IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION

LOCAL NO. 11, AFSCME AFL-CIO

EUGENE DIXON, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-87-1164, Eugene Dixon

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Mental Retardation and Developmental Disabilities, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was held at the Office of the Union on November 4, 1987. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:

Michael P. Duco
Office of Collective Bargaining

For the Union:

Carol L. Bowshier
Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Did the Department of Mental Retardation and Developmental Disabilities terminate Mr. Eugene Dixon for just cause?
>
> If not, what shall the remedy be?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 4117.08(C), Ohio Revised Code.

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

* * *

(2) Direct, supervise, evaluate, or hire employees:

* * *

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

(8) Effectively manage the work force. . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, soley and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(C) numbers 1-9.

* * *

ARTICLE 24 - DISCIPLINE

§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.

§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.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situation which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

FACTUAL BACKGROUND

Eugene Dixon was employed at the Columbus Developmental Center for approximately one year and eleven months as a Hospital Aide. He was discharged effective April 7, 1987, for sleeping while on duty. (Joint Exhibit 3). This was the Grievant's third discipline for similar behavior. On March 10, 1986, he received a verbal reprimand for sleeping on the job; on August 12, 1986, he was issued a two-day suspension for the same behavior. The incident which forms the basis for his discharge occurred on the evening of February 2, 1987.

Grievant was one of four employees directly assigned to Carlson 6 living area on the night of February 2, 1987. The clients in his charge, while ambulatory and highly functional, are very aggressive as well as sexually active. They can be dangerous and could pose a definite threat of physical harm to a sleeping aide.

On February 2, 1987, Police Officer Stanley Bowen entered the television room of Carlson 6 at approximately 9:54 p.m. as part of his routine duties to check all wards at Columbus Developmental Center during his shift.

The Grievant was seated in the dimly lit room in a lounge chair across the room from a television set. Two clients were near a desk in the living area smoking a cigarette. One of the clients, John Morgan, tapped Officer Bowen on the shoulder and pointed to Mr. Dixon. Officer Bowen observed the Grievant for approximately two minutes, concluded that Mr. Dixon was sleeping and walked the approximate twenty-five feet toward Mr. Dixon to tell him to stay awake.

An incident report (Joint Exhibit 3) dated February 5, 1987, was presented to the Grievant on February 6, 1987. The Grievant wrote the following denial on that report:

> I saw Officer Bowen and I said I wasn't asleep and he said watch yourself and stay awake. I told him I wasn't sleeping.

No testimony was provided by any other witness in support of either Officer Bowen's observations or Mr. Dixon's denial.

Following a pre-disciplinary hearing the Grievant was terminated. A timely grievance was filed on April 8, 1987, seeking reinstatement with back pay, restoration of full benefits, and expungement of this discipline from the Grievant's personnel file.

POSITION OF THE EMPLOYER

The Grievant was terminated for just cause for a third incident of sleeping while on duty during his short one year and eleven month tenure as a Hospital Aide. His dismissal was in accordance with progressive discipline standards of the Contract following a verbal reprimand and two-day suspension for the two prior rules violations. (Joint Exhibit 4).

The clients in Grievant's care are sexually and physically aggressive and may be dangerous to other clients and staff. A sleeping aide places clients and himself in a very hazardous situation and the nature of the clients in this case renders Grievant's behavior even more intolerable.

Grievant was on ample notice of the seriousness of his rules violation due to a written policy statement (Joint Exhibit 5) as well as through his prior disciplines for similar behavior.

The testimony of Officer Bowen is more credible than that of the Grievant, who has an obvious incentive to put himself in the best light possible. No reason has been given to suggest that Officer Bowen held any animosity toward Mr. Dixon or had any reason to lie. The Grievant's history of falling asleep on the job confirms his predisposition to such conduct and adds credence to Officer Bowen's testimony. Grievant's neglect of his clients in this hazardous situation provides just cause for his dismissal.

POSITION OF THE UNION

The Employer bears the burden of proving by clear and convincing evidence that just cause exists for the removal of Mr. Dixon. That burden has not been met as to the basic issue of whether or not Grievant was in fact sleeping on the job. The Employer did not provide any witness independent of Officer Bowen to verify that Mr. Dixon was asleep. Officer Bowen's testimony at the arbitration hearing was inconsistent with his prior written statement (Joint Exhibit 6) as to when he saw the Grievant open his eyes and how close he got to Mr. Dixon before getting an oral statement from him.

Grievant has been totally consistent in his version of the event from the outset. In view of the admittedly dim lighting in the television room and the long distance between Officer Bowen and the lounge chair in which Grievant was seated, Officer Bowen could easily have mistaken Grievant's watching of the television set for sleeping.

Even if it is determined that Grievant was asleep, Mr. Dixon has been treated in a disparate manner from other employees due to the severity of the penalty he received. Employees James Bowen and Karen Spires both were penalized more leniently by being given major suspensions for similar behavior rather than terminations.

The Employer's disciplinary policy (Joint Exhibit 5) as well as the penalties accorded Ms. Spires and Mr. Bowen indicate that sleeping on duty is treated by the Employer as a "minor offense" which requires a major suspension of ten or more days prior to removal (Joint Exhibit 5, Par. V). The Employer has wrongfully treated the prior minor disciplines meted out to the Grievant as a major discipline forming the basis for removal.

Grievant is entitled to reinstatement with full back pay, restoration of benefits, and expungement of this incident from his personnel file.

OPINION

By Contract, the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The Employer has imposed the ultimate penalty on Mr. Dixon - the "economic capital punishment" of termination. The authorities agree that the severity of this penalty places the burden on the Employer to demonstrate by at least a preponderance of the evidence proof that the Grievant was guilty of sleeping on duty as well as proof that such behavior constitutes just cause sufficient to support discharge (See e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662).

Since this Arbitrator has concluded that the Employer has failed to prove that Grievant was asleep on the job, there is no necessity for deciding whether the Employer has, in this case, violated applicable standards of progressive discipline. Similarly, there is no necessity for a ruling on the relevancy and materiality of the issue of disparate treatment. The parties disagree as to whether or not the disparate treatment issue was grieved at earlier stages of the grievance procedure herein and have presented conflicting evidence on that issue. That issue is moot since the Employer has failed to prove by at least a preponderance of the evidence that the Grievant was sleeping on duty at approximately 9:55 p.m. on the evening of February 2, 1987.

First of all this Arbitrator hastens to note that he does not suggest by this Opinion that Officer Bowen has lied or misrepresented what he thought he observed on the night in question. But the inconsistencies between Officer Bowen's oral testimony and his previous written statement (Joint Exhibit 6) place enough doubt on the reliability of his unverified observations to prevent this Arbitrator from concluding that he correctly perceived Mr. Dixon to be sleeping. Officer Bowen's written statement is consistent with the Grievant's testimony that Dixon was observed to be awake before Officer Bowen spoke to him.

Considering further the dim lighting in the television room and the distance from which Officer Bowen observed Mr. Dixon, and the fact that the Grievant was not slumped but seated upright in the lounge chair with his feet on the floor, this Arbitrator is unwilling to conclude that the Employer has adequately proven that Grievant was sleeping.

Grievant has satisfactorily explained the reasons for his prior disciplines. The fact that those two incidents were treated as minor infractions by the Employer would indicate that the Employer accepted Grievant's explanation that those infractions were due to his taking medication which contained codeine. Grievant testified that he was not taking codeine at the time of the alleged violation on February 2, 1987. In light of the foregoing facts as well as the consistency of the Grievant's testimony throughout these proceedings, it is concluded that Mr. Dixon's version of the incident in question is at least as credible as that of Officer Bowen.

AWARD

There was not just cause for termination of Eugene Dixon. The grievance is sustained in its entirety. The Grievant is to be reinstated to his position at Columbus Developmental Center with full back pay and restoration of benefits. All reference to this discipline is to be expunged from the Grievant's personnel record.

Thomas P. Michael, Arbitrator

Rendered this Tenth day
of December, 1987, at
Columbus, Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 10th day of December, 1987, upon: Michael P. Duco, Office of Collective Bargaining, 65 East State Street, Columbus, Ohio 43215; and Carol L. Bowshier and Linda Kathryn Fiely, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael