ARBITRATION

BETWEEN

STATE OF OHIO, DEPARTMENT OF
REHABILITATION AND CORRECTIONS

AND

GR: Discipline, James Knapp
OCB Grievance No. G86-595

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, A.F.S.C.M.E.,
AFL-CIO

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
PANEL ARBITRATOR

APPEARANCES:

For the Department:

John R. Alexander, Esq.
Assistant Attorney General
Chief Counsel's Staff
Office of Collective Bargaining

For the Union:

Daniel Scott Smith, Esq.
Legal Counsel
Ohio Civil Service Employees Association

I. BACKGROUND:

This case, particularly well presented by the parties representatives, was heard in Columbus, Ohio, on November 21, 1986. At the conclusion of the presentation of the evidence, the parties' representatives ably argued their respective positions. It was the parties mutual desire that the case be essentially expedited, commensurate with whatever time the undersigned deemed necessary to reach a careful and considered opinion and award.

II. THE CONTRACT:

Pertinent contractual provisions are appended as Appendix I.

III. STATEMENT OF THE CASE:

This case arose at the Orient Correction Institution where employee James E. Knapp, a Correction Officer 2, the Grievant in the case, is employed. The Grievant stands accused of sleeping on duty towards the end of his shift on August 7, 1986, and while assigned guard duty at 5F Dormitory. His accuser is Sergeant Frances E. Fletcher, Correctional Counsellor.

Sergeant Fletcher's office is located just beyond the T.V. lounge in the 5E Dormitory at the Orient facility. The Dormitory houses some 192 inmates, classified as either medium or minimum security inmates. They are not confined to cells.

The Grievant works the third shift i.e. from 10:50 p.m. to 6:50 a.m., and has done so since 1981. Sergeant Fletcher works the first shift i.e. from 5:45 a.m. to 1:45 p.m. During the overlap of shifts Sergeant Fletcher is an indirect supervisor over the Grievant. The Grievant's immediate supervisor throughout his shift is Captain David Stokes. Stokes in turn answers to Major K.D. Bucy, Chief Custody Officer. Bucy in turn answers to Superintendent Thomas J. Stickrath.

It was the testimony of Sergeant Fletcher that at approximately 6:00 a.m. on the morning of August 7, 1986, as she unlocked the door to the T.V. room in 5E Dormitory on the way to her office (as is her normal routine) she observed the Grievant motionless and apparently asleep at the officer's desk in the T.V. room. Four to five inmates were also present in the T.V. room. Fletcher asserted she so observed the Grievant for a minimum of three minutes. At no time did he move. Fletcher testified that she made extra noise by jangling her keys and still the Grievant did not respond to her. It was

Fletcher's opinion that since a window was open in the T.V. lounge the Grievant ought to have heard her coming up the walkway to 5E Dorm in light of all the jangling keys she was carrying. According to Fletcher she then approached the Grievant and stood in front of the desk but three to four feet distant from him, whereupon she observed that the Grievant's eyes were closed: that he was seated in the desk chair with his head against the wall and face toward the ceiling and that his feet were slightly propped up, being on the rail. It was Fletcher's testimony that in a normal tone of voice she called the Grievant's name. He did not respond, and accordingly she then called the Grievant's name in a command tone of voice, whereupon the Grievant "came to" and appeared startled. It was further Fletcher's testimony that when the Grievant came to he stood up and that he did not appear to be groggy. Fletcher also conceded that everything in the Dorm appeared to be in order. Apparently unsure of her authority to directly discipline the Grievant, Fletcher said nothing to him. According to Fletcher, throughout this time frame the television was on at a normal volume and a television show known as the 20 minute work out was turned on.

At approximately 6:30 a.m. Fletcher reported the above incident to Captain Stokes. Stokes instructed

Fletcher to "write up" the incident. Fletcher did so at approximately 8:00 a.m. It recites in pertinent part as follows:

> "....I observed Officer Knapp with his feet proped (sic) up a little bit and head leaning on the wall behind him sleeping. 1) I gave him two calls by saying Officer Knapp he finally responded to me on the second call."

The Grievant's version of events on the morning of August 7th differs markedly from that of Fletcher. The Grievant testified to the effect that he was particularly busy throughout the morning of August 7th. Thus commencing at 3:30 a.m. the Grievant was required to wake up a couple of the inmates for their assignments in main food service. Additional wake up calls were made for a couple of inmates at 4:30 a.m. Then at approximately 5:15 a.m. a "count" of the inmates, followed by the preparation of a count sheet was required. From and after 5:30 a.m. it was necessary to wake up the other inmates in the dormitory. Thereafter the Grievant checked the dormitory to make sure all lights remained on. It was the Grievant's

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1) The word "Sleeping" is slashed in.

testimony that he was sitting at the officer's desk and got up and that while standing near an open window in the T.V. lounge he observed Fletcher coming up the walkway to the 5E building, whereupon he sat back down at the desk. It was the Grievant's testimony that as Fletcher entered the T.V. lounge, he turned his head to look into the bays to make sure all the inmates were properly dressed. It was the Grievant's recollection that the T.V. was on loud and tuned in to the 20 minute workout. Furthermore, according to the Grievant, some twenty to thirty inmates, all talking loudly amongst themselves, were in the lounge watching the 20 minute work out television broadcast. As was indicated at the hearing by several witnesses, this T.V. show, which starts at 6:00 a.m., is especially popular with the inmates, who experience it as a sexual experience, given the bounce and flounce of the female participants as they go through their exercises. Consequently, the 20 minute workout routinely draws a large audience: never as few as four or five, asserted the Grievant. As the Grievant turned his head back from checking the attire of the inmates, Sergeant Fletcher was standing at the desk. The Grievant didn't expect her to be there so soon and hence was, as he conceded,

'startled". In the Grievant's view only a minute had elapsed since he had seen her coming up the walkway. It was further the Grievant's testimony that at all times his eyes were open and that he was not asleep. According to the Grievant, he received sufficient sleep preceding his shift. The Grievant explained the manner in which he was sitting in the chair i.e. head against the wall and feet slightly propped up, as due to his customary "bad posture on sitting". It is noted that the chair at the officer's desk was in poor repair. It was the Grievant's testimony that he didn't hear Fletcher call his name. The Grievant also maintained that he called in to base #2 every half hour, and the post call-in log for third shift August 6-7, 1986, confirms such. The Grievant testified that he had had no run ins with Fletcher and had "no reason to know why Fletcher wouldlie".

On August 8, 1986, the third shift shift Captain, Captain David Stokes, held an employee conference with the Grievant. He showed the Grievant Fletcher's "write up". The Grievant told his version of events, a somewhat truncated version of his testimony at the arbitration hearing. 2) The Grievant stated that upon

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2) See Captain Stokes' notes and recommendation within Joint Exhibit #5.

receiving Fletcher's "write up" he "thought they'd be a disciplinary hearing". Captain Stokes recommended that discipline be imposed for the August 7th incident, noting that in the last 9 months Mr. Knapp had been found "sleeping or nodding on duty....", and "I'm recommending a 15 day suspension." Major Bucy, commenting that this was the 4th sleeping offense in nine months, disagreed, and recommended removal. By notice dated September 17, 1986, the Grievant was notified in writing by Superintendent Stickrath of his proposed removal for "sleeping on duty August 7, 1986, in 5E Dormitory" and of a Disciplinary Hearing to be held September 23, 1986, before Deputy and Hearing Officer Carole Shiplevy. The Grievant appeared and testified in his own behalf. Sergeant Fletcher did not testify at the September Disciplinary Hearing. A second hearing, at the Department's behest, was convened on October 28, 1986, notice of same being given to the Grievant by notice dated October 20, 1986. This hearing was apparently scheduled in order to afford the Grievant the opportunity to cross-examine Fletcher who was available at this hearing. According to the Grievant, it was but three days prior to this second pre-disciplinary

hearing, and therefore on October 23, 1986, that he distributed a flyer addressed "to all members" and signed by him as Chapter President, asserting "the state's flagrant disregard of the new contract," and urging a letter writing campaign to the Governor and other State politicians.

Union Steward Eddington appeared before Hearing Officer Shipley at the second hearing and contended that this second hearing was "double jeopardy" and that accordingly the Grievant would not be participating. Thereafter an "Order of Removal" of the Grievant dated November 5, 1986, signed by Department Director Richard P. Seiter and counter-signed by Superintendent Stickrath, issued. The order recited that it was to become "effective November 7, 1986."

The "Order of Removal" recited that "the reason for this action is that you have been guilty of violation of Department....Rule 5: Sleeping on duty and neglect of duty in accordance with Section 124.34....3)" The rationale for the removal recites that "....your failure to attend this (second, October 28th, 1986) hearing waived your right to the hearing and the opportunity to cross-examine Sgt. Fletcher." It further recites that "....based on the information submitted you were sleeping on duty in an area with inmates present. The seriousness

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3) The reference is to the Ohio Revised Code's section dealing with the requisite reasons for removal of employees "in the classified service of the state...."

of this violation and your previous ten (10) day suspension May, 1986, for sleeping on duty warrant this action and is in accordance with the Department .... Standards of Conduct, Rule 5: Sleeping on duty, second offense. ...." In this regard Department of Rehabilitation and Correction Standards of Conduct, to become effective on September 1, 1986, were unilaterally promulgated by the Department on August 8, 1986, with notice of such to all employees on or about that date. By virtue of the number of points assigned for sleeping on duty offenses, the Order of Removal is correct in stating that a second offense, under the Standards of Conduct, warrants removal.

The prior offenses of sleeping on the job, referred to in the Order of Removal, generated discipline which the Grievant protested before State Personnel Board of Review and became the subject of a Report and Recommendation in Case No. 86-SUS-05-0533 by the State of Ohio, State Personnel Board of Review Administrative Law Judge Kathleen M. Daugherty, dated July 17, 1986, based on a Hearing held before her on July 8, 1986. Judge Daugherty's Report and Recommendation recites that the Grievant was "....observed sleeping on April 7, 1986, and on December 19, 1985: and that he was observed to be

inattentive for approximately two minutes on December 30, 1985," for which the Grievant was suspended by the Department for 10 days. After making certain "Findings of Fact" upholding the accuracy of the "observations" noted above, Judge Daugherty concluded that the two allegations of sleeping and the one allegation of inattentiveness was "established by a preponderance of the evidence." Judge Daugherty went on,however, to characterize the December 30th incident as "very trivial and at best worthy of a written reprimand." Judge Daugherty concluded that the Department's 10 day suspension of the Grievant was "too harsh" and consequently she modified it to a 5 day suspension order. Thereafter the State Personnel Board of Review rejected Judge Daugherty's Recommendations, noting that considering all the findings of fact made by Judge Daugherty, "....a ten-day suspension is certainly not too harsh and should not be disturbed." Accordingly,the Board of Review ordered on August 5, 1986, that "the ten-day suspension given by (the Department) is hereby affirmed."

As the Grievant testified he was served with his Order of Removal on November 5, 1986. Prior to being served with the Order of Removal the Grievant, in his capacity as Chapter President, attended a Labor/Management

meeting at which Sergeant Fletcher was in attendance, among others, on behalf of management. It was the Grievant's testimony that no explanation for Fletcher's presence was made to him. Superintendent Stickrath testified that he could not recall just why Fletcher was assigned to the Labor/Management Committee, but that in any event the reasons were unrelated to the Grievant's discipline. It was Fletcher's uncontradicted testimony that she had been appointed by management as a facility Equal Employment Opportunity Officer and had attended the Labor/Management Committee meeting in her capacity as such.

The Grievant explained the circumstances surrounding the service to him of the Order of Removal. According to the Grievant, Captain Stokes called him over to the Captain's table early in the shift and handed him a pink slip and a blue slip and asked him to "read these". At the time "a dozen officers were around and another dozen officers nearby". When the Grievant asked if he could work out the shift, Stokes told him he couldn't. Superintendent Stickrath testified that he'd been told by Captain Stokes that Stokes called the Grievant to his table in the assembly room where he handed the Grievant his Order of Removal, remarking: "I have something for

you to read." At the time a couple of correction officers and a couple of supervisors were present.

Following receipt of his Order of Removal the Grievant grieved such and by the parties mutual agreement the matter was brought up tothe 4th Step of the Grievance Procedure i.e. the step immediately preceeding arbitration. As it does before me, the Union alleged at Step 4 that in its Order to Remove the Grievant the Department "....violated Sections 2.02, (24.01), 24.02, 24.03, 24.05 and 43.03 of the agreement between the parties, as well as Section 4117.11 (A) (1), (2), and (3) of the Revised Code." The Union additionally alleged, as it does before me, that the Order of Removal of the Grievant resulted from anti-union animus by the Department.

The Fourth Step grievance meeting resulted in a reduction of the Grievant's termination. As OCB Deputy Director Seidler's fourth Step answer recites:

> ".....Because the Grievant's performance as a correctional officer over the past six years was otherwise good, the Department agreed to reconsider the termination, and reduce the penalty to a lengthy suspension ----thirty days in duration--with the provision that any future instances of neglect of duty will result in immediate dismissal."

It is noted that it was the Grievant's testimony that prior to the Union representation election in November 1985, he was an active supporter of the Communication Workers of America, and that following the victory of the OCSEA, he became active on their behalf as a bargaining committeeman. Additionally, the Grievant was elected OCSEA Chapter vice-pres. in January 1986, and subsequently as Chapter President in May, 1986. In his capacity as a union officer and committeeman the Grievant represented and assisted employees in their grievances with management. The Grievant asserted that he usually got to the Orient facility by 10:15 p.m. to discuss problems with employees in the correction officer's lounge, in full view of the supervisory staff.

It was the Grievant's testimony that he'd heard in effect rumors from other officers that Sergeant Williams had stated that management was out to get him.

It was further the Grievant's testimony that beginning in November 1985 and after the union representation election he was told by other corrections officers that his post alone, or at least more frequently than others, was checked by supervisors. I note in this regard that of the Grievant's Employee Performance Evaluations

introduced into evidence,[4] the 1982, 1985, and 1986 evaluations recite under the catergory "5. Dependability (reliability)" the following: "needs frequent checking". The 1983 evaluation rates the Grievant on the cusp between "usually dependable" and "seldom needs checking". His 1984 evaluation rates the Grievant, "seldom needs checking."

The Grievant also testified that during his 1985 evaluation interview with Lieutenant Clark, Clark asked the Grievant if he wanted to be a Sergeant because others, such as Sergeant Williams, would never go anywhere because they were involved in the Union. It was the Grievant's view that Clark wanted the Grievant out of his Union position. Shortly thereafter Clark was no longer the Grievant's supervisor.

The Grievant also related an incident in October 1986, wherein he was at the facility in uniform, but without tie, and not yet on duty. Sergeant Kinder saw him and told him to "get his tie on". The Grievant remarked he would do so "when it's time for work". Kinder insisted he do so immediately, since he was "in dress uniform". According to the Grievant "Kinder had written me up on it." However, it appears that if he did "write

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4) To wit the evaluations dated: 9/8/82: 9/8/83: 9/8/84; 9/8/85: 9/8/86.

up" the Grievant, he failed to follow through on any disciplinary action, for the record reveals that the Grievant's only discipline, since his hire on September 8, 1980, prior to the alleged sleeping on duty incident of August 7, 1986, has been the matters before ALJ Daugherty. Further with respect to this matter, the Grievant contended that others have been at the facility without their ties and merely told to get a tie the next morning; still others were written up. The Grievant stated in effect that the point was that the "clique wasn't written up."

Corrections Officer Paul Tillett, who normally works on third shift in 5E Dormitory testified that from 5:40 a.m. to 6:10 a.m. he's in continual radio contact with Base #2, with the consequence that it's not possible to fall asleep. Tillett also asserted that normally 30 to 35 inmates watch the 20 minute workout, and that the least number of inmates so watching are 15 to 16.

Corrections Officer Gary Lintz, works at Base #2. Lintz testified that supervisors would call in the middle of the night to check on the Grievant's work station. Lintz also testified that Sergeant Williams told him to tell the Grievant to "watch it because they were

out to get him". According to Lintz, other corrections officers had told him that Lieutenant Clark didn't like Union officers. Lintz additionally testified that last winter some corrections officers serving guard over inmates at OSU Hospital were believed to have been sleeping on duty, but that one of them, a SWAT team member, was believed to be only "resting his eyes", and hence, not disciplined. Lintz point was that SWAT team corrections officers were shown favoritism. It is noted that SWAT team assignments are voluntary. It was further Lintz's testimony that others caught sleeping were not thereafter checked up upon to the extent the Grievant was checked up upon. The precise basis for Lintz's testimony in this regard was not established. Lintz also testified that corrections officer Bazie told him that Captain Morse had said that they'd "get the Grievant again". Lintz additionally testified to the effect that the Grievant alone had been a strong voice for the Union and that his departure adversely affected the quality of the employees' union representation, a factor Lintz believed to be demonstrated by the purported increase in disciplinary actions following the Grievant's departure.

Corrections Officer Gary Butcher testified that Sergeant Williams informed him that Lieutenant Clark was

out to get the Grievant. Sergeant Williams also reported to Butcher that he'd heard Sergeant Perry and Lieutenant Clark laughing about who was going to catch the Grievant sleeping. In this regard I note that it was Lieutenant Clark and Sergeant Perry who had observed the Grievant sleeping on duty on December 19, 1985, one of the incidents upon which his 10 day disciplinary layoff in May 1986 rested upon.

Butcher additionally testified that following the 4th Step meeting, corrections officer Razie told him that "we'll get him again".

Corrections officer Michael Taynor testified that while he had "two charges pending", Sergeant Punky told him that they had removed the Union President and if they could remove the Union President they could remove anyone, whereupon Punky "counselled" Taynor to "go with the program".

Corrections Officer David Cousins testified that when he'd been appointed as a third shift Union steward Captain Morse asked him if he was the new president and stated: "Lord I hope you're not like Jimmy Knapp".

The record reveals employee Willie Mondrey was employed as a Corrections Officer II at Orient in

1984. On July 16, 1984, he was found asleep on duty at the Frazier Health Center. In this regard because Corrections Officers are armed while on guard duty away from the facility, such as at health centers and hospitals, and due to the danger to civilians at these institutions, sleeping on duty while on guard duty at such health care institutions is regarded as particularly serious. Prior thereto Mondrey had been found sleeping on duty at the Riverside Hospital on April 16, 1984. For these two incidents Mondrey received a 5 day disciplinary layoff effective January 13, 1985.

Thereafter, four other incidents of neglect of duty arose. Thus on June 18, 1985, Mondrey was AWOL; on July 15, 1985, he was found to have committed a security breach, unrelated to sleeping on duty; on September 28, 1985, he was sleeping on duty at OSU Hospital: and on November 26, 1985, he was AWOL. These actions resulted in hisdemotion to Corrections Officer I on December 8, 1985.

Thereafter on April 22, 1986, Mondrey was found asleep in "disciplinary control", an area of the facility where inmates are placed for disciplinary reasons. He received a 15 day disciplinary layoff, effective June 9, 1986.

Orient Correction Institution employee Michael Mayle is employed as a Corrections Officer II. Mayle was found sleeping on duty at University Hospital on May 12, 1982, for which he received a 5 day disciplinary layoff. It appears that prior thereto he had received a written reprimand and a 3 day disciplinary layoff for reasons undisclosed. Thereafter on April 20, 1983, he was found to have committed a security breach, which breach included being "inattentive", while on hospital duty. For this Mayle received a 5 day disciplinary layoff.

Other matters of note concern certain testimony of OCI Superintendent Stickrath. Thus it was Stickrath's testimony that he had recommended the Grievant's removal based upon Sergeant Fletcher's written account of August 7, 1986, events; the Grievant's past disciplinary record over the eight months preceding August 7th; the seriousness of the August 7th incident; the proximity of the prior discipline, thereby manifesting a pattern of neglect of duty; and hearing officer Shipley's recommendation of removal. Stickrath regarded the August 7th incident as serious because in his view it posed a threat to the Grievant's safety and the safety of others, including inmates as well as other facility per-

sonnel in that his sleeping on duty invited a hostage situation. As Stickrath pointed out, all of Orient's inmates are convicted felons and therefore potentially dangerous. It was Stickrath's testimony that the newly promulgated rules were not the basis for the Grievant's discipline.

It was Stickrath's testimony that in determining to impose but a 10 day disciplinary layoff on the Grievant for his pre-August 7th infractions he took into account as a "mitigating circumstance" the rather lengthy period of time taken by management to impose discipline. In this regard, Stickrath testified in effect that OCI had an unenviable backlog of disciplinary cases and that because of such, the length of time elapsing between the Grievant's infraction in August and the imposition of discipline in November, was not unusual. In this regard Stickrath indicated that upon the closure of the Columbus Correction Institution (CCI), Orient, which apparently inherited much of the CCI inmate population, was from August 1984 until August 1985, "operating two institutions with one staff."

Finally it is noted that Stickrath conceded being aware of the Grievant's letters-to-the-politicians campaign (noted above) prior to the 4th Step meeting on

the instant grievance. Stickrath participated in management's 4th Step decision to reduce the Grievant's removal to a conditional 30 day disciplinary suspension.

Stickrath additionally testified that management and the Grievant, in his capacity as a Union officer, had a "favorable relationship," and that he had no desire to replace the Grievant as the Union's chief representative.

IV. THE ISSUE:

The Union perceives the issue to be:

1. Did the Employer violate Section 24.01 of the Agreement between the parties? If so, what shall the remedy be?

2. Did the Employer violate Section 2.02, 24.02, 24.03, 24.05 or 43.03 of the Agreement between the parties or Sections 4117.11 (A) (a), (2) or (3) of the Revised Code? If so, what shall the remedy be?

The Department perceives the issue to be:

Was the Grievant disciplined for just cause, and if not, what is the appropriate remedy?

In my view the parties are essentially in agreement as to the central issue in the case. As a discipline case, and in light of the just cause standard of Section 24.01, the issue is as stated by the Employer.

V. DISCUSSION AND OPINION:

First addressed are what, for the sake of a convenient description, I shall characterize as the Union's "procedural flaws" contentions, which flaws, contends the Union, warrant the setting aside of the discipline imposed here. Thus the Union contends that the Department has violated Section 24.02 of the parties' Agreement in two ways. First, asserts the Union, the Department failed to adhere to the four step progressive discipline scheme therein set forth. In my view this contention must fail. The parties in this Section have provided that "disciplinary action shall be commensurate with the offense," followed by the provision that "disciplinary action shall include ....verbal reprimand....written reprimand....suspension termination." In the absence,as here, of any negotiation's history to the contrary, in my view these provisions read together merely require that disciplinary action must take the form of the disciplinary actions therein enumerated, and any one of them may be that discipline which is "commensurate with the offense" at hand. Put another way, absent evidence to the contrary, Section 24.02 does not require the imposition of first a verbal reprimand, next a written reprimand, etc. irregardless of the nature of the offense; to the contrary,

for example in certain circumstances outright termination might well be the disciplinary action "commensurate with the offense". Second, the Union contends that the Department was dilatory in its imposition of discipline, and therefore in violation of the Section's mandate that "disciplinary action shall be initiated as soon as reasonably possible....". The Union also obviously relies on this Section's admonition to panel arbitrators, namely, that the latter, in "....deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process." It is readily apparent that these provisions, among others, were intended to secure for employees a certain measure of "due process" in disciplinary cases, and in particular to safeguard for employees the opportunity to marshall in a timely fashion evidence to defend allegations of improper conduct which results in discipline. In applying these provisions to the circumstances present here I believe it's important to note that the discipline imposed here was based upon an incident arising shortly after the effective date of the parties' Agreement and at a time preceding the implementation of "new work rules" as referred to in Section 43.02, which rules, since implemented, provide very specific guidelines for the imposition of discipline. The point to be made, therefore, is that the Department was required to act within a con-

text and time frame marked by uncertainty concerning the impact of the parties' only recently negotiated Agreement. In my view these circumstances warrant a greater measure of leeway in implementing the "as soon as reasonably possible" contractual standard than would be the case later in the parties contractual relationship, and at least to the extent that such leeway does not significantly impinge upon the underlying contractual purposes of this standard, which, as just noted, is the preservation of evidence and the ability of the employee to defend himself. Additionally, this conclusion is bolstered by the uncontradicted testimony of Superintendent Stickrath to the effect that in the near past OCI had experienced an unenviable backlog of discipline cases from which it's fair to infer that employees would have come to expect some delays in the imposition of discipline. The issue thus comes down to whether or not it can be said that the lapse of time between the event in question, August 7th, and the final imposition of discipline, November 5th, impaired the Grievant's ability to defend himself against the sleeping on-duty-on August 7th allegation which triggered the discipline under scrutiny here. In my judgment the record fails to support a conclusion that this lapse in time

impaired the Grievant's defense. Thus I note that on the very day following the August 7th incident the Grievant was confronted with Fletcher's sleeping-on-duty "write up" which the record reflects formed the basis of his discipline. And by that time, August 8, 1986, the State Personnel Board of Review's Order upholding the Grievant's previous discipline for sleeping-on-duty had issued. Small wonder then that as the Grievant in effect conceded, upon receipt of the write up, he expected discipline would follow. But this early-on awareness of the likelihood of discipline serves to undermine any contention that the Grievant's opportunities and abilities to defend himself were eroded by the lapse of time involved here. Moreover, suffice it to say that in light of the yeoman's job done by the Union to defend the Grievant, it cannot be found that the Grievant's ability to defend himself was impaired by the lapse of time between the event for which he was disciplined and the actual imposition of discipline. There is no evidence whatsoever that the Union encountered difficulty, based on the lapse of time, in marshalling evidence for the Grievant's defense. Hence, no violation of Section 24.02 is found.

Next addressed is the Union's contention that the Department violated Section 24.03 - Supervisory Intimidation. Simply put this provision precludes a supervisor from holding over the head of an employee, as the sword of Damocles, his knowledge of an event which may give rise to the imposition of discipline. The Union supports its contention in this regard with the Grievant's subjective assertion that he was "worried" by the pending possibility of discipline and that following the first disciplinary hearing, officer Shipley asserted that she would send her recommendations on up, so that he "thought that was it." In my view, this evidence is not persuasive of the Union's contention. Thus, understandably, the Grievant was worried, who in his position would not be, and it was simply unrealistic of the Grievant, in light of the recent confirmation by the State Personnel Board of Review of his prior discipline for sleeping-on-duty, that Shipley's "recommendations" would mark the end of the matter.

It appears that the Union additionally relies on the appearance of Sergeant Fletcher, [5] who purportedly observed the Grievant sleeping-on-duty, at the Labor

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5) The significance of Fletcher's appearance at the meeting was not specifically articulated by the Union.

Management Meeting of November 5, 1990, as an instance of harassment or intimidation as those terms are contemplated in Section 24.03. In light of: Fletcher's uncontradicted explanation that she was present merely in her capacity as an EEO Officer; the frequency and commonplaceness of the appointment of women to such positions: and the lack of any animosity between Fletcher and the Grievant, there simply is no sound basis upon which to conclude that Fletcher's presence was simply designed to harass or intimidate the Grievant. In light of the foregoing therefore, no violation of Section 24.03 is found.

Next addressed is the Union's contention that the Department has violated Section 24.05's proscription that "the Employer will not impose discipline in the presence of other employees....except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others." The evidence here, from both parties, establishes that, technically at least, this proscription was not honored in that Captain Stokes delivered the Grievant's "Order of Removal" in the presence of "other employees". And to be sure there was no "serious, immediate threat to the

safety, health or well-being of others," which justified his doing so. Nonetheless it is clear that Stokes made no effort whatsoever to humiliate the Grievant. Rather it appears that Stokes was simply unaware or insensitive to the requirements of Section 24.05 in this regard. Given the Grievant's stature as Union President, it was a particularly unfortunate insensitivity. Nonetheless the Grievant makes no claim that he was publicly humiliated by Stoke's method of delivery . In these circumstances, setting aside the Grievant's discipline, or even modification thereof, is simply not warranted for so minor an infraction. Moreover, in these early days of this the parties first contract it is to be expected that employees and supervisors alike will make some minor mistakes in administering and complying with the contract's many and complex provisions. In my judgment the parties long term relationship can only be unnecessarily jeopardized if each and every such minor infraction is rigorously enforced as a serious contract violation. In these early days under their first contract, some leeway is called for. In my judgment, Deputy Director Seidler's direction in his fourth Step answer that Captain Stokes "....be instructed to communicate such sensitive matters as notifications of disciplinary action in some private area...." is all that is called for here.

Next considered is the Union's contention that the Department has violated Section 43.03 - Work Rules. In this regard the Union contends, correctly, that Superintendent Stickrath's and Director Seiter's Order of Removal recites that the reason for the Grievant's removal is that he'd been found guilty of "....violation of Department....rule 5: Sleeping on duty ...." But, argues the Union, the Rules were not in effect at the time of the Grievant's alleged sleeping-on-duty, with the result that it is manifestly unfair to hold the Grievant to the Rules Standard. Were this all that were involved one would have to say that the Union makes a valid point and that such a breach of fundamental due process would warrant some modifications, indeed perhaps recission, of the Grievant's discipline. Such is not the case, however, in that the Order of Removal also recites that the Grievant is guilty of "....neglect of duty in accordance with (O.R.C.) Section 124.34." In my view, since the Rules went into effect before the imposition of the penalty here, albeit after the occurrence of the incident for which discipline was imposed, uncertainty existed as to the relevance of the Rules and hence I find it highly probable that Stickrath and Seiter were simply exercising bureaucratic caution in citing the then existing Rules in addition to O.R.C.

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124.34, lest it subsequently/found that their failure to do so was fatal to their case against the Grievant. In these circumstances there is no reason to doubt Superintendent Stickrath's assertion to the effect that the Department, in removing the Grievant, was not relying on Rule 5, albeit the Order specifically so states. Hence no violation of Section 43.03 is found.

Next addressed is the Union's contention that O.R.C. Sections 4117.11 (A) (1), (2) and/or (3), which are subsumed in the contract, in particular by virtue of Section 43.02 - Preservation of Benefits, have been violated. In my view this contention is inextiricably intertwined with the Union's contention that the Grievant was discriminatorily removed (and following the processing of his grievance, disciplined) i.e. removed/disciplined because of his Union activities, and hence these allegations will be touched upon subsequently, when the discriminatory allegations are considered. To the extent, however, that the Union seeks to have me find independent contractual violations based on the alleged violation of certain O.R.C. Sections, assumed for the sake of analysis only, to be subsumed by the contract, such is in my view beyond the scope of my jurisdiction.

Thus the focus of the grievance and this arbitration is whether the Grievant was disciplined for just cause, and not whether the Grievant, or other employees, were on various occasions interfered with, restrained or coerced in the exercise of their rights guaranteed in O.R.C. 4117, albeit such conduct, if established might well shed light on the motivation behind management's discipline of the Grievant. So it is that I find that any independent finding that the contract as a whole, or in particular Section 43.02, has been violated by virtue of violations of O.R.C. 4117, to be beyond the scope of the instant grievance, and this being so, I have no jurisdiction to make such determinations. Accordingly the issue of whether or not O.R.C. 4117.11(A) (1), (2), and (3) are subsumed within the contract, cannot, and is not, reached here.

Next addressed is the Union's "double jeopardy" contention. In arbitration, under the rubric of "double jeopardy," it has been held that once discipline has been imposed and accepted it cannot thereafter be increased. Such is clearly not involved here however. Additionally, "....the double jeopardy concept (or something akin thereto) also has been held applicable where management unduly delays the assessment or enforcement of discipline".[6]

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6) See: How Arbitration Works, Elkouri & Elkouri, 4th Edition, 1985, BNA Books, Inc., Washington, D.C., p. 677.

It appears that it was this sense of the concept which Union Steward Eddington urged at the second pre-disciplinary hearing. For the reasons noted above, however, I find no "undue delay" here and hence I find the "double jeopardy" defense to be without merit.

Having discussed what I have characterized as the "procedural flaw" arguments of the Union, I turn now to the merits of the case to determine whether in fact the Grievant was sleeping-on-the-job.

Invariably arbitration cases involving allegations of sleeping on the job center around the various indicia of the lack of consciousness known as sleeping. There is no magic number of indicia required to tip the scales in favor of finding, or not finding, the state of sleep.

Here the Union relies heavily on collateral matters to collaterally attack the credibility of Sergeant Fletcher, the Grievant's accuser. Thus the Union introduced evidence that at the time frames testified to by Fletcher there virtually always was a minimum of 15 inmates present in the T.V. room watching the 20 minute workout, whereas Fletcher described only 4 or 5 being present. In this regard, however, the Union's attack rises or falls on the precise accuracy of the

time frame both Fletcher and other witnesses ascribed to events, namely, 6:00 a.m. But a witness's estimate of time can seldom be taken as without inaccuracies. This is especially so where, as here, no one so much as claimed that they had checked their watches or a clock. As ALJ Daugherty observed in the Grievant's December 19, 1985, case before her: "there are no consistent times offered by any of the witnesses." In sum therefore I am not particularly impressed by the discrepencies between the number of inmates present, or normally present, at 6:00 a.m., as described by various of the witnesses, and Fletcher's account. In my view its more reasonable to assume that Fletcher, not surprisingly, misjudged, the precise time and likely arrived very shortly before 6:00 a.m. and that sometime while there in the T.V. room the 20 minute workout came on and was playing. Moreover, even assuming that Fletcher was mistaken about the number of inmates present when she arrived, such does not collaterally destroy her credibility since it is clear from her testimony that from the moment she entered the T.V. room, the Grievant, seated at the officer's desk, was the focus of her attention, and not the inmates.

Another collateral attack consisted of building a portrait of a Grievant so busy and in such a noisy environment as to preclude any sleeping on duty. The

difficulty with this attack is that Fletcher never claimed that the Grievant's sleeping-on-duty ever exceeded 3 to 5 minutes. Allowing as again, her estimate of time was likely longer than reality, given the notorious inaccuracy of accounts of time not checked against a watch or clock, Fletcher's accusation of but a brief loss of consciousness by the Grievant to sleep is simply not ruled out by the routine din described by the Union's witnesses.

Juxtaposing Fletcher's account of events around 6:00 a.m. on August 7th, 1986, with that of the Grievant's, I find the Grievant's account to be considerably strained. In particular I find it highly unlikely that the Grievant would have observed Fletcher approaching the 5E building and yet sat down at the officer's desk again. This is especially so in light of the fact that, as the Grievant does not contest, when Fletcher did get his attention, he came to his feet. He did so of course because employees in the presence of supervisors desire to leave an impression of busyness and not one of idling, as sitting at a desk could well convey. Then too there is the Grievant's incredulous explanation that his position in the chair was simply attributable to his typical poor posture while sitting,

when in fact something at least similar to the Grievant's position was so readily and convincingly explainable by the chair's disrepair and the necessity to therefore sit in it somewhat peculiarly. In my view these matters serve to seriously undermine the Grievant's credibility. Couple with this the lack of any evidence of any animosity harbored by Fletcher for the Grievant: the lack of any evidence that she was aware of the Grievant's prior problems with sleeping-on-duty; the seriousness of sleeping-on-duty and therefore allegations thereof; and the unpersuasiveness of the Union's collateral attacks on Fletcher's crediblity, I am constrained to credit her account. In my view Fletcher described sufficient indicia of lack of consciousness to satisfy me that indeed the Grievant nodded off and was asleep at the time Fletcher observed him from but four feet away. His posture; his closed eyes; his failure to respond to his name stated in a normal tone of voice; and his being startled upon being aroused, are all valid indicia of the state of sleep. And the fact that other indicia of sleep, such as snoring and disorientation were not also described by Fletcher does not serve to diminish this conclusion. The fact that all was in order, however, does indicate that the Grievant merely nodded off and did not deliberately set

out to sleep on duty. This same evidence also indicates that the Grievant was not asleep for long.

But was the discipline meted out to others for similar offenses so much less than that meted out to the Grievant as to make out a case of disparate treatment? In this regard only the cases of correction officers Mondrey and Mayle can be relied upon, for references to still others were simply too lacking in detail to base any finding of disparate treatment thereon. Directly to the point, I believe that Mondrey and Mayle's cases are sufficiently different and distinguishable from the Grievant's to warrant the conclusion that they cannot form the basis of any disparate treatment contention. Thus Mondrey's discipline and fate resulted from an admixture of offenses, not confined, as were the Grievant's offenses, to sleeping and/or inattentiveness to duty. Moreover, as Superintendent Stickrath pointed out, Mondrey was demoted - indeed a severe form of discipline. As for Mayle, the fact is that practically a year had elapsed between his offenses, whereas the Grievant's offenses, four in number, followed one upon another within less than a year. This repetitious recidivism characteristic serves to readily distinguish the Grievant's case from that of Mayle, and indeed of Mondrey.

Accordingly, I find no disparate treatment of the Grievant.

There remains for consideration the allegation that the Grievant's removal, subsequently reduced to a conditional disciplinary layoff, was motivated by anti-union considerations, and therefore discriminatory and accordingly violative of the just cause standard of Section 24.01 and the discrimination proscriptions of Section 2.02.

In this regard, agencies such as the NLRB, charged with determining whether anti-union motivations underlie adverse action against employees, invariably look for what they regard are indicators of discriminatory motivation. Among these indicators are expressions of Union hostility by supervisors; inquiries or statements by supervisors of employees designed to feel out an employee's Union sympathies or designed to discourage pro-union symnathies; and the timing of the adverse action taken. With respect to the conduct of supervisors, as noted above, such conduct attributed to the supervisor or supervisors directly involved in the adverse action is particularly indicative of a discriminatory motive. And of course the victim must be known to be a Union adherent and/or activist.

In the instant case many of these indicators are either present or arguably present. Thus it is clear that the Grievant had a high profile as a Union activist. Additionally, considerable hearsay evidence portraying Sergeants Bunky, Captain Morse, Lieutenant Clark, Sergeant Williams and Sergeant Berry, as harboring anti-union sentiments in general or for the Grievant in particular, was elicited. The difficulty, however, with this evidence is that it is hearsay and in my view, as such, can not be relied upon to support so serious an allegation as discriminatory treatment. Other allegations, such as favorable treatment and/or management's overlooking the transgressions of SWAT team members or members of "the clique" are simply too vague to make a finding of discriminatory motivation.

Two exceptions to the above observations are Lieutenant Clark's advice to the Grievant in late 1985 that the Grievant become a Sergeant, since Union activists would be going nowhere, and Sergeant Bundy's arguable implication to Corrections Officer Taynor that he ought to back off Union sympathy and "go with the program". The difficulty with reliance on these incidents, however, is that neither Clark nor Bundy were involved with the discipline imposed for the August 7th incident. Further-

more, Clark's sentiments were very stale as of August 7th.

Additionally, in support of its discriminatory treatment alleration the Union relies on the purported extra surveillance of the Grievant's activities while on duty. An insurmountable difficulty with such reliance, however, are the Grievant's evaluations both before and after his Union activism suggesting that he "needs frequent checking". This fact furnishes a perfectly legitimate basis for frequent checks of the Grievant, thereby undermining any inference that such extra surveillance (assuming for the sake of analysis to have in fact been undertaken) was discriminatorily motivated. Then too there is the repetition of the Grievant's misconduct in rather rapid succession, which also furnishes a legitimate basis for singling out the Grievant for extra checking-up on.

And of particular significance is the fact that all of the discipline imposed on the Grievant is grounded on a legitimate reason, sleeping-on-duty or being inattentive-on-duty, such that any discriminatory motive would have to be but a partial motivation.

In my judgment close scrutiny of the above matters fails to persuade me that the Grievant's discipline was discriminatorily motivated i.e. motivated

by anti-union considerations. Hence no violation of Section 2.02 is found.

The case thus comes down to whether or not the discipline imposed, a thirty day disciplinary suspension with the proviso "....that any future instances of neglect of duty will result in immediate dismissal" is appropriate.

In this regard there can be no question but that sleeping-on-duty is a serious offense for a corrections officer . As the Department points out, such threatens the safety of both the officer involved and others, and indeed the inmates, if a hostage situation were to arise. At the same time OCI has been somewhat sanguine about the offense and not dealt with it particularly harshly up to the time in question here, August 7th, 1986. Nonetheless a distinguishing feature of the Grievant's case is the close-in-time repitition of the offense. This factor undermines ones confidence that the Grievant is able to control his problem of sleeping-on-duty. Especially distressing is the fact that the Grievant's August 7th offense followed only two days after the Personnel Board upheld his prior discipline for his sleeping-on-duty and followed only about three weeks after an ALJ had sustained in part his prior discipline, two events which had to have impressed the

Grievant the seriousness of his sleeping-on-duty problem. In my view these factors fully support the length of the disciplinary lay off, thirty days, imposed by the Department. Other factors and considerations, however, undercut the validity of the "proviso" to the Grievant's disciplinary layoff. One weakness of the proviso is that it is not restricted as to time, so that presumably a neglect of duty offense quite some time from now would nonetheless warrant immediate discharge. Such a result is "too harsh" in the circumstances presented here. Another weakness in the proviso is that any and every "neglect of duty", whether or not related to the Grievant's specific, and to date only, work related problem of sleeping-on-duty, would warrant immediate dismissal. Such a sweeping standard is simply unwarranted in the circumstances present here. Thus, except for this particular problem of sleeping, the Grievant's record from his date of hire is otherwise unblemished. Moreover, in the past, such as with officers Hendrey and Mayle, a "mix" of different offenses has nonetheless not resulted in a "last chance" disciplinary layoff such as the proviso imposes here. Then too this last instance on August 7th was a "nodding off" and not a deliberate plan to sleep on duty. Accord-

inely, the "proviso" to the Grievant's disciplinary layoff is rescinded. Let the Grievant be cautioned, however, that the recission of the "proviso" does not serve to insulate him from proper discharge for yet another sleeping-on-duty offense or other "neglect of duty" offense, but rather merely restores the contractual standard of "just cause", which may or may not be transgressed by discharge for such conduct, depending on all the facts and circumstances then prevailing.

VI. AWARD

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. The Grievant's thirty day disciplinary layoff without pay for sleeping on duty is sustained; the proviso to his disciplinary layoff is rescinded, and the Grievant's records will so reflect this recission.

Because of the technical violation of Section 25.04, which is matter inextricably intertwined with the Grievant's discipline, and hence within the scope of the instant grievance, the Department is directed to

instruct Captain Stokes to communicate such sensitive matters as notifications of disciplinary action in some private place because the Agreement so requires.

DATED: 12/4/86

Frank A. Keenan

FRANK A. KEENAN
PANEL ARBITRATOR