ARBITRATION DECISION NO.:
203

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Rehabilitation
and Correction
Lucasville Correctional Facility

DATE OF ARBITRATION:
September 19, 1989

DATE OF DECISION:
October 18, 1989

GRIEVANT:
James Stulley

OCB GRIEVANCE NO.:
27-25-(89-02-10)-0005-01-03

ARBITRATOR:
Harry Graham

FOR THE UNION:
Donald Sargent

FOR THE EMPLOYER:
Joseph B. Shaver

KEY WORDS:
Timeliness of Grievance
Filing
Arbitrator's Authority
Racial Slur
Timeliness of Management
Response

ARTICLES:
Article 25-Grievance Procedure
§25.01-Process
§25.07-Advance Grievance
Step Filing

FACTS:

The Grievant was employed as a Corrections Officer in an ODRC facility. Prior to the events at issue, the Grievant had no disciplinary violations. The Grievant was alone on his cell-block at the console which operates the doors, when a fight broke out between two inmates. The Grievant stayed at the console and summoned help. Another guard rushed in and, with another officer who arrived after him, stopped the fight. One inmate was severely injured, requiring more than $9,000 in surgery. The Grievant was suspended for 10 days for failing to aid a fellow officer. Included in the reasons for the discipline was that he allegedly used racial slurs in referring to the inmates. The suspension was given on Feb. 2, 1989; it became effective on Feb. 4, 1989. On Feb. 10, 1989, the Union Steward discussed the case with the Labor Relations Officer at the Institution. On Feb. 17, 1989, the Grievance was mailed to the appropriate authority for Step 3 of the Grievance procedure.

EMPLOYER'S POSITION:

The Employer argued that this dispute was not properly before the Arbitrator, since the Union failed to file this Step 3 Grievance within 14 days of the notice of the action to be taken, pursuant to Section 25.07 of the Agreement. Also, Section 25.01 specifies that a Grievance is considered timely if postmarked within the appeal period. However, this Grievance was not postmarked within that period. Furthermore, even though the Steward and the Labor Relations Officer met and discussed discipline, there was no Grievance at this point. The written Grievance clearly shows it was the Union's intent to appeal the case to Step 3 of the Grievance procedure.

Even if the Grievance was properly before the Arbitrator, the 10-day suspension was for just cause. If the Grievant had assisted the officer when he called, the injury to the inmate and subsequent medical expenses to the Employer might never have occurred. Moreover, the Grievant compounded the problem by later making a racial slur about the inmates.

UNION'S POSITION:

The Union argued that the Grievance was timely filed. When the Steward discussed the case with the Labor Relations Officer on Feb. 10, the Steward thought they had engaged in a Step 2 discussion. The Employer was obviously aware on Feb. 10 that the Union intended to file a Grievance, so the Grievance must be considered filed on Feb. 10, not Feb. 17. Furthermore, pursuant to Section 25.07, a Grievant may initiate the action within 14 days of notification of the discipline. The date for tolling the time period for filing a Grievance is the effective date of the action. Using this determination, the Union filed after 13 days, falling within the 14-day limit. Because Section 25.07 provides that a suspension "may" be grieved at Step 3, then the connotation of flexibility associated with "may" should weigh in favor of allowing this dispute to be considered on its merits. Also, the Steward who dealt with the Grievant was not familiar with the Grievance procedure. Moreover, the Employer did not even raise the timeliness issue until the day of the hearing. The Employer violated Section 25.02 by failing to respond to a Step 3 Grievance within 15 days of the third step meeting. That meeting occurred on March 9, 1989. The Employer's response was not received until May 16, 1989. The Employer cannot be allowed to raise a time limit defense, when it violated the same procedures.

The Union further argued that the 10-day suspension was not for just cause, since the Grievant acted correctly by not intervening in the fight alone, but remaining at his post to secure the cellblock. Also, the Grievant denied making any racial remarks. Since the officer who responded to the Grievant's call was angry with him for failing to assist in the break-up, that officer's allegation that the Grievant made racial slurs should be disregarded.

ARBITRATOR'S OPINION:

The Arbitrator ruled that the Grievance was timely. Because the Employer was aware on Feb. 10 that the Union was grieving the suspension, the Grievance must be considered filed on that date. The Employer cannot claim untimely filing by the Union, when it committed the same error. The Grievance indicates that the Step 3 meeting was held on March 9. Section 25.02 calls for the third step answer to be given within 15 days after the meeting. Certainly May 5 is well beyond the 15-day limit. Although the Union was somewhat lax in timely filing the Grievance, the Employer's delay in answering was substantially greater. Since both parties were deficient, it is inappropriate to dismiss the Grievance because of a procedural defect.

Moreover, there is not substantial evidence that the Employer acted incorrectly in suspending the Grievant. Such evidence must be found for the Arbitrator to reject the Employer's judgment. As long as discipline is reasonable, the Arbitrator should be reluctant to overturn it. The penalty here was reasonable, since the safety of officers and inmates was compromised. The allegation of the racial slur must be disregarded, since there is no way to determine whether the Grievant actually made the remark.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of Rehabilitation, and Correction

Before:
Harry Graham

Case No.:
27-25-(89-02-10)-05-01-03

Appearances:

For OCSEA/AFSCME Local 11:
Donald Sargent
Staff Represent native
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For Department of Rehabilitation and Correction:
Joseph B. Shaver
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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on September 19, 1989 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on October 6, 1989 and the record was closed on that date.

Issue:

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Is the grievance of James Stulley properly before the Arbitrator? If so, was the Grievant given a ten day suspension for just clause? If not, what shall the remedy be?

Background:

The events that give rise to this proceeding are not disputed. The Grievant, James Stulley, has been employed for the past 3.5 years as a Corrections Officer in the Correctional Facility operated by the State of Ohio at Lucasville, OH. The Lucasville operation is a maximum security prison. Prior to the events under scrutiny in this proceeding the Grievant had no disciplinary entries on his record.

On December 18, 1988 the Grievant was assigned to the L-3 cellblock at Lucasville. He was alone on the cellblock and stationed at a console which controls the operation of doors in the area. At about 6:10 AM he released some inmates from their cells for clean-up tasks in the area. Shortly thereafter two of the inmates, Butler and Malone, began to fight. Stulley's order to them to cease was ignored. He then activated his silent alarm to summon help. In response to the alarm Correction Officer Carl Distel entered the cellblock, ran to where Butler and Malone were fighting and attempted to break up the fight. While engaged in that effort additional help arrived in the person of Officer Walter Bear. In due course they were able to separate the combatants. Before the fight ceased Malone bit off Butler's ear. Subsequent efforts at microsurgery to reattach it were unsuccessful and additional surgery was required to graft Butler's ear to his stomach in order to increase its blood supply. The State has spent in excess of $9,000 to date on surgery for Butler and at the hearing estimated it may have to spend $25,000 to complete his cure.

After investigation of this incident the Grievant was given a ten day suspension for failing to come to the aid of his colleague, Officer Distel. Included in the reasons provided the Grievant for the discipline was the allegation of Officer Distel that Stulley had used racial slurs in referring to Butler and Malone. That suspension was given to the Grievant on February 2, 1989. It became effective on February 4, 1989. On February 10, 1989 the Union Steward responsible for the case, Larry Preston, discussed it with the Labor Relations Officer at Lucasville, Vic Crum. On that date the grievance was assigned a number by Mr. Crum. Subsequently, on February 15, 1989 the

Grievance was written on the appropriate form and mailed to appropriate authority on February 17, 1989.

Position of the Employer:

The State asserts this dispute is not properly before the Arbitrator for determination on its merits. As it views the record in this case the Union has failed to comply with the time limits for processing of grievances specified in the Collective Bargaining Agreement. Examination of the Grievance indicates that the Grievant was aware on February 2, 1989 of the suspension to commence on February 4, 1989. Pursuant to the Agreement at Section 25.07 a grievance involving a suspension or discharge may be filed at Step 3 of the grievance procedure. A Step 3 grievance may be filed within 14 days of the notice of the action to be taken. As Mr. Stulley was aware on February 2, 1989 of the suspension he had 14 days to file his Step 3 grievance or until February 16, 1989. In fact, the Union advocate in this case, Donald Sargent, mailed the grievance on February 17, 1989 as was clearly indicated on the postmarked envelope viewed at the hearing. Obviously the grievance was filed one day late and should not be considered according to the State.

Furthermore, Section 25.01 D of the Agreement specifies that a grievance shall be considered timely if it is postmarked within the appeal period. This grievance was not postmarked within that period, hence it must be considered to be untimely according to the State.

The Union Steward, Larry Preston, met with the Labor Relations Officer at Lucasville, Vic Crum, and discussed the Stulley discipline. While discussion was held, there was no grievance. In fact, Mr. Crum indicates he has never dealt with a suspension grievance at the Step 2 level. Furthermore, the grievance itself, written by the Union Staff Representative, Donald Sargent, clearly shows it the intent of the Union to appeal the case to Step 3 of the Grievance procedure. As the record indicates the Union appeal to be initiated under Step 3 of the Agreement and it was late, the merits of the case should not be considered in the State's view.

If the grievance is to be considered on its merits the State insists the ten day suspension in this situation was justified and should not be modified in any respect. There is no doubt that inmates Butter and Malone engaged in a fight. Butler's ear was bitten off by Malone, an event that might not have occurred had two Corrections Officers arrived promptly on the scene to break up the fight. Stulley merely stood and watched as Distel, subsequently assisted by Bear, broke up the fight. Such behavior is unacceptable according to the State. In discussing the incident shortly after it occurred, Stulley compounded the problem by indicating to Distel that he did not care if "niggers" killed each other, he would not stop them from doing so. These are serious infractions which cannot be tolerated in a penal institution in the State's view. Distel might have been injured. Butler was severely injured and the State incurred substantial medical bills on his behalf due to Stulley's inaction. Given these circumstances the State insists that the ten day suspension at issue in this case be upheld and urges that the Grievance be denied.

Position of the Union:

The Union claims that the Grievance must be considered to have been filed in timely fashion. Stulley was informed on February 2, 1988 of the ten day suspension to commence on February 4, 1988. On February 10, 1988 the Steward, Larry Preston, and the Labor Relations Officer at Lucasville, Vic Crum, discussed the case and Crum gave it a number. It was Preston's belief that the parties were engaged in a Step 2 discussion. Clearly the State was aware on February 10, 1988 that the Union had every intention of filing a grievance over this matter. It must be considered

that the Union had filed the Grievance on February 10, 1988 in spite of the fact that the official grievance form was not postmarked until February 17, 1988 in the Union's opinion.

If the calendar in this case starts to run on February 4, 1988, the day the suspension commenced, the Union is within the letter of the Agreement with respect to the time limits. Section 25.07 of the Agreement, "Advance Grievance Step Filing" may initiate the action within 14 days of notification of the discipline. In Case No. G-87-1905, OCSEA v. Ohio Department of Mental Retardation and Developmental Disabilities, Arbitrator Hyman Cohen determined the appropriate date for tolling the time period for filing a grievance under Section 25.07 to be the effective date of the action. If that is the case, the Union filing occurred after 13 days, not the 14 provided in the Agreement. Thus, it is well within the time frame contemplated by the parties.

Section 25.07 provides that a suspension "may" be grieved at Step 3 of the grievance procedure. There is no requirement that occur. The word "may" used in this connection carries with it connotations of flexibility which should weigh in favor of consideration of this dispute on its merits in the Union's opinion.

If Mr. Stulley's suspension is not reviewed on its merits a forfeiture will result. This is not appropriate in the opinion of the Union. In addition, the Chief Steward who would normally handle Stulley's claim was absent during its initial stages. Larry Preston, the Steward who dealt with the Stulley grievance, was unfamiliar with the workings of the procedure. The State did not raise the timeliness issue until the day of the hearing. Under these circumstances the dispute should be heard on its merits the Union insists.

Furthermore, while there may have been a minimal time limit defect in the processing of this case, a circumstance acknowledged by the Union if not entirely agreed with, the record indicates that the State violated the Agreement in the fashion in which it responded to the Grievance. Section 25.02 of the Agreement calls for the State to respond at the third step of the procedure within 15 days of the third step meeting. That meeting took place on March 9, 1989. The response was not received until May 16, 1989, obviously well beyond the 15 days contemplated by the Agreement. The Employer cannot be permitted to assert a technical time limits defense when it is violation of the very procedural provisions it raises according to the Union.

Turning to the merits of the case, the Union points out that Stulley was securing the cell block and locking inmates in their cells when Distel rushed in to the cell block. Officers are taught not to attempt to intervene in fights alone. Rather they are to wait for assistance. Distel acted wrongly in this instance. Stulley acted correctly by remaining at his post to maintain the security of the cellblock. In fact, Distel required the assistance of another officer, Bear, in order to subdue the inmates.

Stulley denies making any racial remarks whatsoever. Distel was angry with him for his failure to come to his assistance. Given those circumstances the Union views the allegation of racial slurs, forthrightly denied by the Grievant at the hearing, to be baseless. It urges they be disregarded in consideration of this dispute.

Stulley is a well-trained, conscientious officer. At the hearing the Superintendent of Lucasville acknowledged as much. There is no discipline on Mr. Stulley's record. Given these circumstances the Union urges that the suspension be overturned and Mr. Stulley be made whole.

Discussion:

The argument of the State that this grievance should not be considered on its merits is misplaced. The State was aware on February 10, 1988 that the Union was grieving the ten day suspension imposed on Mr. Stulley. On that date a discussion took place between the Union Steward and the Labor Relations Officer at Lucasville. The State could have been under no

misapprehension that the Stulley suspension would be the subject of a grievance. Under these circumstances it must be determined that the grievance was well and truly filed under the applicable provisions of the Collective Bargaining Agreement.

The argument of the State concerning the timely processing of this grievance is particularly inappropriate when its history is examined. Joint Exhibit 2, the Grievance and associated paperwork throughout the procedure, indicates that the Step 3 meeting called for by the Agreement was held on March 9, 1989. The answer was provided to Mr. Stulley on May 5, 1989. The Agreement calls for the third step answer to be given "within fifteen (15) days following the meeting." Obviously May 5, 1989 is well beyond the fifteen day period in which the answer is to be provided to the Grievant. The State cannot claim that the grievance may not be heard on its merits due to a procedural defect committed by the Union when it has committed a procedural error itself. The record made in the processing of Mr. Stulley's grievance indicates that there was a certain degree of laxity with respect to processing it within the time limits prescribed by the Agreement. To some degree both parties erred, though the magnitude of the State's delay is substantially greater than any that was committed by the Union. As both parties were deficient in the processing of this dispute it is inappropriate to dismiss the grievance due to a procedural defect. Consequently attention must be devoted to it on its merits.

There is no doubt that the failure of the Grievant to come to the aid of his colleague, Carl Distel, occurred as related by the State. Considerable doubt exists concerning whether or not Mr. Stulley uttered the racial slur attributed to him. If that alleged sentiment is disregarded there still exists the fact central to the State's case. Mr. Stulley did not assist Officer Distel in breaking up the fight between inmates Butler and Malone. When the Union asserts that Stulley acted correctly in this instance it seeks to have the Arbitrator substitute his judgment for that of trained, long experienced professionals in the field of corrections, principally that of the Superintendent at Lucasville. In order for that to occur there must be a great deal of evidence that the Employer acted incorrectly. Such evidence is absent in this case.

At the hearing one of the witnesses called by the Union was Captain Gary Brown who is stationed at Lucasville. Captain Brown is an instructor in fight break-up technique and the technique of unarmed self-defense. Captain Brown testified that Corrections Officers are not to break up fights alone. This lends credence to the Union's view that Officer Distel acted precipitously in rushing to separate inmates Butler and Malone. Captain Brown continued to testify that in his experience the range officer, which was the position being filled by the Grievant on the day in question, has always come to his aid when he was breaking up a fight. This testimony is given great weight by the Arbitrator. It serves to overcome the contention of the Union that Stulley acted correctly in this instance. Brown's indication that officers consistently come to the aid of their colleagues in fight break-up situations provides clear evidence of the sort of behavior to be expected when such events occur.

The allegation concerning the racial slur allegedly uttered by Officer Stulley must be disregarded in this case. Officer Distel says he heard it. He was angry with Stulley several hours after this incident when Stulley allegedly uttered the words in question. Stulley denies using the racial epithet. There is simply no way to determine with any confidence whether or not Stulley made the remark attributed to him. Consequently it must be given no weight for the purpose of assessing any penalty in this situation.

Failure to aid a colleague in a fight break-up must be considered to be a serious offense within the prison community. The safety of fellow officers and prisoners may be compromised by inaction. Consequently discipline is appropriate. Even disregarding the alleged racial slur which may or not have been uttered by the Grievant, discipline is warranted. The discipline in this case is substantial and the Union is correct to indicate that a ten day suspension imposed upon an

employee with no disciplinary entries who is highly regarded by the State is unusual. Set against that is the view, consistently espoused by this Arbitrator, that neutrals should act circumspectly when modifying penalties when an offense has been found to have been committed. As long as discipline is within the boundary of reasonableness when considering the offense an arbitrator should be reluctant to disturb it. This is the case even though the arbitrator or the proverbial man-in-the-street might have levied a different penalty when confronted with the same facts. In this instance when considering the offense the penalty must be considered to be within the bounds of reasonableness. No reason exists to alter the action of the Employer.

Award:

Based upon the preceding discussion the grievance is DENIED.

Signed and dated this 18th day of October, 1989 at South Russell, OH.

Harry Graham
Arbitrator