

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration Between:
ATLANTIC COUNTY

and-

**C.O. George Hebert
Discipline Grievance
AR-2009-686**

FRATERNAL ORDER OF POLICE LODGE # 34

Before: Susan Wood Osborn, Arbitrator

Appearances:

For the Employer:

James F. Ferguson, County Counsel
(Richard Andrien, Assistant County Counsel)

For the Union:

Selikoff and Cohen, attorneys
(Keith Waldman, of Counsel)

Witnesses:

Union Witnesses: George Hebert, Grievant
Jeff Creighton, Lodge 34 Vice President

County Witnesses: Corrections Sergeant Eric Nilson
Corrections Lt. James Gaunt
Captain Joseph Bondiskey
Warden Sean Thomas
Officer Steven Iuliucci - IAB Investigator
Ryan Pushkal - Ocean Co Corrections Off.

ARBITRATION AWARD

In accordance with the parties' arbitration agreement, I was designated by the Public Employment Relations Commission on June 4, 2009 to hear and decide this matter. The parties' collective agreement provides that the arbitration in this matter shall be

final and binding. An arbitration hearing was held on August 24, 2009 at the Justice Complex in Mays Landing, at which time the parties were given a full opportunity to present testimony, evidence and argument in support of their respective positions. Witnesses were sequestered during the hearing except for resource persons. The parties filed formal briefs by October 15, 2009 and the record closed on that date.

ISSUE

The parties stipulated the following issue in dispute:

Did the County discipline Corrections Officer George Hebert without just cause in contravention of the collectively negotiated agreement and past practice? If so, what shall be the remedy?

BACKGROUND AND RELEVANT CONTRACT LANGUAGE

Fraternal Order of Police Lodge #34 represents Atlantic County's corrections officers. Superior officers are represented in a different negotiations unit. Lodge 34 had a collective negotiations agreement (J-1) with the County which expired in 2006. The terms of the agreement remain in effect while the parties are negotiating a successor agreement.

Article II Grievance Procedure, states in part

Level Four - In the event a settlement has not been reached through Level Three procedures, the FOP upon determining that the grievance is meritorious, may submit the grievance to binding arbitration. The arbitrator shall be selected in accordance with the procedures established by the Public Employment Relations Commission (PERC).

The arbitrator shall be bound by the provisions of this agreement and restricted to the application of the facts presented in the grievance proceeding. The arbitrator shall not have the authority to add to, modify, detract from or alter in any way the specific and express written provisions of this agreement or any amendment or supplement thereto. The arbitrator shall have no authority to interpret any law, court decision or statute of this State or the United States in rendering any determination.

ARTICLE XIII Management Rights, states in part

- A. Management rights include the following...
 - 2. to direct the officers;...
- C. Inherent management rights include, but shall not be limited to, such areas of discretion in policy as the functions and programs of the County, including but not limited to standards of service, the overall budget, utilization of technology, the organizational structure and selection and utilization of personnel.

ARTICLE XIX Employee Rights, states in part

14. Nothing in the foregoing shall abridge the right of the Warden, commanding Officer or supervisor to counsel with, advise or admonish an Officer under his/her command/supervision in private, nor shall anything in the foregoing abridge the right of the Warden and of the Department to initiate discipline, as long as it is handled in a matter consistent with the protections set forth in this contract.

Arguments of the Parties

The County argues that Corrections Officer George Hebert violated its Regulations and Standards of Conduct by conspiring with inmates and threatening a superior officer in the presence of co-workers and inmates. It asks that the five-day suspension it imposed on Hebert be upheld.

The FOP maintains that Hebert is not guilty of any wrongdoing and asks that the five-day suspension be rescinded.

Findings of Fact

George Hebert has worked for the Atlantic County Corrections Center in Mays Landing for 14 years. He is also the FOP Lodge 34 President, and is active on behalf of its members. Hebert is normally assigned to the day shift with Tuesdays and Wednesdays off. He is responsible for the care, custody and safety of 53 inmates housed in the Jail Annex, AXD Unit. Hebert reports to Sergeant Eric Nilson. Lieutenant James Gaunt is the commanding officer on the day shift. Captain Joseph Bondiskey is the Operations Commander. All shift commanders report to him. Warden Sean Thomas manages the correctional facility.

Bondiskey testified that Hebert's disciplinary record is not extensive and involves mainly use of time issues. Hebert testified that this is the first time he has been suspended. Gaunt testified that he has a good working relationship with Hebert, although they do not always see eye to eye.

The State Department of Corrections requires inmates to have a daily one-hour recreation period outside, weather permitting. This was confirmed to all corrections personnel most recently by Memo dated November 11, 2008 (ER-2). Warden Thomas has established parameters of what are acceptable weather conditions for the inmates to participate in outdoor recreation.

On November 16, 2008, Lt. Gaunt checked the weather conditions by internet in the morning: the temperature was 50 degrees, and it was cloudy (ER-3). He determined that the inmates would participate in outdoor recreation, and issued that directive. Unlike the main jail, which has a climate-controlled outdoor shelter, the Annex recreation yard has no protected area.

On that particular day, Hebert was working his usual shift. At the appointed time, Hebert escorted his 53 inmates outside. He himself did not have a jacket that day because his uniform jacket was at the tailor being repaired. As soon as the inmates got outside they started to complain that they were cold and it was too windy. Hebert then contacted Nilson by radio stating that the inmates were cold and asked if he could bring them back inside. At that point, Gaunt intercepted the radio transmission and directed Hebert to stay outside. The inmates continued to complain to Hebert about the weather conditions and demanded to go back inside. Hebert again called Nilson and asked him to come outside¹.

Correction Officer Ryan Pushkal, who now works for another

¹After the initial radio transmission, Nilson claims that Hebert "then responded a few minutes later requesting my presence at the courtyard" (ER-1C). In Hebert's statement (ER-1D), he said, "I requested the Sergeant to respond to the area", whereas, in the Hebert's supplemental report (ER1I), "he does not recall calling Sgt. Nilson over the radio and asking him to respond to the yard". I credit Nilson that Hebert called him out to the yard.

County, was working in an adjacent yard off of the prison kitchen. The recreation yard and the kitchen yard are fenced separately and divided by a walkway approximately six feet wide (ER-4). Some inmates in the recreation yard with Hebert were minimum of 10 to 20 feet from Hebert. Others were gathered against the building under the heating vents. Hebert and Pushkal began to talk through the fence (ER-1G).

When Nilson arrived outside, Hebert was talking with Pushkal. What was said outside is disputed.

Nilson's Account:

Nilson testified that when he arrived in the yard, the inmates started to complain to him that it was cold and that they wanted to go in. Hebert asked Nilson if he thought it was cold. Hebert told Nilson to go tell Gaunt that, "If he is going to make me stay out here, I'm going to get the inmates to contact the NAACP and that Lt. Gaunt will wish he never came to work today." Nilson further testified that the inmates were spread out in various areas of the yard, some as close as 20 feet from Hebert. Pushkal remained in the kitchen yard near the fence. Nilson testified that he was positive that Pushkal and the inmates heard Hebert's comments. Nilson started to go back inside and turned and asked Hebert, "Are you sure you want me to tell Gaunt that?" Hebert replied affirmatively. Nilson then went to tell Gaunt what was said.

In his written report (ER-1C), Nilson characterized Hebert's comments this way:

I approached Ofc. Hebert and asked him what he needed. Ofc. Hebert stated to me to tell Lt. Gaunt that if he was forcing him to stay out in inclement weather, he would get NAACP and any other organization willing to sue on behalf of the inmates and himself. He concluded by saying that if Lt. Gaunt forced him to be out there Lt. Gaunt would wish that he never came to work today. I asked if Ofc. Hebert had anything else, Ofc. Hebert said that he would get the inmates in his dorm to file a petition.

Hebert's Version:

Hebert testified that, within a few minutes of their arrival in the recreation yard, the inmates began complaining about the weather. He stated that inmates complain and comment about everything on a daily basis and you learn not to pay attention. While Hebert was talking to Pushkal through the fence, the inmates were exclaiming "Call the NAACP - it's cold!" According to Hebert, when Nilson arrived outside Hebert asked him "Don't you think it's cold? I'm going to be filing a complaint with the Warden as the Union president because we're outside." Hebert denied saying that Gaunt would regret coming to work or that he would sue Gaunt or the County. He also denies threatening to collect a petition on behalf of the inmates. Hebert first had no recollection of mentioning the NAACP. However, on cross-examination, Hebert testified that he may have sarcastically said, "Yeah go ahead, call the NAACP" in response to the inmates' pleas. Hebert testified that while he was not angry about being

in the yard, he was disgusted.

In Hebert's written report (ER-1D), Hebert states that,

"When Sgt. Nilson arrived [outside] I asked him if he believed it to be cold out and he agreed with me saying yes. I advised him as the Union president that I will be filing a complaint with the Warden due to improper handling of this matter."

Hebert further stated in his report that, in a discussion a week before with Gaunt, it was agreed that the Union would cooperate with the outdoor recreation requirement, weather permitting.

Hebert's report states that he understood that,

If the weather was cold, then the group could be returned; [today] this was in direct contrast to our conversation.... The way we are currently trying to run [outdoor recreation] needs to be addressed. We need another recreation officer and a shed like the main [jail], to alleviate this matter.(ER-1D)²

Pushkal's Version:

Ryan Pushkal had been a correction officer for Atlantic County for three years.³ Pushkal left the County's employ on good terms. He was assigned the position of Kitchen Relief Officer. On November 16, he was working in the kitchen yard. He and Hebert began talking through the fences. Pushkal testified that the inmates in the recreation yard were agitated because they were outside in the cold and they were demanding that the

²Gaunt's January 29 statement to Internal Affairs disputed that his earlier conversation with Hebert included any mention of weather conditions in conjunction with outdoor recreation.(ER-1L)

³Pushkal now works for Ocean County Corrections Department.

NAACP be called. Pushkal testified that Hebert said, "Can you believe this? They want me to call the NAACP." After Nilson arrived outside, Pushkal also heard Hebert tell Nilson that he was going to call the NAACP but believed he did so jokingly, echoing prisoner demands that he do so. Pushkal did not believe that it was intended as a threat.

In his written statement, written the next day at Nilson's directive, Pushkal reported,

I was approximately ten feet away when I heard Hebert tell Nilson that he was going to contact the NAACP on behalf of the inmates if they were not returned due to inclement weather. (ER-1E)

After his conversation with Hebert, Nilson immediately went to Gaunt and relayed Hebert's message.⁴ Gaunt prepared a written report (ER-1A-1B) which essentially recites the substance of what Nilson reported to him.⁵

Gaunt directed Nilson to obtain a written report from Hebert about what was said in the yard. At approximately 12 noon, Hebert called Gaunt on the phone and said, "What report is Sgt.

⁴Nilson testified that although he is prescribed Klonopin (ER-5, U-1, U-1A), he does not recall whether or not he was taking it on the day of the incident or on either of the days he gave statements. He stated that he does not suffer from any of the possible side effects such as hallucinations, amnesia, or confusion, which the pharmaceutical label associates with this medication.

⁵Gaunt's statement differs slightly from Nilson's original statement as well as the supplement. However, I find these differences to be minor. The meaning is still the same.

Nilson talking about that he needs?" Gaunt told Hebert to give Nilson a report on what he (Hebert) said in the yard. Hebert then stated "Oh he (Nilson) told you what I said?" Gaunt replied, "Yes and I need a report on it." Hebert then stated "Oh you want to be like Lt. Giberson and go there, OK, I'll get you your report and we can go there." (ER-1A-1B;1H).⁶

As Nilson was writing his report, Hebert approached him and said "You misunderstood me." Nilson replied, "There was no miscommunication." Several times over the next few weeks, Hebert spoke to Gaunt about the incident and indicated that he did not intend to disrespect him. Hebert also claimed that he believed Nilson misunderstood the context of his statement regarding the alleged threat to contact the NAACP (ER-1H).

Between November 25 and January 20 Internal Affairs Officer Steven Iuliucci conducted a series of interviews with the witnesses to the event. Nilson was the first to be interviewed as his statement was taken on November 24. According to Iuliucci's report, Nilson's account of the conversation with Hebert was as follows:

As he approached Hebert, [Hebert] stated "You tell Gaunt if he is going to force me to stay out in inclement weather, I am going to file a lawsuit with the NAACP and any other organization willing to sue on behalf of the inmates and myself." Nilson stated that Hebert told him he would also get the inmates to file a

⁶The reference to Lt. Giberson is not explained in the record.

petition... Nilson stated that Hebert also told him that if Gaunt forced him to remain outside, he wished he never came to work today. Nilson stated prior to walking away, he asked Hebert if he was sure he wanted him to tell Gaunt this information and Hebert replied 'yes'... Nilson stated it was no misunderstanding of the comments made by Hebert.⁷

Iuliucci interviewed and took a statement from Hebert on January 5, 2009. In his statement (ER-1I), Hebert reported that he told Nilson:

As FOP Union President, he was going to file a complaint because it was not fair he had to be forced to stay outside in the inclement weather with no protection. Hebert stated that he did not have his jacket on because it was in the tailor shop getting repaired. Hebert stated numerous officers have come to him and complained about having to stay in the annex yard with no protection from the elements... [while] officers working in the main jail yard have a shed to stay in that has heat and air conditioning.

Hebert stated his main concern is officers and not the inmates.

Iuliucci interviewed Pushkal on November 25. Pushkal reiterated his earlier statement that he heard Hebert tell Nilson that he was going to contact the NAACP on behalf of the inmates and that he wanted his inmates brought in due to the weather. Pushkal claimed did not hear any of Hebert's other comments to Nilson. Iuliucci interviewed Pushkal again on February 10, 2009. In this interview, when asked how was it that Pushkal had heard Hebert's comment to Nilson that he would contact the NAACP, but

⁷Although the Internal Affairs statement (ER-1F) is signed by both Iuliucci and Nilson, it is clear by the third-person narrative that Iuliucci, not Nilson, authored the statement.

did not hear any of his other comments, Pushkal replied that "This [NAACP comment] was made prior to Nilson arriving [outside], the inmates were requesting that Officer Hebert contact the NAACP due to them not being returned." (ER-1K)

In Gaunt's Internal Affairs statement on December 23, he essentially repeated the content of his earlier written statement about what Nilson reported to him that Hebert had said. (ER-1H) Gaunt makes no mention of Hebert saying he would be sorry he came to work that day or that Hebert was getting a petition from all of the inmates, in this report.

At the arbitration hearing, Nilson testified that, although he has heard at least one member of management complain about Hebert's vigorous representation of FOP 34 and its members in negotiations or defending discipline, he denied that he or the County was out to get Hebert because of his union activities. He stated that he did not care one way or the other whether Hebert's suspension would be sustained.

Iuliucci, who conducted the Internal Affairs investigation for the alleged incident, testified that an investigation must be thorough and fair. However, in reports he prepared from witnesses' statements, he refers to the details of the incident as undisputed, as if they had, in fact occurred. For example, ER-1F refers to "...Hebert told Sgt Nilson..."; ER-1G refers to "...Hebert stated that he was going to contact the NAACP..."; ER-

1L refers to "...a comment made by ...Hebert..."; ER-1M refer to "...comments that were made by...Hebert...".

Iuliucci's report of the investigation of the case further stated that Hebert stated he did not have his uniform jacket on the date in question. Iuliucci requested that Hebert provide him with a receipt for the jacket repair and contact information for the cleaners where the jacket was being repaired. After Hebert provided the tailor's receipt (U-2), Iuliucci called the cleaner to verify that the authenticity of the receipt.

The day after the incident, the AXD Unit was again ordered to go outside for their one-hour recreation. Hebert was off that day and Nilson had custody of the inmates normally in Hebert's custody. According to Nilson, the inmates were refusing to go and saying, "We're not going outside until we see Big Herb". Also, that same day Officers Creighton and Rodriguez brought another group of inmates in from the recreation yard without the sergeant's knowledge and without the lieutenant's permission. Rodriguez was given a one-day suspension and Creighton a three-day suspension.

Jeff Creighton, Lodge 34 Vice President, testified for the Union. According to Creighton, Nilson was untruthful in a previous disciplinary matter involving an officer's excessive use of force. However, the evidence does not establish that Creighton had any first-hand knowledge of the actual events

leading to that discipline. Therefore, Creighton's testimony is not particularly helpful in assessing Nilson's truthfulness.

After the internal affairs investigation was completed, Iuliucci filed a report with Capt. Bondiskey. After reviewing the investigative reports, Bondiskey prepared the notice of discipline and served it on Hebert on March 4, 2009, suspending him for five days without pay. Hebert was charged with violating the following sections of the Employee Policies and Procedures Manual (ER-6):

1.01: Standards of Conduct; 1.02: Loyalty; 1.03: Cooperation;
1.10: Insubordination; 1.12: Criticism of Official Acts Orders or Policy; and the following sections of Violations and Discipline:

12.18: Publicly criticizing the official action of any other employee without utilizing the proper channels and/or other procedures;

12.25 Knowing and purposely creating dissension among employees pertaining to any Facility Policy, Rule, Directive or decision made by the Director of Department Head.

Specifications: On November 16, 2008, employee was assigned to AXD and made insubordinate comments to his supervisor about the shift commander on duty. Specifically, employee threatened to sue Lt. Gaunt and contact the NAACP on behalf of the inmates if forced to remain outside in inclement weather. This comment was made in the presence of the inmate population of AXD while in the Annex Courtyard. Employee reported during an interview by facility staff that he was acting as the FOP Union President when he made this statement. Employee also made an insolent comment to his supervisor directed at Lt. Gaunt by stating, "I will make [Lt. Gaunt] sorry I came to work today." (J-2)

Bondiskey felt that a five-day suspension was appropriate

because the correctional facility is a para-military organization and orders must be obeyed, not undermined. He felt that the threat to Gaunt, said in front of a co-worker and inmates, was alone sufficient to warrant discipline. Bondiskey believed that Hebert's comments encouraged an alliance with inmates not conducive to the mission of the correctional facility.

The suspension was apparently served on April 9, 16, 23, 30 and May 7. On March 10, Lodge 34 filed a grievance (J-3). The grievance was denied on March 19, and this demand for arbitration was filed with PERC.

DISCUSSION

The County argues that it properly suspended Hebert for five days and that there was just cause for such disciplinary action. The County maintains that the discipline imposed adequately meets the commonly-used seven tests of discipline.

The FOP asserts the County failed to prove that Hebert actually said any of the comments he is accused of saying. The FOP further maintains that the discipline imposed fails to meet several of the seven tests of valid discipline. The FOP also argues that even if Hebert is found to have made any one of the comments he accused of, the penalty imposed was not proportional to the offense.

There are three main components at issue, with regard to what Hebert said to Nilson in the recreation yard, that led to

this discipline.

First, Hebert was disciplined for "threatening to sue Lt. Gaunt and contact the NAACP on behalf of the inmates if forced to remain outside in inclement weather". The evidence on this is conflicting:

1. Nilson's testimony, as well as his written report and his statements to Internal Affairs, while containing minor discrepancies in the wording, all convey the same meaning, namely that Hebert called Nilson outside and told him to tell Gaunt that if he was forcing him to stay outside in the weather, that he would file a complaint with the NAACP on behalf of himself and the inmates.

2. In his testimony, Hebert initially denied even mentioning the NAACP, but later admitted that he may have sarcastically referred to contacting the NAACP in response to the inmates' demands. In his written statements, Hebert claimed to have said that "As the Union President, I will be filing a complaint with the Warden..."

3. Pushkal's statements are conflicting. In his written report and his first statement to Internal Affairs, Pushkal acknowledged hearing Hebert tell Nilson that he was going to contact the NAACP on behalf of the inmates. However, in his final statement to Internal Affairs, he changed course, claiming that the NAACP comment was made before Nilson arrived outside.

In his testimony at the arbitration, Pushkal again stated that he heard Hebert tell Nilson that he was going to contact the NAACP.

4. Since Gaunt was not a party to the conversation outside, his statements are not helpful in the credibility resolution of what Hebert actually said.

I believe Hebert told Nilson to go tell Gaunt that, if he was going to make him stay out in the weather, he was going to contact the NAACP on behalf of himself and the inmates. I believe Hebert was angry. He thought he and Gaunt had an understanding about not running recreation outside during inclement weather. Hebert believed that day's weather was inclement. Unlike the main jail yard, with a climate controlled shed, the annex yard has no protection from the weather. The inmates were complaining to him, and he agreed with them, that it was too cold to be outside. He had asked Nilson for permission to bring the inmates in and Gaunt intercepted the transmission and directed him to stay outside for the full hour. By this point, Hebert was cold and angry.

Hebert must have had some motive in calling Nilson outside. It was not to obtain permission to come in - Nilson was not going to countermand Gaunt's directive to stay outside for the full hour. I do not believe Hebert actually wanted Nilson to deliver his message to Gaunt. I believe his motive may have been just to complain to someone.

Further, what Hebert said apparently lead the inmates to believe that they had an ally in Hebert - the very next day, when again ordered to get outside for recreation, the inmates refused to go until they "talked to Big Herb." This supports the conclusion that Hebert said he would be contacting the NAACP and that the inmates heard him say it.

Moreover, as soon as Hebert learned that Gaunt wanted a report on what was said in the yard, Hebert's first reply was, "Oh, he told you what I said?" and then he immediately became defensive, saying, "Oh, you want to go there? We can go there." If what Hebert said was as innocent as "As union president, I will be filing a complaint," he would not likely have been surprised that Nilson repeated his comment, nor would he have become defensive. Instead, I believe he knew what he said would get him in some trouble. I believe that Hebert's account of what was said is a respinning of the event - to make it appear that he was only speaking as a union official representing his members.

Additionally, Pushkal adds little to the credibility of either version. Pushkal's initial statement - before he had much chance to think about possible consequences - specifically said that Hebert told Nilson that he would be contacting the NAACP on behalf of the inmates and himself. Pushkal repeated this story during the arbitration hearing - at a time when he was no longer

an employee, and had no dog in the race. Therefore, I find that Pushkal's statements in his written report and at the arbitration hearing concerning the NAACP comment were accurate. Any implication in the Internal Affairs report (that Hebert mentioned calling the NAACP only before Nilson arrived outside) is discredited.

For all of the reasons set forth above, I find as a fact that Hebert told Nilson that if Gaunt was making him stay outside in that weather, he would be contacting the NAACP on behalf of the inmates and himself.⁸

The second component of the disciplinary charge against Hebert was that his comments were made in the presence of inmates. By all accounts, some of the inmates were at most, 10 to 20 feet away. Hebert does not strike me as a soft-spoken individual. Moreover, he was angry. And, the inmates' cries the following day, that they would not go outside until they spoke to "Big Herb" support the concept that they heard him and believed they may have had an ally in objecting to outdoor recreation in cold weather. I find that Hebert's comment was made in the presence of inmates.

Finally, Hebert was disciplined for threatening to "make Gaunt sorry he came to work that day." Hebert denied making this

⁸Whether Hebert used the specific words "call the NAACP" or "contact the NAACP" or "file a complaint with" the NAACP, is of no moment: the import is the same.

comment entirely. Pushkal had no recollection of hearing this comment, although he testified that he remained in the same area near the fence/walkway during the conversation between Hebert and Nilson. Gaunt's statements, of course, are hearsay, since he was not present outside. However, Nilson had a unwavering recollection that Hebert said Gaunt would wish "he" never came to work that day. While there appears to be some confusion in Nilson's written statements on whether Hebert predicted Gaunt would wish he (Gaunt) never came to work, or whether Gaunt would wish he (Hebert) never came to work that day, Nilson was positive that Hebert said Gaunt would wish someone never came to work that day. I credit Nilson's testimony which is consistent with and corroborated by his written statements. Nilson testified in a clear and forthright manner. Such a statement would be consistent with the level of anger Hebert displayed in the yard. Moreover, Hebert's defensiveness to Gaunt immediately after the incident supports the accuracy of Nilson's statement. While I do not find that Hebert "threatened to make Gaunt sorry he came to work that day" as charged in the discipline notice, I do find that Hebert predicted Gaunt would "wish he never came to work that day."

However, I do not find that Hebert's comment, as found above, is much of a "threat." Whether Hebert's expressed intention was to file a complaint, a lawsuit, or a demand for a

NAACP investigation, any of these actions might make a commanding officer rue the day that triggered that legal issue. Therefore, Hebert's comment that Gaunt would wish he did not come to work that day, is not truly a threat, but a prediction.

Was there just cause for the 5-day suspension?

Hebert is charged with violating these personnel rules and regulations involving:

1.01 Standards of Conduct: Officers shall conduct their private and professional lives in accordance with high ethical standards and to avoid bringing the department into disrepute.

1.02 Loyalty: Officers shall maintain loyalty to the department and their associates...

1.03 Cooperation: Department members are strictly charged with establishing and maintaining a high spirit of cooperation.

1.10 Insubordination: Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer.

1.12 Criticism of Official Acts, Orders, or Policy: Officers shall not criticize the official actions, instructions, or orders of any department member in a manner which is defamatory, obscene, unlawful, disrespectful, or which tends to impair the efficient operation of the department.

12.18 Publicly criticizing the official action of another employee without utilizing the proper channels and/or other procedures.

12.25 Creating dissension among employees pertaining to any Facility Policy, Rule, Directive or decision made by the Director or Department Head.

Officer Hebert called his sergeant outside and directed him to convey to a lieutenant, his criticism of the shift commander's order to remain outside for the full hour. Hebert's comments in front of inmates criticizing orders of a superior officer, and threatening to contact the NAACP, showed disrespect, disloyalty, a failure to cooperate, insubordination and public criticism of an official action in violation of 1.12, 1.02, 1.03, 1.10, 1.12, and 12.18.

Further, Hebert's comment regarding contacting the NAACP was made within earshot of inmates. This comment gave inmates the impression that they had an ally in Hebert. As Capt. Bondiskey pointed out, the appearance of an alliance with inmates is not conducive to furthering the mission of the correctional facility. This violated 1.01 Standards of Conduct and 12.18 Public Criticism.

I conclude that Hebert's actions on November 16, 2008 cannot be brushed away lightly with just a reprimand but warrant more severe discipline. The County determined that a five-day suspension was an appropriate penalty. However, the following mitigating factors must be considered.

The FOP contends that the investigatory interview process

was flawed and prejudicial. It does appear from Iuliucci's reports that the questioning of the participants/witnesses was based on biased suppositions of fact; that is, the questions asked in the interviews suggested that the facts had already been established and that Hebert made the inappropriate statements as he was accused. The record does not make clear whether Bondiskey's decision to discipline Hebert was based exclusively on the Internal Affairs reports or whether the prior written reports were also made available to him. Even if Bondiskey relied entirely on the Internal Affairs reports, Hebert and Nilson as parties to the conversation directly, each already had an independent recollection of what occurred in the yard and would not have changed their answers based upon any bias in the questions. Only Pushkal could have been so affected. But, except for a firm recollection of hearing the NAACP comment, Pushkal had no memory of hearing anything else. Pushkal's statement to Internal Affairs is consistent with his earlier written statement. Therefore, I find that the investigation, although flawed by biased questions, was not fatal to the outcome.

It is noted that Hebert received a five-day suspension, even though he complied with the directive to stay outside for the full hour. On the other hand, Creighton and Rodriguez respectively received a one-day suspension and a three-day

suspension when they independently decided to return their inmates from the yard early the following day without permission. It appears that the discipline given to Hebert, as compared with the two correction officers who were insubordinate by disobeying a direct order, is disproportionate and excessive. While Hebert was insubordinate, disrespectful, and created the appearance of an alliance with inmates, the penalty imposed was too severe. The FOP suggests that a more appropriate penalty would be a written reprimand. It points out that Hebert is a fourteen-year employee and has no prior disciplinary record. I find that considering the seriousness of the offense, a written reprimand is not sufficient. The appearance of conspiracy with inmates is a serious offense. Although he may have believed as Union President, he was defending his own rights as a correction officer, and possibly those of other correction officers, an employee cannot use his position as a union officer as an excuse for insubordination or to create an appearance of conspiring with inmates.⁹

On the other hand, it is a commonly accepted theory of discipline in the workplace is that discipline needs to be progressive. Discipline and Discharge in Arbitration, Norman

⁹Hebert's additional alleged comment that he would get the inmates to file a petition is not part of the disciplinary charges against Hebert. Therefore, this issue will not be considered.

Brand, Ed., The American Bar Association, Chicago (1998). The purpose of progressive discipline is to put employees on notice of improper behavior in order to give them a chance to correct their behavior. While certain conduct is so egregious that progressive discipline is not required, I do not find Hebert's actions on November 16, 2008 to fall into this category. While Hebert blustered and threatened, he never followed through with any contact to the NAACP. Taking into consideration Hebert's 14-year career with no prior record of discipline for any similar conduct, I find that a two-day suspension is a more appropriate penalty for Hebert's violations of the County's personnel regulations as listed above.

AWARD

The grievance is sustained. I find that there was not just cause to suspend Officer George Hebert for five days on March 4, 2009. I find that there was just cause to suspend Hebert for two days based upon his violations of County Regulations. The County is directed to reduce the penalty for the November 16 incident to a two-day suspension and to pay Hebert back pay for the additional three days already served, and to adjust his personnel records accordingly.

Susan W. Osborn

Susan Wood Osborn
Arbitrator

DATED: February 19, 2010
Trenton, New Jersey

State of New Jersey }
County of Mercer }

On this 19th day of February, 2010, before me personally came and appeared Susan Wood Osborn to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Susan E. Peslin

SUSAN E PESLIN
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires November 18, 2013