#1247

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-29-961219-0253-01-03
and	*	
	*	
OHIO DEPARTMENT OF	*	Derrick C. Thrash, Grievant
REHABILITATION &	*	Removal
CORRECTION	*	

Appearances

For the Ohio Civil Service Employees Association:

Robert Jones, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Department of Rehabilitation and Corrections:

Michael P. Duco, Manager, Dispute Resolution
Pat Mogan, Operations Team Leader
Ohio Office of Collective Bargaining

Hearing

A hearing on this matter was held at 9:40 a.m. on November 25, 1997, at the Dayton Correctional Institution in Dayton, Ohio before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the State were Captain Carlton H. Johnston and Inspector Michael Mockabee. Testifying for the Union were Correction Officers Darlene Williams and Wanda May, and the Grievant, Derrick C. Thrash. Also present was Cynthia D. Hill, Chapter President. A number of documents were entered into evidence: Joint Exhibits 1-6 and Union Exhibits 1-4. At 2:20 p.m. on November 25, following oral summation, the hearing was closed. This opinion and award is based solely on the record as described herein.

Issue

Did the Employer remove the Grievant for just cause?
If not, what should the remedy be?

Statement of the Case

The Grievant was hired by the Ohio Department of Rehabilitation and Correction as a correction officer on October 23, 1989. At the time of his removal, he was working at the Montgomery Education and Pre-Release Center in Dayton, Ohio to which he had been transferred from the Dayton Correctional Institution in April 1994. He had four disciplines

on his record, three of which were for vulgar and abusive language (a written reprimand on December 15, 1994, a two-day suspension in 1995, and a five-day suspension in 1996), one of which was for assaulting a fellow officer off premises while in uniform (seven days in 1995). From mid-February until mid-August 1996, the Grievant was on disability stress leave and being treated for depression. His doctor's statement and State stipulations establish that the Grievant suffered marital and financial difficulties, and felt discriminated against and harassed at work where a relative of his wife's is among management staff. He filed a number of incident reports about his relations with other staff, but Management found no probable cause to pursue the allegations beyond its investigations, so the Grievant turned to external remedies, apparently also without resolution satisfactory to him.

The incident that led to the Grievant's removal occurred on August 27, 1996, shortly before the end of his shift and less than two weeks after he returned to work from disability leave. Incident reports and testimony of State witnesses provide the following account: When Lt. Camp and Mr. Bogan tried to serve the Grievant with five-day suspension papers for a pre-leave infraction, the Grievant, who had just received bad news from his attorney, became visibly upset and demanded to see the warden or deputy warden. He went to the administration area on the second floor, but when he was not able to see the warden as he wanted, he said, "Fuck these pussy motherfuckers. I'm going home." Investigator Mockabee ordered him to stay until he was served, but the Grievant replied, "Fuck that. Send them certified." He then punched out and left the building. CO May, who walked out with him, testified that he was "a little irritated," but she did not hear any abusive language towards management. A minute or so later, he was back in the entry area, kicking over an ash can as he entered, slamming his hands down on the desk repeatedly and saying, "Fuck these pussy motherfuckers. These people are going to make me go postal and kill somebody." He bypassed the metal detector and headed towards the visiting room area. Mockabee testified the Grievant was very agitated and hostile, and that he tried to calm him down.

Inmates who were present in the area were escorted out by CO Williams, who testified the Grievant was loud and seemed upset. She did not hear or could not recall hearing abusive statements. Unit Manager Mattingly entered the area and also tried to calm the Grievant down, but the Grievant went off at him, too, pointing his finger and angrily saying, "You don't give a fuck about my son." After Lt. Camp returned with the suspension papers, the Grievant was escorted out of the building, approximately twenty or twenty-five minutes after the episode began, and placed on administrative leave the following day. Mockabee testified that while he did not personally feel threatened, he felt the institution and others were threatened.

For his part, the Grievant testified he may have said, "Fuck it" or "To hell with it," but he never threatened or abused anyone while in the administrative area, nor did he threaten Mockabee, although he did say, "I just got back and they're already fuckin' with me." He had already been disciplined for abusive language and would not jeopardize his job by calling administrators "motherfuckers" or talking about going "postal." He admits he behaved unprofessionally by losing his temper, for which he telephoned Deputy Warden Grayson and apologized. While he could have carried himself better that day, he and his son do not deserve job loss over it.

A number of witnesses to these events filed incident reports, among them Mattingly, Camp and Mockabee. In addition, CO Williams, CO Usher and Job Coordinator Hines, who also witnessed parts of the incident, reported what they observed. Captain Johnston interviewed the Grievant, who did not recall much about it, and three witnesses in September. He concluded the Grievant was verbally abusive and threatening, and requested disciplinary action. A pre-disciplinary hearing was conducted on October 24 by Patrick Mayer, Labor Relations Officer, who concluded there was just cause for discipline under Rules 12 (obscene or abusive language) and 18 (threats, intimidation or coercion) of the Department's Standards of Conduct, aggravated by the presence of other staff and inmates. The Grievant was removed from his position on December 13, 1996.

This action was grieved on December 19, alleging violation of the just-cause and progressive discipline articles (24.01 and 24.02) of the Collective Bargaining Agreement. Being processed through the grievance steps without resolution, it came to arbitration, where it presently resides, for final and binding decision, free of procedural defect.

Arguments of the Parties

Argument of the Employer

The State first counters a Union procedural argument, saying there is no contractual requirement for union representation at the time discipline is imposed, only Article 24.04's right of union representation during an investigatory interview.

The State next argues that witness statements and testimony support its version of events, claiming the most credible evidence is on its side. Mockabee, who had a good relationship with the Grievant, presented testimony consistent with his statement written the

following day. Hines, Camp and Mattingly all agree that the Grievant was very upset, and even the Grievant admitted he was agitated. The Grievant's testimony, however, was not consistent with his statement, for when he was interviewed he had very little memory of what was said but which he now says he clearly recalls. May's testimony should be discounted, as she was with the Grievant for only a few moments. Usher's statement, too, is vague, and Williams, who also cannot recall much, seems unwilling to be involved. The State contends its version is supported by the Grievant's disciplinary record, which shows a pattern of difficulty in controlling temperament in similar ways. Other staff may contribute to the Grievant's problems, but he is responsible for his own actions.

Regarding the Grievant's justification for being upset, the State understands why he would be agitated after hearing from his lawyer, but Lt. Camp had no way of knowing the Grievant's state of mind when he approached him. Had he known, he might have waited to serve him with the suspension. Nevertheless, the Grievant had already had a pre-disciplinary meeting on the suspension, and had recourse to the grievance procedure if he wanted to question Management's decision to suspend him. As far as the allegations of discrimination are concerned, no evidence was presented to connect Bogen with what occurred on August 27 and there is no reliable evidence of other discriminatory acts.

However poor the Grievant's state of mind, the State says other staff do not have to tolerate this kind of behavior. It contends it met its burden of proof and acted reasonably. The Grievant may have known his intention was innocent, but an outside observer could believe he was going upstairs to the administrative office as a threat to the institution and staff: he was in a trancelike state, had been outside, did not clear the metal detector, used

foul language towards management, pounded on the table, and made a threat of going postal. The State asks that if the Arbitrator finds the events occurred as the State believes they did, she not substitute her judgment for Management's but uphold the discharge.

Argument of the Union

The Union contends there was no just cause to remove the Grievant. It points out that the incident occurred after the Grievant had clocked out and was given a direct order by management, arguing that had there been no direct order, there would have been no trouble. The Grievant had just come back from stress leave, had forgotten about the outstanding discipline and was upset as no one would explain it to him. During its opening statement, it also pointed out that the suspension was served without the presence of a union steward, which it alleges is a procedural error. The suspension papers had been sitting on someone's desk for months and could have waited until the next day. The Grievant felt bad about what occurred and apologized, but was terminated anyway.

The Union claims its witnesses are just as credible as the State's. Mockabee did not feel personally threatened at the time he gave his statement, but in arbitration found a reason be feel threatened. In his statement, Camp said the Grievant was verbally assaultive in the administrative area, but none of the secretaries made concurring statements. As for the Grievant's record, the Union says the two-day suspension was grieved, but the State raised an issue of grievance timeliness because it had no other defense.

The Union further argues that the investigation was not thorough or fair as Johnson did not interview all witnesses.

The Union alleges the Grievant has been a victim of discrimination on account of a family relationship, which is prohibited by Article 2.01, and harassment and coercion, in violation of Article 2.02.

Moreover, says the Union, removal is not reasonable or commensurate with the offense and surely was issued as a form of punishment because no consideration was given to the Grievant having just returned from stress leave. In support of this argument of too severe a penalty, the Union cites the decisions of a number of panel arbitrators.

In conclusion, the Union asks that the Arbitrator grant the grievance, order that the Grievant be brought back to work and given back pay, roll call, sick leave, and to be made whole.

Opinion of the Arbitrator

On the heels of upsetting news from his lawyer to the effect that his financial and marital difficulties were escalating, it is understandable that the Grievant would be even more angered by the additional bad news of a five-day suspension. One could and perhaps should excuse a spontaneous verbal outburst under such circumstances. But more occurred here. What began in the privacy of Mockabee's office between the Grievant, Camp and Bogan did not stay there. It continued over a period of time, moving upstairs to the warden's area, back downstairs, outside and back in again, escalating, drawing in others, and being observed by staff and, for a time, inmates, despite several attempts to calm the Grievant down. I think the Grievant minimizes his behavior during this period, perhaps because he was too upset for full self-awareness. Mockabee's testimony about what occurred in the warden's area is consistent with his own statement written the day following

the incident and is corroborated by Lt. Camp's statement. Similarly, his testimony about what occurred on the first floor is consistent with his own statement and is corroborated by those of Mattingly and Hines. Against this is the Grievant's testimony acknowledging he lost his temper but flatly denying the allegations of abusive language and threats. In his interview of September 19, however, he did not remember whether he said these things, and witnesses called in his behalf were present only briefly or could recall very little. Thus, we have, on the one hand, the uncorroborated denial of the Grievant who was by all accounts agitated at the time and who could not recall much three weeks later, and, on the other, specific recollections of a person with no evident axe to grind corroborated by statements of a number of witnesses written close to the time of the incident. I am convinced the allegations are true and that the incident occurred substantially as reported by Mockabee, Mattingly and others. The Grievant was out of control, making obscene and abusive statements about administration, using aggressive body language and speaking loudly, resisting efforts to calm him down, and making a remark about "going postal." Such a display and threat has no place in the workplace, and certainly not in a penal institution. It was reasonable for Mockabee to believe the safety of members of administration and the institution itself were threatened, particularly in light of the Grievant's history at MEPRC. The question, then, is whether there are mitigating circumstances that justify a different disciplinary outcome.

The Union suggests Management was culpable on several counts. It issued the five-day suspension without a Union steward present when the Grievant was vulneraable (having just come off stress leave and received bad news), did not afford him the courtesy of

confronting top management, and gave him a direct order to stay although he was off the clock and could have been served the following day. After the incident, it did not conduct a full investigation, and the entire episode occurred against a background of discrimination and harassment. Taking each of these in turn, there is no contractual requirement for Union representation when discipline is issued. Second, although in retrospect the timing of the issuance of the suspension was bad, there is no evidence Management was aware of the attorney's phone call and news, and thus could have avoided contributing to the Grievant's displeasure that afternoon had it wanted to do so. Neither did Management spring the suspension on the Grievant as soon as he returnd from his leave as it might have had it been motivated by ill will. On the contrary, the Grievant had more than a week to settle into his job again before he was faced with this suspension. While it is true it was not necessary for the Grievant to be served that day, Mockabee testified that when he gave the order to stay, he did not know the Grievant was scheduled to work on the next day, which was his good day.

As far as wanting an explanation for the suspension and the legitimacy of the direct order are concerned, the Grievant had recourse through the grievance procedure provided by the Contract for the very purpose of resolving disputes without disruptions such as what occurred on August 27. Management must be able to issue direct orders without the expectation they will provoke threats of violence.

Regarding the quality of the investigation, I agree more witnesses might have been interviewed, but both principals were, and a total of eight witnesses from a variety of vantage points either supplied statements or were interviewed or both. I discern no pattern

of bias in the investigation nor the overlooking of witnesses who might have cleared the Grievant of having threatened the institution. On the contrary, those who might have been in a position to know stated they did not hear or did not remember. Secretarial staff in the warden's area could have been interviewed, but what occurred up there was secondary to what happened in the entry area, which is what provided the basis for the removal.

As to the allegations of discrimination and harassment, I accept that the Grievant feels persecuted, believing himself to be a victim of harassment. But the Grievant's belief is not enough to establish the fact of harassment, and no reliable evidence of improper discrimination was brought, only the Grievant's own statements and unsigned, hearsay statements of others. The Union interprets the Grievant being served his administrative leave in the parking lot of MEPRC as an act of harassment. On the contrary, it was an act of prudence. The Grievant had just the previous day talked of being driven to violence by management whom he even now believes persecutes him. Barring his entry to the institution on the day following that incident was a reasonable precaution pending investigation.

The Union submitted a number of cases to support its claim that removal is too harsh. I do not see the applicability of the *Warnock* case, which involved fighting between two bargaining unit members with clean records. In *Bailey*, the grievant said "Fuck yourself" to a supervisor. Arbitrator Rivera deemed this abusive and insulting, but reduced the ten-day suspension to five because the grievant was a nine-year employee with only a written reprimand on his record and the remark was made in private. The instant case is distinguished from *Bailey* on several points: the lack of privacy and the presence of a

lengthier discipline record among them. *Niswander* involved a second offense which received a five-day suspension in accordance with the grid, but which Arbitrator Fullmer reduced to one day, on the grounds of disparate treatment and his finding that the term used ("prick") was relatively minor for the Ohio State Reformatory. Again, the instant case is distinguished by the Grievant's lengthier record and circumstances of the infraction. Finally, there are the *Newton* and *Adams* cases, both of which bear resemblances to the case at hand. In *Newton*, Arbitrator Rivera reduced to thirty days the discharge of an employee with a long record of similar improper behavior because she was not convinced the threat of violence was genuine. However, she ordered the grievant in that case not to be assigned to the same supervisor, who did feel threatened. The *Adams* case involved a restroom fight between co-workers at the Ohio Bureau of Workers Compensation during which the gievant threatened to get her .38 and "blow [the fellow employee] away." Arbitrator Dworkin, in assessing whether this employee was salvageable, found no evidence that she was a violent person and a probability that she was not, being a battler with words (p. 16). Despite her poor attendance and productivity, he returned her to work without backpay, but permitted the Employer to condition her reinstatement on a psychiatric examination. The instant case is different from the *Adams* case in that the Grievant here has a history of physical aggession, having previously been disciplined for fighting. Moreover, the setting is entirely different, being an institution of security and rehabilitation, not an office, and management, rather than employees, are the targets. However, Dworkin's point regarding salvageabiity is apt. In *Newton* and *Adams*, the case ultimately turned on whether a lesser penalty was

predicted to have a corrective effect. It is to this issue, upon which I have pondered long and hard, that I now turn.

Unlike Newton, the Grievant in this case had recently returned from stress leave during which he was treated for depression and alcohol abuse, and developed through counseling a plan and strategy for managing his problems. One of those strategies was to walk away from stressful situations. In a prison, however, the very job of a correction officer demands he respond to, not retire from, stressful situations, even under provocation, and he must do so in a controlled fashion. This incident demonstrates that the Grievant was not able "to ignore the ongoing stresses [he] felt from the administration" (Union Ex. 1), despite six months of leave and treatment. Although the Grievant was remorseful and apologized for his conduct, he still places the ultimate blame on management. I do not see that returning him to the same workplace, even with a lengthy suspension, will accomplish what those months of stress leave and treatment did not. There is too high a probability of repetition and too great a risk if it does.

Award

The Employer removed the Grievant for just cause. The grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
January 6, 1998