VOLUNTARY LABOR ARBITRATION

#420

In the Matter of the Arbitration

-between-

STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES

-and-

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

ARBITRATOR'S OPINION

Grievant: ISAAC G. BLAND

FOR THE STATE:

DENEEN D. DONAUGH
Labor Relations Administrator
Ohio Department of Youth Services
Division of Administrative Services
Labor Relations
51 N. High Street, Room 611
Columbus, Ohio 43215

FOR THE UNION:

TIM MILLER
Staff Representative
Ohio Civil Service Employees Association, Local 11, AFSCME
Northern Ohio Regional Office
77 N. Miller Road, Suite 204
Fairlawn, Ohio 44313

DATE OF THE HEARING:

March 1, 1990

PLACE OF THE HEARING:

OCSEA
77 N. Miller Road
Fairlawn, Ohio 44313

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

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The hearing was held on March 1, 1990 at the Ohio Civil Service Employees Association, Local 11, AFSCME, 77 N. Miller Road, Fairlawn, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 10:00 a.m. and was concluded at 4:30 p.m.

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On August 14, 1989 **ISAAC BLAND** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES**, the "State" protesting his discharge by the State for sleeping while on duty. The grievance was denied at the various steps of the grievance procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME**, the "Union". Since the parties were unable to resolve the grievance, the grievance was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was first employed at the Cuyahoga Hills Boys School in Warrensville Township, Ohio on November 18, 1984. The State removed him from his position of Youth Leader 2 effective August 5, 1989.

The events giving rise to the instant grievance occurred on June 10, 1989 during the Grievant's shift which begins at 11:00 p.m. and ends at 7:00 a.m. when Crystal Bragg, Superintendent of Cuyahoga Hills Boys School and Harry Edwards, Deputy Superintendent of the School showed up at the facility during the middle of the shift. Bragg explained that her reason for doing so was because of the "verbal and written complaints" that she had been receiving from staff members. They said that there "were problems on the shift". Edwards had been

to the facility during the shift but "he could not get the total picture". She went on to state that Edgar Jacobs, Youth Leader Supervisor 2, who was also a Duty Officer, had told her that staff employees were sleeping and he could not stop them. He requested "help" from her because he would find employees sleeping but "it was his word against their word". According to Bragg, Jacobs thought that sleeping by the staff presented a danger at the facility. Bragg testified that Jacobs told her that the supervisors "did not always agree" on whether the staff was sleeping. Jacobs told her that one supervisor would say that an employee was sleeping and the other supervisor would say that the employee was not sleeping, or that he did not see the employee sleeping.

Since Bragg felt that if the employees were sleeping it would constitute a safety problem and in order to assist Jacobs, she decided to show up at the institution during the 11:00 p.m. 7:00 a.m. shift, without alerting any of the staff personnel. Bragg also referred to the "telephone network" that existed during the evening shift at the facility. For example, if the Assistant Superintendent was seen walking through the front door, a "network" of employees would be contacted so that the various supervisors and employees on the shift would be on "their best behavior".

In order to avoid alerting the "network" that they were entering the institution, Bragg, Edwards and the Chief of Security drove up to the Institution and parked in an area where they would not be noticed by anyone looking out of the windows of the dormitories. When they entered the institution, they encountered a staff member at the switchboard. In order to avoid any phone networking at the switchboard, the Chief of Security was posted at that site so that the switchboard operator would not alert anyone else including the Duty Officers on the shift that the Superintendent and Assistant Superintendent were in the facility. Furthermore, the switchboard operator was instructed not to alert anyone of their presence in the facility.

Bragg and Edwards then checked on the various areas that were locked after which they proceeded to walk through the dormitories. Bragg indicated that her plan was to have staff accompany them on their rounds so that they would not alert other staff personnel in dormitories that they had not visited. After their walk through the facility Bragg and Edwards found that of the twelve (12) persons who were on the 11:00 p.m. to 7:00 a.m. shift, [nine (9) Youth Leaders, two (2) Duty Officers and a Switchboard Operator] eight (8) investigations were subsequently initiated based upon the offenses of sleeping or inattentiveness to duty.

The Grievant was on duty as a Youth Leader 2 in Dormitory "H". Before entering Dormitory "H", Duty Officer Jacobs joined Bragg and Edwards. As they entered the day room of Dormitory "H", Jessie Williams, a Duty Officer, according to Bragg, was seated in a chair facing the television set. Bragg indicated that he was not facing the area where where the youth were sleeping. Bragg and Edwards then entered the Youth Leader Office where they found the Grievant asleep. At first glance, Bragg indicated that the Grievant appeared to be asleep, but she wanted to make sure that he was asleep. As a result she said that we waived our hands around the glass or the window surrounding the office which looks out into the area where the youth sleep. She took a key and tapped it on the window and there was no response from the Grievant. After entering the Youth Leader Office, the Grievant jumped up out of his seat. When Bragg asked him if he needed a break, the Grievant replied, "No", he did not.

After leaving Dormitory "H" which was the last dormitory that they investigated, Bragg said that "we went back to decide what to do". With regard to the Grievant's situation, once a Union Representative was secured, a meeting was held with the Grievant "on short notice". A Notice of Investigation, was prepared according to Bragg. When it was given to the Grievant, he tore it up. A second notice of investigation was then prepared which described the

incident as follows: "Mr. Bland was in violation of B-19, Work Rule 7 "sleeping during working hours." The Notice of Investigation was signed by Jacobs. On the bottom of the first page of the form there is an employee statement. Bragg indicated that the Grievant checked off the category "agreed" in response to the question which states: "Do you agree with the allegations contained in Section 1?" Section 1 of the notice of investigation describes the incident which has already been set forth. Bragg indicated that they found the Grievant asleep at approximately 3:55 a.m.

Referring to Williams, Bragg indicated that he was sitting in the day room and it "appeared" that he was also asleep. Their investigation by Bragg's account showed that Williams allowed a Youth Leader to sleep and as a result, Williams was removed from his position.

Bragg testified that before entering the Youth Leader Office to find the Grievant asleep, she told Williams to be quiet because he was speaking loudly. In Bragg's view, Williams was trying to arouse the Grievant. Edwards said after finding the Grievant asleep, he took a head count of the boys in Dormitory "H".

Williams testified that he stopped by Dormitory "H" at which time the Grievant told him that he would take a break. Williams said

that he stationed himself in the day room, where he listened to the radio and had a clear view of the dormitory where the boys were sleeping. When the Grievant told him that he would take a break, Williams said that he [the Grievant] did not leave the dormitory; nor did the Grievant tell him that he would leave the dormitory on his break. Furthermore Williams said that he did not know whether or not the Grievant would leave or stay in the dormitory. Williams testified that when Bragg, Edwards and Jacobs came into the day room, he addressed them and asked Jacobs, "hey, what's happening?" He denies that he was sleeping; furthermore, he testified that he did not have a chance to explain the situation.

Turning to the Grievant's testimony on the events of the early morning hours of June 10, he said that he "was tired and could not sleep" before going to work. He said that there was "some machine" outside of his window at home and he could not sleep that day. As Williams made his regular rounds, the Grievant testified that he asked him for a break. After Williams agreed that he could take a break, the Grievant stayed in the Youth Leader Office and started to read. He testified that he "did not intentionally fall asleep or nod off" . The Grievant testified that Williams was seated in the day room so he could see the boys. He went on to state that he noticed Bragg when she came into the office and asked if he needed a break. He said, "No",

since Williams had given him a break. The Grievant estimated that he was on break approximately twenty (20) to twenty-five (25) minutes. On cross examination the Grievant said that he did not see Bragg looking through the window; nor did he hear her tap her key against the window. He said that he began his break at approximately 3:15 a.m.

DISCUSSION

The issue to be resolved by this arbitration which was agreed upon by the parties is as follows: "Was the Grievant removed for just cause? If not, what should the remedy be?"

The Grievant was discharged effective August 5, 1989 for violation of Department of Youth Services General Work Rule No. 7 for "[S]leeping during working hours" and "neglect of duty". The initial query to be addressed is whether the Grievant committed the offense in question. After carefully examining the evidentiary record I have concluded that the Grievant was sleeping during working hours on June 10, 1989.

Bragg's testimony is persuasive that the Grievant was asleep at approximately at 3:55 a.m. when she entered the Youth Leader's Office

at Dormitory "H", of the State's facility. Bragg's testimony was highly detailed and had the ring of truth. Thus, when Bragg, Edwards and Jacobs entered the dormitory, they walked around the Youth Leader's office. At "first glance, according to Bragg, the Grievant appeared asleep. Since she was uncertain that he was asleep, Bragg waived her hands around the glass walls of the office in order to attract the Grievant's attention. She then took a key and "tapped on the window but there was no response from the Grievant". Upon entering the office, the Grievant "jumped out of his seat". Bragg then asked the Grievant if he needed a break to which he replied, "no". Edwards corroborated Bragg's testimony that the Grievant was asleep. It is important to point out that Williams did not deny that the Grievant was asleep; he said that he "never saw him sleeping", while he was in the day room.

Viewing the Grievant's testimony in isolation warrants the reasonable inference that he was asleep during working hours on June 10. He acknowledged that he was tired because he had not slept during the day because a "machine" located close to the window of his room at home caused a great deal of noise.

When Williams entered Dormitory "H" as part of his "regular rounds", the Grievant asked him for permission to take a break, which was given. According to the Grievant he "started to read". He then

stated that he did not intentionally fall asleep or nod off". It is well established that a person is always given conscious warnings of drowsiness. If he does not heed such warnings, sleep is usually certain to result. I therefore disagree with the Grievant's characterization that he "did not intentionally fall asleep or nod off".

By falling asleep during work hours, the Grievant, as a direct care employee, committed a serious offense. Each dormitory at the facility houses forty (40) boys, all of whom have committed felonies. Depending upon the degree of felony, incarceration can range from six (6) months to one (1) year. The average age of the boys who are confined is sixteen and one-half (16 1/2) years. Although the Cuyahoga Hills Boys School is classified as a "medium security" facility, there is no difference between the youth sent to a "medium security" and "maximum security" institution.

The Youth Leader is directly responsible for the dormitory. The duties of the Youth Leader require that he has the "most contact with the youth" in overseeing their activities. They see to it that the youth do not "disturb" or damage property and that they do not hurt themselves or others. If there is an escape by the youth the Youth Leader is the first to know about it. If the Youth Leader fails to perform his duties properly, it creates a major security risk.

In light of the Youth Leader's duties, it is important that the youth are observed during evenings when they are supposed to be asleep. As Bragg explained "incidents" have occurred during evenings, including the "crawling" by youth along the floor in order to escape from the facility. Bragg indicated that if the youth are not observed, they could escape by obtaining keys from a Youth Leader who is asleep. They could also "tamper" with the windows in order to escape if a Youth Leader is not alert and properly performing the duties of the job. Moreover, as I have already indicated, the youth can hurt themselves or others if a Youth Leader is asleep. Accordingly, by sleeping on duty during working hours, the Grievant has committed a serious offense.

"BREAKS"

Since the Grievant was sleeping during his break, it is important to consider the evidence concerning breaks by Youth Leaders. Since they are paid for the eight (8) hours on their shifts, Youth Leaders are paid during breaks and lunch. As Bragg indicated, Youth Leaders are required to observe the youth and/or be accessible during their shifts. On July 6, 1989, Bragg issued a memorandum to the Union which indicated that Youth Leaders are to call their supervisor or duty officer on the "7-3 & 11-7 shifts * * * to get a break". The memorandum indicates that "[U]nder no circumstances

are the youth to be left unsupervised"; and that "[A] break is not to exceed 15 minutes". In her testimony, Bragg confirmed the requirements for a break which are contained in her July 6, 1989 memorandum.

Bragg explained the purposes of a break for Youth Leaders. During a break, Youth Leaders are to handle personal matters, go to the bathroom, buy "pop" or refresh themselves so they will not go to sleep. She emphasized that "they are always on duty" and "they are not paid to sleep".

Williams indicated that on July 10 the Grievant asked for a break as he [Williams] stopped by Dormitory "H". Williams told the Grievant that when he was ready to leave , he should let him [Williams] know. Williams then "went out to the sitting room". Williams went on to state that about five (5) minutes later the Grievant told him that he would take a break. Williams testified that he [Williams] stationed himself in the day room and was listening to the radio. Williams stated that the Grievant did not leave the office during his break.

The Grievant testified that as Williams "made his regular rounds", and stopped by Dormitory "H", he asked Williams for permission to take a break from Williams. After receiving

permission, he remained in the office and "began to read". As I have already indicated, the Grievant said that he "did not intentionally fall asleep or nod off". However, as I have previously established, the Grievant, in fact, intentionally fell asleep.

In light of these factual considerations, the following concept is fairly well recognized:

> "Where an employee is guilty of wrongdoing but management [ordinarily the supervisor] is also at fault in some respect in connection with the employee's conduct, the arbitrator may be persuaded to reduce or set aside the penalty assessed by management. Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition (BNA, 1985) at page 688.

The evidentiary record warrants the conclusion that management, specifically, Williams is also at fault in connection with the Grievant's conduct. Pursuant to Bragg's July 6, 1989 memorandum, the Grievant notified Williams, the Duty Officer on the shift and received permission to take a break. The Grievant took his break in the Youth Leader office. Since the State did not submit evidence to

prohibit the Grievant as a Youth Leader from taking a break in his office, I have concluded that he is permitted to do so in his office. The query to be addressed is whether the youth in Dormitory "H" were left unsupervised. Bragg said that since there is not as much staff on the 11:00 p.m. to 7:00 a.m. shift the Supervisor or Duty Officer relieves the Youth Leader when he is requested to do so, during his rounds or when the request is made over the telephone. During his rounds, Williams gave the Grievant permission to take a break. During the break, Williams listened to the radio in the day room. The Grievant could reasonably assume that pursuant to the State's policy, Williams would supervise the youth during his break.

Bragg said that when she entered Dormitory "H", Williams was not covering the youth. He had not "placed himself in the place of the Grievant". Bragg and Edwards said that Williams had "appeared to be asleep". Furthermore, Williams was discharged for permitting the Grievant to sleep during working hours. Williams denied that he was asleep on June 10. Moreover, he testified that he "had a clear view of the dormitory", and "could see and hear any disturbance".

The point to underscore is that the Grievant could reasonably assume that after granting him permission to take a break, Williams would relieve him by carrying out his duties, including the

supervision of the youth in the dormitory. There is no evidence in the record that when he was relieved to take the break on June 10, the Grievant was aware that Williams intended to fall asleep. It is the reasonable perceptions of the Grievant when Williams permitted him to take a break that are important. Upon being relieved, the Grievant reasonably relied upon Williams to carry out his duties in a proper manner.

Having established that the State, or more accurately Williams was also at fault concerning the episode on June 10 does not excuse the fact that the Grievant was asleep. The purpose of taking a break, generally, is to refresh oneself so that sleep would not be necessary. However, the State's responsibility in the episode in question is of great weight in reducing the penalty assessed by the State against the Grievant.

Bragg said that the "standard" period of time for a break is "fifteen (15) minutes. The Grievant acknowledged in the "Notice of Investigation" that the approximate time for the beginning of the break was 3:15 a.m." Since Bragg awakened the Grievant at approximately 3:55 a.m., the Grievant took a break in excess of fifteen (15) minutes. Williams acknowledged that "breaks vary--some are ten (10) minutes and some fifteen (15) or twenty (20) minutes. He agreed that the forty (40) minutes break by the Grievant "was a long break".

Although the Grievant stated that the time that he acknowledged that he began his break was "approximate" or an estimate, I have concluded that he violated the State policy concerning the required length of time that he was to be on a break. However, again it must be emphasized that the State or more accurately, Williams is not wholly without responsibility. During the roughly forty (40) minutes that the Grievant was on break, he could have reasonably assumed that Williams carried out his duties in a proper manner. Moreover, Williams did not terminate the break; but, he acquiesced in the Grievant's break of roughly forty (40) minutes. Again, the Grievant committed a serious offense but Williams must bear some responsibility in the episode namely, for acquiescing in, or permitting the Grievant to fall asleep and for the break to last as long as roughly forty (40) minutes.

APPLICATION OF GUIDELINE 9

Guideline 9 of Chapter B-38 sets forth a progression of penalties from a "1st" occurrence to "4th" occurrence which includes "verbal" warning, "written" warning, "suspension" and "removal". It then provides that "a. causing danger to life, property or public safety" warrants "suspension or removal" for a "1st" occurrence and "removal" for a "2nd" occurrence.

In light of the job duties of a Youth Leader, "sleeping on duty" can be characterized as causing danger to life, property or public safety in the sense that in light of such a failure to supervise and observe the youth there is a likelihood to inflict injury to life, property or public safety. However, I have already established that Williams relieved the Grievant while he took a break. Moreover, after having been relieved, the Grievant reasonably relied upon Williams to properly supervise and observe the youth. Accordingly, I cannot conclude that by committing the offense of sleeping on duty, the Grievant caused danger to life, property or public safety. However, he has committed the offense of "[S]leeping during working hours".

PROCEDURAL ISSUES
a. Chapters B-19 and B-38

Bragg acknowledged that she recommended the discharge of the Grievant. She went on to state that Chapter B-19 contains the Department of Youth Services General Work Rules. When there is a violation of Chapter B-19, she turns to Chapter B-38 to determine where the offense falls within the grid that is contained therein. Bragg added that she uses it as a "guideline". Among the numerous Rules contained in Chapter B-19, Section IV is Rule 7 which provides: "Sleeping during working hours". No penalty is set forth for the

various Rules in Section IV, although Section III B of Chapter B-19, in relevant part, provides as follows:

> "* * Violation of this Directive and other Department of Youth Services directives as well as those directives developed by each Managing Officer shall constitute cause for corrective action, up to and including removal depending upon the gravity of the situation. * *"

Chapter B-38 provide for "Disciplinary Actions". It contains "Disciplinary Guidelines" in the form of a grid. Thus Guideline 9 provides as follows:

"DISCIPLINARY GUIDELINES

	Occurrences			
Violations	1st	2nd	3rd	4th
		* * *		
Sleeping on Duty	Verbal	Written	Suspension	Removal
a. Causing danger to life, property or public safety	Suspension or Removal	Removal		
	* * * * -			

The employees, including the Grievant, at the Cuyahoga Hills Boys School were aware of the General Work Rules in Chapter B-19. However, the Union raises several issues concerning Chapter B-38. Bragg acknowledged that Chapter B-38, which contains the "Disciplinary Guidelines" took effect when the employees "signed off on a form". The employees "signed off on a form" containing Chapter B-38 at different times. Characterizing Chapter B-38 as a "directive", Bragg said that various groups within the facility signed off on Chapter B-38 at different times because some of the "groups" of personnel are on duty and are required to watch the boys; the groups had different schedules and rotations; it "was faster" in taking effect and one group could benefit from the answers to the questions asked by another group. Although it is an unusual procedure because the "Disciplinary Guidelines" did not apply at the same time to all of the bargaining unit employees at the facility, the Grievant acknowledged that he had seen Chapter B-38 and "signed off on it". It is true that the Grievant signed off on receipt of Chapter B-38 before June 10, 1989 when the episode in question occurred. Had a Youth Leader, other than the Grievant committed the same offense as the Grievant, the State would not have applied Chapter 39-B if such Youth Leader had not signed off upon receipt of Chapter 39-B. In such a situation the directive could not be applied equally to persons similarly situated, and would be considered a serious procedural deficiency. In the absence of such evidence, I

cannot conclude that when the Grievant committed the offense in question, the other bargaining unit employees (Youth Leaders), similarly situated were unaware of Chapter B-38 and did not sign off upon receipt of the directive. Furthermore, by signing off on Chapter B-38, I have concluded that the Grievant knew or should have known that the directive applied to his future conduct.

The Union contends that the Grievant was notified that he violated General Work Rule 7, "sleeping during working hours" but was discharged under Chapter B-38, Guideline 9, roughly five (5) weeks after the incident. The Union's contention is among several issues which will be considered in the discussion that follows.

ARTICLE 24, SECTIONS 24.02 AND 24.04

Article 24, Section 24.02, in relevant part, provides:

> "* * 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."

Furthermore, Section 24.04 in relevant part provides:

> "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."

In light of these terms in Article 24, I turn to consider the events beginning on June 10, 1989 when the Grievant was found sleeping during working hours by Bragg. Afterwards, on June 10, a Notice of Investigation was issued by Jacobs indicating that the Grievant "violated B-19, Rule 7* Sleeping during working hours". On July 3, 1989 Deputy Superintendent Jackson sent the Grievant a letter notifying him that a third party hearing would be held on July 12, 1989. As a result of the third party hearing or pre-discipline meeting, that was held on July 14, 1989, Bragg's decision to remove the Grievant was made on July 17, 1989, but the Grievant was not notified that he was removed effective, August 5, 1989 until August 4, 1989.

Based upon this sequence of events I have concluded that the State failed to comply with the letter and spirit of Article 24, Sections 24.02 and 24.04. The pre-discipline meeting did not occur until July 12, slightly more than one (1) month after the incident giving rise to the meeting. Thus, given the unequivocal events of June 10, as

observed by Bragg, Edwards and Jacobs, the State waited until July 12 to hold a pre-discipline meeting in accordance with Section 24.04. Moreover, although Section 24.04 requires that the Grievant "and his or her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline, the notice of pre-discipline meeting merely confirms that the Grievant "received a copy of the Notice of Investigation subjecting [him] to discipline for Neglect of Duty [sleeping] as described in the NOI dated June 10, 1989." Thus, contrary to Section 24.04, the Grievant was not informed in writing of the possible form of discipline. Indeed, when the Grievant received the Notice of Investigation on June 10, Jacobs refers to a violation of B-19 work rule 7# * * *." As I have previously indicated the Work Rules contained in Chapter B-19 do not specify a penalty for violation of any of the Work Rules, except to indicate that the "Violation of this directive" (Chapter B-19) as well as other directives of the Department "shall constitute cause for corrective action up to and including removal depending upon the gravity of the situation". These terms would be known to the Grievant had they not been contained in Chapter B-19. What is to be emphasized is that under Section 24.04 the Grievant and his representative were required to be notified of the "possible form of discipline" prior to the pre-discipline meeting. This requirement was not satisfied. Indeed, the Grievant was first notified on August 4, 1989 that he was removed

effective the following day, August 5. Thus, almost two (2) months after the incident giving rise to the removal, the Grievant was notified of the form of discipline imposed.

It is not as if the Grievant was removed from employment as a Youth Leader 2 on June 10, given the facts as found by Bragg in Dormitory "H". However, the Grievant continued to be employed as a Youth Leader for roughly eight (8) weeks after June 10, when he was notified on August 4 that he was removed, effective the following day. Such a delay in notifying the Grievant that he would be removed combined with the Grievant who continued to satisfactorily carry out his duties for a period of roughly eight (8) weeks is unfair. The Grievant could reasonably believe that he would be disciplined, but such discipline would not include removal. In other words, the Grievant was lulled into a false sense of believing that he wold not be removed, by reason of the State's failure to notify him of the possible form of discipline prior to the pre-discipline meeting and by continuing to be employed in the same position carrying out the same duties for a period of roughly eight (8) weeks.

Bragg characterized the Grievant's offense of "sleeping during working hours" on June 10 as a "security risk". He continued to be employed, she indicated, because eight (8) of the twelve (12) employees were subject to investigations as a result of sleeping during

working hours or due to inattentiveness to duty on June 10. Thus, it is reasonable to infer that the State's failure to notify the Grievant of the possible form of discipline prior to the pre-discipline meeting of July 12 and its failure to notify him that he was removed until August 4 were intentional. The State's reason is only too apparent. To notify the Grievant that the possible form of discipline was removal prior to the pre-discipline meeting, and to continue to employ him as a Youth Leader are, to put it mildly, inconsistent with sound labor relations policy. Moreover, the delay of approximately two (2) months before notifying the Grievant that he would be discharged, warrants the reasonable inference that the Grievant could not be replaced. These internal considerations of the State, do not excuse the State's violations of Section 24.02 and 24.04. Parenthetically, since I am required to consider "the timeliness of the Employer's decision to begin the disciplinary process" the State's delay in imposing discharge and by having the Grievant employed in the same position for roughly two (2) months after June 10 are factors to consider, within the terms of Section 24.02.

There is another matter that must be considered. Since the effective date of the Agreement between the State and the Union, no employee had been found by supervision to have committed the offense of "sleeping during working hours". This added to the

uncertainty by the Grievant [and the Union] concerning the possible form of discipline to be imposed against the Grievant prior to the pre-discipline meeting as required by Section 24.02.

To conclude, the procedural deficiencies must be viewed cumulatively rather than by considering each deficiency in an isolated manner. Taken as a whole, they are sufficient to warrant a reduction of the penalty to be imposed against the Grievant.

PENALTY

Between September 29, 1988 and January 16, 1988 the Grievant had been suspended on five (5) different occasions ranging from one (1) to fifteen (15) days for committing various offenses, including neglect of duty, insubordination and failure of good behavior. He then enrolled in an Emergency Assistance Program (EAP) and successfully completed it. Edwards called the Grievant "a good Youth Leader". The Grievant indicated that Edwards asked him to train Youth Leaders on June 9, the day previous to the incident giving rise to his removal from employment.

In light of the State's responsibility in the incident of June 10 as well as the procedural deficiencies committed by it. I have decided to reinstate the Grievant without back pay. This penalty should not be construed to minimize the offense of sleeping during working hours.

It is a serious and grave offense which but for the particular circumstances of this case, would warrant discharge. The Grievant should take advantage of this opportunity to justify the confidence that Edwards had in him on June 9, 1989 when he requested him [the Grievant] to train Youth Leaders.

AWARD

In light of the aforementioned circumstances the State failed to prove by clear and convincing evidence that the Grievant was discharged for just cause.

The Grievant is to be reinstated without back pay.

Dated: May 4, 1990
Cuyahoga County
Cleveland, Ohio

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295