BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

IN THE MATTER OF:	)
	)
CARL PAOLINI,	)
	)

Members Present:

Katy K. Woo, Chairperson
Robert Burns
Gary Fullman
Walter Bowers

James J. Hanley, Deputy Attorney General
Counsel for the Board

Jeffrey M. Taschner, Deputy Attorney General
Attorney for the Department of Corrections

Frederick H. Schranck, Deputy Attorney General
Counsel for the Department of Corrections

Richard G. Elliott, Jr., Esquire
Counsel for Mr. Paolini

The Merit Employee Relations Board ("the Board") conducted hearings on November 2, November 10, November 23, December 8, 1994 and January 12, 1995 in Dover, Delaware. The hearings concerned the appeal by Mr. Paolini of his termination by the Department of Corrections for racist and derogative remarks made in the Thanksgiving, 1993 edition of the "Midnight Sun", and Mr. Paolini's failure to obey a direct order to report to the Warden's Office on December 2, 1993. At the beginning of the hearing the Chairperson indicated that a fifth member of the Board, Mr. Dallas Green, was unable to attend the hearing because he was out of the country. Mr. Green

did attend the latter sessions of the hearing, but did not participate in the decision making.

SUMMARY OF THE EVIDENCE

1. Captain Joseph H. Belanger was sworn and testified as follows:

   a) Cpt. Belanger from October 1992 until November 1993 was a Correctional Lieutenant assigned the task of scheduling the staff for vacations and relief.

   b) In October, 1992, the Midnight Sun was published, and it was his opinion that the articles about the staff were irregular.

   c) In the Thanksgiving, 1992 issue his picture appeared in the paper, and he complained to the Warden that is was racial. He wrote a memorandum to Warden Snyder desiring to put a stop to the paper because he felt it was very racial and had nothing positive to do with the facility. The Warden told him that according to the Attorney General's Office, no action was warranted.

   d) In the Christmas, 1992 issue another picture offended him and he wrote a letter to the Attorney General's Office. He felt the paper was trying to belittle in a racial and gender preference manner, members of the staff.

   e) In June and July, 1993 people felt that Paolini was going to "pay a price off the job."

   f) In the Thanksgiving, 1993 issue, he felt humiliated because of the reference to him as a "nigger with an attitude". C/O Walls and Hazzard came to him concerning the comment. He filed a class action grievance with the Warden concerning this issue of the newspaper. There was a petition of correctional officers objecting to the newspaper. Cpt. Belanger stated that he never spoke with Paolini concerning the newspaper.

   g) On cross examination, Cpt. Belanger stated that in the January 1993 paper, there was an article advising that they were sorry for the prior article.

h) He was very upset in October and December, 1992. He stated he has heard correctional officers use the word "nigger." He became aware of the Thanksgiving, 1993 issue on November 30, 1993 from two correctional officers. All the signatures on the petition were obtained by December 1, 1993 and a grievance hearing was held with Warden Snyder on December 1, 1993. Paolini was not present at the hearing, and the termination letter suspended him without pay. He felt Paolini should be terminated. Cpt. Belanger stated he cannot remember whether he spoke with any inmates between November 30 and December 1, 1993. The petition signed by numerous correctional officers was not introduced at the December 1, 1993 hearing.

i) In further testimony, Cpt. Belanger stated that the racism hurts morale and the paper caused morale problems.

2. Correctional Officer Karl Hazzard was sworn and testified as follows:

a) Officer Hazzard has been employed by the Department of Corrections for eleven (11) years.

b) A group of officers approached him as he came to work and told him that he would be upset with the November issue of the paper. He spoke with Lt. Belanger. He had never referred to himself as a nigger and had never used the word at DCC. He called the Warden and the Commissioner in March, 1993 because the picture on the front of the paper offended him. He initiated the petition against the Midnight Sun at DCC. It took him a couple of days to complete the petition. A copy of the petition was submitted with the grievance. He was present at the meeting on December 1, 1993 to hear the grievance.

c) In further testimony, he stated that he hated the word "nigger". He spoke with Paolini four times about the newspaper.

d) In response to questioning by the Board members, Mr. Hazzard stated that the December 1, 1993 meeting was the result of the union grievance even though the union grievance procedures were not in place at that time. He stated the inmates had access to the newspaper, but there were no documented incidents resulting from the paper.

3. Mr. Steven Walls was sworn and testified as follows:

a) Mr. Walls has been a correctional officer for 12 1/2 years and was angry that he was named in Thanksgiving edition of the Midnight Rambler. He felt belittled and wanted the paper stopped. He did not pay much attention to the paper in March and April, 1993.

b) On December 1, 1993 he was sick and did not attend the hearing. He wrote a memorandum to Warden Snyder and to the Internal Affairs Officer. He was referred to as a "nigger with an attitude." He was infuriated and complained to his supervisor, Cpt. Kane, and to the Warden's Office.

c) On cross examination, he stated that he had heard the word "nigger" used at work by both black and white officers. He never heard Paolini use the word "nigger."

4. Sgt. Bruce Burton was sworn and testified as follows:

a) He stated that he has spoken with Paolini concerning a newspaper and told him that he was going too far. The paper was causing problems including confusion. The officers depend on one another and they were becoming angry, humiliated and frustrated.

b) The Thanksgiving issue of the newspaper was posted to the inmates, and the officers were in an uproar. He stated that he told the Warden that the officers and inmates were upset. Paolini was becoming a problem.

c) On cross examination, he stated that the problem was caused by the Midnight Rambler, and that if the paper was not printed there would be no problem. In his statement, he did not say to the Warden that the inmates were in an uproar. He stated the inmates wanted to know how a correctional officer could use the word "nigger". He was never instructed to confiscate the newspaper.

d) In further testimony, Mr. Burton stated the paper comes in the prison through the gate house, and although the paper was in the prison, the administration never said anything about removing it. He stated that for the year and a half that he has been a Sergeant, the issue of the paper was never discussed at a staff meeting.

5. Warden Robert Snyder was sworn and testified as follows:

a) Warden Snyder indicated that his staff made him aware of the newspaper in October and November, 1992. He was advised by the Attorney General's Office to leave well enough alone unless the paper was interfering with the safety and security of the institution.

b) In November, 1993, the inmates wanted to know what he was going to do about the paper. The officers in his lobby next to his office wanted him to do something. He stated that he was worried about a riot in the prison.

c) He met with his staff, and they were demanding that he fire Paolini. He was told there was a petition going around, and he received a formal grievance from Local 247. He made the decision to suspend Paolini and directed the Deputy Warden to go and order Paolini back to the institution. He barred the paper from the institution.

d) At the hearing on December 2, 1993, the Union representative was present, Paolini was not there because he had refused to come in. Deputy Warden notified him that Paolini was not coming in, and he continued with the hearing. The Union representative stated that he did not need Paolini to be there. The December 2, 1993 letter suspended Paolini pending termination.

e) It was his opinion that Paolini created problems and on December 1, 1993, he decided that he had to do something because the racial slurs had upset the staff and the inmates.

f) On cross-examination, Warden Snyder indicated that the staff had told him that the paper lowered morale. He was concerned with the division among the staff. He met with Paolini only once concerning the paper. He first heard about problems caused by the paper from the inmates. They say they saw it posted on the guard post. Staff stated that they wanted to get Paolini. He suspended him without pay.

g) He vaguely remembered Paolini's apology. He stated that if the safety or security of the institution is at risk, he has full authority to suspend without pay. He was concerned that the inmates were going to take over the building. He scheduled a hearing at 9:00

a.m. the next day. He could not have heard it at another time. He wanted to hear from Paolini. He instructed the Deputy Warden to get his side of the story. He did not tell him anything but the time. He believed his actions defused the situation. If Paolini had showed he still would have suspended him. No alternatives were proposed at that time.

h) He stated that he spoke with the Attorney General's Office several times in December, 1993. The guards in the institutions do not use racial slurs.

6. Commissioner Robert Watson was sworn and testified as follows:

a) Commissioner Watson is Commissioner of the Department of Correction.

b) Warden Snyder informed him that the newspaper had been published, and he instructed him to talk with the Attorney General's Office. He was later advised that unless there was an impact on security, he should let the paper continue.

c) On November, 1993 after the Thanksgiving issue came out, he received another phone call and was told that a group of employees were upset. He had the paper read to him and felt that it had crossed the threshold and told Warden Snyder to go back to the Attorney General's Office. In subsequent conversations, he was told that a group of inmates were upset.

d) After Paolini was suspended, his involvement was minimal. There was a hearing before Stan Taylor who supported the Warden. He signed a letter prepared by the Personnel Office.

e) In his opinion, termination was appropriate because of the public safety function requires employees to do what is expected. Paolini had disrupted the security of the institution. Employees have to fulfill their responsibility. Paolini did not respond to a direct order to report and this was insubordination. In his prior employment in Oregon, he had terminated an employee for failing to do his duty. The effect of the newspaper was the primary trigger for his termination coupled with the failure to show. The system in the prison is to work and then grieve, if you believe that the order was

improper.

f) In further testimony, he indicated that there was no attempt to resolve the matter within an intermediate step.

g) On cross-examination, Commissioner Watson stated that he did read the paper, although not every month.

h) In November, 1993, the Attorney General's Opinion had changed, and he stated that the Department of Correction had reason to act. He stated some things in the paper offended him. He did not say anything or talk to Mr. Paolini. He stated that when it is so disruptive that the safety is compromised, he can suspend without a hearing.

i) On December 1, 1993 he told Warden Snyder to follow the advice of the Attorney General. Immediate action was required when a number of employees demanded action. Presence of the employee was disruptive. It was his opinion that there were no other options besides terminating Paolini.

j) Warden Snyder had the authority to call Paolini to the person under the general management authority and the security of the prison. He was not called into work and he should be there, if the Deputy Warden orders him to be. Paolini is on call 24 hours a day. Paolini had the attend the hearing because the purpose of the hearing was to security of the prison. A hearing was needed to finalize the actions occurring on December 1, 1993. He was unaware of any suggestions that Paolini should be suspended only. Finally, Commissioner Watson stated that he has overruled Warden Snyder at least three or four times by not accepting the recommendation to terminate.

7. Deputy Warden Gulledge was sworn and testified as follows:

a) Deputy Warden Gulledge stated that he advised his secretary to contact Paolini, and she did talk to him. He talked to him also and told him that it was a direct order. He did not mention to Paolini why he had to come. There was no reason why he did not tell him. He expected Paolini to carry the order out.

b) On cross-examination, Deputy Warden Gulledge stated that for the safety and security of the institution, the employee has to report. If he determines that an employee should be present for the operation of the facility, he can call him back to work. He needed Paolini there to explain his role in the newspaper. Paolini should have known that it was important when he gave him a direct order.

c) Deputy Warden Gulledge stated that Paolini had to tell his side of the story even after he was suspended without pay.

8. Mr. Allan Machtinger was sworn and testified as

follows:

a) Mr. Machtinger stated that he was the Personnel Director for the Department of Correction.

b) He stated that Paolini was given an opportunity to come in and explain that he should not be suspended. When he did not show, he was suspended. During the investigation, Paolini was given an opportunity to tell his side of the story. Paolini filed a grievance under the contract, but it ceased at the arbitration stage.

c) After he recommended termination, there was a pre-decision hearing. The Commissioner affirmed. The grievance was under the merit rules and not the contract because the contract ceased on February 16, 1994. The pre-decision hearing took an hour and a half, and Paolini presented signed statements from six persons and testified on his own behalf. He recommended a dismissal or suspension and transfer to another institution. Commissioner Watson said that he chose dismissal because Paolini's actions were just cause for termination, a transfer was not acceptable and suspension was not severe enough. The Union Contract gave the Warden the right to suspend without a hearing.

d) On cross-examination, Mr. Machtinger stated that the rule did not say suspension "without pay".

e) The hearing on December 1, 1993 was a pre-suspension hearing which is not required by the Union Contract.

f) There were two (2) hearings before Stan Taylor. He does not recall that he saw any document indicating that there was any disruption among the staff. There was a petition signed by 80 officers. The Department had previously disciplined an employee for racial language.

g) In further testimony, Mr. Machtinger indicated that when an employee is requested to report to work, he is expected to report to work.

h) In response to questioning by the commission, Mr. Machtinger indicated there was no record of the hearing. The reason for termination and suspension without pay were the same. It was his understanding that the action was taken for the safety and security of the institution.

9. Captain Cunningham was sworn to and testified as

follows:

a) In 1993, Captain Cunningham was as shift commander on the 12 to 8 shift.

b) He found out that Paolini was suspended and was not contacted by Snyder or Watson prior to the suspension.

c) It was his opinion that the Thanksgiving issue of the paper was no more significant than any other issue. There did not seem to be any disruption among prisoners or guards. He cannot recall any events relevant to the publication.

d) On cross-examination, he stated that he was unaware of any problems when he left his shift. In further testimony, he stated that the paper was not to be brought into the institution for distribution and the staff was not supposed to bring literature into the facility. There were no meeting of shift commanders concerning the morale or safety issues relevant to the Thanksgiving issue of the paper.

10. Lt. Peter Hall was sworn and testified as follows:

a) Lt Hall is Mr. Paolini's immediate supervisor on the 12 to 8 shift.

b) On the Monday after Thanksgiving, he saw on a sheet at the gate

house that Paolini was suspended. Ordinarily, the supervisor does the write up in a disciplinary matter. The newspaper did not offend him but he looked upon it as light hearted humor. He was not aware that the Thanksgiving issue of the newspaper caused a disruption among inmates or the correctional officers. He stated that in the prison the language used by the inmates and guards is trashy.

c) On cross-examination he stated that when he writes up an employee that it concerns activities on his shift. This was the first time that someone who worked for him was disciplined without his writing it up. When he comes on his shift, he receives reports but he received no reports of a disturbance.

d) In further testimony, he stated that he had heard that inmates went to the Warden's window but did not hear about any disruptions. He was never advised of the action to take when the newspapers were brought onto the grounds.

11. Cpl. Joseph Sabago was sworn and testified as follows:

a) Corporal Sabago stated that he was asked to sign a petition, and he signed it as he was leveling the institution. He was told that the signing meant that he was offended by the article in the newspaper. He stated that he signed after Paolini was suspended.

b) In further testimony, he stated that he does not remember correctional officers referring to other black correctional officers as nigger.

12. Mr. Boddato was sworn and testifies as follows:

a) Mr. Boddato is a Department of Correction employee presently out on a workmen compensation injury.

b) In November, 1993, he worked the six to two shift. He stated that he did not hear of any disruption by inmates in the prison. He did not hear any prisoners saying anything to cause alarm. He stated other officers used the word nigger and a staff lieutenant had used it in the mess hall and was given probation by Warden Redman.

13. Mr. Timothy Gray was sworn and testified as follows:

a) Mr. Gray is a correctional officer who works the 12 to 8 shift.

b) He stated that the language used by guards and the prisoners' language he would not want to use outside. He stated the guards use the word nigger, but he has not heard the word used by the lieutenant.

c) The Thanksgiving, 1993 issue of the paper did not cause disruption among the inmates. It was his belief that he had to return to the prison in an emergency situation.

d) On cross-examination, he stated that there was no disturbance on his shift, and the other correctional officers did not report disturbances on the other shifts.

14. Correctional Officer Jelliffe was sworn and testified

as follows:

a) Officer Jelliffe has been employed by the Department of Correction for 18 years and was assigned the 12 to 8 shift in November, 1993. He did not notice any adverse effect among the inmates or the staff from the Thanksgiving, 1993 issue of the newspaper. A few days later there was a reaction among senior staff offended by the work nigger.

b) It was his belief that can be ordered back from home when it is an emergency and all other officers report.

15. Mr. Carl Paolini was sworn and testified as follows:

a) Mr. Paolini stated that he was first employed with the Department of Correction in March, 1989, and after rotating shifts was assigned to the 4 to 12 shift in 1989. He bid for the 12 to 8 shift.

b) In July, 1992, he distributed a booklet on tuberculosis. After his third distribution on TB, the Union censored his efforts and he began a newspaper called the Midnight Sun. He also published the Department of Correction's Gazette. He began the Midnight Rambler in January, 1993 attempted to keep the articles light. The

paper gave the officers an opportunity to express themselves. It was the officer's paper with his work and his money. He distributed the DCC Gazette in the gate house and some officers contributed money. Fifty percent of the paper was serious and 50% was light.

c) In October, 1992, he was called into Warden Snyder's office and the Warden was upset with the paper. He understood that the Warden could ban his newspaper from the prison, but the Warden cannot forbid him from publishing. Little by little he brought the paper into the institution.

d) The Thanksgiving issue of the Midnight Rambler was brought in on Sunday night. He worked three shifts after the paper was distributed and left work on Wednesday morning and was due back on Friday evening, at one minute to twelve.

e) The article on page 4 containing the phrase "nigger with an attitude" was joke based on the WWF. He heard so much from other officers and he wanted to make a complaint with Officer Hazzard.

f) In April, 1993, he used several ethnic and racial terms including nigger. His feelings of racist were contained in an article in the Thanksgiving issue of the Midnight Rambler.

g) He stated that Bruce Burton was the only person who complained to him about the paper on the three days that he worked after it was distributed. When he left on Wednesday morning, he had no idea that there was a problem with the paper. On Wednesday afternoon he received a call from Deputy Warden Gulledge's secretary. She had told him that she did not know what the meeting was about and he told her that he had to work Thursday morning and had to go to court on Friday morning. Deputy Warden Gulledge told him he was to report at 9:00 p.m. Thursday. He informed Deputy Warden Gulledge that he was not refusing to come in, but he just could not come in on Thursday morning.

h) He called the Union Grievance Chairman who stated that he would go and call Paolini with the result at 4:30 p.m. on Thursday afternoon. He call him and told him of the suspension without pay pending termination. He stated that he believed that his duty was to return for a declared emergency. Otherwise he was not obligated to report. On Thursday morning, he worked construction and on

Friday morning he went to traffic court. He was not informed of the Department of Correction decision by the Department of Correction until Saturday. He was suspended without pay, although usually the investigation comes first.

i) He wrote a letter to the Warden apologizing believing that he had done something wrong. It was unintentional but some people were offended. He never talked to Warden Snyder. His termination banned him from prison and banned the paper from prison. He was not offered a lesser punishment. He never heard of a disruption among prisoners and guards. At the hearing he became aware that Belanger, Walls and Hazzard were upset.

j) On cross-examination, he stated that he was shop steward of the Union for two years. He stated the purpose of the newspaper was an outlet for the officers, a hope for dialog, exchange of ideas and improve the prison morale. He did not report because it was not an emergency situation and therefore, he did not feel he had to make other arrangements. He decided not to show up.

k) In further testimony, he stated that in November, 1992, Snyder did not tell him that the paper was banned. He stated that after the suspension the newspaper was declared contraband. Policy on reading materials depends on the Warden. The Warden can ban all reading materials, if they choose.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the testimony and documents received, the Board finds the following facts to be supported by substantial evidence.

1. The Thanksgiving, 1993 issue of the Midnight Rambler did not cause safety and security problems at the Delaware Correctional Center. The Board notes the testimony of Warden Snyder as well as Correctional Officers Hazzard, Burton, and Walls and find that this testimony is very isolated. Correctional Officers presented by Officer Paolini stated that they were working during the period of time between the distribution

of the newspaper and the suspension of Paolini, but they were not aware of any disturbances or reports of disturbances. The Board relies heavily upon the fact that there is no written documents indicating a concern for prison security or safety at the time of Paolini's suspension in the beginning of December, 1993. Also, supervision in the prison was not aware of any reports of disturbances.

2. The order by Deputy Warden Gulledge to Paolini to report on Thursday morning was not a proper order. There is no evidence suggesting that there was an emergency occurring. Moreover, Paolini was not told why he was to report. Paolini was not being requested to report to work, and the testimony indicates that Paolini was not scheduled to work for two additional days.

3. Paolini did not receive a written notice of the charges prior to his suspension.

4. There was no progressive discipline in this matter. Although Paolini had published in one form or another for a approximately 15 months, he not been previously disciplined nor had he been informed that his publishing and distribution activity could result in discipline.

DECISION

the Board finds that there was not just cause to terminate Mr. Paolini from his employment with the Department of Correction. The evidence does not support a finding that there was a safety and security problem resulting from the publication of the newspaper, and Mr. Paolini is not guilty of insubordination as a result of failing to attend

the meeting on December 1, 1993. Although the Board has some reservation in stating that Mr. Paolini bears no responsibilities for his conduct, the Board concludes that Mr. Paolini's conduct both in publishing the newspaper and in response to Deputy Warden Gulledge is not sufficient cause for termination. It is the decision of the Board therefore, to reverse the decision of the Commissioner of the Corrections and to make Mr. Paolini whole including reinstatement. His benefits are to include back salary sufficient to make him whole when added to the wages and unemployment benefits received by Paolini from the date of suspension to the date of December 31, 1994.

IT IS SO ORDERED this 15 day of February, 1995.

Katy Woo

Katy K. Woo, Chairperson

Robert Burns

Gary Fullman

Gary Fullman

Walter Bowers

Walter Bowers

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