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 In the Matter of Arbitration *
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 Between *
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 Fraternal Order of Police- *
 Ohio Labor Council *
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 and *
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 The State of Ohio, Department *
 of Mental Retardation and *
 Developmental Disabilities *
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Case No.:
 24-14-(89-09-15)-15-197-
 05-02
 Before: Harry Graham

Appearances: For Fraternal Order of Police:

Kay Cremeans
 General Counsel
 Fraternal Order of Police-Ohio Labor Council
 3360 East Livingston Ave.
 Columbus, OH. 43227

For The State of Ohio:

John Tornes
 Office of Collective Bargaining
 65 East State St., 16th Floor
 Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on December 20, 1989 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. No post hearing briefs were filed in this dispute and the record was closed at the end of oral argument.

Issue: At the hearing there was a dispute between the parties concerning the issue in dispute between them. The disciplinary record of the grievant includes a termination on

September 16, 1988. That termination was grieved and a settlement was reached. The discharge was reduced to a suspension. The settlement agreement of November 4, 1988 indicates that if the grievant were to receive further discipline and it were to be grieved that an arbitrator would have no authority to modify any penalty unless it were to be found that the grievant did not commit the offense which resulted in the discipline. The question before an arbitrator was to be limited to whether or not the grievant performed the act which gave rise to discipline. At the hearing the Union was of the view that the proper issue before the Arbitrator was the traditional one concerning whether or not the employer had just cause for discipline. Based upon the settlement agreement of the Grievant's prior discharge dated November 4, 1988 the State proffered a modified form of the traditional issue. It urged that the authority of the arbitrator was restricted under the terms of the 1988 agreement between the parties. The Union strenuously objected to the State's formulation of the issue.

Based upon the settlement agreement of the Grievant's prior discharge the conclusion is inescapable that the State's view of the issue is correct. The Union agreed to limitations upon the authority of an arbitrator in November, 1988. The issue before the Arbitrator is:

Did management have just cause to discipline the Grievant? If the Arbitrator finds that management had

just cause to discipline, the level of discipline imposed by management shall not be modified by the Arbitrator. If the Arbitrator finds that management did not have just cause to discipline, what shall the remedy be?

Background: The central feature of the events leading to the discharge of the Grievant, Paul Day, is the subject of dispute between the parties. The background events are not a matter of disagreement. Mr. Day has been employed as a Police Officer 1 at the Warrensville Developmental Center since 1981. It is fair to say that in recent years he has compiled an indifferent record. Since March, 1985 he has accumulated three written reprimands and eight suspensions. Those suspensions have been for a period as short as one day and as long as 18 days. None of the suspensions or reprimands were for sleeping on the job.

On July 23, 1989 at about 6:00AM the Police Chief at the Warrensville facility, Phillip Wenner, observed Mr. Day in a position which indicated to him that Day was asleep in his police cruiser. Aware of the fact that if he disciplined Day for sleeping on the job without some sort of corroborating evidence that it was likely the discipline would be overturned, Wenner went and got the Polaroid camera used at Warrensville. He proceeded to take Mr. Day's photograph. When that picture was taken the flash was used and the motor drive associated with use of a Polaroid camera properly engaged. Neither the sound of the motor nor the light of the flash

caused Mr. Day to stir. After taking the camera back to its place in the officer Chief Wenner returned to the cruiser and found that Mr. Day had not moved. The Chief then opened the door to the car and Mr. Day came close to falling out.

Subsequently, on July 29, 1989 the Grievant called-off work late. He was required to call-off one-half hour prior to the start of his shift. On that date he called in at 11:55PM, five minutes before his shift was to start.

Mr. Day was subsequently discharged from his employment with the State. A grievance protesting that discharge was promptly filed. It was processed through the grievance procedure of the parties without resolution and there is agreement the grievance is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State indicates that Mr. Day had compiled a poor disciplinary history in recent years. In July, 1988 he had received a 15 day suspension for the poor quality of his work. In connection with that suspension he was warned that if discipline was again warranted in the State's opinion, discharge would result. Subsequently, in September, 1988 the State again found grounds to discipline Mr. Day. He was discharged. In the course of the grievance procedure the parties agreed that the discharge would be reduced to a suspension. Ten months later Mr. Day was found sleeping on the job. Enough is enough according to the State.

In the State's view there is no doubt that Mr. Day was asleep. The Police Chief at Warrensville, Phillip Wenner, arrived unexpectedly on July 23, 1989 which was a Sunday. As part of the accrediting process he was making an unannounced inspection. When he arrived he saw the police cruiser parked in an unusual location, towards the rear of the parking lot. It was parked in the back-in, rather than the head-in position. He went over to cruiser and found Officer Day slumped against the pillar of the driver's side door. His eyes were shut and his mouth was open. To all appearances, Day was sound asleep. As was recounted above, Chief Wenner secured a Polaroid camera and took Mr. Day's picture. (Employer Exhibits 2 and 3). Mr. Day did not stir. After returning the camera to its proper place in the facility Mr. Wenner returned to the cruiser. Day had not moved. Chief Wenner opened the door and Day almost fell out. The Chief is a veteran of service with the Ohio State Highway Patrol. He retired after rising into the supervisory ranks of the Patrol. He is a trained observer who knows when a person was sleeping. Day was unquestionably sleeping according to the Chief. He did not secure a witness to the sleeping as the people on duty in Cottage 8 were too far away from the scene. The State insists the photographs are an accurate representation of Mr. Day's position on the morning of July 23, 1989. They unmistakably show him to be asleep. Given his

lengthy history of discipline, the discharge imposed in this situation is appropriate the State insists.

The sleeping on July 23, 1989 furnished sufficient grounds for discharge standing alone. However, Mr. Day added to his transgressions on July 29, 1989. On that date Mr. Day called in late to indicate he would not report for work as scheduled on the midnight-8:00AM shift. The contractual call-in provision provides that call-in must occur no later than one-half hour prior to the start of the shift. Day called-in at 11:55PM, five minutes before he was due to be at work. Day was a Union steward. He should have been familiar with the Agreement. It was incumbent upon him to know the call-in procedure. Taken together with the sleeping incident occurring several days earlier, the discharge action at issue in this proceeding was reasonable and should be sustained the State insists.

Position of the Union: According to the Union Mr. Day was not asleep on the morning of July 23, 1989. He was parked at the rear of the parking lot in order to get a good view of the facility. He was filling out his log. Officer Day denies that he was sleeping as alleged by the State.

The Union asserts that the photographs introduced in support of the State's claim that Day was sleeping do not show that to be the case. In fact, the Union asserts they are a fabrication of some sort. They were clearly taken with a

flash camera. The flash is reflected in the window of the car. If they were taken at approximately 6:00AM on July 23, 1989 the sun would have risen. A flash camera would not be needed. The evidence of the photographs must be discounted according to the Union.

The Union points out that this represents the first incidence of sleeping on Mr. Day's record. It asserts that progressive discipline has not been followed in this case. Furthermore, the Chief should have secured a witness. The lack of a witness and the substitution of photographic evidence represents a fatal flaw in the State's case according to the Union.

When Day called in late on July 29, 1989 he did so by mistake. The Agreement had been renegotiated in the Spring of 1989 and the call-in procedure changed. From call-in within the first half-hour after the scheduled start of the shift the procedure was changed to call-in one half-hour before the shift. The procedure was new and Mr. Day's error was understandable under the circumstances. As that was the case, the Union urges the grievance be sustained.

The union also points out that the Chief is new to the Warrensville facility. By repute, he is hostile to black employees. Day is black. His discharge represents some sort of attempt to "get" Mr. Day according to the Union. Consequently, it urges the grievance be upheld.

Discussion: No disinterested observer of the photographic evidence introduced by the State could fail to conclude that Mr. Day was asleep. His closed eyes and open mouth are ample testimony to the fact that he was sleeping on the morning of July 23, 1989. That Chief Wenner did not secure a witness does not diminish the authenticity of the photographs. They show that Mr. Day was sleeping. The assertion of the Union that in some manner the photographs were fabricated in an attempt to "get" Mr. Day is so lacking in foundation as to be dismissed out of hand.

Standing alone, sleeping on the job is a serious offense when committed by an employee entrusted with the care of others. In this instance, that offense does not stand alone. Mr. Day compiled what must be characterized as a very poor record when in the service of the State. His record is replete with discipline. The claim that this discharge is in violation of the principles of progressive discipline fails when it is viewed in the context of Mr. Day's poor work history.

Mr. Day was a union steward. The Agreement was negotiated several months prior to his late call-in. He must be expected to know of the altered call-in procedure. Even if the late call-in is overlooked, the fact that he was sleeping on the job on the morning of July 23, 1989 is sufficient to require the Arbitrator to conclude that this grievance must

be denied.

There is nothing on the record to indicate that Mr. Day's discharge was motivated by racial hostility or prejudice. A complaint against Chief Wenner was filed with the EEOC by employees at Warrensville. It was dismissed. Whatever may have been the merits of that claim, the defense raised by the Union fails before the fact that Mr. Day was sleeping on the job on July 23, 1989, his late call-in on July 29, 1989 and his poor work history, replete with discipline over the preceding several years.

Award: The grievance is denied.

Signed and dated this 29th day December, 1989 at South Russell, OH.

Harry Graham
Harry Graham
Arbitrator