

In the Matter of the  
Arbitration Between

The Division of Public Works  
Health

Grievance #02-03-  
(90-03-15)-0124-01-03

Employer

Grievant (Zwiebel)

and

Hearing Date: July 30, 1990

OCSEA, Local 11  
AFSCME, AFL-CIO

Opinion Date: September 4, 1990

Union.

# 485

Advocates for the Employer: Shirley Turrell  
Rodney Sampson

Advocates for the Union: John Fisher  
John Porter

In addition to the Grievant Catherine Zwiebel and the Advocates,  
the following persons were present at the hearing: Kenneth  
Bowers, Security Supervisor (witness), Les Hughes, Building  
Superintendent O.B.S. (witness), Crystal L. Fletcher, Ohio Highway  
Patrol Dispatcher (witness), Edward J. Painter, Purchasing  
Administrator (witness), Donald G. Slenmek, Highway Patrol Captain  
(witness) and Gary L. Hilton, Security Supervisor (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the  
sole purpose of refreshing her recollection and on condition that

the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

#### Joint Stipulations of Fact

1. Grievant was properly classified as a Security Officer I.
2. Grievant worked in the Old Blind School, for the Public Works Division of the Department of Administrative Services.
3. Grievant's date of hire -- March 30, 1981.
4. Grievant's working hours were 7:00 a.m. - 4:00 p.m., Monday through Friday.

#### Joint Exhibits

1. 1989 Collective Bargaining Agreement
2. Notice of Removal and Predisciplinary Notice
3. Grievance Trail
4. Position Description
5. Classification Specifications

6. Previous Discipline of Record
7. Work Rules - Security Officers
8. Time Records - Olentangy Inn
9. Time Cards - Department of Administrative Services

### Joint Issue

Was the discipline for just cause? If not, what shall the remedy be?

### Relevant Contract Sections

#### § 24.01 - Standard (in part)

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.

#### § 24.02 - Progressive Discipline (in part)

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

- A. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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.

#### § 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 the 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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, 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 ask questions, 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.

#### § 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§ 25.03 - Arbitration Procedures (in part)

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Facts

The Grievant is a Security Officer I hired on March 30, 1981. At the time of the discipline, she was stationed at the Old Blind School. Her shift was 7:00 a.m. - 4:00 p.m. Monday through Friday.

Prior to the discipline under review, the Grievant had received the following discipline (Joint Exhibit 6).

- |          |  |
|----------|--|
| 10-31-85 | Written reprimand for failure to make rounds (Rule 1a)   |
| 11-04-86 | 2 day suspension for Failure of Good Behavior to wit, watch TV while supposed to be on duty (Rule 13).   |
| 4-23-88  | Neglect of Duty which included (1) leaving post without permission, and (2) using property of a tenant (i.e. typewriter). (Rules 2 and 3)                                |
| 11-19-88 | 15 day suspension for Neglect of Duty which included (1) leaving post without notice, (2) sleeping on duty, and (3) failure to wear a complete uniform (Rules 8, 9, 11). |
| 9-6-89   | Written reprimand for being out of uniform on 9/4/89 after previous counseling in month of July re Uniforms (Rule 15).   |

The Department of Administrative Services employs Security Officers through the Bureau of Buildings to provide 7-day, round-the-clock security service to six (6) different state facilities. Various state agencies are housed within these facilities; each agency is charged a monthly fee for the security services provided. The Classification Specification for a Security Officer I requires among many other duties 1) screening persons entering and leaving premises, 2) logging messages. The Classification Specification also specifies that Security Officers are expected to "work in isolation" (Joint Exhibit 5). The Position Description is congruent (Joint Exhibit 6). Work Rules for Security Officers are 19 in number (Joint Exhibit 7). Work Rule 8 requires the wearing of the uniform. Work Rule 9 prohibits sleeping on duty. Work Rule 3 requires a guard to remain at the main desk unless for an emergency. Work Rule 1 on General Duties requires that a Security Officer "f. adhere to any specific verbal or written instruction given for a particular state building." Work Rule 2 requires a Security Officer to notify the supervisor if, because of illness or some other reason, the officer must leave the post. Rule 5 requires call-in one hour prior to shift. Work Rule 15 is descriptive of how violation of work rules can result in discipline. Work Rules 16, 17, 18, and 19 explain proper leave procedures.

This Arbitration arises from the removal of Grievant for the following alleged violations:

10-3-89      Away from post without permission  
10-31-89     Away from post with permission  
11-2-89      Away from post without permission

Work Rules 2 and 3

9-24-89      Asleep at post  
9-26-89      Asleep during duty (away from post)

Work Rule 9

8-22-89      Wearing pink house shoes at work - out of uniform  
8/23/89      Wearing pink house shoes at work - out of uniform  
8/24/89      Wearing pink house shoes at work - out of uniform  
11-6-89      No badge - out of uniform  
11-7-89      No uniform

Work Rule 3

10-6-89      Refused to answer phone  
10-12-89     Refused to answer phone

Work Rule 1

7/12/89      OBS -- Called in sick for shift at 3:00 a.m.  
             Inn -- Clocked out at 8:57 a.m.

7/19/89      OBS -- Did not punch in on security timeclock.  
             Paid from scheduled start time of 7:00 a.m.  
             Inn -- Clocked out at 7:05 a.m.

7/26/90      OBS -- Arrived at 8:56 a.m. Did not call to  
             report you would be late. Used 2 hours of comp  
             time, requested in arrears.  
             Inn -- Clocked out at 7:04 a.m.

8/9/89       OBS -- Called at 5:10 a.m. and said you wouldn't  
             be in. Used vacation leave, requested in  
             arrears.  
             Inn -- Clocked out at 8:29 a.m.

8/16/89      OBS -- Clocked in at 7:05 a.m. Did not call to  
             report you would be late.  
             Inn -- Clocked out at 6:53 a.m.

8/18/89      OBS -- Did not report for shift. Used vacation  
             leave, requested in arrears.  
             Inn -- Clocked out at 7:13 a.m.

9/1/89       OBS -- Called in sick for shift at 4:05 a.m. Used

comp time, requested in arrears.  
 Inn -- Clocked out at 9:41 a.m.

9/6/89      OBS -- Clocked in at 7:09 a.m. Did not call to  
              say you would be late.  
              Inn -- Clocked out at 6:53 a.m.

9/13/89      OBS -- Called at 6:45 a.m. to report you would be  
              an hour late. Never reported. Used vacation,  
              requested in arrears.

9/20/89      OBS -- Called at 6:38 a.m. to say you would be  
              late. Arrived at 7:35 a.m. Not leave taken.  
              Inn -- Clocked out at 7:17 a.m.

10/4/89      OBS -- Called in, did not work. Used comp time,  
              requested in arrears.  
              Inn -- Clocked out at 8:05 a.m.

10/10/89      OBS -- Called in sick for shift at 10:30 p.m. the  
              previous evening.  
              Inn -- Worked from 1054 p.m. on 10/9 until 7:06  
              a.m. on 10/10.

10/11/89      OBS -- Called in sick for shift at 6:02 p.m. on  
              10/10.  
              Inn -- Worked from 10:49 p.m. on 10/10 until 7:56  
              a.m. on 10/11.

(When you returned to work at the OBS, you submitted a  
 Dr.'s excuse to be off work for 10/10 and 10/11. Used  
 comp time for both days, requested in arrears.)

10/17/89      OBS -- Called in sick. Used comp time, requested  
              in arrears.  
              Inn -- Worked from 10:55 p.m. on 10/17 to 6:45  
              a.m. on 10/18.

11/1/89      OBS -- Called in sick at 6:00 a.m. No leave  
              granted.  
              Inn -- Clocked out at 8:02 a.m.

One request for removal was made December 25, 1989 by Gary  
 Hilton, Supervisor, based on the December 25th sleeping-on-duty  
 incident (Employer Exhibit 8). During that time, an investigation  
 was already under way with regard to improper use of leave (see



IOC Bowers to Trout) (Employer Exhibit 10). After the Pre-disciplinary Meeting of January 23, 1990, the Grievant was notified of her removal. She grieved on March 15, 1990. Step 3 was held on March 29, 1990, and Step 3 report was issued April 30, 1990. On May 10, 1990, a request for Arbitration was made by the Union (Joint Exhibit 3). Relevant testimony at the Arbitration hearing was as follows:

Captain Slemmer of the Highway Patrol, whose job was Facility Manager of the Facility, testified that on numerous occasions the Grievant failed to perform her duty by reading newspapers and magazines on the job, failing to challenge entering persons, sleeping, and being out of uniform. He said he had made numerous verbal complaints and then on November 9, 1989 he wrote to Mr. Hughes about uniform violations on November 7, 8, 9, 1989 (Employer Exhibit 1).

Edward Painter, a purchasing agent, testified that while leaving the facility on September 24, 1989, he observed the Grievant in a "relaxed pose, slumped in her chair, eyes closed, hands on lap." He further testified that she did not challenge him (or his companions) and merely opened her eyes briefly as they passed. He reported these facts to Captain Slemmer who wrote to Mr. Hughes on October 10, 1989 (State Exhibit 2).

Ms. Fletcher, the Ohio Highway Patrol Dispatcher, testified that on December 25, 1989, she observed the Grievant at her desk through a monitor. Dispatcher Fletcher said the Grievant "appeared to be asleep." Furthermore, Dispatcher Fletcher

observed Gary Hilton come in the building behind the Grievant, walk up behind her (the Grievant) and tap her shoulder. Until Mr. Hilton tapped the Grievant's shoulder, the Grievant did not move. Dispatcher Fletcher also testified that she had seen the Grievant asleep on duty on other occasions and had seen her wearing pink houseslippers at work.

Mr. Kenneth Bowers, Security Supervisor, testified that he had assigned the Grievant to the 7-3 Monday-Friday shift at her personal request. He also said that the Grievant had received two (2) copies of the Work Rules (Joint Exhibit 7). He testified that he was involved in the investigation of mis-use of leave. He said he knew she had another job, part-time at the Olentangy Inn and that when she called in sick on 11/1/89, he called there to check on her. Mr. Bowers also stated that the State had, in 1985, furnished the Grievant with uniform skirts rather than uniform pants because of her religious objection to pants.

Mr. Hughes, OBS Building Superintendent, said that he had received numerous verbal complaints about the Grievant's work from Captain Slemmer and from other tenants. He said she was told to knock on his door when she needed to take restroom breaks. He received a letter from Cathy Mock on October 3, 1989 (Employer Exhibit 3) complaining that the desk was unstaffed several times (during Grievant's duty).

Mr. Hughes also said that he directly ordered the Grievant to answer his phone (which rang at the guard's desk when he was not there) when he was out of his office and that the Grievant replied

"that's not my job, I'm not your secretary." A meeting was held between Mr. Hughes, the Grievant, and the Union Steward about the phone. At that meeting, Grievant's only reply was "I heard you." Subsequently, on October 6, 1989, a temporary custodian was asked by Mr. Hughes to observe the Grievant not answering the phone. The custodian signed a statement as to what he had witnessed (Employer Exhibit 5). Mr. Hughes also received the statement (Employer Exhibit 4) from another employee, Jeanetta Roarh, who claimed she found the Grievant lying down in the restroom during the Grievant's shift.

Mr. Hughes said that during the leave violation investigation, he went with Mr. Bowers to the Olentangy Inn and picked up time cards. He said he consulted with Shirley Turrell as to whether he was allowed to do that. He also testified that around 12/1/89 he worked with Ms. Turrell to match the time cards with State payroll records.

Mr. Gary Hilton, Security Supervisor, also testified. He said that on 12/25/89, he had to tap Grievant on her shoulder to awaken her; she was sleeping at her post.

The Grievant stated that on 12/25/89 she was not sleeping, that on 9/26/89 she was not lying on the couch, and that she could not recall the incident of 10/3/89. Moreover, she said she only ever left her post to go to the bathroom and that she did not inform Hughes because he was "not available." She said "no one had ever questioned her about her request for leave forms." She said she had no uniforms because "everyone else got their new ones

in July and I did not, so I turned my old ones in." Under cross examination, she said the old ones did have skirts, and she was aware that the State claimed to be having trouble getting skirts that fit her in the new model. She admitted calling in 16 times to notify the Employer that she was not coming in, when for part of the time requested she was working at the Olentangy Inn as a receptionist. She adamantly denied that her behavior constituted "fraud." She said "one could get sick at any moment" or that "perhaps she had a dr.'s appointment that day." On rebuttal, Advocate Turrell took the stand and was questioned by Co-Advocate Sampson. She testified that she was the only Step 3 designee for her department and had been so for many years. In her job as Labor Relations Officer, she did speak with Hughes and Bowers to advise them on the proper procedures to obtain the time cards. She maintained she never personally obtained evidence at the Olentangy Inn until 7/18/90, in preparation for the Arbitration. As a Labor Relations Officer, she reviews all requests for just cause and denies requests for discipline where she believes just cause does not exist.

The Exhibits were introduced which contained the Grievant's time cards from Olentangy Inn, phone messages with Grievant's call-ins, and Grievant's requests for leave (Joint Exhibits 7 and 8 and Employer's Exhibits 6 and 7, and Union Exhibit 2).

#### Union's Position

1. Step 3 Hearing Officer was Shirley Turrell who was

involved in the investigation; therefore, Ms. Turrell was not "neutral" as required. Union cites to Decision of Arbitrator Rivera in G-24-09(04-01-88)-40-01-04 (1/13/89).

2. The charges against Grievant are "stacked," i.e., duplicative. Union cites to Decision of Arbitrator Rivera G-31-05-880314-0018-01-06 (6/6/89).

3. The State was aware that Grievant had a second job and the State approved all her requests for leave.

#### Employer's Position

The Employee had a long record of misconduct for many of the violations alleged in this discipline (sleeping, uniform, away from post). She had been progressively and properly disciplined. Moreover, Grievant has been proven to have intentionally, repeatedly, and fraudulently alleged illness to acquire leave. Removal is commensurate and progressive.

#### Discussion

The evidence is clear and convincing that the Grievant was away from her post on numerous occasions without authorization. From prior counselings and disciplines, she had clear notice. If she was denied opportunities to go to the bathroom, the issue could have been raised much earlier or grieved. Moreover, she could have left the Supervisor notes when she had to leave. Thus,

the Grievant violated Work Rule No. 3. The evidence is also clear and convincing that Grievant has slept on duty. Both Dispatcher Fletcher and Mr. Painter are objective witnesses whose testimony was credible. The Grievant violated Work Rule No. 9. The Grievant also failed on numerous occasions to wear her uniform. The State had provided her with skirts to meet her religious needs. However, she still was out of uniform. Grievant violated Work Rule 8. The Arbitrator is also convinced that the Grievant failed to follow an order of her supervisor, to answer the phone (Rule #1). Given her prior disciplines for these same infractions, including a 15 day suspension, a strong argument could be made that removal was justified on these grounds alone. However, the Grievant displayed a clear and obvious pattern of calling-in from one job to report sick, to report late, or to report non-attendance and then continuing to work at the other job when she should either have been traveling to arrive at her Security Post on time or when she was supposed to be at her Security Post.

In those cases where she received sick leave and was working at the other job, she committed fraud. (See 7/12/89 where she worked at the Inn while allegedly sick from 7:00 a.m. to 8:57 a.m. (her shift). (See 9/1/89 where she worked at the Inn until 9:41 a.m. when her shift began at 7:00 a.m.; the same shift which she was too sick to work.)

When Grievant called in from the Inn and subsequently requested either vacation or comp time, she was after claiming

sickness but taking comp or vacation time because her sick leave was exhausted. This behavior violated the leave policies of Rules 16-19.

Many times she called-off late or reported late when either working at the Inn or traveling from the Inn because she clocked out at the Inn with insufficient time to arrive at her job as a Security Officer.

The Union's rebuttal that the Employer knew of her second job and also approved the leave requests is totally irrelevant. The Employer knew she had another job; however, the Employer had no knowledge that she was working at the second job while claiming sick leave, vacation leave, and comp time from the Employer. Secondly, the approval of the leave requests is not binding on the Employer when the Employer had no knowledge of the Employee's behavior.

The stacking charge has some minor merit. In the Grosenbaugh Award, Arbitrator Rivera found that some charges were duplicative and some irrelevant. The Arbitrator favors being specific and clear in charges and not stacking by listing both the general inclusive charge and well as the specific charge. In this case, Work Rules #2 and #3 are the same offense in essence, i.e., being away without authorization. (If one is away from the post, the proper way is to notify the superior.) Work Rule #15 is mainly a description of possible discipline with groupings under larger headings, i.e., "Neglect of Duty." Hence, if one lists the specific actions, listing Rule #15 may be duplicative. Therefore,

the Arbitrator finds violation of #1, #3, #8, #9, and a violation of #5 on Reporting and Call-Offs. The behavior re: false reports on sickness, etc. could have been violations of 16-19, however, they best fit #15 (3) Dishonesty.

Lastly, the Union alleged that the discipline is unjust because of a procedural flaw, namely, Ms. Turrell was both the Labor Relations Officer and the Third Step Hearing Officer. The Union claims she was not "neutral." The contract does not require a "neutral;" in fact, since the Third Step Hearing Officer is always management, such a person could not be "neutral." The only person required in the process to be "neutral" is the Arbitrator. The Contract specifies little about the characteristics of a Step 3 person, i.e., only that he or she is an Agency "designee" (see Article 25.01). However, as pointed out by Arbitrator Rivera in the Penteost decision, a "fair and objective" investigation is part of "just cause." No evidence was introduced that the investigation was unfair nor not objective. The evidence of Ms. Turrell's alleged pre-discipline visits to the Inn was weak and successfully rebutted. One of the main purposes under the Contract for Step 3 is for the Employer at a higher level to review the evidence and hear the Employee's version. The Step 3 response of Ms. Turrell is a clear review; however, the Grievant chose not to be heard (as, of course, is her right). The double duty served by Ms. Turrell may pose some problems not brought to



light in this Grievance and as such should be a proper subject for Union-Employer discussions and if unresolved, a Grievance.

However, the Arbitrator finds no evidence of impropriety during this Grievance.

Award

Grievance denied.

September 4, 1990  
Date

  
Rhonda R. Rivera  
Arbitrator