#323

IN THE MATTER OF ARBITRATION	
Between	
STATE OF OHIO	
	OPINION AND AWARD
The Employer	Jerry Niswander 5 Day Suspension
-and-	
	27-20-88-08-02-152-01-06
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11 AFSCME, AFL-CIO	
The Union	

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

[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.

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, the Grievant told a supervisor that he was "full of shit up to his ears". He said it twice and quite emphaticallynd 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 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 first 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 Employuer 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