ARBITRATION AWARD SUMMARY

OCB Award Number: 400

OCB Grievance Number: 35-03-890810-0046-01-03 Jerry Stevens

Union: OCSEA/AFSCME

Department: DYS

Arbitrator: Anna D. Smith

Management Advocate: Donald Elder

Union Advocate: Tim Miller

Arbitration Date: 2-26-90

Decision Date: 3-26-90

Decision: Denied

In the Matter of Arbitration Between THE STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES, CUYAHOGA HILLS BOYS SCHOOL and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	OPINION and AWARD Anna D. Smith, Arbitrator Case No. 35-03-(08-10-89)-46-01-03 Removal of Jerry Stevens

I. Appearances

For the State of Ohio:

Donald E. Elder, Advocate, Department of Youth Services
John Tornes, Second Chair, Office of Collective Bargaining
Crystal E. Bragg, Superintendent, Cuyahoga Hills Boys School
Harry Edwards, Deputy Superintendent, Cuyahoga Hills Boys School

For OSCEA/AFSCME Local 11:

Tim Miller, Staff Representative and Advocate
Jerry Stevens, Grievant
Dorothy O. Brown, Chapter 1830 President

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 12:00 noon on February 26, 1990 at the Cuyahoga Hills Boys School, Warrensville Township, Ohio before Anna D. Smith, Arbitrator. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of

oral argument, 3:45 p.m., February 26, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

> Was the Grievant, Jerry Stevens, terminated for just cause and, if not, what shall be the remedy?

IV. Stipulations

The Parties stipulated to two facts:

1) The case is properly before the Arbitrator;
2) Jerry Stevens was hired by Cuyahoga Hills Boys School as Youth Leader 2 in March, 1981.

The following documents were received as joint exhibits:

1) State of Ohio/OCSEA Local 11 Contract, 1986-89;
2) Grievance Trail;
3) Discipline Trail;
4) Department of Youth Services Directive B-19,"D.Y.S. General Work Rules" and Grievant's acknowledgement;
5) Department of Youth Services Directive B-38, "Disciplinary Actions" and Grievant's acknowledgement;
6) Letter from physician, July 19, 1989;
7) Performance Evaluation of Grievant, 1987-88;
8) Performance Evaluation of Grievant, 1988-89;
9) Grievant's Employment Application.

V. Relevant Contract Clauses

Article 24	Discipline
Article 31	Leaves of Absence
Article 43.03	Duration: Work Rules

VI. Case History

Cuyahoga Hills Boys School is a maximum security facility for the confinement of high-risk, violent youth offenders in an open dormitory arrangement. Built for a capacity of 200 beds, its population in the last two years has exceeded 300 youth.

The Grievant, Jerry Stevens, was hired in March of 1981. In his capacity as Youth Leader 2, he was directly responsible for the youth in the dorm to which he was assigned. He has an extensive background for this position, holding a bachelor's degree and some graduate work in behavioral sciences and social work, 35-40 years of experience in working with youth, and has received a number of awards. His performance at Cuyahoga Hills Boys School for the 1987-89 period was acceptable. He concurrently holds a full-time day-time position with the Domestic Relations Court of Cuyahoga County (Joint Exhibit #9 and Grievant's testimony).

The events that led to his removal on August 8, 1989 are these: Superintendent Crystal Bragg entered the institution on June 10 and 28, 1989, outside her normal working hours to investigate reports she had been receiving about staff members sleeping on the job during the third shift. Because of an alleged employee warning system, she took precautions to make her visits a surprise so that she could get an accurate view of what went on at the institution during her absence. On June 10, she, Deputy Superintendent Edwards and Chief of Security Saunders arrived at about 3:00 a.m. Saunders stayed at the switchboard to control phone communications while Edwards and Bragg toured the buildings. Of the twelve staff members on duty that night, eight had investigations initiated for sleeping on duty, including one member of management. All employees for whom sleeping was proved were removed. The Grievant, who was

working his regular assignment on the 11:00 p.m.-7:00 a.m. shift in "G" dorm, was one of these staff members. On June 28, 1989, Edwards and Bragg again visited Cuyahoga Hills Boys School during the third shift and again found the Grievant asleep at his post.

The Grievant admits that he was sleeping on duty as charged, but testified that there were extenuating circumstances accounting for his behavior. He was tired from traveling to and caring for his seriously-ill brother and mother. He was also taking medication for pain caused by arthritis, a chronic condition known to Management. This medication makes him drowsy. He testified that he reported his use of it to his supervisors. On both occasions the dormitory was warm and quiet. On June 10, he had just nodded off after the duty officer's visit when Superintendent Bragg appeared. On June 28, he had been working without a break except for when his supervisor came through and signed the books.

The record discloses that Mr. Stevens had received four suspensions for neglect of duty in the two years prior to the incidents precipitating his removal (Joint Exhibit #3). He testified that the three-day suspension was related to his exceptionally heavy personal responsibilities. He also stated that his prior difficulties have been resolved.

On June 10 and June 28, notices of investigation were issued on the above incidents, citing Mr. Stevens for violating Directive B-19, Rule #7, sleeping during working hours. A

Notice of Third-Party Hearing was issued on June 30 and said hearing was held July 6. On August 8, Grievant was notified that he was removed from his position of Youth Leader 2, effective August 9, 1989, for neglect of duty (sleeping) in violation of Chapter 124.34 O.R.C. (Joint Exhibit #3). This action was grieved on August 10, 1989 and processed through to arbitration where it presently resides.

Several practices of the institution are relevant. One is that the youth leaders are locked into the dormitory to which they are assigned, taking their keys with them. According to the testimony of Deputy Superintendent Harry Edwards, youth leaders are very important for maintaining the security of the institution and its community because of their direct supervision of the youth who do such things as start fights, make keys and weapons from stolen items, and plan and attempt escapes. In this environment youth leaders must remain alert for their own safety as well as that of others. If a youth leader is afraid of becoming drowsy, according to Superintendent Crystal Bragg, he is supposed to notify the duty officer, who makes relief in the form of breaks and assistance available. If the youth leader is unable to perform his duty, he is not to come to work, but to use the call-off measures of the institution.

Another relevant practice of the institution is the method by which the Employer implements new work rules, in particular, Directive B-38 (Joint Exhibit #5). This directive, which is dated June, 1988, specifies removal for the fourth

occurrence of minor neglect of duty (Violation #1b) or sleeping on duty (Violation #9), and for the first or second occurrence of neglect of duty (Violation #1a) or sleeping on duty (Violation #9a) which endangers life, property of public safety. Superintendent Bragg was informed of the directive in the fall of 1988, whereupon she began its implementation. The Grievant received and reviewed the directive on October 10, 1988 (Joint Exhibit #5).

Ms. Dorothy O. Brown, a 13-year employee, President of Chapter 1830 and Chief Steward, testified that when she became aware of Stevens' pre-disciplinary investigation she did not think he would be discharged because no one had ever before been removed for sleeping in the years she had been at Cuyahoga Hills Boys School. Randy Garrett was discharged, but that was on July 29, after Stevens' hearing. Directive B-38 was on the OCSEA/AFSCME Labor Management meeting agenda for October 13, 1988 (Employer Exhibit #5) and she knew of it, but she does not know when it became effective. She further testified that when the Union is aware that an employee is subject to discharge, it is put on notice as to what actions to take to defend the employee. In this case, the discharge was a total surprise to her.

VII. Positions of the Parties

Position of the Employer

The Employer argues that the Grievant was, in fact, found sleeping on duty both on June 10 and June 28. Contrary

to the Union's argument, there are no degrees of sleeping at Cuyahoga Hills Boys School. Sleeping on duty is so serious as to warrant discharge on the first offense because of the threat of danger to the youth, the institution, and the surrounding community. It constitutes a major breach of security.

The Employer contends that the Grievant knew of the seriousness of sleeping on duty and of the injuries and escapes that could result. He was also aware of the rules prohibiting sleeping and neglect of duty, having read and understood Directive B-19, "General Work Rules." Both the Grievant and the Union were aware of the disciplinary grid of Directive B-38, "Disciplinary Actions," which became effective on the date each employee acknowledged having reviewed it.

Management has not bargained away its authority to manage which is protected by §4117 O.R.C. and Article 5 of the Collective Bargaining Agreement, and the Union has not grieved or objected to the implementation of Directive B-38, for which notice was provided as called for in §43.03 of the Contract.

The Employer also points out that past practices are not binding authority under §43.03 of the Contract, and that since B-38 has been in effect it has been consistently applied.

Regarding the Union's contention that the Employer knew of the Grievant's medical problems and medication, it points out that the physician's statement was dated July 19, 1989, after the fact of the sleeping incidents. The Grievant never provided documentation of on-going medical problems and failed

to show that he notified the duty officers on the nights in question. Given the Grievant's personal schedule of working two jobs and time at the gym, it is no wonder he was tired, but his medication defense is self-serving.

Regarding the Union's contention that nothing serious happened as a consequence of the Grievant's actions, what if something had happened? Management's hands cannot be tied because there is always the risk of danger and the public, if it knew, would not tolerate eight of twelve staff members sleeping while on duty in this institution.

The Employer also claims 124.34 O.R.C. is assumed in the just cause standard, and management's use of it has been consistently upheld.

Finally, in support of its right to establish rules and to discharge on a first offense of sleeping, the Employer cites Arbitrator Feldman in M.R.D.D. v. O.C.S.E.A. (Brown), Grievance No. G87-0874 (7-31-87).

Position of the Union

The Union does not dispute that the Grievant was asleep on the job on both June 10 and June 28. However, it claims that there were mitigating circumstances and procedural defects that violate the just cause and progressive discipline standards of Article 24 of the Collective Bargaining Agreement.

First it claims that the only prior discipline of the Grievant in his eight years of employment at Cuyahoga Hills occurred one and a half years prior to the instant case. This,

too, was related to the personal responsibilities that played a role in his current difficulty. On both June 10 and June 28, the Grievant was on medication that produces drowsiness and reported same to his superior. Moreover, Management knew of his medical history. The Union cites Arbitrator Pincus who sustained a grievance partially because of the Employer's failure to investigate and consider the Grievant's medical problem (Cuyahoga Hills Boys School v. O.C.S.E.A. (Cayson) 35-05-8708-89-00670103). Also on the nights in question, the Grievant had been working without breaks following stressful and tiring trips out of town to attend to seriously ill family members. Moreover, nothing untoward happened at the institution as a result of his accidental nodding off--no escapes or attempts and no injuries to youth or staff.

The Union goes on to argue that the Grievant had no forewarning that he could be discharged for sleeping. Directive B-19 does not specify a penalty for the infraction of this rule. Directive B-38 does, but arbitrators have ruled that its grid is a guideline for management (Graham in M.R.D.D. v. O.C.S.E.A. (Niepling) #24-09-890214-0174-01-04 and Smith in Cuyahoga Hills Boys School v. O.C.S.E.A. (Garrett) #35-03-(08-02-89)-41-01-03). Moreover, it was not clear when B-38 was actually in effect. Article 24.04 requires that employees be informed of the possible form of discipline when they are notified of the pre-disciplinary hearing, but the Grievant's Notice of Third-Party Hearing merely says "discipline" and the

Notices of Investigation refer to B-19. Since no employee had previously been discharged for sleeping, the most the Grievant could reasonably expect was a suspension. The Union was thus hindered in its ability to represent the Grievant effectively. It argues that it is not fair to get tough without clear advanced warning, and cites Arbitrators Pincus (Cuyahoga Hills v. O.C.S.E.A. (King) #G87-2810) and Smith (Cuyahoga Hills v. O.C.S.E.A. (Garrett) #35-03-(08-02-89)-41-01-03), each of whom returned an employee to work because of procedural violations including failure to inform the grievant of the possible form of discipline.

The Union goes on to contend that the timing of the Employer's actions in this matter are also at fault. The removal decision was made on July 11, just two business days after the hearing, too fast to have taken into consideration the Union's evidence and argument put forth at the hearing. The actual removal, however, did not occur until August 9, four weeks after the hearing and six weeks after the second incident of sleeping. Arbitrator Drotning has found a 44-day delay to call into question management's view that the employee's action warranted discharge rather than rehabilitation (Kristen Hosier v. O.D.O.T. 31-07-890323-20-01-06).

Finally, the Union challenges the State's reliance on O.R.C. 124.34, claiming that this diminishes the due process rights guaranteed by Article 24 of the Contract. In support it

cites Rollins v. Cleveland Heights and Arbitrator Pincus in Wiley King v. CHBS - G87-2810.

For all of these reasons, it asks that the Grievant be returned to work with full back pay, seniority, and benefits, and be made whole.

VIII. Opinion

It is an uncontroverted fact that the Grievant was found asleep on duty twice within a three-week period. It is also clear that sleeping on duty in these circumstances constitutes neglect of duty with potentially serious consequences for the youth in the care of the State, for the staff of the institution, and for the community. As I have previously held, that no harm was done on these particular instances does not mitigate the threat of danger, which is real and not speculative. The Employer's rule against sleeping on duty is therefore a reasonable one, and one for which discipline is appropriate to improve and ensure employee performance. It is also clear from the record that the Grievant knew of the rule because of his acknowledgement of Directives B-19 and B-38. What is not so clear is whether he and the Union knew, or ought to have known, that discharge was a possible consequence of his behavior on the nights of June 10 and June 28. I think the answer to this is yes, the Grievant and Union could reasonable have foreseen that he could be removed, particularly after the June 10 incident. The Grievant had received four increasingly heavy suspensions in the two years preceding the June 10 incident for neglect of

duty. The record, including the cases submitted by the Union as Exhibit #2, does not disclose how the Employer treated other employees on their fifth rule violation (or, indeed, if any had accumulated a similar discipline record), but the Grievant and Union must have known or ought to have known that the Employer's tolerance for rule violations was nearing exhaustion. Despite this, the Grievant neglected his duty yet a sixth time on June 28.

The Union claims that the ambiguity surrounding the implementation of Directive B-38 deprived it of clear notice that Stevens was to be held to a higher standard than prior rule offenders. It asks that this discharge be set aside for the same reasons that Randy Garrett's removal was. There are several reasons this cannot be done. A major factor in the Garrett case was the fact that he had twice been held to the pre-B-38 standard after he had received the directive setting forth the disciplinary grid. This fact plus the failure of the Employer to indicate in any way that the situation was different in May from what it had been when the prior discipline had been applied persuaded me that "the Union and Grievant could not have reasonably foreseen that discharge was a possible outcome of the pre-disciplinary hearing" (Garrett decision, p. 16). As a consequence, Garrett waived his right of Union representation at the pre-disciplinary hearing. These facts do not obtain in the case at bar. There were no disciplinary actions intervening between the acknowledgement of B-38 on October 10, 1988 and the

incidents giving rise to the removal in June, 1989 to cloud further the effective date of B-38. Additionally, unlike the Garrett case, the Union here did not show prejudice to the Grievant on account of B-38's ambiguous effective date. Indeed, the uncertainty surrounding the effective date of the higher standard is irrelevant in this case because when Stevens was found sleeping in June, his neglect of duty record of four violations placed him at risk of losing his job under the pre-B-38 standard. The Union and the Grievant should have known this.

The Union correctly points out that timeliness is a factor to be considered by the Arbitrator under §24.02. I disagree that two days is too little time for the Employer to have considered the Union's case as put forth at the pre-disciplinary hearing. I am also persuaded by the testimony of Superintendent Bragg and Employer Exhibits 1 and 2 tracing the routing of this disciplinary action that the time elapsing between Superintendent Bragg's decision and the actual removal represents due consideration of the issues involved by specialized staff and higher authority rather than unwarranted delay.

The Union's argument that reliance on O.R.C. 124.34 diminishes the Grievant's due process and procedural rights under the Contract is unfounded since the Employer does not seek to use the Code to usurp the collectively-bargained provisions of the Contract.

Finally, the Union raises the issue of the Grievant's condition on the nights he was found sleeping. The claim that the Employer knew the Grievant was taking medication that produces drowsiness is unsubstantiated. While the Arbitrator sympathizes with the Grievant's physical and emotional condition brought on by his own and his family's ill health, the fact remains that he chose to work while under personal stress and without adequate sleep, rather than to seek leave. This decision placed himself, the youth in his charge, the institution, and community at risk.

To summarize, Jerry Stevens neglected his duty by sleeping on June 10 and June 28, 1989, he was progressively disciplined under reasonable and known work rules, he could reasonably foresee the consequences of his behavior, and he received due process.

IX. Award

Grievance denied.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
March 26, 1990