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FILE

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE OHIO DEPARTMENT OF MENTAL
RETARDATION AND DEVELOPMENTAL DISABILITIES,
Cleveland Developmental Center

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
Local 11, AFSCME, AFL-CIO

GRIEVANCE: Calvin Farrow (Discharge)

CASE NUMBER: G-87-1006 / 24-05-871006-0001-01-04-0

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: November 19, 1987

APPEARANCES

For the Employer

Pat M. Herron	Operations Personnel Director
Marilyn L. Reiner	Labor Relations Coordinator
Dan Exline	Unit Director
Pearlyne Wallace	Hospital Aide Supervisor III
Ingrid Davis	Police Officer I
Michael P. Duco	Labor Relations Specialist
Jack Burgess	Chief, Arbitration Services

For the Union

Calvin Farrow	Grievant
Steven W. Lieber	Staff Representative
John Porter	Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the Ohio Department of Mental Retardation and Developmental Disabilities, Cleveland Developmental Center, hereinafter referred to as the Employer, and the Ohio Civil Service Employee Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986-July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on October 7, 1987 at the office of Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs.

ISSUE

Was Mr. Calvin Farrow's termination for just cause under the Collective Bargaining Agreement? If not, what should the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse." (Joint Exhibit 1, pages 34-35)

Section 24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)

B. Written reprimand;

C. Suspension;

D. Termination.

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

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process." ... (Joint Exhibit 1, page 35)

CASE HISTORY

Calvin Farrow, the Grievant, has been employed as a Hospital Aide at the Cleveland Developmental Center for approximately four (4) years. At the time of the incident in question the Grievant worked the third shift; the shift commences at 11:00 p.m. and

terminates at 7:00 a.m. The responsibilities of a Hospital Aide working the third shift consist of a number of activities dealing with residents' safety and comfort. Some of the activities include: making a thorough inspection of house and residents; follow through with toileting schedule; document behaviors in progress notes; check bedcheck form every half hour; ensure that residents are accounted for and in their proper room; all areas of the house are to be in order and acceptable by third shift (Employer Exhibit 6).

The Cleveland Developmental Center employs approximately two hundred and seventy (270) employees and provides services for approximately one hundred and eighteen (118) patients. The Grievant was assigned to the third floor Phoenix unit at the time of the incident. This unit has a twenty-eight (28) resident capacity level with an equal number of residents assigned to two separate groupings on the unit. Minimum staffing levels on third shift, moreover, have been established as three (3) Hospital Aides.

Dan Exline, the Unit Director for Basic Skills, testified that the resident population on the Phoenix unit require constant supervision because they possess certain behavioral and physical maladies. The majority of these residents are not cognizant of dangerous circumstances because their mental age ranges from eighteen (18) to four (4) years. These residents, moreover, are basically nonverbal, multi-handicapped, and tend to engage in self-abusive behaviors.

Managerial personnel contacted the Grievant on February 4, 1987 and asked if he would accept an overtime assignment on second shift. The Grievant decided to help after he was informed that other attempts to solicit help had failed. As a consequence, the Grievant came to work at approximately 5:00 p.m.

Ingrid Davis, a Police Officer I, testified that a member of the nursing staff lodged a complaint against the Grievant regarding his sleeping on duty tendencies. Davis discussed the allegation with the Grievant prior to the third shifts starting time. She warned the Grievant that she would write the Grievant up if these accusations proved to be accurate.

On February 5, 1987, at approximately 12:10 a.m., Davis, Karen Klaczik, a Police Officer I, and Pearlyne Wallace, a Hospital Aide Supervisor III, conducted rounds on the Phoenix union. Documents (Employer exhibits 1 and 5) introduced at the hearing and the testimony supplied by Davis and Wallace, indicate that the following sequence of events took place on the unit. As these individuals stepped out of the elevator they observed the Grievant reclining in the day room (Employer Exhibit 2). He, more specifically, was sitting on a vinyl-stuffed chair, with his arms folded, legs stretched out, and head in a downward position. Wallace attempted to get the Grievant's attention by calling him by name; the Grievant did not respond. Davis walked around and faced the Grievant and noticed that the Grievant's eyes were closed. Upon observing the Grievant's condition, Davis bent down to eye level and placed her face directly in front of the Grievant's face. Again, Davis failed to obtain any physical or

verbal response. The Grievant eventually awoke when Davis shook his shoulder and responded "I'm awake." Davis reminded the Grievant about their earlier conversation and he noted, "Do what you want to do, I am leaving, I have a stress headache." The Grievant exited the day room and eventually left the facility.

On March 4, 1987, the Employer issued an Order of Removal as a consequence of the above incident. The Order of Removal contained the following particulars:

> ...
>
> The reason for this action is that you have been guilty of Neglect of Duty (Sleeping on Duty) in the following particulars, to wit: On February 5, 1987 at approximately 12:28 a.m. you were observed sleeping while on duty. You were observed by Two (2) (sic) Security Officers and a supervisor. Since March 28, 1986 you have Received a Three (sic) day and Ten (sic) day suspension for Neglect of Duty.
>
> ...
>
> (Joint Exhibit 2, Pg. 1)

On March 22, 1987, the Grievant filed a grievance contesting the above allegations. The Grievance Form contained the following Statement of Facts:

> ...
>
> "Statement of Facts (for example, who? what? when? where? etc:
>
> Addendum to Grievance Form (3-22-87)
>
> On approx. 9-26-86 I received notification of a (10) day suspencion (sic) based on a Progressive Disciplinary Action Policy instated (sic) by G. D. Darling (Supt), that is in Violation of Union Contract superceded former Disciplinary Policy. Grieavance (sic) was filed however (Exhibit B). Through confusion & misinformation it was delayed getting to step III (Exhibit C & D). It is supposed to be pending arbitiction (sic) hearings at this time.
>
> On approx 1-6-87 one grievance was written based on improper staffing assignment (Exhibit E), and a second grievance alledging (sic) harassment and failure to allow union time to me as a Union Steward (Exhibit F) against P Wallace HAS III (my alledged (sic) supervisor). Steps 1 and

2 grievances were held. I was told by G. D. Darling that grievance (1) was unsubstantiated. I was told by D Exline (Unit Director Basic Skills) that Mrs. Wallace was harassing me and she would be counseled. Mrs Wallace informed me that I shouldn't have wrote (sic) her up & that she would "get me". But the aforementioned grievances were held by Administration unit the end of Feb. and when returned they were opened and resealed with answers contrary to what I had been told earlier. Meanwhile Mrs. Wallace continued to harass me, including bringing two security guards with her on rounds to catch me in error on anything. Unfortunately during this holding period on approx. 2-5-87 I inadvertently dosed off for a minute while taking a break. I immediately woke up when security touched me. Usually on 3rd shift in such a situation a warning was all that was given to other staff. However, a hearing was conducted on 2-19-87 (Exhibit G) and I was subsequentially Removed (sic) on 3-19-87 (Exhibit H). I had no prior convictions on any of the disciplines I received suspensions on, however Progressive Discipline was used to expedite removal.

Calvin Farrow HA
Union Steward
Executive Board Member"

(Joint Exhibit 2, Pg. 2)

The Grievance Form also contained the following list of proposed remedies:

"...

Remedy Sought: 1) Grievant be Reinstated (sic) with full Back Pay (sic) 2) Grievant receive Back Pay (sic) for aforementioned 10 day suspencion (sic) 3) That 10 day suspencion (sic) & Removal be removed from grievants Personnel File 4) That all past Disciplnary (sic) Actions Be Void (sic) & not considered in any future Disciplinary actions against grievant 5) That grievant be made whole 6) That management follow the contract & Ohio Revised Code in the future 7) That management Promote Harmony with All Employees in the future

Signature: Calvin Farrow Date: 3-22-87
(Grievant/Union Representative)"

(Joint Exhibit 2, Pg. 2)

The Parties were unable to settle the grievance at the various stages of the grievance procedure, and the Union requested that the matter be taken to arbitration in a letter

dated May 26, 1987 (Joint Exhibit 2, Pgs. 5-6). The grievance is properly before this Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to discharge the Grievant for sleeping on the job. The Employer based its position on the circumstances surrounding the sleeping incident and the Grievant's record in his service with the Employer.

The Employer argued that the record clearly indicated that the Grievant was sleeping on the job the morning of February 5, 1987. Corroborating testimony was provided by Wallace and Davis, which was further supported by a Crime Report (Employer Exhibit 5) authored by Davis, and a Statement (Employer Exhibit 1) written by Wallace the morning of the incident. The evidence and testimony was not contested by the Grievant. He, moreover, stated that he had fallen asleep, although, he felt that the duration did not exceed five minutes.

The Grievant's posture and actions, moreover, indicated that he did not accidently fall asleep. Activities should have been engaged in by the Grievant to offset the onslaught of his drowsiness state. Every possible means should have been employed by the Grievant to ensure that his responsibilities to the patients were fulfilled.

The resident population was placed in a potentially dangerous situation, and thus, the Grievant's behavior was viewed

as extremely abhorrent by the Employer. Phoenix unit residents cannot take care of themselves and require competent and responsible supervision. Supervision that the Grievant cannot obviously provide as evidenced by his behavior.

For a number of reasons, the Employer argued that its removal decision complied with the basic elements of just cause. First, the Employer gave the Grievant forewarning or foreknowledge of the possible and probable consequences of sleeping on the job. Notice was provided via a policy and procedure inservice dealing with a new Corrective Action Policy (Employer Exhibits 3 and 4) which contained the offense in dispute; the warning provided by Davis the day of the incident; and similar counseling provided by Wallace several months prior to the incident in an altercation involving similar circumstances.

Second, the rule dealing with sleeping on the job is manifestly reasonable in light of the service provided the residents in the Phoenix unit. The Employer, again, emphasized the characteristics of the residents and the consequent performance expectations engendered by these unique demands. Staffing levels on third shift were also discussed to support the reasonableness of the rule. The Employer claimed that the staffing levels on the third shift are lower than those on the alternate shifts. A greater level of diligence is, therefore, required when one attends to the needs of residents on the third shift.

Third, with respect to the fair investigation element, the Employer maintained that a concerted effort was engaged in by the Employer to determine whether the Grievant did in fact sleep on the job. Although the majority of the investigation consisted of evidence unearthed by other employees, and the Grievant's own admissions, the Employer contended that its investigation was sufficiently complete and untainted by a predisposed bias toward the Grievant.

Fourth, the Employer maintained that it has applied its sleeping on duty rule (Employer Exhibit 4) even-handedly and without discrimination to all employees. Marilyn L. Reiner, Labor Relations Coordinator, has a number of responsibilities that deal with the equal treatment element. She coordinates the administration of the Agrement (Joint Exhibit 1) for four developmental centers, one of which is the Cleveland Developmental Center. Reiner, moreover, serves as the agency designee at all third step grievance hearings. Reiner noted that she was involved in the formulation of the Corrective Action Policy (Employer Exhibit 4), and that the policy has been consistently applied throughout the Department of Retardation and Developmental Disabilities. With respect to the specific offense of sleeping on duty, she stated that the rule has been consistently applied by the Employer.

The Employer vigorously contested the Union's harassment argument. Wallace testified that she never told the Grievant that she was going to get him. She also noted that on February 5, 1987 she had no reason to believe that the Grievant was

sleeping, and thus, her actions were not engendered by a predisposed negative motivation. Wallace stated that on several occasions she did deny the Grievant union time to investigate and/or write-up grievances. Justification for these denials was based upon the staffing needs on the floor at the time of the requests. Wallace also maintained that these requests occurred when the Grievant had been caught sleeping on the job.

Exline provided additional testimony which allegedly conflicted with the Grievant's harassment claim. Exline, more specifically, challenged a statement contained in the Grievance Form (Joint Exhibit 2, Pg. 2). This statement referred to a statement made by Exline to the Grievant concerning Wallace's harassment of the Grievant. Exline emphasized that he never uttered such a statement. He claimed that he told the Grievant that he would investigate this allegation. If the investigation, moreover, supported the Grievant's charge, he would then take corrective action against Wallace. Exline testified that he did conduct an investigation, and that his finding failed to support the Grievant's accusation.

The Employer argued that Reiner's testimony bolstered its claim that harassment did not play a role in the removal decision. She stated that the Grievant's Union position had no bearing on the removal. She also maintained that at the time of the third step hearing she was not aware that the Grievant was a Union Steward, and that the harassment issue was not raised by the Union at this step of the grievance procedure.

Last, the Employer maintained that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense, and the record of the Grievant in his service with the Employer. Reiner testified that the circumstances surrounding the sleeping incident and Grievant's prior disciplinary record (Joint Exhibit 3) were both considered to be critical facets of the removal decision. Although the Corrective Action Policy (Employer Exhibit 4) provides for a ten (10) - day Suspension or Removal for Sleeping on Duty, Reiner noted that the suspension option was not deemed to be appropriate. Reiner remarked that the Employer places significant weight on any employee's previous discipline record. She referred to a series of verbal and written reprimands, all dealing with neglect of duty matters, issued against the Grievant for the period 1984-1986. The most recent disciplinary action, moreover, dealt with a three day suspension for failing to return from a break (Joint Exhibit 3). Although the documentation was not provided at the hearing, Reiner testified that a ten-day suspension had been issued and served by the Grievant prior to the removal, and that this infraction was also considered at the time of the removal.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant for sleeping on the job. The Union acknowledged that the Grievant was sleeping on duty for a short period of time, but that he did not intentionally fall

asleep. As a consequence, the Union did not challenge the veracity of the sleeping charge, but did contest the propriety of the penalty. In other words, the Union claimed that the penalty was too severe in light of a number of mitigating circumstances.

The Union maintained that the Grievant was a responsible employee and deserved a second chance. Other employees, more specifically, would have denied the sleeping allegation, but the Grievant honestly acknowledged his mistake. The Union also referred to the Grievant's performance record in an attempt to underscore his responsible nature. A series of Employee Performance Evaluation documents (Joint Exhibit 4) was introduced evidencing the Grievant's excellent performance record. The patients, moreover, were not placed in jeopardy because one of the employees was in the area on an approved break, while another employee was sitting in the day room with the Grievant.

The Union argued that the circumstances surrounding the incident increased the likelihood that the Grievant would fall asleep. The Grievant volunteered to work overtime on the second shift the day of the incident. Manpower levels and his starting time, moreover, caused the Grievant to perform eight hours worth of work in six hours. Potential deterioration of the Grievant's physical state was further heightened because the Employer failed to provide a required break between shifts.

Indications of an improved disciplinary record were also offered by the Union as positive factors which should have led to a less severe penalty. The Union noted that the Grievant's record did not contain other sleeping on duty violations.

Although the Grievant did experience some tardiness and absenteeism problems prior to the incident (Joint Exhibit 3), he had diligently improved his record over the past two years.

Periodic clashes involving the Grievant and Wallace concerning the Grievant's Union Steward responsibilities were also discussed by the Union as potential mitigating circumstances (Joint Exhibit 2, Union Exhibits 2 and 3). These clashes, moreover, were viewed by the Union as evidence of anti-union discrimination, and that the Grievant's discharge indirectly resulted from his Union activity.

THE ARBITRATOR'S OPINION AND AWARD

From the testimony and evidence introduced at the hearing it is the opinion of this Arbitrator that the Employer had just cause to remove the Grievant for sleeping on duty. This conclusion is based on an analysis of the various basic elements which constitute just cause, and a determination that proof of anti-union discrimination was not properly supported by the Union.

The record clearly indicates that the Grievant was sleeping on duty on February 5, 1987. Special importance was placed upon the forewarning provided the Grievant concerning the probable consequences associated with this particular brand of disciplinary conduct. The Grievant was fully aware of the consequences based on his review of the Corrective Action Policy (Employer Exhibit 4). At the hearing he read the policy fluently, and under cross examination he expressed his

understanding of the disciplinary grid and the potential penalties attached to sleeping on the job. Thus, the Grievant's alleged lack of understanding during the inservice training (Employer Exhibit 3) is viewed as a guise which clouds his real understanding of this work rule. The notice provided by Davis on February 4, 1987 is also viewed as extremely important by this Arbitrator. Her warning provided the Grievant with additional notice that nursing staff was concerned about his lack of attentiveness and his propensity to sleep on the job. Unfortunately, the Grievant failed to heed Davis' advise and was caught sleeping on duty while working his normal shift.

Activities such as sleeping on duty violate fundamental principles of the employer-employee relationship. Employees in Developmental Centers have responsibilities which exceed those normally attached to positions held in industrial establishments. Those charged with the care, custody and protection of such persons must possess extraordinary patience and self-discipline. Unlike an industrial plant which produces goods, a developmental center provides services to residents with behavioral and physical maladies. Residents on the Phoenix unit require special attention and vigilance because their condition is especially acute. It is evident to this Arbitrator that the Grievant does not possess the qualities necessary to perform the duties required of a Hospital Aide.

Modification of the Employer's penalty can only take place if the Arbitrator determines that the penalty exceeds "the range

of reasonableness" and is unduly severe (Ford Motor Co. and UAW, Opinion A-2, Shulman, 1943).

In this Arbitrator's opinion, the penalty falls within "the range of reasonableness" when one considers the nature of the offense within a clinical environment, and the Grievant's previous work record. The Union, moreover, failed to produce documents supporting its scheduled break period hypothesis. The other mitigating factors proposed by the Union were not viewed as sufficient by the Arbitrator. The Grievant, more specifically, volunteered his services on February 4, 1987. Once this decision was made, he became responsible for his activities while on duty. He could have engaged in a number of activities to reduce his drowsiness, rather, he placed the residents' lives in jeopardy by engaging in derelict and irresponsible behavior.

When an employer produces convincing evidence of misconduct, the burden of proof shifts to the union to prove that anti-union discrimination was the actual reason for the grievant's discipline (Feather-Lite Mfg. Co., 62 LA 305, Williams, 1974; Humko Sheffield Chemical, 66 LA 1261, Ross, 1976). The following combination of elements must normally be present for a union to prove anti-union discrimination: evidence of union activity; lack of good cause for discipline; expressions of antagonism by management; and a nexus between the disciplinary decision and the alleged union activity (Safeway Stores, Inc., 44 LA 889, Block, 1965; Thunderbird Inn, 97 LA 849, Armstrong, 1981; Grand Auto Stores, 54 LA 766, Eaton, 1970). In this Arbitrator's opinion, the evidence and testimony provided by the Union fail to

establish that the removal was based on a desire to discourage Union activity. The Union introduced two Grievance Fact Sheets (Union Exhibits 2 and 3) which evidence that the Grievant was allegedly having difficulty procuring sufficient union time to investigate and process grievances. These grievance, however, were never processed beyond the initial step of the grievance procedure. Thus, this Arbitrator can only conclude that the Union did not deem these grievances as sufficiently meritorious. Exline's testimony indicates that the Grievant's accusations were not disregarded by the Employer. He investigated the Grievant's charges and determined that harassment by Wallace did not take place. If the Grievant was dissatisfied with the outcome of the investigation and/or the Employer's response to his grievances, he should have continued the processing of these grievances. His status as a Union Steward, moreover, provided him with a clear understanding of his rights under the Agreement (Joint Exhibit 1); and he could have availed himself of these rights and obligations.

Obviously, the second element dealing with good cause for discipline has not been established by the Union. The Grievant was asleep and the mitigating circumstances provided by the Union are not deemed to be sufficient to mitigate the removal decision.

In a like fashion, the Union failed to provide specific expressions of antagonism by management. The Grievant, more specifically, did not provide sufficient evidence to substantiate Wallace's intention of "getting him." The validity of this statement was not corroborated by any witnesses. Additional

circumstantial evidence dealing with the turbulent relationship between the Grievant and Wallace was also lacking. Testimony offered by Davis and Wallace, moreover, indicated that Wallace was frequently accompanied on rounds by security officers. Thus, the Grievant's accusation that Wallace was accompanied on February 5, 1987 for the specific purpose of entrapping the Grievant, is also unfounded and unsupported by the evidence.

As the Arbitrator noted, timing is one of the principal tests to determine whether disciplinary action is improperly motivated. This principle is especially important when the disciplinary justification for a removal is found to be weak. In this particular instance, however, the removal decision was not found to be deficient. The Grievant's sleeping behavior, and his previous work record, clearly indicate that removal was justified. Although the filing of the grievance (Union Exhibits 2 and 3) dealing with Union time and the removal decision (Joint Exhibit 2) follow closely in terms of timing, nothing in the record evidences a nexus between these two events. The three-day suspension (Joint Exhibit 3) issued prior to the filing of the two grievances (Union Exhibits 2 and 3), and the other reprimands on the Grievant's record, also minimize an inference of anti-union discrimination. In other words, the Grievant's neglect of duty propensity surfaced before the alleged discrimination, and thus, reduces the veracity of the Union's claim.

AWARD

The grievance is denied and dismissed.

Date: November 19, 1987

Dr. David M. Pincus
Arbitrator
SS # 276-46-4879