#1273

SUMMARY OF DECISION IN RE: OHIO DEPARTMENT OF REHABILITATION AND CORRECTION—NCCI AND OCSEA AFSCME, LOCAL 11

SUMMARY OF RELEVANT FACTUAL FINDINGS

I. The North Central Correctional Institution (NCCI) is a branch of the Ohio Department of Rehabilitation and Correction

II. NCCI charged the Grievant with violating the standard of employee conduct, which involved violations of:
- A. Rule # 6—Insubordination involving disobedience or inappropriate delay in carrying out a direct order.
- B. Rule # 12—Making obscene gestures or statements or false or abusive statements toward or concerning another employee, supervisor, or member of the general public.
- C. Rule 13b—Discrimination—Hostile environment sexual harassment.

III. When the instant dispute arose, the Grievant was a correctional officer assigned to the mail room in NCCI.

IV. Horseplay, joking and pranks were a part of the work environment in the mail room before the Grievant transferred in there. The environment became worse for some individuals after the Grievant transferred in. Also, the nature of the work in the mail room contributes to the character of this work environment. As part of their job description, mail-room employees receive, open, inspect, and otherwise screen incoming mail sent to the inmates of. This mail often has a very strong sexual character that would likely offend the ordinary person not accustomed to the "Correctional institutional" environment. Although the type of treatment to which Correction Officers Jerwe and Swartz were subjected changed after the Grievant transferred out of the mail room, the overall environment worsened for these officers.

V. **Insubordination.** The employer alleged that the Grievant disobeyed a direct order not to discuss an investigation in which he was a prominent object. For the following reasons, the Arbitrator holds that the record does not support a charge of insubordination because, under the circumstances, the Grievant was justified in disclosing information about the investigation.
- A. After leaving an investigative interview with Captain Duffy, the Grievant was distraught and asked his supervisor for permission to leave work. The Grievant was obliged to disclose the actual reasons for requesting leave. In stating the reasons for his request, the Grievant disclosed information about the investigation to his supervisor.
- B. There is also unsubstantiated evidence in the record that the Grievant mentioned the investigation when he returned to the mail room. However, evidence in the record as a whole does not establish this accusation.

VI. **Obscene Gestures or Statements and Abusive Statements Towards or Concerning Employees.** The Arbitrator finds that the record substantiates this charge.
- A. The record contains clear and convincing evidence that, among other behavior, the Grievant:
  1. Wrote "Cabbage Ass" on post-it notes and placed them in the work area of Correction Officer Moorehead.
  2. Ordered Correction Officer Jerew to "Shut up."
  3. Advised Correction Officers Jerew and Swartz that they should be assigned to the inmates' dormitories or "locks" where there are 250 "Swinging dicks."
  4. Advised Correction Officers Jerew and Swartz that women should not work in a correctional institution.
  5. Placed a picture of an elephant's rear end in his work area along with a note stating "Cabbage ass."
  6. Told Officer Jerew, "Hell no they didn't get it [the mail]. I didn't get it "fucking done, and if

they don't like it, they can suck my dick."

7. Referred to mail bags as "cattle bags" and to the mail bins as "cattle troughs" and mentioned or discussed cows in a thinly veiled reference to Officer Jerew or Swartz.
   a. "Cow" is a gender-based reference to the weight of these Correction Officers.

VII. **Hostile Environment Sexual Harassment.** The most troubling issue in this dispute is whether the Grievant sexually harassed Correction Officers Jerew ans Swartz by creating a hostile working environment for them.

A. The EEOC defines sexual harass:

1. (a) Unwelcome sexual advances, requests for sexual favors, and *other verbal or physical conduct of a sexual nature* constitute sexual harassment when . . . (3) such conduct has the *purpose or effect* of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (29 C. F. R. § 1604.11(a)).

B. Also, the EEOC has offered the following comment:

> "Since sexual harassment is a form of *sex discrimination*, the crucial inquiry is whether the harasser treats a member or members of one sex *differently* from members of the other sex. EEOC Compliance Manual, Vol. II § 615.2 (1981) (emphasis added).

C. In addressing the issue of hostile environment sexual harassment, one must view the Grievant's conduct with the mail-room work environment as a backdrop. Employees in this environment, were constantly exposed to sexually explicit material, joking, and pranks or horseplay. Therefore, behavior that would constitute unlawful sexual harassment in other work environments might not qualify here, since employees must come into contact with explicit and often offensive sexual material in the course of their ordinary job duties. Nonsexual bantering and horseplay might be viewed as simply a part of the work environment.

D. However, bantering and horseplay become unlawful sexual harassment when they are aimed at employees *because of* the employees' gender. The record in this case establishes that the Grievant directed much though not all of his "bantering" toward Correction Officers Jerew and Swartz.

E. Also, as the EEOC's guidelines reflect that unlawful sexual harassment occurs where a harasser subjects victims to conduct of a sexual nature because of their gender or sex. Again, the record establishes that the Grievant subjected Correction Officers Jerew and Swartz to conduct of a sexual nature because they were women. Because these women worked in a naturally sexually charged environment does not give the Grievant the right to subject them directly to additional conduct of a sexual nature like that mentioned above in section VI, A.

F. Nor does the argument that the employer somehow waived the right to discipline the Grievant because the employer was previously aware of the situation in the mail room but took no action. This waiver theory might apply to in-house work rules and contract provisions that the parties themselves created. However, federal law governs unlawful sexual harassment, and no employer that is covered by this federal law may waive its duty to enforce that law in the work place.

VIII. For the foregoing reasons and reasons set forth in a forthcoming, full opinion, the Arbitrator finds that the employer established two of the three charges against the Grievant. Therefore, some discipline was warranted. In addition, a three-day suspension is not unreasonable in light of the Grievant's disciplinary record, work history, and tenure with either NCCI or the Ohio Department of Rehabilitation and Correction. The Grievance is therefore, DENIED.