employees during work hours, on state property, or in uniform.		5-10/R	R		

ANALYSIS

FINDINGS OF FACT

The site of the events in these grievances is the Ross Correctional Institution, located in Ross County, close to Chillicothe, Ohio. RCI houses approximately 1,600 convicted felons. The security force totals approximately 190, including about 130 correctional officers who are in the bargaining unit. Some Correction Officers are white, some are black. The two Grievants are both classified as Correction Officer II, a job in the bargaining unit represented by the Union.

Grievant Smith is a well-built black man who appears to be in his late 40's or early 50's. He was appointed a Correction Officer in 1984. He began to work at Ross Correctional Institution in the spring of 1987.

Grievant Warnock is white and seems to be in his 30's. According to his testimony, he grew up in a "mixed" neighborhood of blacks and whites in Portsmouth, Ohio. He claims familiarity with black culture, basing that belief on his experience in childhood, the Army, other places and at Ross since his appointment as Correction Officer in April 1987. In March 1988 he was also serving as Local Union President of his bargaining unit.

Warnock and Smith were both scheduled to work the 3:30 P.M. to midnight shift on March 5, 1988. After entering the institution about 3:15 P.M. that day Smith joined Warnock and several other correction officers. He asked Warnock about the status of several employee working condition requests Warnock had been pursuing with supervision. Their conversation was laced with profanity but, according to their testimony at arbitration, neither objected to the swearing. Warnock's status report was unsatisfactory to Smith. In stating his disapproval, Smith used several terms in reference to Warnock and his performance. Smith said "dumb", "stupid", "dumb ass", and similar adjectives and nouns.

At 3:30 P.M. the both went to work.

During the shift Grievant Warnock considered and became angry about Smith's reaction and his use of the terms quoted above. Warnock recollected that Smith had used the same appellations and characterizations in reference to Warnock on prior occasions. At arbitration Warnock testified that he decided on March 5, 1988 to put an end to such comments by Mr. Smith which he considered insulting.

Just before midnight on March 5 various Correction Officers and supervisors were in the area of the time clock. About the time he punched out, Warnock -- still in uniform -- went to Smith who was standing nearby.

Smith was also in uniform. Warnock told Smith never to use the terms he had used that afternoon in referring to Warnock or his actions. They proceeded to talk to each other, both using terms commonly regarded as profane, obscene, and hostile. After punching his time card Warnock started to walk down the hall. He stopped about twenty feet away from Smith, turned and said "Hey Smitty, your Mama..." He did not finish the statement. Smith immediately ran and struck his fist against Warnock's face. No other blows were attempted by either man. Warnock noted to the witnesses that Smith had hit him and invited Smith to meet him at Sherman Park right away "to finish it."

They both left the institution. Warnock drove his auto to Sherman Park where he waited. After Smith passed without stopping Warnock went home where he phoned the Night Captain to report and complain that Smith had assaulted him.

The next day Smith and Warnock each wrote and submitted a statement about the incident.

Over the next few days supervision investigated and obtained statements from other correction officers. On March 21 each Grievant was separately notified of a pre-disciplinary conference to be held in connection with alleged violations by him of specific rules during the incident on March 5-6. After investigation and review each employee was suspended for 10 days. Warnock was suspended for allegedly violating General Rules 11 and 17 and Smith for allegedly violating Rule 18. Each officer filed a grievance on April 22 protesting his suspension.

On May 3, 1988 Officer Warnock filed a criminal complaint in Chillicothe Municipal Court alleging he had been the victim on March 6, 1988 of Floyd Smith's "crime of assault," a misdemeanor of the first degree. After Smith pleaded "no contest" the Court found him guilty and sentenced him to 30 days in jail and fined him \$250 and costs. (The Court suspended 25 days of the sentence and \$100 of the fine on condition of good behavior for one year.)

EVALUATION

The Department's published "Rule Violations and Penalties" were known to both Grievants. For a first violation of rules 11, 17 or 18, the rules result in a penalty up to discharge on the first offense. In comparison, other offenses do not merit removal until the fifth offense.

The Grievance of Officer Smith

Officer Smith concedes that he violated Rule 18 which prohibits "fighting with another employee or employees during work hours, on State property, or in uniform." However he seeks a reduction in the discipline to a reprimand claiming that the Employer's own rules provide for only a five day suspension on the first offense but that in this case even that length of suspension isn't proper because the provocative terms uttered by Mr. Warnock reached Mr. Smith after a workday in the stressful environment of the institution, triggering a reflex action -- the blow to Warnock's face.

The Employer's rules provide that fighting is one of the most serious offenses. The prescribed penalty for the first offense is a suspension of 5 to 10 days or removal; the only penalty for a second offense is removal. In this case a 10 day suspension was meted out.

Officer Smith does not claim that the profanity and obscenity used by Warnock during their conversation at the clock excuses or justifies his striking Officer Warnock. As a matter of fact both Warnock and Smith testify that the vulgar and profane language they used to address each other is typical, common and accepted among Correction Officers as well as inmates. Other Correction Officers acknowledge that some officers do use such language but disclaim such use themselves. It is unnecessary for purposes of this case to decide whether that language and vocabulary is common and accepted among Correction Officers or actionable by the State. Neither Smith nor Warnock was disciplined for words at the time clock. Furthermore, neither Grievant relies

on those words to defend the charge(s) made against him.

Officer Smith was disciplined for his reaction to "Hey Smitty, your Mama..." Officer Smith testified that in the black community the phrase is a corruption and abbreviation of the insult having a number of variations implying sexual promiscuity, commonly "your Mama is a prostitute". He also explained that whereas the statement is regarded as a very serious personal and familial insult when delivered by blacks, it has an additional quality of being racial defamation when stated by a white to a black. White officers who testified recognize the "your Mama..." statement by a white to a black to be a severe racial/ancestral insult of the highest magnitude -- the "straw that breaks the camel's back" -- calling for a fight to defend honor. Although aware of the racial aspect to Warnock's statement, Smith says he reacted because of the insult about his mother, whom he lost when he was only six years old, many years ago.

The Union and Smith concede that his striking Warnock was a violation of Rule 18.

Verbal provocation does not excuse or justify such use of force. Nor is the stress of the Correction Officer job an excuse. Correction Officers are selected and expected to be able to meet and handle such verbal taunts.

Although the Union's written opening mentioned failure by the State to observe the provisions of 24.04, no evidence was submitted which would justify a finding of any violation by the State of Section 24.04. Furthermore the written stipulation agreed that "there are no procedural problems...."

More meritorious is the Union's claim concerning progressive and appropriate discipline required by Article 24. The State considered both Grievants to be "equally culpable" so both were given the same penalty. In this regard the State cited an Arbitrator's decision in Grievance G-87-0811. In that case, two employees were each suspended for 10 days "for their

participation in the incident at issue." However both employees had been charged with violating Rule No. 4 of the Ohio Department of Transportation, "Striking a fellow employee". Arbitrator Rivera said:

...The management team apparently concluded that a fight occurred and that they could not determine who was at fault and as a consequence equal discipline was imposed. The Arbitrator finds this management conclusion a reasonable and fair result. The Arbitrator finds that the Grievant and Mr. Humphrey engaged in a fight and violated A-301 (#4). The discipline imposed should be equal as no evidence emerged which clearly and convincingly exonerated one of the participants. The substance of the discipline is upheld.

The case before this Arbitrator is considerably different in facts, rules and controlling contract provisions. In the first place the undersigned Arbitrator has made specific findings on the facts, responsibilities and improper actions of both participants. Second, the two employees were charged with different offenses. Third, the specific penalty depends on application of the published standard of employee conduct consistent with principles and provisions of Article 24, not on some general notion of "equal culpability" for an incident.

Whether a ten day suspension was appropriate for Smith depends on the rule he violated and whether progressive discipline was properly applied and the discipline was "reasonable and commensurate with the offense..." as required by Article 24.

The Department had announced that it would impose, for the first violation of the fighting rule, a suspension of 5 to 10 days or a removal. The rule provides that removal is the only penalty for the second fighting incident. Imposing removal no later than the second fighting offense emphasizes that fighting is extremely serious misconduct. However the fact that seven penalties are available for the first offense -- suspensions of 5 to 10 days or removal -- is a recognition that the nature and circumstances of fighting differ. In that framework it is difficult to image a lesser fight

than occurred in this instance. Only one blow landed and no other was attempted. It was swung by a middle-aged "aggressor" responding to public insult of family and race by a person about twenty years younger. The total affair -- from punch to challenge to meet in the park -- lasted about 2-3 seconds.

The State compares Smith's "fight" to the ODOT fight mentioned above. The ODOT altercation involved a number of minutes of verbal and physical misconduct by two employees, first in a truck cab -- in motion part of the time -- and later on the highway where two more physical misconducts occurred; medical attention and eight stitches were required for one participant. Without minimizing or condoning the Smith fight, the Arbitrator must objectively recognize that it was a momentary event meriting classification at the lower end on the fight scale.

Arbitrator Rivera found a ten day suspension proper for the ODOT fight but her decision does not mandate the same penalty for Smith's punch. Although all fights may be serious, they are not equal qualitatively or in penalty deserved.

For his one punch the State issued Smith the sixth most severe of the seven penalties available, despite his good record in four years of service, his apology for participating in the March 6 incident, and his promise to avoid such incidents in the future. Under these circumstances the Arbitrator finds that the ten-day suspension on Smith was not "reasonable or commensurate with the offense" as required by the Agreement. However there was just cause for a five day suspension, the lowest penalty for the first fighting offense specified in the published rules.

The Grievance of Officer Warnock

The situation of Officer Warnock is considerably different than that of Officer Smith. He denies any fault or responsibility. Furthermore, despite what has happened and what he heard at the arbitration hearing, Warnock says he might do the same things tomorrow.

In the opinion of witnesses there was no question that Warnock invited Smith to fight off the premises. Given the circumstances and words Warnock used, their conclusion is reasonable. Before accepting that conclusion the Arbitrator considered Warnock's explanation for his invitation -- that he wanted to "help" Officer Smith plan (in the park) how Smith could best defend any charges brought against him for his misconduct in striking Officer Warnock. Not only does that story fly in the face of the reasonable perception of the witnesses, and of Smith, it ignores and is inconsistent with two prominent facts:

1. Warnock called the night commanding officer later that evening attempting to shift total responsibility for the incident to Officer Smith, just as he did in other statements over the next few days;

2. Two months later Warnock initiated a criminal complaint, knowing that incarceration and/or fine might be imposed on conviction.

These are hardly helping actions.

The Arbitrator finds that Officer Warnock violated Rule 17 when he invited Officer Smith to Sherman Park.

Officer Warnock also disavows any fault whatsoever in respect to Rule 11 which prohibits intentional acts of racial discrimination, among others. The State's basis for alleging that violation was Officer Warnock's statement "Smitty, your Mama..." Officer Warnock testified that the statement is not a racial slur just an innocent phrase without malice. When asked to define it,

he said it has no meaning whatsoever -- a no-meaning statement originally used in the black community but now also used by some whites. He claims to say "it all the time" to blacks and/or whites.

Such wide-eyed innocence by a correction officer, who admits to knowing and using many profane and disrespectful words, who served as a military policeman in the United States Army after growing up proximate to blacks, would be phenomenal if Warnock was credible, but he was not. All the whites who testified understood the same meaning for "your Mama..." explained by Officer Smith. The Arbitrator takes arbitral notice that it is a well known racial slur. The Arbitrator believes Warnock also understood the meaning when he said the words.

At the time clock Officers Warnock and Smith used vulgar and obscene terms to each other. They claim to use such profanity in their everyday conversation without significance. That may be true, but on March 6 the words were said in anger, not casual conversation. When Officer Warnock walked away from Smith he was furious. Warnock stopped and turned to deliver the strongest insult within his command. Even if by some incredible, unlikely possibility Warnock did not know the meaning, he certainly intended the words he shouted. An employee is responsible for the commonly accepted meaning of the words he elects to use provided there is no contradiction by the circumstances. Similarly, he is also subject to the prescribed consequences for such words. It may be that the familial insult rather than the racial aspect was the primary stimulus of Smith's reaction but that does not neutralize the statement as a racial slur. The violation occurred when the statement was made, not when and if Smith reacted. Accordingly, the Arbitrator finds that Officer Warnock violated Rule No. 11.

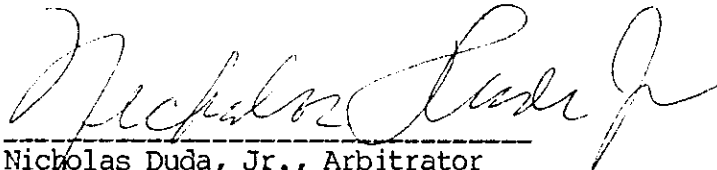
Whereas Officer Smith was contrite and indicated that he would avoid such situations in the future, Officer Warnock steadfastly insisted throughout the hearing and to the end that he had done nothing wrong, that it was permissible to communicate as he did on March 6, 1988 and would not hesitate to use the "Mama" expression again. Hopefully he will reconsider.

Officer Warnock violated two serious rules. A 10 day suspension for those two violations is not inconsistent with principles of progressive discipline in his case. His performance during his eleven months service prior to March 6, 1988 was good but insufficient to persuade a reduction in penalty under the circumstances. There was just cause to suspend Officer Warnock ten days.

AWARD

There was just cause for the suspension of Officer Warnock so his grievance is denied.

There was just cause to discipline Officer Smith but under the circumstances more than a five day suspension was not reasonable and commensurate with his offense or with the principles of progressive discipline. Accordingly the State is directed to reduce Officer Smith's suspension to a five day suspension and revise his personnel file accordingly. He should be made whole for the five lost workdays in the period April 27 to May 3, 1988.


Nicholas Duda, Jr., Arbitrator