

#153

ARBITRATION

RE: Paul K. Ellis Grievance
FOR EMPLOYER:
FOR GRIEVANT: Don Sargent

ARBITRATOR: Andrew J. Love
Ms. Freddie Sharp

DECISION AND AWARD

The issues presented in this hearing are whether the Grievant was suspended for "just cause", and, if not, what the remedy should be.

Exhibits admitted into evidence are as follows:

Joint Exhibit 1 - Collective Bargaining Agreement between the State of Ohio and OCSEA-AFSCME.

Joint Exhibit 2 - Grievance Trail.

Joint Exhibit 3 - Disciplinary Trail.

Joint Exhibit 4 - General Security Procedures at the Southern Ohio Correctional Facility (SOCF).

Employer Exhibit 1 - Memorandum from T.L. Morris, Superintendent, SOCF dated February 9, 1988 re: Personal search of Grievant on February 23, 1987.

Employer Exhibit 2 - Ohio Department of Rehabilitation and Correction Standards of Employee Conduct.

Employer Exhibit 3 - Letter from D.E. Elder, Ohio Department of Rehabilitation and Correction, to Russell G. Murray, Executive Director, OCSEA, Local 11, AFSCME, AFL-CIO.

Union Exhibit A - Grievant's Employee Performance Evaluation dated by Grievant on May 26, 1986.

Union Exhibit B - Notice to Grievant of personal search of Grievant (February 23, 1987).

This matter came on for hearing in respect to action taken by SOCF alleging that the Grievant had engaged in Neglect of Duty, i.e. sleeping while on duty

and failure to follow post orders. Notice to the Grievant was timely made, and pre-disciplinary hearing was held on March 20, 1987. At such hearing, the Hearing Examiner found that "just cause" existed that the Grievant was sleeping while on duty. A five (5) day suspension was recommended. The Superintendent of SOCF approved said suspension.

The following matters were stipulated thereto:

1. The Grievant was employed at SOCF for approximately 10 months prior to the time of the above-indicated incident.

2. The Grievant was subject to a strip search at the beginning of his work day on February 23, 1987.

Harold Carter, a Unit Manager at SOCF and assigned to the J Complex in Administrative Control, was approached by Correction Officer Slusher on February 23, 1987, wherein that Officer advised Mr. Carter that the Grievant was sleeping in the J-4 cell block. It should be noted that the area to which Mr. Carter referred contained an area where Correction Officers, while on duty, could observe inmates on walk lines (areas where inmates walk along the range for exercise). This type of exercise is required by the Ohio Department of Rehabilitation and Correction. The Grievant was assigned to observe such inmates on their walk lines, in order to protect against escapes and/or harm against other inmates or personnel.

Mr. Carter testified that he and other SOCF personnel went into the J-4 cell block and observed the Grievant with his feet on the desk, his head resting against a wall behind the desk and his eyes closed. Mr. Carter stated that, after several seconds of watching the Grievant, the Grievant opened his eyes and asked if something was wrong. Mr. Carter then ordered relief for the Grievant.

Mr. Carter testified that, pursuant to post orders for Correction Officers in J-4 cell block (Joint Exhibit 4) such Officers on duty are required to closely observe inmates while such inmates are on the range. Those post orders are available at all times, and cell block Officers sign these post orders daily. Mr. Carter testified under cross-examination that the Grievant was in no position to observe the two walk lines. He stated that, although the desk where the Grievant was seated faced the range, the Grievant's view would be obstructed because of a recess in the wall next to the window where the view of the range could be had. Mr. Carter further stated that he observed the Grievant at the desk approximately 2 to 3 minutes. At all times, the Grievant's eyes were closed. This witness did not know that the Grievant had been strip searched for alleged contraband when he came on duty earlier in the day. Moreover, he was not aware of any illness of the Grievant.

Mr. Carter stated that, in order to enter into the J-4 cell block, a Correction Officer had to unlock the hall door. The desk where the Grievant sat was inside a cage area.

Mr. Carter stated that he was 100% certain that the Grievant was sleeping.

Jack Bendolph, an Administrative Assistant to the Superintendent at SOCF, testified that he was a witness to the incident involving the Grievant's alleged sleeping. He had also prepared an incident report to this effect.

Mr. Bendolph stated that on February 23, 1987, he entered the J-4 block to serve papers on individuals residing there for notarizing. At that time he was called by Mr. Carter and others to view the Grievant inside the cage. When asked by Mr. Carter what he observed, Mr. Bendolph stated "it looks like he's asleep to me." He stated that the Grievant never opened his eyes while the Grievant had his feet on the desk and his head against the wall. He further stated that he was certain that the Grievant was asleep. From the Grievant's

vantage point at the desk, Mr. Bendolph said that the Grievant would not have been able to view an inmate on the top walk line from the desk, even if his eyes were open. He stated that the Grievant would have had to reposition himself at the desk to see the lower walk line.

Under cross-examination, Mr. Bendolph stated that he observed the Grievant from approximately 5 to 6 feet away from the Grievant. He further stated that there was plenty of lighting in order for him to determine that the Grievant was sleeping.

Mr. Bendolph further testified that the Grievant seemed to be upset about something when he came on his shift.

This witness was asked about the possibility of strip searches of employees or any other persons in SOCF. Mr. Bendolph testified that all employees are advised of the possibility of strip searches. He stated that there is a sign for all to see that advises that anyone could be subject to a strip search. The reason for such searches, the witness stated, is to determine whether contraband is on a person in question.

The Grievant stated that he was subjected to a strip search on February 23, 1987 by the Superintendent, Deputy Superintendent and Lieutenant Neil. He stated that he was well treated by them. Nothing in the way of contraband was found on his person. The Grievant testified that he was, however, nervous and upset. He stated that he felt that other guards were harassing him. He stated that the ordeal made him feel emotionally ill.

The Grievant testified that he has been the subject of harassment because he is from Cleveland, Ohio. SOCF is located in the Lucasville, Ohio area, where individuals from large urban areas are treated with some scorn due to the high

incidence of crime there.

The Grievant testified that, because of his emotional and physical state, he asked the Superintendent whether he could go home. The Superintendent, according to the Grievant, said that the institution needed the Grievant at work on that particular day.

The Grievant testified that he was aware of the presence of officers observing him for approximately two minutes. He had been at his post approximately 45 minutes when the officers, including Mr. Carter, approached him. He stated that his eyes were not completely shut; rather, his lids were such that he would not have his eyes fully open.

The Grievant stated that he was in position to see the top and bottom range and could observe both walk lines. He stated that if an inmate goes too far down the range, the Grievant could stand up to see him.

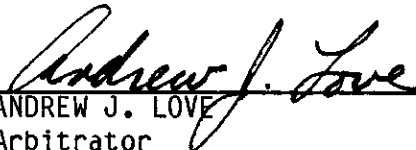
The Grievant acknowledged that he had received a copy of rules of conduct of the institution. Such rules of conduct include no sleeping while on duty. The Grievant was also advised of the strip search conducted on him earlier in the shift and acknowledged that he was calm at the time of the search. It was after the search that the Grievant became angry. He stated that he had complained of harassment by other officers to his supervisors on other occasions.

The Grievant admitted that he was inattentive at the time officers approached him in the cage area. He stated that he could not see the line walk from his position (feet on the desk and head leaning against the wall).

The Grievant expressed his attitude of anger of his being searched earlier, and he stated that he did not move from his position at the desk when he observed officers approach him because he was fed up with his treatment.

This Arbitrator finds that "just cause" existed for the implementation of disciplinary action against the Grievant. The evidence is overwhelming that the Grievant was sleeping while on duty. The witnesses for SOCF convinced this Arbitrator that the Grievant sat at the desk with his legs propped up on the desk and his head leaning against the wall for a period of at least two minutes where there was absolutely no motion by the Grievant indicating his awareness that he was being observed. Moreover, the testimony of these witnesses strongly shows that the Grievant's eyes were closed. The only rational conclusion that could be drawn from this evidence is that the Grievant was asleep. As to the suspension itself, this Arbitrator finds ~~for~~ a four day suspension, rather than a five day suspension. This Arbitrator recognizes that the Grievant probably has been the subject of harassment by other employees. It should be noted that a person who provided information to the Superintendent alleging that the Grievant may be carrying contraband necessarily requires the Superintendent to conduct a search. However, this so-called information tends to verify what the Grievant had stated during the course of his testimony for this hearing (that he was subject to harassment by other officers). Nevertheless, it is the Grievant's duty to perform his job and maintain alertness, especially in a maximum security institution such as SOCF.

Accordingly, the Grievance is denied. The Grievant shall receive one day's back pay.


ANDREW J. LOVE
Arbitrator