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| In the Matter of Arbitration | |
| Between | |
| Fraternal Order of Police-Ohio Labor Council | Case No.: 24-10-(5-23-88)-38-04-01 |
| and | Before: Harry Graham |
| The State of Ohio, Department of Mental Retardation and Developmental Disabilities | |

Appearances: For Fraternal Order of Police-Ohio Labor Council

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Introduction: This dispute came to be heard before Harry Graham on July 31 and September 5, 1989. At the hearings both parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were not filed in this dispute. The record was closed at the conclusion of oral argument on September 5, 1989.

Issue: The parties agree upon the issue in dispute between them. That issue is:

Was the Grievant, Ronald Schorling, discharged for just cause? If not, what shall the remedy be?

Background: There is little agreement between the parties over the circumstances that give rise to this dispute. What agreement that exists between them is concerned with the employment record of the Grievant during his tenure with the State prior to the purported events that give rise to this proceeding. At the time of his discharge Mr. Schorling was employed as a Police Officer 1 at the Northwest Ohio Developmental Center in Toledo, OH. In the course of his employment with the State Mr. Schorling had received discipline ranging from a verbal reprimand for tardiness to a ten day suspension of sleeping on duty. The ten day suspension was received in 1985. (Joint stipulations).

On March 25, 1988 the Grievant was on duty on the third (night) shift at the Northwest Ohio Developmental Center. In the course of his shift he was expected to patrol the grounds regularly. Early in the morning of March 25, 1988 Dan Housepian, Program Director and Assistant Superintendent of the Toledo facility, came into work. He arrived on the site at 3:19AM. Later that day he was to go on vacation and he wanted to get last minute tasks completed. Upon his arrival he noticed the jeep used to patrol the grounds parked at the flagpole roughly in the center of the facility. After working at his desk for some time he decided to tour the grounds. According to his testimony, which is hotly disputed by the

Union, he came upon Mr. Schorling in the jeep and found him to be sound asleep. It is the allegation of the State that Mr. Schorling was sleeping on the job that furnishes the basis for this dispute.

In due course Mr. Schorling was discharged from his employment with the State. A grievance protesting that discharge was processed in the procedure of the parties. Its arrival at this stage of the procedure was not without incident. The grievance was the subject of a prior arbitration proceeding before this Arbitrator in which the State asserted the dispute should not be heard on its merits as it was not advanced to arbitration in timely fashion under the terms of the Agreement. That argument was not accepted by the Arbitrator and the dispute is now heard on its merits.

Position of the Employer: The State's case revolves around the testimony of Dan Housepian, Program Director at Northwest Ohio Developmental Center. According to him he witnessed the Grievant asleep in his jeep at about 4:30AM on the morning of March 25, 1988. Upon noticing Mr. Schorling sleeping he went to cottage 610 and telephoned the central switchboard. He told the operator to radio Schorling in two minutes. Thereupon he returned to the jeep in which Schorling was still sleeping. The radio call came as directed. Schorling was directed to "call 260." After two repetitions of that directive Schorling woke and responded, in a somewhat

somnolent fashion. Upon noticing Mr. Housepian he became completely awake with a start. According to Mr. Housepian the time period of this incident was about ten to fifteen minutes.

After awakening Schorling, Housepian returned to his office to complete an incident report. Within the hour Schorling came in and asked him not to write up his sleeping. Schorling was concerned about his continued employment with the State as he was aware that sleeping on the job is a very serious offense.

According to the State the Grievant's denials of sleeping on the job ring hollow. His logbook for March 25, 1988 indicates that the time taken for his various patrols was in the 30 - 40 minute range. But during the time period in which the alleged sleeping occurred his logbook entry spanned 75 minutes, about twice as long as usual. This is indicative of the fact that something unusual, sleeping, took place at about 4:30AM on the morning of March 25, 1988.

In the State's view there cannot be any suggestion that it was intent on "getting" the Grievant. Had it been so intent, it would not have had only one witness, Housepian, view the sleeping. Supervisors are instructed to have a witness view any personnel asleep on the job in order to substantiate any discipline for sleeping. No one other than Housepian saw Schorling asleep on March 25, 1988 because no

one else was available. Housepian did not want to go to any of the cottages where staff were at work for fear that Schorling would awaken. Time was of the essence in this situation.

In the opinion of the State the Grievant has compiled a poor record. He has five instances of discipline, including one for sleeping on the job, on his record. Clearly this record furnishes grounds for the discipline under scrutiny in this proceeding according to the Employer.

When the pre-disciplinary conference provided for in Section 19.04 of the Agreement was conducted the State's principal witness against the Grievant, Dan Housepian, was not in attendance. This is not a fatal flaw in the State's case it asserts. The Agreement provides that the employee and/or his representative have the right to cross-examine "any witnesses at the conference." Housepian was not in attendance and there is no contractual requirement that he attend according to the Employer. Under these circumstances, the State urges its action be upheld.

Position of the Union: The Union insists that the State be held to a high standard of proof, a burden it has not met and cannot meet in this situation. In particular, the Union points to what it considers to be substantial defects in the case made against the Grievant.

No witnesses other than Dan Housepian were involved in

this situation. The State could and should have secured witnesses to verify that Schorling was sleeping as it alleges. When Housepian telephoned the switchboard to direct that Schorling be paged on the radio he could have summoned someone to witness Schorling sleeping in the jeep. That he did not do so is indicative of the fact that Schorling was not asleep. No witnesses were summoned according to the Union because there was nothing to witness.

In fact, there exists a discrepancy concerning the timing of events in this case which is fatal to the State's case in the Union's view. Union Exhibit B is the logbook maintained by Virginia Watson who was on duty in cottage 604 on the morning in question. Ms. Watson keeps careful records as the State has emphasized to her the necessity of doing so. Her log indicates that Mr. Housepian arrived in cottage 604 at 4:40AM. She is absolutely certain that is when he arrived and that her entry is correct. After Housepian found Schorling sleeping, an event the Union claims never occurred, Housepian began to question her concerning her logging of the time he arrived in cottage 604. Union Exhibit C, a note from Watson to Housepian resulted. In that note she reiterates that according to her watch he arrived at cottage 604 at 4:40AM on March 25, 1988. Questioned further by Housepian concerning her assertion that he was in the cottage at 4:40AM Union Exhibit C(1) was generated. It is an amended version of

Union Exhibit C which carries the notation that Ms. Watson could not swear that her watch was 100% accurate. The amended version of Exhibit C is important, not for the doubt it casts upon the accuracy of Ms. Watson's watch but for the indication it provides of the central importance of time in this dispute and the efforts made by Mr. Housepian to coordinate all aspects of his story. Further evidence of Housepian's desire to coordinate the time sequence of his testimony is shown by the fact that he telephoned Ms. Watson at her home to inquire about the accuracy of her watch upon learning she had logged him into 604 at 4:40AM on March 25, 1988. As the Union interprets the evidence, Housepian was not in 604 at 4:30AM as he claims. The log maintained by Ms. Watson indicates he did not arrive until 4:40AM. At the hearing on September 5, 1989 she testified that she entered 4:40AM in the log as the time of Mr. Housepian's arrival in 604 at the moment of his arrival, 4:40AM. She is certain he was in 604 at that time. As that was the case, he could not have been there at 4:30AM as he testified according to the Union. That Ms. Watson's time record is accurate is indicated by Joint Exhibit 6, an Inter-office communication from Lucinda Crawford. She indicated that Schorling was beeped at 4:41AM and that he answered "immediately" and in a "clear, crisp voice." The time noted by Crawford is consistent with the time recorded by Watson. Similarly, her indication that

he answered immediately shows that he was not asleep. As the evidence introduced by the State in support of its assertion that Schorling was sleeping is flawed the discharge should not be permitted to stand according the Union.

Schorling has a good record notwithstanding its disciplinary entries. He has received several commendations and served as acting sergeant on occasion. Given this record, discharge is inappropriate according to the Union.

The Union is of the view that there exists a substantial procedural error by the State which should void Mr. Schorling's discharge. At the pre-disciplinary conference Dan Housepian, Mr. Schorling's accuser, was not present. Section 19.04 of the Agreement indicates that the Employee and his representative have the right to "cross-examine any witnesses at the conference." As Mr. Housepian was not at the conference the Union was deprived of an opportunity to question the central figure in the discharge of Mr. Schorling. This is obviously not what the parties intended in Section 19.0 4 of the Agreement according to the Union. As the State has failed to provide any independent evidence to support his testimony and in fact such evidence as exists refutes his testimony with regard to the timing of the events under review in this proceeding and a substantial procedural error was made by the State, the Union urges that Mr. Schorling be reinstated to employment and be made whole.

Discussion: The Grievant in this situation is neither the wretched employee deserving of termination due to accumulated disciplinary entries on his record nor the paragon of law enforcement depicted by the Union. His disciplinary history as reflected on the joint stipulations of fact indicates three instances of discipline for attendance related problems. The most recent of these entries was "early 87" according to the record. He received a five day suspension for "failure of good behavior" in July, 1987, almost a year before the event under review in this proceeding. There is one entry on the record for sleeping on the job, dating from November, 1985. This record is not good. Set against it are the commendations he received from the State (Union Exhibit F) as well as the good performance evaluations on his record (Union Exhibit E). The State has regarded Mr. Schorling as a more than satisfactory employee who on occasion has gone out of his way to be of service to residents of the Northwest Ohio Developmental Center. Examined in its entirety Mr. Schorling's record provides no strong support for either the position of the State or the Union.

At the hearing the Union placed great emphasis upon what it regards as discrepancies in the timing of events on the morning of March 25, 1988. Some of those discrepancies are not serious and might well be due to variation of individual clocks or watches. Thus, when the Union points to its Exhibit

B showing a time for Dan Housepian in cottage 604 at 4:40AM and a page to be made at 4:41AM (Joint Exhibit 3f) and urges this variance be regarded as a fatal flaw in the Employer's case it is making a mountain out of the proverbial molehill. Sample variation in timekeeping devices may well explain the one minute difference. No great weight can attach to the one minute difference between the two exhibits.

Of more concern is the discrepancy between the testimony and written record of Virginia Watson and the testimony of Dan Housepian concerning the timing of his whereabouts on the morning of March 25, 1988. His testimony indicates that he contacted the switchboard at 4:35AM. The record (Joint Exhibit 3f) shows that Housepian contacted the switchboard at 2:39AM. This must be an erroneous entry as Housepian did not arrive at the facility until 3:19AM. More properly, the 2:39AM entry should read 4:39AM, which is corroborated by Exhibit 3d and Joint Exhibit 6. Those Exhibits indicate Housepian contacted Crawford at 4:39AM and that she paged Schorling at 4:41AM as instructed. This evidence is consistent with the record made by Virginia Watson who placed Housepian in Cottage 604 at 4:40AM. As noted above, slight differences may well exist among the various clocks maintained at the Developmental Center and the watches worn by employees. While Housepian's testimony places him at Cottage 604 telephoning the switchboard at 4:35AM,

independent records made by Crawford and Watson place him there at 4:39AM -4:40AM. A one minute variation in their records is not material and is consistent with the fact that clocks at the Center operate independently of one another. It is unlikely that both Crawford and Watson were mistaken about the time Housepian was in 604 and contacting the switchboard. It is more likely that Housepian erred when recollecting the precise time he visited Cottage 604. That such a small discrepancy exists does not represent a fatal flaw in the State's case.

Housepian is the sole witness against Schorling. Attention must be devoted to his credibility. There is nothing on the record that shows Housepian to harbor animosity towards the Grievant. To the contrary, approximately one month before this incident occurred Housepian authored a Letter of Commendation to Schorling. While the Union strongly urges the Arbitrator to take the view that the institution was out to "get" Mr. Schorling no evidence indicates that Housepian's arrival at the Center early on the morning of March 25, 1988 was part of any such plot. If there were such an effort underway, the perpetrators could certainly have done a better job. There is no witness to corroborate Housepian's testimony that Schorling was sleeping. Had there been a plan to fabricate a reason for discharge surely the State would have had a witness close at

hand.

Officer Schorling's log (Joint Exhibit 5) for March 24, 1988 (covering the morning of March 25, 1988) shows three entries under the caption of "patrol grounds." One was for 30 minutes, another for 40 minutes. During the period giving rise to this dispute, the log indicates he was on patrol for 75 minutes. This is unlikely given the duration of the other patrols.

The Union strongly urges that the discharge of Ron Schorling be set aside as the State did not comply with the procedural requirements of Section 19.04 of the Agreement. As Dan Housepian was not in attendance at the pre-disciplinary meeting the Union had no opportunity to examine him. The Union argues that as Schorling's accuser it is a contractual requirement that Housepian be present at the pre-disciplinary conference. That provision of the Agreement is designed to ensure that a grievant is provided due process in the imposition of discipline. In fact, the Grievant was provided the due process contemplated by the Agreement. He was notified of his discharge. He was immediately aware on the morning of March 25, 1988 that the Employer regarded his sleeping on the job to be a serious offense. His rights were not compromised in any manner by the absence of Mr. Housepian from the pre-discipline hearing. That there may have occurred a violation of the Agreement when Mr. Housepian was not in

attendance at the pre-discipline meeting (a finding not made by the Arbitrator) did not prejudice his rights in any manner. The action of the Employer in this case is not fatally defective due to the absence of Mr. Housepian from the pre-disciplinary meeting.

Award: Based upon the preceding discussion the grievance must be DENIED.

Signed and dated this 26th day of September, 1989 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator