

#193

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN
THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION, LIMA CORRECTIONAL INSTITUTION

-and-

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

GRIEVANCE: Warren Mason (Discharge)

CASE NUMBER: G-87-1802

ARBITRATOR'S OPINION AND AWARD

Arbitrator: David M. Pincus

Date: June 22, 1988

APPEARANCES

For the Employer

Lt. Harold R. Fisher
Harry K. Russell
Rodney D. Sampson
Freddie M. Sharp
Jerry Dunnigan
Ted Durkee

Corrections Supervisor I
Superintendent
OCB - Observer
OCB - Advocate
Labor Relations Officer
Labor Relations Officer

For the Union

Bob Roland
Linda Fiely
Warren Mason
Terry Hawk
Leonard Hunt

Staff Representative
Associate General Counsel
Grievant
Witness - Chief Steward
Witness

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 of the Agreement between the State of Ohio, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1986 to July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on May 6, 1988 at the office of Collective Bargaining, Columbus, Ohio 43215. 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 make closing arguments rather than submit post hearing briefs.

ISSUE

Whether the discharge of Warren Mason was for just cause, if not what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely 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 (A) numbers 1-9."

(Joint Exhibit 1, Pg. 7)

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."

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."

...

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in

writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

Section 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-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days 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 situations 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."

(Joint Exhibit 1, Pgs. 34-37)

CASE HISTORY

Lima Correctional Institution, the Employer, was built in 1915. It was originally a state hospital for the criminally insane. As a state hospital for the criminally insane, the institution was under the auspices of the Ohio Department of Mental Health. In 1981, the Department of Corrections began renovating the facility to accommodate regular inmates under tighter security standards. Higher classifications of inmates have been, at times, housed at the Lima facility. At the time of this incident, more specifically, a group of inmates was transferred to Lima from the Ohio State Reformatory in Mansfield, Ohio. These inmates were isolated and locked-down in "A" Block. The Grievant, Warren Mason, was assigned to "A" Block at the time of this incident.

Warren E. Mason, the Grievant, has been employed at the Lima Correctional Institution since April 15, 1985. At the time of the incident, the Grievant worked on the third shift and held the position of Corrections Officer II. It should be noted that the third shift officially started at 11:00 p.m. and that officers are required to report ten minutes early for instructions, the shift ends at 7:00 a.m.

Policies and procedures are promulgated by the Employer for each post via a written set of Post Orders. These Post Orders indicate, in part, what duties an employee is expected to perform, and each post has its individual set of Post Orders (Employer Exhibits 1 and 2). General duties for "A" Block include physically checking the locks at the start of each shift

and thereafter on a prepared schedule. In addition to these checks, there is a regular inmate count that must be taken. Once taken, the Institutional count is phoned into a control center. If these counts are not called in by five minutes to the scheduled reporting hour, the control center notifies a supervisor. The supervisor goes to the area not responding to the count to determine why the count has not been reported.

On April 29, 1987, Lt. Harold Fisher, the Employer's chief witness, was in the dining room area when he received a call from the control center informing him that "A" Block had not, as yet, reported their count. This conversation took place at 3:55 a.m., five (5) minutes before the reporting hour. Fisher subsequently left the dining room and went to "A" Block to determine the nature of the delinquent count.

Fisher testified that he had some difficulty entering the block. He maintained that the first door to "A" Block proved to be uncooperative, the second door was bypassed because of potential obstructions, and that he finally entered the block through a third door. Fisher further noted that he went up a stairwell to the second floor and entered the second floor through a steel crash gate. He then travelled the length of a hallway passing a shower room with an exhaust fan rumbling. Upon arriving at a water fountain, he peered into the day room. He allegedly observed the Grievant sitting back in a chair in front of a desk with his feet propped up on another chair. The Grievant's back was to Fisher, and his head was resting back in the chair turned to the left. Fisher also maintained that the

Grievant's man-down alarm was unsecured on the table in an upright position. Leonard Hunt, the other lock officer assigned to the "A" Block watch, was also observed by Fisher from the hallway. Fisher maintained that Hunt was sitting behind a desk with his head resting on his folded arms, which were positioned on the desk. These observations indicated that both individuals were asleep while on watch.

Fisher entered the day room to confirm his observations. He further testified that he addressed the lock officers as he entered the day room by stating: "Gentlemen your both on report and will be written up, take your lock count and call it into central its 3:57 a.m. and we have an Institutional count to clear." Fisher also stated that he moved toward the Grievant as he proceeded to make the previously mentioned statement. He noted that the Grievant's eyes were closed and remained in that position until he was standing in front of the Grievant. The Grievant arose from the chair, stated that he was not asleep, and left the day room to take the count. Hunt, however, was allegedly more disoriented and had to be ordered to assist the Grievant with the count.

At approximately 4:01 a.m., the Grievant called into control and the Institutional count was cleared. Neither officer was removed from their duties, and both completed the shift.

As a consequence of the above incident, Fisher filed a Report of Employee Corrective Action (Joint Exhibit 3, Pgs. 4-5) on April 29, 1987. This Report contained a series of reasons for

corrective action while documenting the alleged sleeping incident.

On April 30, 1987 an investigation interview was held by Fisher. The Grievant was notified of the interview and his right to representation. Both the Grievant and his representative were present at the interview. A pre-disciplinary conference was also held on May 6, 1987 (Joint Exhibit 3, Pg. 3). This conference resulted in a recommendation for removal (Joint Exhibit 3, Pg. 2).

On June 10, 1987 an Order of Removal was issued. It contained the following pertinent particulars:

"...

The reason for this action is that you have been guilty of violation of DR & C Standard of Employee Conduct, Rules, Sleeping on Duty in the following particulars, to wit: that on or about April 29, 1987, when the count for A Block had not been called in to Control, Lt. Fisher went to A Block and observed you sitting back in a chair in front of the desk with your feet up in and in another chair and your head resting against the back of the chair, asleep. Your man down was sitting on the desk.

..."

(Joint Exhibit 3, Pg. 1)

On June 22, 1987, the Grievant contested the above decision by filing a grievance. The grievance contained the following Statement of Facts:

"...

AFSCME/OCSEA and Warren Mason Grieves Management is in Violation of Article 24, Section 24.01 and all other pertinent articles and sections of the Contract. AFSCME/OCSEA and Warren Mason was removed for sleeping on duty.

..."

(Joint Exhibit 2, Pg. 6)

The Parties were unable to resolve the grievance at the various stages of the grievance procedure (Joint Exhibit 2, Pg. 1-5). The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant for sleeping on duty.

The Employer argued that the Grievant, and the Union, were given proper forewarning of the possible consequences of the Grievant's disciplinary conduct. The Employer contested the Union's notice arguments dealing with the implementation of the Rules of Conduct and the attached disciplinary grid (Joint Exhibit 5). The Employer asserted that the Union was placed on notice when a letter was submitted by the Employer to the Union's Central office.

The Employer maintained that the testimony provided by Fisher clearly indicated that the Grievant was sleeping on duty on April 29, 1987. Several indicia of sleep were discussed by this witness in support of the allegation. First, neither the Grievant nor Hunt asked for relief the day of the incident. Witnesses testified that relief is available when officers feel drowsy; and they should take advantage of this procedure when they feel that their efficiency, or alertness, is being threatened. Second, activities engaged in by Fisher prior to his entrance into the day room should have been heard by the Grievant if in fact he was awake and alert. Fisher, more specifically,

alluded to his door opening problems, his entrance via a crash gate, and his hallway approach in support of this allegation. Third, the Grievant's physical state, as observed by Fisher from the hallway and in the day room, clearly indicated the Grievant was asleep. Also, Hunt's lack of attentiveness and his posture further reinforced the conclusion that both individuals were asleep. Fourth, the Grievant's man-down alarm was not on the Grievant's person but resting in an upright position on the desk. Harry Russell, Superintendent, and Fisher both testified that the Post Orders (Employer Exhibit 1) and a Post Order Supplement (Employer Exhibit 2) advised employees that man-down alarms had to be secured at all times. The unsecured status of the Grievant's man-down alarm, therefore, provided additional support concerning the Grievant's sleeping status. Last, Fisher's credibility was bolstered by the lay-out of "A" Block (Employer Exhibit 1) introduced at the hearing. His testimony was consistent and documented the vantage point he had to make the above observations.

The Employer emphasized that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense, and the record of the Grievant's service with the Employer. The Employer introduced documents establishing two (2) prior incidents of sleeping while on duty (Joint Exhibit 4). Russell testified that the first incident took place on or about February 28, 1986. Shortly thereafter, on or about March 6, 1986, the Grievant was again found sleeping on duty. It should be noted that discovery of the latter incident

took place while the Employer placed the Grievant on notice about a forthcoming disciplinary hearing. Russell, moreover, maintained that because of a merger and bar requirement both incidents were merged into one (1) thirteen (13) day suspension. The Grievant waived his rights to a disciplinary hearing in both instances (Joint Exhibit 4, Pgs. 2-3), and accepted the thirteen (13) day suspension.

These prior incidents provided the Employer with justification for the removal decision. The Employer maintained that the decision was rendered in light of the penalties contained in the Standards of Employee Conduct (Joint Exhibit 5). The decision, moreover, was undertaken in accordance with recognized progressive discipline standards.

Aggravating circumstances were also referred to by the Employer as justification for the removal. Russell contended that sleeping while on duty was extremely serious because it endangered the security and welfare of other employees and the inmates under the Grievant's custody. This particular sleeping offense, moreover, was especially egregious in light of the dangerous inmates housed in "A" Block the night of the incident.

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 while on duty. This position was based on a number of procedural and substantive arguments.

The Union alleged that the Union and the Grievant were not properly notified of the Standards of Employee Conduct (Joint

Exhibit 5). The Union stipulated that this document was in effect at the time of the altercation, but that the implementation of same was improper because of notice deficiencies.

The Union argued that the Employer's investigation was not conducted fairly and objectively. Fisher's involvement in the investigation process was critically viewed by the Union. As the Employer's chief witness to the altercation, his role in the investigation was viewed as suspect and prejudicial to the process. The Union also considered Fisher's Report of Employee Corrective Action (Joint Exhibit 3, Pgs. 4-5) as biased. The Grievant testified that this Report was prepared prior to the investigatory hearing, and thus, did not contain the Grievant's version, or statements made by the Union Steward and other witnesses. Thus, the Union maintained that Fisher's recommendation for further disciplinary action was defective and biased.

For several reasons, the Union argued that its witnesses provided more credible evidence than the testimony provided by Fisher. First, Fisher's testimony contained several inconsistencies. Fisher initially stated that he could not find the proper key and then he remarked that the key did not work. Second, he also altered his response concerning the location of his initial utterance to the Grievant and Hunt. He initially testified that he uttered his statement as he entered the day room; but modified his testimony when he noted that he uttered the statement while facing the Grievant. Third, Fisher did not

have a proper vantage point to observe the Grievant's condition. Terry Hawk, Chief Union Steward, provided testimony concerning his investigation of the incident. By referring to a document depicting the location of the participants and various obstructions (Union Exhibit 1), he sufficiently rebutted Fisher's testimony concerning his ability to accurately determine whether the Grievant was asleep. Fourth, the Grievant and Hunt followed proper procedures when informed that the Institutional count had not been cleared. Fifth, the location of the man-down alarm as evidence of the Grievant's sleeping status was also refuted by the Union. The Post Order Supplement (Employer Exhibit 2) and the Post Orders (Employer Exhibit 1) do not define how man-down alarms should be secured, or whether securing these alarms requires that they be worn by an officer. This ambiguity, however, was corrected by the issuance of an Inter-office Communication which requires all officers receiving man-down alarms to wear them at all times (Union Exhibit 2). Since this document was issued after the incident in dispute, the Grievant had no way of knowing that the man-down alarm had to be secured, on his person, at all times.

The Union maintained that the removal penalty was unreasonably administered because it was not related to the seriousness of the Grievant's proven offense. Progressive discipline, more specifically, was not followed by the Employer. Russell testified that the usual practice when dealing with sleeping offenses is to employ a three (3) step progression; with the final offense resulting in discharge. Since the

Employer combined the prior two (2) incidents into one (1) thirteen (13) day suspension, the Union alleged that the last incident should be viewed as the second occurrence. Thus, the Employer's removal decision violated the procedure testified to by Russell.

THE ARBITRATOR'S OPINION AND AWARD

A notice argument places the burden of proof on the Union to substantiate its occurrence. The Union failed to provide this Arbitrator with sufficient evidence or testimony dealing with this argument. Mere allegations dealing with pending arbitration decisions and grievances, unsupported by any other documentation, do not provide sufficient substantive detail to fully analyze this critical procedural requirement.

In a like fashion, the Union failed to support its fair investigation argument. Fisher did not function as witness, prosecutor, and final judge. Although he took part in the initial investigatory hearing, a subsequent pre-disciplinary conference was held (Joint Exhibit 3) and a recommendation was fashioned. This recommendation, and the facts contained therein, were reviewed prior to the implementation of the Removal Order. Thus, several upper management representatives conducted a disinterested evaluation to prevent a prejudiced or partisan decision. Also, the mere existence of a prepared Report of Employee Corrective Action (Joint Exhibit 3, Pg. 4) does not prove that the investigatory hearing was a pro forma activity initiated by Fisher. The Grievant was given an opportunity to

respond to the charges and allegations. If this opportunity had not been provided, the Union would have had a stronger argument. Without any additional evidence and testimony, this Arbitrator concludes that the investigation was objective and fair.

In the opinion of this Arbitrator, based on the evidence and testimony introduced at the hearing, the Employer did have just cause to discharge the Grievant for sleeping on duty. This determination is based upon inconsistencies in testimony provided by Union witnesses and circumstantial evidence.

Fisher's testimony was far more credible than the testimony provided by Union witnesses. Despite the frequent repetition of his testimony in the course of direct examination, cross-examination, re-direct examination, and recross examination, Fisher's testimony remained remarkably consistent. The inconsistencies referred to in the Union's arguments were not evidenced in the record reviewed by the Arbitrator.

A number of glaring inconsistencies were provided by Union witnesses. First, Hawk's testimony regarding "A" Block's layout (Union Exhibit 1) was highly contradictory. He modified, on several occasions, the various distances involved in his investigation. Testimony surrounding the accuracy of his layout (Union Exhibit 1) are also suspect in light of his varying testimony dealing with the location of the phone and desk. Special emphasis was placed on his testimony regarding potential observations of the desk from the location of the water fountain. His testimony supports (Arbitrator's emphasis) Fisher's version. He, more specifically, alleged that one could not observe day

room activities until one reached the water fountain. This testimony supports Fisher's testimony dealing with his observations from the water fountain into the day room. This contradiction also indicates to this Arbitrator that the desk was not set-back as far as Hawk had alleged at the hearing.

Second, Hunt's testimony in support of the Grievant's version also lacked veracity. Hunt contradicted the Grievant when he maintained that the Grievant made no statement to Fisher, in the day room, after the Grievant got up from the chair. The Grievant under direct examination maintained that he responded to Fisher's statements. Hunt also changed his testimony regarding the position of his head on several occasions. Justifications provided by Hunt dealing with his "shock" for being placed on report are also viewed as suspect, and therefore, his support of the Grievant's version is quite limited. If in fact he was not asleep and observed Fisher in the hallway while sitting at the desk, then he should not have been startled by Fisher's entrance, or query regarding the count. His statements regarding his ability to observe Fisher from the desk lends further support to Fisher's testimony regarding his ability to make accurate observations from the water fountain.


The above discussion indicates to this Arbitrator that Fisher was able to make his observations from the hallway, and that the positions enjoyed by both officers at the time of Fisher's entrance are not in dispute. Circumstantial evidence, moreover, indicates that the Grievant was, indeed asleep. All of the counts, prior to the one in question, were called in by the

officers in a timely fashion. The nonexistence of an available time clock in "A" Block does not provide this Arbitrator with a plausible explanation for the untimely count. This condition existed for all prior counts, and yet, they were called in properly within the recognized count schedule. The Grievant, moreover, stated that he had a watch in his person during the entire shift. If the Grievant was awake, the availability of his watch should have allowed him to call in his count in a timely fashion. Finally, this Arbitrator finds it extremely hard to believe that the Grievant was awake while facing Hunt, and that Hunt observed Fisher in the hallway without any response by either the Grievant or Hunt to Fisher's appearance in "A" Block. Such an appearance should have led a reasonable person to utter some type of acknowledgement. An utterance did take place only after Fisher made his statements to the officers and awoke them from their sleeping state.

AWARD

The grievance is denied and dismissed.

Date: June 22, 1988.


Dr. David M. Pincus
Arbitrator