

ARBITRATION DECISION NO.:

76

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction, Marion
Correctional Institution

DATE OF ARBITRATION:

DATE OF DECISION:

December 16, 1987

GRIEVANT:

William Weatherbee

OCB GRIEVANCE NO.:

G-87-1700

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Brenda Persinger

FOR THE EMPLOYER:

Nicholas Menedis

KEY WORDS:

Just Cause
Suspension
Insubordination

ARTICLES:

Article 24 - Discipline
§24.01-Standard

FACTS:

The Grievant was employed as a Corrections Officer II at the Marion Correctional Institute where he has had fourteen (14) years of corrections experience. On June 8, 1987, the Grievant was suspended for one (1) day based upon allegations of violations of the Ohio Department of Rehabilitation and Correction Standards of Employee conduct for the use of discriminatory language, for jeopardizing the security of the Marion Correctional Institute facility, and for

insubordination and failure to follow written procedures. A grievance was filed alleging the suspension was without "just cause".

In his report, the Arbitrator did not discuss the arguments advanced by either management or the Union; rather, his report developed the facts by summarizing the testimony of various witnesses. The first witness, who had been employed for fifteen and one half (15 1/2) years in corrections, testified that on April 10, 1987, he heard the Grievant yell the term "6/5", an inmate term warning inmates that a corrections officer is nearby and alerting inmates to discontinue certain acts which could be punishable. However, the Grievant was not aware of the witness' intent to strip search an inmate suspected of having received drugs or other contraband and, therefore, the witness stated it did not appear that the Grievant was warning inmates. Rather, the witness testified that the Grievant had used "poor judgment" in speaking the inmate term "6/5".

The witness further testified that on March 27, 1987, he observed the Grievant with a black inmate and heard him say to the inmate, "if you would wash your face, you would be white like me". However, the witness did not discuss the racial comment with the inmate.

The second witness, whose experience includes nine (9) years in corrections, testified that on April 10, 1987, the Grievant refused to comply with the witness' request that the Grievant show his identification badge. When a second request was made, the witness testified that the Grievant cursed at him and again refused to show him his badge. The witness testified that a departmental rule requires all employees to display their badges if required for the purpose of preventing inmates, who may have obtained a badge, from escaping from the institution. The witness denied any prior confrontation with the Grievant.

The third witness, a Corrections Officer II, testified that he was approximately 100 feet away from the Grievant when the Grievant used the term "6/5". He testified that he heard the Grievant say the term only once and that there were no inmates nearby at the time. He further testified that the Grievant was not using the term "6/5" as a warning, but rather, was using it in a "joking around" manner.

The fourth witness, a Corrections Officer II, as well as the Chief Steward for the Union, testified that the Grievant advised her concerning the incident of racial remarks and that the inmate in question responded by laughing. However, the witness did not discuss the incident with the inmate during the course of her own investigation. The witness cited two (2) occasions on which management gave verbal reprimands for racially derogatory remarks.

The fourth witness also testified that the term "6/5" is occasionally used by corrections officers and confirmed prior testimony concerning the purpose of the identification check. She further testified that she was aware of a confrontation between the Grievant and the second witness regarding the slashing of tires belonging to the second as well as the Grievant's grievance against the second witness for intimidation.

The Grievant testified that nothing malicious was intended by his racial remark to the inmate and that he was trying to state in a somewhat joking manner that if there were soap available, the inmate could wash as much as he wished. He testified that the inmate laughed and stated, "I understand what you mean".

As to the "6/5" incident, the Grievant testified that an officer stepped out of one area of the cell block and asked the Grievant, who was across the hall, "where is the 6 5?", to which the Grievant answered, "the 6/5 is in the hall". The Grievant testified that this was meant as a reference to the Grievant himself. He further testified that several inmates were coming from the dining hall and were approximately 30 to 40 feet away.

With respect to the incident involving the identification badge, the Grievant testified that, as he was leaving he had his identification badge flipped up so that inmates on the floor could not see his social security number. He stated that this was often done to protect the corrections officer

from reprisals from inmates who would have additional information with which to harass these employees. The Grievant stated that when asked to show his badge, he flipped it down twice for the second witness to see, commenting on the witness' inability to see. The Grievant testified that at no time did he use foul or profane language.

The Grievant further testified that his friendship with the second witness ended when he borrowed money from the second witness who did not like the manner in which he was repaid. Later, this witness accused the Grievant of participating in the tire slashing at the witness' residence. The Grievant testified that his reaction to the witness' request to see his badge was due to harassment from the witness and that he did not intend to be insubordinate. The Grievant testified that he had filed at least four (4) or five (5) incident reports on this witness.

ARBITRATOR'S OPINION:

The arbitrator upheld the Grievant's suspension as in his view the one (1) day suspension imposed is commensurate with the sum total of the offenses committed by the Grievant. The arbitrator concluded that the employer had provided sufficient evidence to establish "just cause" in the imposition of disciplinary action against the Grievant. The arbitrator determined that at least two (2) of the acts of misconduct are primarily acts of poor judgment and not intent to commit violations of the Ohio Department of Rehabilitation and Corrections Standards of Employee Conduct.

However, the arbitrator concluded that the Grievant's conduct in refusing to show his identification badge was without question intentional and provocative and that this conduct was inexcusable. Even if a personality conflict existed, on at least two (2) occasions, the Grievant refused to show a supervisor his badge, in violation of Rule 3a of the Standards of Employee Conduct.

The Grievant has no history of prior disciplinary action. However here all three incidents, when taken cumulatively, constitute "just cause" for disciplinary action.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

ARBITRATION

MARION CORRECTIONAL INSTITUTION

and

**O.C.S.E.A. LOCAL 11
A.F.S.C.M.E. A.F.L.-C.I.O.**

(William Weatherbee Grievance)

GRIEVANCE NO.:

87-79B
G-87-1700

For MCI:

Nicholas Menedis

For Grievant:
Brenda Persinger

DECISION AND AWARD

The issue presented in this proceeding is whether the one day suspension of the Grievant by the Marion Correctional Institution (hereinafter "MCI") on June 8, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective Bargaining Agreement; and whether the disciplinary action taken was commensurate with the offense. The following joint exhibits were admitted into evidence:

1. Contract between the State of Ohio and O.C.S.E.A. Local 11 A.F.S.C.M.E.
2. Grievance trail.
3. Security screening procedures for employees.
4. Ohio Department of Rehabilitation and Correction standards of employee conduct.

The facts are as follows:

The Grievant, a Corrections Officer II classification with 14 years of corrections experience at MCI, was suspended for one day based on allegations of violations of the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct for the use of discriminatory language, for jeopardizing the security of the MCI facility, and insubordination and failure to follow written procedures.

Sergeant Walter Saylor, who has been employed for 15 1/2 years in corrections, testified that on April 10, 1987, he was involved with a plan to search an inmate suspected of having received drugs or other contraband. When Sergeant Saylor went down the hall, which contained the Grievant, several other corrections officers, and inmates who had arrived in this particular cell block area after having left the dining room, he heard the Grievant yell, "6/5 down the hall" and "6/5 in six dorm." The term "6/5" is an inmate term alerting other inmates to discontinue certain acts which could be punishable. It is a warning to inmates that a corrections officer is nearby. Sergeant Saylor testified that he was just a short distance from the Grievant when he heard the Grievant utter what seemed to this witness to be an alerting signal to the inmates nearby.

On March 27, 1987, Sergeant Saylor testified that he observed the Grievant with a black inmate and heard the Grievant say to said inmate, "if you would wash your face, you would be white like me." It should be noted that the Institution (MCI) is under a court order to refrain from the use of racial comments by corrections officers and other employees of the Institution to inmates. This is embodied in the Standards of Conduct for Institution Personnel.

On cross examination, as to the April 10, 1987 incident, Sergeant Saylor acknowledged that he had never discussed a strip search of an inmate with the Grievant. Therefore, the Grievant could not have known the purpose for Sergeant Saylor's presence in the Grievant's assigned cell block area. Sergeant Saylor stated that he has never heard officers announce the term "6/5". He did state, however, that corrections officers sometimes pick up inmate slang. The witness further stated that the Grievant used "poor judgment" in speaking the inmate term "6/5". He stated that it did not appear that the Grievant was warning inmates. As to the March 27, 1987 incident alleging racially disparaging remarks, Sergeant Saylor stated that he did not talk to the inmate regarding

the racial comment.

Sergeant Andrew T. Wilson, whose experience includes 9 years in corrections, testified that, on April 10, 1987, he observed the Grievant leaving the premises due to the end of the Grievant's shift through the exit in the A building of the MCI facility. At that particular location, there is a sign that requires all MCI personnel to show their identification badges. Sergeant Wilson testified that the Grievant's badge was turned up, thereby concealing his photograph and social security number. Sergeant Wilson stated that he requested that the Grievant show him his badge, because he could not see it. He stated that the Grievant refused to comply with this request. Sergeant Wilson stated that he requested to see the Grievant's badge a second time. He stated that the Grievant cursed at him and refused to show him his badge. He stated that Lieutenant Newland was present during this episode. Sergeant Wilson acknowledged that statements contained in Joint Exhibit 2 (Lieutenant Newland's account of the events that occurred at building A, including foul language made by the Grievant to Sergeant Wilson) were correct and accurate.

On cross examination, Sergeant Wilson testified that one of the purposes of displaying an identification badge is to prevent inmates, who may have obtained a badge, from escaping from the Institution. He also stated that it is a departmental rule that all employees display their badges if required. Sergeant Wilson stated that one of his duties is to assure that such badges are displayed by personnel. He stated that, in the event an employee forgets or loses his or her badge, MCI supplies a temporary badge to that employee, and that employee shall turn in the temporary badge at the end of the shift.

Sergeant Wilson was asked whether he had had any previous confrontations with the Grievant, to which he responded that he never had any prior confrontation.

Roger McNamara, Corrections Officer II, stated that he was approximately 100 feet away from the Grievant when the Grievant used the term "6/5" on April 10, 1987 in the previously discussed cell block area. He stated that corrections officers and even supervisors occasionally use the term in a joking manner. He testified that the Grievant was not using the term (6/5) as a warning to inmates on April 10, 1987; rather, he was using it in a "joking around" manner. Even though Sergeant Saylor had previously testified that the Grievant yelled this term twice in the hallway of the cell block area, Mr. McNamara stated that he only heard the Grievant say the term once; furthermore, the Grievant did not yell the term. He further stated that no inmates were near either the Grievant or himself at the time the term was used. There were inmates farther down the hall.

Frances Risinger, Corrections Officer II, Chief Steward, and EEO Officer for her union, testified that management has given verbal reprimands for racially derogatory remarks. She cited two employees who were reprimanded in this fashion. As to the incident of racial remarks in the instant matter, the witness stated that she was advised by the Grievant of the incident and that the inmate in question responded by laughing. Ms. Risinger stated that she did not talk with the inmate, who was not known to her, during the course of her own investigation.

As to the use of the term "6/5", Ms. Risinger testified that it is occasionally used by corrections officers.

As to the incident involving Sergeant Wilson, Ms. Risinger stated that she has knowledge of a confrontation between the Grievant and Sergeant Wilson regarding tires belonging to Sergeant Wilson having been slashed. She was aware of the Grievant's grievance against Sergeant Wilson for intimidation.

Ms. Risinger stated that her duties include working in the mail section and visiting area of the lobby, which is the A building. She stated that she knows that a Sergeant or a Lieutenant is there to check identification badges. The purpose for such identification check is to prevent inmates from escaping the facility. She also stated that proof of proper identification is required. She stated that she sometimes carries her identification badge in her billfold and that she has never

been stopped by anyone to show proof of identification.

The Grievant testified that, on March 22, 1987, he was asked by a black inmate for soap to wash up. The Grievant stated that he advised the inmate that there was no soap due to a shortage at the time and "if there was some, you could have as much soap as you wanted and you could be as white as me." He testified that the inmate laughed and stated, "I understand what you mean." The Grievant further stated that Sergeant Saylor said nothing to him until the day after this incident. The Grievant advised this Arbitrator that nothing malicious was intended by his statement to the inmate. He was trying to state in a somewhat joking manner that if there were soap available, the inmate could wash as much as he wished.

As to the "6/5" incident on April 10, 1987, the Grievant testified that Officer McNamara had stepped out of one area in the cell block and asked the Grievant, who was across the hall, "where is the 6/5?". The Grievant answered "the 6/5 is in the hall." Apparently, this was meant as a reference to the Grievant himself. The Grievant stated that several inmates were present about 30 to 40 feet away and they were coming from the dining hall.

As to the matter of the incident involving Sergeant Wilson, the Grievant stated that, as he was leaving, he had his identification badge flipped up so that inmates on the floor could not see his social security number. This is often done to protect the corrections officer from reprisals from inmates who would have additional information in which to harass these employees. As the grievant was leaving the A building, his badge was still flipped up. Sergeant Wilson asked to see the Grievant's identification badge, and the Grievant stated that he flipped it down. Sergeant Wilson then said that he did not see the badge. The Grievant stated that he showed Sergeant Wilson the badge again and said to him, "If you can't see it get some glasses." Sergeant Wilson asked again to see the Grievant's badge. The Grievant stated that he again flipped the badge down and then said, "get an optometrist." The Grievant stated that at no time did he use foul or profane language to Sergeant Wilson.

The Grievant stated that he and Sergeant Wilson were friends at one time. He stated that the friendship ended when he had borrowed money from Sergeant Wilson and Sergeant Wilson did not like the manner in which he was to be repaid. Later, Sergeant Wilson accused the Grievant of being a participant in the slashing of a number of tires at Sergeant Wilson's residence. The Grievant stated that he reacted to Sergeant Wilson's request to see his badge in the manner he described, because Sergeant Wilson had been harassing him. He testified that he had filed at least four or five incident reports on Sergeant Wilson. The Grievant states that it was not his intention to be insubordinate.

This Arbitrator is satisfied that MCI has established evidence sufficient to fine "just cause" in the imposition of disciplinary action against the Grievant. In finding for MCI, this hearing examiner determines that at least two of the acts of misconduct are primarily acts of poor judgment and not intent to commit violations of the Ohio Department of Rehabilitation and Correction Standards of Employee Conduct. There was no evidence to show that the Grievant knew of any unannounced strip search of an inmate suspected of having contraband on his person on April 10, 1987. Furthermore, although the racial remark to an inmate on March 22, 1987 falls in the category of Rule 19 of such Standards of Employees Conduct, this hearing examiner agrees with the decision of the Departmental hearing officer, who stated that the remark was essentially poor judgment as well. The evidence is clear, however, that the conduct in which the Grievant engaged with Sergeant Wilson was without question intentional and provocative. This hearing examiner is satisfied from the evidence that the Grievant, by his language and conduct toward Sergeant Wilson was inexcusable. Even if the Grievant has a personality conflict with Sergeant Wilson or vice versa, Sergeant Wilson is a supervisor. The evidence disclosed shows to this Arbitrator's satisfaction that, on at least two occasions, the Grievant refused to show Sergeant Wilson his

badge, in violation of Rule 3a of the Standards of Employee Conduct. All three incidents, when taken cumulatively, constitute "just cause" for disciplinary action.

The evidence shows that the Grievant has no history of prior disciplinary action. In this Arbitrator's view, a one day suspension imposed is commensurate with the sum total of the offenses committed by the Grievant.

DATE: December 16, 1987

ANDREW J. LOVE, ARBITRATOR

COUNTY OF MARION
STATE OF OHIO