ARBITRATION DECISION NO.:
452

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

EMPLOYER:
Department of Rehabilitation
and Correction, Marion
Correctional Institution

DATE OF ARBITRATION:
June 16, 1992

DATE OF DECISION:
June 30, 1992

GRIEVANT:
Jack Ludwick

OCB GRIEVANCE NO.:
27-16-(91-09-05)-0719-01-03

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Butch Wylie
John Fisher

FOR THE EMPLOYER:
Roger A. Coe

KEY WORDS:
Removal
Racial Slurs
Standard of Proof for Claim
of Disparate Treatment
Mitigation

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
§24.04-Pre-
Discipline
§24.05-Imposition
of Discipline
§24.06-Prior

Disciplinary Actions

FACTS:

The grievant was a Corrections Officer 2 at Marion Correctional Institution (MCI). The facility has a predominantly black inmate population. The grievant had 11 years of state service at the time of his removal. Although his performance evaluations indicated that he was an average employee, the grievant received eight disciplines within his last two years of service. The grievant entered into an office at the institution and made a racial slur using the word "nigger". The grievant made this statement in the presence of two other Officers, one of whom was recently severely disciplined for making a similar statement. To combat the serious racial tensions which existed at the institution, the court in Taylor v. Perini imposed restraints upon MCI. The Perini order prompted MCI to redraft its employee handbook and work regulations to expressly prohibit the use of racial slurs. The handbook went as far as to list examples of unacceptable words including the word "nigger".

The parties stipulated that the grievant received, read and understood pertinent sections of the employee handbook and the Employee Standards of Conduct. Further, the parties stipulated that the grievant was aware of the Perini order and the remark and resulting discipline levied upon the other Officer, in front of whom the grievant made the remark.

EMPLOYER'S POSITION:

The State argued that it had just cause to remove the grievant. The Union offered in evidence the disciplinary records of five bargaining unit members who allegedly received little or no discipline after making either racial or sexist remarks. The State rebutted the Union's argument of disparate treatment with the following explanations: the first Officer's statement was a "slip of the tongue" and since it was not heard by any other officers or inmates, any potential damage was mitigated. Similarly, the second Officer apologized to the inmate immediately thereby mitigating the damage. The third Officer had 14 years of service and no prior discipline, and he received a one day suspension after making the racial remark. Although this same Officer made another racial slur, this second incident occurred more than two years after the first, and the Officer was issued a corrective counseling. The fourth Officer used a racial slur, but he used the term solely to convey the opinion of a third party. Therefore, the State determined that this Officer lacked the requisite intent. The fifth Officer made the racial remark after recently returning from a stress-related sick leave. The State found that the harm was minimal because the Officer was under medication and she reported herself.

These Officers were disciplined prior to the Perini order when the penalties in effect were less severe. The grievant stipulated that he was aware of the new regulations imposed as a result of the Perini order. The State argued that given the grievant's awareness of the new regulations, the grievant's past disciplinary record and the dangerous racial tensions at MCI, the grievant was put on notice that removal is a likely consequence for a fourth violation.

UNION'S POSITION:

The Union argued that the State failed to establish just cause because the grievant was treated disparately. The Union offered in evidence the disciplinary records of five bargaining unit members who received little or no discipline after making either racial or sexist remarks. The first Officer received only a verbal reprimand for using the word "nigger" in the presence of two other Officers, one of whom was black. The second Officer received only a written reprimand after referring to an inmate as "Sambo". The third Officer received only a one day suspension after making a racial remark, and shortly thereafter this same Officer was given only a corrective counseling for using the word "nigger". The fourth Officer used a racial slur during a conversation with a black staff member and received no discipline whatsoever. The fifth Officer used the word "niggers" and received only a one day suspension. Therefore, the Union argued that removal was not commensurate, progressive or fair.

ARBITRATOR’S OPINION:

The Arbitrator held that the State had just cause to remove the grievant. The grievant admitted making

the racial remark, and that remark constituted a violation of the Standards. The Arbitrator held that to minimize the effect of the grievant's remark would be to question the validity of the discipline that the other Officer received. Although the advocate argued that the grievant felt remorse, the Arbitrator noted that no apology appeared on the record, and the grievant never testified as to his intention or state of mind. The Arbitrator recognized the grievant's 11 years of service, but found that his length of service was outweighed by his considerable disciplinary record.

The Arbitrator held that the Union failed in proving its claim of disparate treatment. To prove disparate treatment, the Union needed to prove that the different treatment had neither a reasonable nor contractually appropriate explanation or prove that the different treatment was motivated by discrimination or another ill purpose. The Union showed only that the grievant was treated differently. The Arbitrator stressed that in almost all the cases cited by the Union, the employees involved had little or no prior discipline. Therefore, the Arbitrator concluded that the Union failed to meet its burden of proof and failed to overcome the State's finding of just cause.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

State of Ohio
Employer.

Grievance No.:
27-16-(91-09-05) 0719-01-03

Grievant:
(J. Ludwick)

Hearing Date:
June 16, 1992
Award Date:
June 30, 1992

Arbitrator:
R. Rivera

For the Employer:
Roger A. Coe

For the Union:
Butch Wylie
John Fisher

Present at the Hearing in addition to the Grievant and Advocates were Dean Millhone, LRO (witness), Lt. Daniels (witness), Fran Reisinger (witness), Tim Jones, Chap. Rep. (witness), Pat Howell (witness).

Preliminary Matters

The Arbitrator asked permission to record the Hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

1. Contract
2. Disciplinary Trail
   A. Incident Report by Lt. Daniels (3 pages)
   B. Investigatory Report by Capt. Allen
   C. Pre-Disciplinary Hearing Notice
   D. Pre-Disciplinary Officer's Report
   E. Removal order

3. A. Grievance
   B. Step 3 Response (4 pages)

4. A. 1986 Standards of Employee Conduct
   B. 1987 Standards of Employee Conduct
   C. 1990 Standards of Employee Conduct

5. Letter of Commendation dated May 16, 1989
6. Taylor vs. Perini
7. Employee Handbook

Employer Exhibits

1. Disciplinary Record of Grievant from central Office files
2. Jennings Award (Rivera) 10/5/90
3. Wheeler Award (Rivera) 1/10/90

Employer Exhibits

1. Grievant's Annual Evaluation, 90-91
2. Disciplinary Record of Grievant from Institutional Personnel File
3. Lamb and Howell Award (Love) (no date)
4. Disciplinary Report (etc.) (Jolliff)
5. Disciplinary Report (etc.) (Riale)
6. Arbitration Award (etc.) (Weatherbee)
7. Disciplinary Record (etc.) (Weatherbee)
8. Disciplinary Record (etc.) (Lyman)
9. Disciplinary Record (etc.) (MacArthur)
10. Disciplinary Record (etc.) (Wells)
11. 71 LA 1021

12. 56 LA 623
13. 79 LA 1237
14. 79 LA 13
15. 75 LA 1221

Jointly Stipulated Facts

1. On July 11, 1991, the Grievant entered the Safety and Sanitation Office and stated "These niggers have it made." Present in the room were Lt. Charlie Daniels and Sgt. Jerry Wente. The only persons present were Lt. Daniels, Sgt. Wente, and the Grievant.
2. The Grievant received a copy of the Employee Standards of Conduct and signed statement that he had read and understood same.
3. The work rule is reasonably related to mission of the Department.
4. Captain Allen conducted a full and fair investigation of the facts of this offense.
5. Grievant's date of hire was June 2, 1980.
6. At the time of the offense, no post orders per se, existed for the Grievant's post.
7. Grievant had knowledge of the Perini vs. Taylor Court Order.
8. The Grievant had received a copy of the Employee Handbook.
9. While serving as Deputy Warden at MANCI, Sgt. Jerry Wente made the statement to another employee "Dennis Baker is a two face, lying nigger" and comments about ". . . . The nigger Warden." As a result, Sgt. Wente was reduced six pay ranges and transferred to MCI. Both the transfer and demotion were voluntary and as a result of settlement negotiations.
10. Grievant worked in the same location (post) from July to date removed. (Post selected on 6 month rotation).
11. Neither Lt. Daniels nor Sgt. Wente spoke to the Grievant concerning his racial comment.

Issue

Was the Grievant removed for just cause? If not, what should the remedy be?

Contract Sections

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of

the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employer and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

Section 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

Facts

This incident took place at the Marion Correctional Institution (MCI). The Grievant is a Corrections Officer 2 with 11 years service at the time of the incident that gave rise to the Discipline at issue. His last evaluation indicates that he was an average employee. (He met expectations in all areas: he had no areas above expectations and none below) (Union Exhibit 1). On July 11, 1992, the Grievant entered an office where Lt. Daniels and Sgt. Wente were engaged in a conversation. The Grievant then made a statement to them: "those niggers sure have it easy." He subsequently left the office; Lt. Daniels testified that on that same day he notified management of the Grievant's words but that he did not write up the incident report until the following day because he suffered an intervening illness (Joint Exhibit 2).

The Institution, Sgt. Wente, and the Grievant all have a history. The Institution at the present time has a predominantly black inmate population. Moreover, in the past, the Institution had been the scene of a variety of serious racial problems. Only shortly before the discipline at issue, the Institution had been released from the control of the court. That supervision was ordered in the case of Taylor v. Perini (see Joint Exhibit 6 and 6b). A major element of the Perini order was to impose on the Institution restraints designed to reduce racial acts of discrimination. As a consequence, the employee handbook devoted a whole section to forbid that use of discriminatory language (See page 25 in Joint Exhibit 7). Among the words considered a racial slur was the word "nigger." Sgt. Wente had been formerly a TIE Deputy Warden but only shortly before this incident he had been demoted 5 or 6 pay ranges for using similar language. He was then moved to Marion. The Grievant had a rather full discipline list. Whether one looks at the discipline list found in the Central Office (Employer's Exhibit 1) or the list of discipline from the Personnel Office (Union Exhibit 2), the Grievant had 8 disciplines in the last two years, including both a five day suspension and a ten day suspension.

Upon investigation, the Grievant admitted using the word "nigger." He also agreed that he had been furnished with a copy of the Standards of Employee Conduct effective June, 1990. The Grievant also acknowledged receipt of the employee handbook which contained the Taylor case list. The Grievant received a pre-disciplinary hearing on July 30, 1992; the charges were a violation of Rules 14A & 8 (See Joint Exhibit 2). The Hearing Officer found just cause on August 1, 1991. On August 3, 1991, Grievant was notified that he had been removed (See Joint Exhibit 2E).

A Grievance was filed on September 5, 1992 (See Joint Exhibit 3A). A Step III answer was provided dated February 4, 1992 (See Joint Exhibit 3B). Arbitration was held June 16, 1992.

At the Hearing, the Union introduced the disciplinary records of 6 bargaining unit employees and introduced testimony concerning one member of management. The parties also stipulated as to the discipline of Sgt. Wente.

The Union introduced a disciplinary report of CO Jolliff. This report indicated that CO Jolliff received a Verbal Reprimand for using the racial slur "nigger" in front of two officers: one black and one white. From the report, management used as mitigating factors that the remark was a slip of the tongue, not directed toward the other CO, and not heard by inmates (See Union Exhibit 4). The Union introduced no evidence of the prior record or longevity of Officer Jolliff.

Also introduced was the disciplinary record of Officer Riale. Riale had referred to an inmate as "Sambo." Riale received a Written Reprimand. Riale admitted the remark, and evidence indicated that he apologized on the spot to the Inmate (See Union Exhibit 5). No evidence was brought forward by the Union of Riale's previous disciplinary record or of his longevity.

The Union introduced evidence of the discipline of Officer William Weatherbee. Union Exhibit 6 is an arbitration award. The decision indicates that at the time of that Grievance (June, 1987), Officer Weatherbee had 14 years of service. Officer Weatherbee said to an inmate that "he (the inmate) would be as white as me if he washed long enough." The Arbitrator upheld the discipline but found that the racial remark was unintentional and not provocative. The one day suspension was given not for the just the improper racial slur but for insubordination to a superior officer (refusal to show badge on command). The decision also revealed that at the time of that discipline, Officer Weatherbee had no history of prior discipline.

Union Exhibit 7 also concerned Officer Weatherbee. Officer Weatherbee was given a Corrective Counseling for the use of the word "nigger." This second incident occurred more than two years subsequent to the incident outlined in Union Exhibit 6 (i.e., 6 occurred on 3-27-87 & #7 occurred on 10-25-89).

Union Exhibit 8 concerned the discipline of Officer Lyman who received a one (1) day suspension for a sexist slur directed at female officer. No evidence was presented by the Union on his prior discipline or longevity.

Union Exhibit 9 concerned Officer MacArthur who referred to two other human beings as "Nigger Lill and Nigger Bill" in a conversation he was having with a black female staff member. After a pre-disciplinary conference was held, no disciplinary action was meted out. The Hearing Officer found that the Section under which the Officer was charged required "intent." No intent was found. The Officer was referring to how two persons he had known 60 years previous were called in the community. The person to whom the remarks were made indicated that she did not know whether the CO intentionally was offensive and indicated that she had not had any problems with him since. No evidence was presented on prior discipline or longevity.

Union Exhibit 10 concerned CO Vicki Wells. Officer Wells was suspended for one (1) day for breaking #14A. The remark was made in front of two secretaries, two inmates, and a sergeant. She used the word "niggers." The Officer at the pre-disciplinary conference found that the officer, who had just reported back to work and was under medication for stress, made the remarks after being harassed by the inmates for a considerable time. She apologized immediately and, in fact, reported herself to her superior. No evidence was adduced by the Union as to her longevity nor her prior disciplinary record.

The Employer moved after the Union's evidence on disparate treatment that the affirmative defense of disparate treatment be struck as the Union had failed to meet its burden of proof in that the Union failed to show that the employees in question were in a same or similar situation as the Grievant. The Arbitrator took the motion under consideration, and the Employer rebutted the evidence.

Jolliff case: Mr. Millhone compared the two standards of conduct applicable to the conduct at issue. When Jolliff was disciplined, the penalty for such behavior was less under the rules than under the Rules of Conduct in force at the time of the incident at issue (See Joint Exhibit 4A: Effective 9-1-86). At that time, discipline gave the employee 5 points; for 5 points, the discipline could range from a Written Reprimand to a 5 day suspension. Under current rules, discipline can be from a Written Reprimand to Removal. Millhone said that at the time of the incident, Jolliff had no prior discipline.

Riale case: Officer Riale is now retired; in his entire record he had only one discipline: the one at issue.

Weatherbee case: The discipline on 11-15-89 was the first discipline for over two years, and under the Contract any prior discipline had been expunged.

Lyman Case: Prior to the incident of the sexist conduct, Lyman had three verbal reprimands for late call-off (2) and inattention to duty (1).

MacArthur case: Millhone said he was the Hearing Officer and he found no just cause for a combination of factors. First, the complainant had waited 8 or 9 weeks before reporting the words; second, the Code of Conduct then required intention, and lastly, MacArthur had longevity and was about to retire. At the time of the incident, he had no prior discipline.

Wells Case: The employee was in EAP and permitted Management to call her doctor who explained her stress reaction. At the time of the incident, she had no prior discipline.

Employer's Argument

The Grievant has admitted making a racial slur contrary to the policy of the Institution as found in the Employee Handbook and contrary to the Standards of Employee Conduct. He has stipulated that he was on notice of these two items. He made this remark in front of two officers, one of whom had just been severely disciplined for the same type of conduct. He made this remark with willful disregard for the rules as well as with full knowledge of Sgt. Wente's recent discipline. The Grievant's conduct not only broke the rule but, given the dangerous racial tension in the Institution, raised a serious security issue. At the time of this remark, the Grievant had a long record of discipline including, within the last year, a 5 and 10 day suspension. Rule 8 puts employees on notice that for a fourth offense removal is a likely consequence, while a violation of Rule 14 may cause removal on the first offense. The removal of the Grievant was for just cause; his discipline was commensurate to the offense and progressive. In rebuttal to the Union, no disparate treatment was proven by the Union. While the Union introduced evidence that a number of other

employees received lesser punishment for saying similar offensive remarks, the Union failed to prove that the discipline in those cases met the standard of disparate treatment. The Union failed to meet its burden because the Union failed to show that employees named were in a same or similar position as the Grievant with regard to prior discipline.

Union's Argument

The Grievant has admitted that he made the remark. The issue before the Arbitrator is whether the discipline was commensurate, progressive, and fair. An employee should not loose their job for one misuse of language; such discipline is not commensurate. The discipline was also not progressive. No inmate or visitor heard the words in question and hence, the harm was small. The Grievant is an employee of 11 years whose evaluation shows to have been a competent employee. Moreover, the Union has shown that numerous other employees made similar remarks and received lesser disciplines; disparate treatment has been shown. The Grievant's discipline should be equal to that of other employees.

Discussion

The Grievant in this case admitted his remarks. Those remarks violated both Rule 8 and Rule 14. However, Rule 8 encompasses a violation of Rule 14, and Rule 14 is the more specific offense. While charging both violations may make sense to make sure that the offense is covered, the employee cannot be found to have violated both; such a finding would be duplicative. Rule 14 does not require intention, only volition. Clearly, the Grievant violated Rule 14. The quantum of harm is less than if he directed such remarks to fellow employees or to inmates or visitors. However, he did make the remark in the presence of an Officer who he (the Grievant) knew had been severely disciplined for the same offense. To pass off the Grievant's remark would call into question the validity of the discipline of that Officer. No record appears of an apology, although the Advocates of the Union did say the Grievant was sorry and understood the gravity of his behavior. Advocacy is not testimony. The Grievant himself did not testify as to his intention nor current state of mind. At the time of the incident, the Grievant had 11 years in the service. This length of service mitigates in his favor. However, at that time of the discipline, the Grievant had a significant record of prior discipline. In 1987, he had four disciplines, 1988--one discipline, in 1989 he had four disciplines, in 1990, he had four disciplines including a 5 and 10 day suspension, and lastly, in 1991, he had one discipline before this incident occurred.

Without regard for the claim of disparate treatment, the Arbitrator finds that the discipline of the Grievant was for just cause. The Grievant committed the offense. His longevity, the harm caused, his prior discipline, and any mitigating factors must be balanced. The balancing is the prerogative of the Employer unless the Arbitrator were to find that the discipline is clearly not progressive or commensurate. This Arbitrator, while generally uncomfortable with removal of employees, cannot find from the evidence that, in choosing removal, the Employer violated the Contract; the Arbitrator cannot substitute her judgment for that of the Employer without such a finding.

The disparate treatment claim is essentially an affirmative defense which may be asserted to overcome a claim of just cause. The burden is on the Union. In the case at hand, the Union did show that a number of employees were facially treated differently from the Grievant. Different treatment alone does not prove disparate treatment. (These words are a more precise statement of the Arbitrator's position than the similar words in the Wheeler case.) To prove disparate treatment, the "different treatment" must either have no reasonable and contractually appropriate explanation or be motivated by discrimination or other ill purpose. The Union proved only one part of the claim of disparate treatment: different treatment. However, the Union failed to show that the employees in question were in a similar or analogous position. In almost all the cases cited by the Union, the employees in question had no or little prior discipline. In the case at hand, the Grievant had a long and clear record of disobeying rules with no indication that discipline was corrective. He could not apparently go the periods required under 24.06 necessary to have past discipline expunged. The Arbitrator finds that the Union did not meet its burden of proof in the disparate treatment claim and failed to

overcome the finding of just cause.

Award

The Grievance is denied.

Rhonda R. Rivera
Arbitrator

June 30, 1992
Date