ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1399 Expedited

OCB GRIEVANCE NUMBER: 27-21-990107-1697-01-03

GRIEVANT NAME: Sam Carter

UNION: OCSEA/AFSCME Local 11

DEPARTMENT: Rehabilitation and Correction

ARBITRATOR: Sandra Furman

MANAGEMENT ADVOCATE: Meredith Lobritz

2ND CHAIR: Pat Mogan

UNION ADVOCATE: Donnie Sargent

ARBITRATION DATE: October 22, 1999

DECISION DATE: October 22, 1999

DECISION: MODIFIED

CONTRACT SECTIONS: 24.01, 24.02, 2.01, 2.02

HOLDING: 1) Grievance is Modified.

COST: $350.00

#1394 expedited

ARBITRATOR: FURMAN	HEARING DATE: October 22 1999
GRIEVANT: Sam Carter	GRIEVANCE #: 27-21(99-01-07) 1697-01-03
DEPARTMENT: ODR+C	UNION: OCSEA Local 11
MANAGEMENT ADVOCATE: Lobritz	UNION ADVOCATE: Sargent

Was the G fired for just cause? If not
what shall the remedy be?

see attached.

ISSUED AT: Olbert
DATE: 9-22-99

ARBITRATOR'S SIGNATURE:

The instant case was conducted before Arbitrator Furman at the Orient Correctional Institute (OCI). Present on behalf of the State were Meredith Lobritz, Advocate; Pat Mogan, witness and OCB representative. The Union was represented by Don Sargent, OCSEA Staff Representative. The State witnesses were William Blaney, Investigator at OCI; Capt. Jenkins; and Pat Mogan. Union witnesses were Grievant (by telephone)[1]; Union officer and chief Steward [redacted] Ginn; and CO King. All witnesses were sworn. Each side had a full opportunity to examine and cross examine witnesses; to submit written documents; and to argue their positions.

The State has the burden of proof in a discipline matter. The burden imposed by the Arbitrator in this case is preponderance of evidence. No higher or different standard was argued by the Union. The State alleged a violation of Rule 18 occurred when Grievant purportedly told Captain Jenkins that he would "kick his ass' on September 24, 1998. The precipitating event for this statement, which the State characterizes as a threat, was the fact that the State had blocked in Grievant's car with its vehicle, as he was in a shift commander's parking spot. The State claims that Jenkins had no motive to lie; no history of bad animus against Grievant; and no discriminatory motivation based upon race. The State supports the five day fine with its disciplinary grid, arguing that the next step for this alleged conduct is a five day discipline, in light of Grievant's prior three day suspension in 1996.[2] The State points out inconsistencies with Grievant's testimony, and argues his self serving testimony should not be credited.

The Union makes a variety of arguments. It argues that Grievant's rights under Article 24 were violated in the conduct of the pre disciplinary hearing. The Arbitrator rejects those arguments. It is not required under Article 24 that the Grievant have a full blown hearing at that level of the procedure: significant due process rights attach at other steps of the grievance procedure- not at a pre disciplinary hearing. The Arbitrator may have some reservations about the neutrality of the hearing officer; the claimed frustration of witnesses from being allowed to appear; and the non availability of the accuser. But these do not rise to the level of a contractual breach by the State. The Union failed to sustain its burden of showing a violation of Article 24 as to the predisciplinary hearing.

Likewise, the Union does not prevail on its arguments that the length of time- 63 days- between the date of the incident and the holding of the predisciplinary hearing- is so long as to violate the mandates of Article 24. The Arbitrator agrees that in a relatively uncomplicated fact pattern as exists in this matter, two months is unreasonable. But there was no prejudice to Grievant or the Union by this delay, and it is not so egregious as to demand a modification of the discipline.

The Union also argues that the discipline may be motivated by racial overtones; Grievant is a black male; the accuser is a white male. There was insufficient evidence to conclude that the discipline was motivated by illegal considerations of race. No other purviews under Article 2 were cited by the Union.

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[1] Grievant was not present at the hearing. He was in New Jersey, available only by telephone. The State did not agree to a second postponement of the hearing, as Grievant's case was scheduled to be heard in July, 1999, at a NTA day. At that time, Grievant made a similar claim of insufficient notice. The Arbitrator sought a compromise position- allowing the Grievant to testify by phone. The parties agreed. The problems related to assessing credibility were discussed prior to the compromise solution.

[2] It is somewhat unclear to the Arbitrator whether or not the Grievant actually forfeited five days of pay or not. It is expected and assumed that the appropriate payroll records will be researched and payments/adjustments made consiistent with this opinion and award.

The case turns on credibility of the witnesses as to what happened on September 24, 1998. It is clear that OCI has some marked parking spaces that designate "spots" for certain named individuals by title or position. This area was viewed by all parties present at the conclusion of the testimony. It is also clear that Grievant on the date in question was parked in a spot that was designated at some point in time to be that of the Shift Commanders. He should not have parked there if the sign was up on that date, as the area was known to be a reserved area. This reserved area of parking appears to be a matter of custom at the OCI; The State did not claim that parking in the wrong spot violated a work rule, and that Grievant was or should have been aware of the consequences.

Grievant claimed he saw no sign that date; it was foggy; he backed in ; and had parked in the same area many times before without incident. The Arbitrator is not convinced that the sign "Shift Commander " was up on the date in question. A sign fell down on the inspection tour when the Arbitrator lightly rested her hand on the sign. The Arbitrator does not have a sufficient clear picture based upoon the eveidence presented as to what signs were up on the date in question. Today's viewing did not answer that question.

There was no dispute that Grievant acknowledged in his first conversation with Jenkins that he would move his car. There is no dispute that the consequences of not moving the car immediately were never discussed in that or in any subsequent conversation with the Grievant. When Grievant went out to move his car, he saw it was blocked by the state vehicle. His version of what he said in the third phone call to Jenkins and Jenkins' statements as to the conversation diverge. It is clear that the Grievant has used the phrase "kick your ass" on at least one other occasion, when he gets challenged. The prior three day suspension of 1996 is based upon a Rule #18 violation, as well. However, the State bears the burden of proof that the offense occurred on this occasion, and that the discipline is commensurate with the offense. I am not convinced that there was a threat issued to Captain Jenkins in the sense of a real, present, immediate danger of physical harm. Jenkins did not state he felt threatened. He did not state that he was afraid of Grievant. In fact, he was on his way out to move the blocking vehicle when the Major stopped him, and said he was going to move the state vehicle blocking Grievant's car.

The Union produced witness King, who had similar terminology directed at her by Grievant two years earlier. She testified that she wasn't threatened or afraid of Grievant; she stated "that's just Sam". The State did not escort Carter off grounds , or put him on Administrative Leave with Pay, as it has done in the past when it has felt a threat has occurred or a danger of physical conflict will occur. The Arbitrator further notes that the Grievant was paid overtime that date, until the blocking vehicle was moved. This seems somewhat anomalous, that he would receive a financial benefit for his purported misconduct.

The Arbitrator is left without a clear understanding about why the State chose to handle Grievant's conduct in parking in a purportedly improper space by its admitted actions on September 24, 1998. Instead of giving Grievant a direct order to move his car, it chose to block in his car with a state vehicle. What was the point? To make the Grievant angry ? To embarrass him ? To inconvenience him? To challenge him to react? The State's testimony that it has in the past blocked other employees cars with a state vehicle was not convincing; the union witnesses Ginn and King supported the Grievant's and the Union's claim that this approach was unique to Grievant's situation. I am assuming that had the State given him a direct order to move the vehicle, and Grievant had refused, a charge of insubordination would be before the Arbitrator. The State has a legitimate concern about the fact that a breach in decorum and discipline would exist if Grievant did in fact state he would kick a

It could appropriately discipline an employee for such a remark! under the appropriate circumstances

supervisors ass/ No one heard this other than the Captain. It was not corroborated by King. Grievant's testimony was not internally inconsistent.

The Grievant claimed that the State Highway Patrol remark was made in the context of getting them to move the vehicle. This was not rebutted or refuted by the State. Grievant followed up his chagrin and feelings of mistreatment by a ~~series of~~ written reports after the incident.

It is the Arbitrator's conclusion that there is insufficient proof that the Grievant threatened Jenkins on the date in question. It is clear to the Arbitrator that the phrase "kick ass" is not unknown to Grievant, but that is not proof he said it on that date. Even if the Grievant said he would kick Jenkins ass, I do not find that in the context, it was meant or intended as a threat. It is inappropriate, rude, offensive language, for which a separate charge could have been filed. Or, the State could have ordered him to move his car, and issued discipline based upon what he may have done with a direct order. But no contention was made that a direct order was given.

I do find the grievant's claim about a foggy day and no sign convenient. I also find that he used at least one rude or profane comment to Jenkins , i.e. "damn car". For his conduct on September 24, 1999 a written reprimand is in order. Grievant is strongly cautioned to temper his remarks and style of address to conform to agency rules and expectations.

AWARD

The Arbitrator orders the written repimand be substituted for the fine amd be made whole. IT IS SO HEREBY ADJUDGED ORDERED AND DECREED.

Sandra Furman

Arbitrator Sandra Mendel Furman

at Orient Ohio this 22 day of October, 1999.