ARBITRATION AWARD SUMMARY

OCB Award No: 86

OCB Grievance No: 86-1013

Union: AFSCME

Department: Rehab & Corrections

Arbitrator: Nyman Cohen

Award Date: 8/8/84

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

LIMA CORRECTIONAL INSTITUTION
DEPARTMENT OF REHABILITATION
AND CORRECTION

-and-

ARBITRATOR'S OPINION

OCSEA/AFSCME, Local 11
Grievant: JOHN E. WRIGHT

FOR THE STATE:

JOSEPH B. SHAVER
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FOR THE UNION:

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DATE OF THE HEARING:

MAY 14, 1987

PLACE OF THE HEARING:

Office of Collective Bargaining
State of Ohio
375 South High Street
Columbus, Ohio

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
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The hearing was held on May 14, 1987 at the Office of Collective Bargaining, State of Ohio, 375 South High Street, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 10:15 a.m. and was concluded at 3:05 p.m. Post-hearing briefs were submitted on May 27, 1987.

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JOHN E. WRIGHT was removed from the position of correction officer 2 on September 4, 1986 for "neglect of duty--sleeping on duty". He filed a grievance with **LIMA CORRECTIONAL INSTITUTION, DEPARTMENT OF REHABILITATION AND CORRECTION, STATE OF OHIO,** the "**Department**" in which he claims that his removal was "unjust and not warranted". The grievance was denied at the various steps of the grievance procedure set forth in Section 25.07 of the Agreement between the Department and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO,** the "**Union**".

Since the grievance was not resolved between the parties, the dispute was carried to arbitration.

FACTUAL DISCUSSION

The Grievant is employed as a correction officer 2 at the LIMA CORRECTIONAL INSTITUTION located in Lima, Ohio. At the time that he was discharged he was working the third shift which begins at 11:00 p.m. and ends at 7:00 a.m. Various responsibilities of third shift correction officers were set forth during the hearing and are as follows: They report to work ten minutes to eleven p.m. [10:50 p.m.]; they are to report to the lock assignment and they are required to read the "post orders"; they are required to conduct five (5) counts, which take place at 11:00 p.m., 12:30 a.m., 2:30 a.m., 4:00 a.m. and 5:00 a.m.; they are required to call control every half hour; they are

required to be alert and hold "shake downs on locks"; they are to see to it that all lock equipment is secured; they are to keep the lock clean and to make sure that the inmates are bedded down at 11:30 p.m.; they are to see to it that the day room is secured and that smoking is prohibited after the lights are out; they are to make certain that the inmates are safe and there are no rule violations or attacks that take place.

The events that gave rise to the discharge of the Grievant occurred on August 7, 1986. Harold R. Fisher, is a correction supervisor 2 at the LIMA CORRECTIONAL INSTITUTION and the Grievant was employed under his "charge". On August 7, 1986 at aproximately 1:15 a.m. Fisher was engaged in making his routine lock rounds. When he entered the downstairs lock, he noticed that the Grievant was not at his desk which is located in the hallway. Fisher thought that the Grievant was making his rounds. Fisher proceeded to check the annexes, the side rooms and the main dormitory. He also checked the rest rooms. However he could not find the Grievant.

Fisher then proceeded to the day room where he noticed that the television which was located in front of the west wall of the day room was turned on. The lights were out in the day room. The Grievant was seated in a chair in front of the television. He was about six (6) feet from the television. Fisher went on to state that the Grievant was seated with his head tilted back against the top and

back of the chair. Fisher proceeded to walk in front of the Grievant where he positioned himself. There was sufficient light from the television to see the Grievant's face. Fisher observed that the Grievant's eyes were closed. He stood in front of the Grievant for a few moments and according to Fisher, the Grievant did not respond to his presence. He then called, in a firm voice, the Grievant's first name, twice, "to get him to respond". By Fisher's account, the Grievant raised his head, looked at his watch, stood up and said that "he must have dozed off". When Fisher asked the Grievant whether he was sleeping on duty, the Grievant responded by stating that "it was an accident". Fisher then expressed to the Grievant the seriousness of sleeping on duty. He then referred to the things that could possibly happen to him, such as, affording inmates on the lock the opportunity to seize him and get his uniform, keys, identification badge and that the inmates could gain control of the lock. Fisher told the Grievant that he should be happy that he was alive. He went on to say that he would make a report of the incident. Fisher asked if he [the Grievant] would be all right for the rest of the shift. He also told him that if he gets tired, he was to call the office and "we would get relief and he could take a walk."

Fisher indicated that the sound of the television was low and he could not hear it, when he was in the hall. He also stated that at the time of the incident there was no specific policy on whether

lights were required to be on or off in the day room. Fisher stated that since the Grievant was facing the television there was sufficient light to see the Grievant's face. He indicated that he could state with certainty that the Grievant's eyes were closed.

The Grievant testified about the episode giving rise to his discharge. He said that he was sitting on a chair in the day room with his head tilted back and he was fighting to stay awake and he nodded his head while watching television.

On August 28, 1986, Richard P. Seiter, Director of the Department, issued an order of removal to the Grievant in which the Grievant was notified that he was to be removed from the position of correction officer 2, effective Sepember 4, 1986 for the reason that he has been found guilty of "neglect of duty--sleeping on duty". The order states on or about August 7, 1986 the Grievant "was observed by Lt. Fisher to be asleep while sitting in a chair in the day room of 6 Dorm. of the LIMA CORRECTIONAL INSTITUTION. The lights were out and the television set was on. During the pre-disciplinary conference on August 21, 1986 the Grievant admitted to being asleep. This act proposed a direct threat to the security of the institution". The order of removal also indicated the following:

> "Previous discipline includes a 3-day suspension eff. 9/23/85 for sleeping and a 10-day suspension eff. 5/12/86

for failing to call in a scheduled count
and not being alert while on duty".

In light of this outline of events the instant grievance was filed with the Department.

DISCUSSION

After carefully examining the evidence in the record, I have concluded that the Grievant was asleep on his lock on August 7, 1986. I am persuaded by Fisher's testimony that while standing in front of the Grievant for a few moments, the Grievant did not respond to his presence. It was only after Fisher called his name twice, in a firm voice, did the Grievant raise his head, look at his watch and state that he "must have dozed off". When Fisher asked the Grievant why he was sleeping on duty, the Grievant replied that "it was an accident". Sleeping or dozing is not accidental. Indeed, a person is always given conscious warnings of drowsiness and if a person does not heed such warnings, it results in the suspension of consciousness.

The Grievant admitted that he accidentally dozed off but he was not out. He distinguished between dozing which he said was "fighting sleep" and sleeping which he referred to as a condition of being "totally out". As I have indicated, for a few moments, the Grievant did not respond to Fisher's presence in front of him. Moreover, under the circumstances of August 7, 1986, I find that whether he was dozing or sleeping, to be a distinction without a difference.

It is true that he did not place several chairs together and lay down. Moreover, there was no Department policy on whether the lights in the day room were required to be on or off. However, he was sitting back in a chair with his head tilted back in the day room where the lights were off. The Grievant's eyes were closed and the sound of the television was so low that Fisher, while he was in the hall, could not hear any sound coming from it. The Grievant indicated that he thought "the glare" would "help me stay awake". Had he put the lights on in the day room, it would have been more useful than "the glare" of a television, in keeping him awake. Furthermore, it is significant that the Grievant referred to the "glare", rather than the sound of the television to keep him awake. Had he turned up the volume of the television, it would have been more effective in keeping him awake. Since the day room lights were off and the room dark except for the glare from the televison which was turned down, the conditions were suitable for sleeping while remaining inconspicuous.

A "Man-Down alarm" with a "1-way transmitter to control" is worn on the belt of a correction officer. If the alarm is in a prone position, a signal is activated and officers are dispatched to the lock since it is "assumed that the officer is down". Fisher said that he had heard about correction officers removing the battery of the alarm. He indicated that he did not check to see if there was a battery in the Grievant's "Man-Down alarm". The Grievant said that during the

events in question on August 7, Fisher asked him if he had a battery in his "Man-Down" to which he gave an affirmative reply.

In any event, I have concluded that the Grievant acted deliberately in falling asleep in a chair in a dark room with the television turned down low. As Fisher indicated, correction officers go to the day room to perform a security check. He added that after the lock is down and the inmates are asleep, there is no reason for the television to be turned on in the day room. Fisher went on to state that the correction officer's post is at the desk in the hall and not in the day room. The evidence warrants the inference that the Grievant deliberately went to the day room for the purpose of sleeping in a chair.

Fisher testified that if a correction officer gets tired he could call the office and request relief. He indicated that the correction officer could take a walk or get coffee, soda and sandwiches from the vending machine. It is undisputed that the Grievant has called the office on one (1) or two (2) occasions for relief because he was tired. On the occasion in question he failed to do so.

The Union contends that the weather was warm on the night of August 6. As a result, the droning of the fans which provides circulation in the cell block contributed to the Grievant's fatigue. The Grievant did not recall the weather on the night in question. He stated, however, that the "fans were on in the shower room"--and

"whenever the fans are on it is hot". The Grievant indicated that the fans make a loud noise so that "you cannot hear yourself talk". He went on to state that it "can cover the sound of footsteps down the hall". After carefully examining the Grievant's testimony, I find nothing to indicate that "the droning" or sound of the fans contributed to the Grievant's fatigue on the night of August 7.

In fact, the Grievant disclosed why he was tired. He said that he had trouble sleeping during the day after working the third shift. He "was not used to it". The Grievant testified that his wife was going to school during the day and he had to watch their daughter. When he arrived at home at about 7:15 to 7:20 a.m., he would drive his wife to school and he would pick her up at 1:00 p.m. to 2:00 p.m. Their daughter would accompany them on the trips to and from school. The Grievant indicated that it was best to go to sleep when he first came home from work. By the time he finally got to sleep, after 1:00 p.m. to 2:00 p.m. he "was wide awake". Thus, the reason for the Grievant's fatigue was that he was not getting enough sleep during the day. However, in no way does this serve to justify sleeping on duty in his position as a correction officer.

The Grievant acknowledged that he had "to struggle staying awake on the third shift" and he attempted to work on the first shift but was "denied the opportunity". He indicated that he felt that due to his seniority, he should have been reassigned to the first shift. He

went on to state that employees with less seniority were placed on the first or second shift.

It should be noted that there is nothing in the record to indicate that the Grievant ever filed a grievance over the Department's failure to re-assign him to the first or second shift. Furthermore, the Grievant acknowledged that by choice he was placed on the third shift. He stated that when he was hired, the first shift "was locked up". The Grievant had a choice of selecting the second or third shift but decided to work the third shift.

PAST RECORD

The Grievant joined the Department as a correction officer 2 on February 6, 1984. On July 5, 1984 he was "suspended from duty without pay for one (1) day" for neglect of duty and insubordination for failing to obey an order from a supervisor to supply tobacco to inmates. A few months later, on August 11, 1984, he was suspended again for one (1) day for neglect of duty for conducting a late count and not being alert while on duty. On September 23, 1985 the Grievant was suspended for three (3) consecutive working days for neglect of duty because he was observed slumped in a chair at the officer's desk, asleep. On May 12, 1986, the Grievant was suspended for ten (10) consecutive days for neglect of duty. The circumstances involved his immediate supervisor who observed him "sitting in a chair in the day room with [his] head bent down. The day room was "dark and the

television was on", and the Grievant "did not recognize [his supervisor's] presence on the lock until he approached [the Grievant] in the day room".

The Union claims that the Grievant's honesty which caused him to be suspended for one (1) day on August 11, 1984 should be taken into consideration by the Arbitrator. When the Grievant was asked why his count was late he replied that he had been "dozing". Had he lied, for example, by stating that he had been in the bathroom, under the Department's policy of progressive discipline, the events of August 7, 1986 would have resulted in a ten (10) day suspension. The Union indicates that the August, 1984 episode was the first of the offenses involving inattentiveness and sleeping on duty.

The Grievant's honesty is commendable. However, it does not detract from the seriousness of the offense. I cannot consider the Grievant's honesty as a mitigating factor in this case.

The Union also indicates that "the first 3 suspensions were not subject to the test of just cause"; rather "they were subject to the lower standard of whether the employee's actions were a failure of good behavior".

The Grievant admitted that he "had dozed off" and thus was late in calling for a 5:00 a.m. count, which resulted in the initial suspension for "neglect of duty" and "not being alert while on duty". He also admitted that he "accidentally dozed off" which resulted in

the second suspension for "neglect of duty". The Grievant indicated that the Board of Appeals did not respond to his appeals for the third suspension which he received. In light of the Grievant's admissions to the first two (2) suspensions and his failure to appeal the third suspension, I find it of no weight that the penalties were not subjected to the test of just cause.

The Union contends that the Grievant had been permitted to appeal only one (1) of the previous suspensions for "inattentiveness or sleeping". This was because under the Civil Service Rules in effect prior to the Agreement, suspensions of three (3) days or less were not appealable. The only suspension that the Grievant could have appealed was the ten (10) day suspension. The Grievant said that he sent two (2) letters to the Board of Appeals on his ten (10) day suspension but he never received "a response". It should be noted that the ten (10) day suspension order was issued on May 8, 1986. It is sufficient to state that the arbitration hearing is not the proper forum to address the Grievant's failure to receive a response to the Board of Appeals.

THE KNAPP DECISION

An arbitration decision involving the parties over the thirty (30) day suspension of James Knapp, a correction officer at the Orient Correctional Institution was issued on December 4, 1986. Knapp was found sleeping on duty, on the same date, as the event giving rise to the instant grievance, namely August 7, 1986. The August 7, 1986

sleeping episode was the fourth such offense for Knapp within one (1) year. He had been observed sleeping on August 7, 1986, on December 19, and 30, 1985. These three (3) offenses were merged into one (1) disciplinary action, and the Department suspended him for ten (10) days. After a hearing before Administrative Law Judge Kathleen M. Daugherty, the order of suspension was reduced to five (5) days. However, the State Personnel Board of Review rejected Judge Daugherty's recommended findings and reinstated the ten (10) day suspension.

As a result of Knapp's fourth offense the Department removed him from his position as correction officer. At the fourth step grievance, the Department reduced Knapp's termination to a thirty (30) day suspension. The dispute was then carried to arbitration where the thirty (30) day suspension of Knapp was sustained.

It should be noted that the parties are being governed under their first collective bargaining agreement. Although the Agreement is effective July 1, 1986, it was signed by the parties on August 13, 1986. Three (3) of the sleeping episodes by Knapp occurred prior to the effective date of the Agreement. However, the three (3) episodes were merged into one (1) disciplinary action, which resulted in a ten (10) day suspension. Before the August 7, 1986 sleeping episode, the Grievant committed four (4) offenses, all of which occurred before the Agreement became effective. Unlike the Knapp case, each of the

offenses were treated differently by the Department. Each of the Grievant's offenses for sleeping, prior to the August 7, 1986 incident resulted in the increase of disciplinary penalties, starting with a suspension from duty for "one work day"; the next offense resulted in suspension for three (3) consecutive working days and then he was suspended for "ten consecutive working days". As opposed to the Knapp case, the principle of progressive discipline was carried out by the Department in the instant case. This principle requires that an employer withhold the final penalty of discharge from an errant employee until it has been established that the employee is not likely to respond to a lesser penalty. Granted, that the steps of the progressive discipline policy contained in Section 24.02, which contains four (4) stages beginning with a verbal reprimand, for the first offense, followed by a written reprimand , then suspension and culminating with discharge for the fourth offense, were not followed by the Department. Again, it should be underscored that the Grievant's offenses prior to the August 7, 1986 incident occurred before the effective date of the Agreement. Thus, it is significant to point out that in contrast to Knapp, the Grievant's past offenses, were not merged into one (1) disciplinary action, but became more severe with each offense.

There is another vital difference between the two (2) cases. In the Knapp case, the Department modified the removal order at the

fourth step "* * [B]ecause the Grievant's performance as a correctional officer over the past six years was otherwise good * *." Thus, the Department took into account, Knapp's satisfactory performance over a six (6) year period, which apparently was a weighty mitigating factor. In the instant case, the Grievant was first employed by the Department on February 6, 1984. Roughly four (4) months thereafter, he committed his first offense of neglect of duty and insubordination. In a period of two and one-half (2 1/2) years of employment with the Department, the Grievant committed five (5) offenses, four of which involved "dozing" or sleeping while on duty. I have concluded that the differences between the Knapp case and the instant case are significant. Accordingly, the Department did not discriminate against the Grievant. Its treatment of the Grievant was different than its treatment of Knapp, because, simply, their circumstances were different.

CONCLUSION

There is no question but that safety perils and hazards are heightened at a correctional institution when a correction officer sleeps while on duty. He puts himself at possible risk of violent assault by the very inmates that he is required to watch over and over whom he is required to maintain constant surveillance. If inmates were to get the keys in the Grievant's possession, it could lead to a serious disruption and potential harm to both staff and inmates.

Furthermore, the correction officer is charged with seeing to it that the inmates do not violate the rules within his area of responsibility, and to detect any act of violence and homosexual activity. In addition, if a fire were not quickly detected, it could lead to deplorable and tragic consequences. Clearly, for a correction officer to sleep on duty is an extremely grave offense. The Grievant has committed this offense, not only once, but on four (4) different occasions. As a result, I have concluded that the Department proved by clear and convincing evidence, that the Grievant was discharged for just cause.

THE AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: August 24, 1987
Cuyahoga County
Cleveland, Ohio

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