In the Matter of the
Arbitration Between

#584

State of Ohio
Office of Collective Bargaining
For The Department of
Rehabilitation and Correction

and

State Council of Professional
Educators/OEA/NEA

Grievance Number:
27-16-901127-0394-06-10

Grievant: Charles Hartwell

Hearing Date: January 31, 1991

Brief Date: March 12, 1991

Award Date: April 22, 1991

Arbitrator: R. R. Rivera

For the Employer: Bruce Brown
Lou Kitchen

For the Union: Henry Stevens

The following persons were present at the Arbitration hearing in addition to the Grievant and the Advocates named above: Ronald E. Nelson, Jr., Assistant to Warden (witness), Bob Hansen, MCI, School Facilitator (witness), Michael L. Aldridge, MCI, Correction Officer (Sgt.) (witness), Dean Millhorne, Labor Relation Officer (witness), Herman Clark, Union Site Representative (witness), Carrie Smolik, President, SCOPE (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 Exhibits

1. 1989-1992 Contract

2. Grievance Trail (quoted in part below)

"Specific Violation of Article 1.05 -- Failure to abide by constitution of USA (Amend. 6)
Specific Violation of Article 3.01(5) -- Failure to abide by DRC Code of Conduct
Specific Violation of Article 13.03 -- Failure to abide by Pre-Disciplinary language
Specific Violation of Article 13.04 -- Failure to abide by "progressive discipline" language.

Remedy Sought: (1) Overrule the 5-day suspension and throw-out all paperwork re same; (2) Communicate all Due Process guarantees to accused employees; (3) Communicate right of accused to call witnesses favorable to self-defense; (4) Communicate right of accused to cross-examine and question witnesses re circumstantial issues; and (5) Grant Labor the right to call Management and Exempt as witnesses."

3. Discipline Trail

4. Prior Discipline (quoted in part below)

"On December 5, 1988 when GED Test Booklets were returned to the Department of Rehabilitation and Correction Bureau of Education and Training it was determined that six (6) of the booklets were missing. An investigation was conducted and it was determined that you did receive and were responsible for the booklets. During the time the "booklets" were your responsibility you did not follow procedures in the proper control or security, as required. Records indicate you did receive training in the GED Test Policy. Your actions constitute insubordination and were a violation of #6C of the Ohio Department of

Rehabilitation and Correction Standards of Employee Conduct and did result in the temporary discontinuance of GED Testing for the Department of Rehabilitation and Correction. Therefore, you are hereby suspended from duty without pay for three (3) days."

5. 6th Amendment to the U.S. Constitution

6. a) diagram of site
   b) diagram of site

Employer Exhibits

1. Revised Standards of Employee Conduct Dated 6/1/90 Effective 6/17/90
(Quoted in part p.1)

"Attached you will find the Revised Standards of Employee Conduct, which are to take effect on June 17, 1990. As we learn from experience, we strive to periodically update and improve upon that which has gone before. These Standards are applicable to all employees in the Department, and your adherence to them will serve to enhance the operational effectiveness of the Department. For these reasons, your attention to and compliance with the Standards of Employee Conduct is greatly appreciated."

Quoted
Rule 11 - Sleeping on duty
1st offense = 3-5 day suspension
2nd offense = 5-10 day suspension
3rd offense = removal

2. a) Acknowledgment dated 8/20/86 by Grievant of Standards of Employee Conduct.

   b) Acknowledgement dated 5/31/90 by Grievant of Revised Standards of Employee Conduct.

   c) Acknowledgement dated 6/7/88 signed by Grievant of amended copy of pp. 13 and 14 Standards of Employee Conduct.

   d) Acknowledgement dated 10/23/87 signed by Grievant of Revised Standards effective 10/13/87.

e) Acknowledgement dated 2/13/89 signed by Grievant of Marion Correctional Institution Employee Reference Manual/Handbook #412.

3. Statement dated August 15, 1990 by Correction Officer Mike Aldridge.

4. Statement dated August 15, 1990 by R. Hansen, School Facilitator.

5. Acknowledgement and Waiver of Right to Representation signed by Grievant and dated August 24, 1990.

Union Exhibits

1. Letter dated 5/10/90 to Henry Stevens from Joseph B. Shaver.

2. Letter dated 5/23/90 to Joseph B. Shaver from Henry Stevens. Salient portions are as follows:

"In accordance with Article 14 Work Rules, Section 14.01 Work Rules, this letter will serve as the Association's objection to certain aspects of the Code of Conduct.

Any violation of Ohio Revised Code 124.34 may require discipline from an oral reprimand through removal. That item is found in the beginning of the Code of Conduct. Any other items should begin with an oral reprimand, allowing for mitigating circumstances. To do otherwise, would be in violation of the Agreement."

3. Letter dated March 1, 1990 from Arbitrator Dworkin to Tim Wagner, Chief, OCB Arbitration Services.

Contract Sections (cited by Union in the Grievance)

Article 1.05 - Savings Clause

This Agreement shall be interpreted to be in conformance with the Constitution of the United States, the Constitution of the State of Ohio, all applicable

federal laws, and Chapter 4117 of the Ohio Revised Code.

Should specific provision(s) of this Agreement be declared invalid by any court of competent jurisdiction, all other provisions of the Agreement shall remain in full force and effect.

In the event of invalidation of any portion(s) of this Agreement by a court of competent jurisdiction, and upon written request by either party, the Employer and the Association shall meet within thirty (30) days at mutually convenient times in an attempt to modify the invalidated provision(s) by good faith negotiations.

Amendments and modifications of this Agreement may be made by mutual agreement of the parties subject to ratification by the Association and/or the General Assembly as required pursuant to Chapter 4117 of the Ohio Revised Code.

Article 3.01(5) - Management Rights

5. Suspend, discipline, demote, or discharge for just cause, reduce in force, transfer, assign, schedule, promote, or retain employees.

Article 13.03 - Pre-Suspension or Pre-Termination Conference

When the Employer plans to initiate a suspension, termination or demotion, a written notice of pre-disciplinary conference shall be given to the employee who is the subject of the pending discipline and to the designated Association representative. Written notice shall include a statement of the charges against the employee, contemplated disciplinary action, and the date, time and place of the conference. The conference will be held at a reasonably convenient location determined by the Employer and shall be scheduled no earlier than three (3) days following the notification to the employee.

At work facilities having no designated site representative, employees may request through their supervisor that a fellow employee accompany him/her to a scheduled pre-disciplinary conference.

The employee may request that a representative designated by the Association be present at the

conference. The employee, or his/her representative, may make a written request to the Employer for continuance of up to forty-eight (48) hours. A continuance beyond forty-eight (48) hours may be arranged by mutual agreement of the parties. Such continuance shall not be unreasonably requested or denied.

Prior to the conference, the Employer may take temporary action to reassign the duties of the affected employee or place said employee on administrative leave until final disposition by the Employer. Such action may not be unreasonable in duration or result in loss of pay for the employee involved and shall not constitute discipline under this Article.

The pre-disciplinary conference will be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary action against the employee. At the conference, the employee will be provided with documents used to support the possible disciplinary action which are known of at that time and an opportunity to present the employee's side of the story. The employee may, but is not required to, respond to the allegations.

The Appointing Authority shall render a written decision within twenty (20) work days of the conclusion of the conference and transmit the written notification to the employee and the designated Association representative. "Work days" refers to Monday through Friday excluding legal holidays. Times shall be computed by excluding the first and including the last day.

The employee may waive this conference by written notification. Absent extenuating circumstances, failure of the affected employee to appear at the conference will result in a waiver of that employee's right to a conference.

Article 13.04 - Progressive Discipline

the Employer will follow the principles of progressive discipline. Disciplinary action shall include:

1. Verbal reprimand (with appropriate notation in the employee's official personnel file);
2. Written reprimand;

3. Suspension without pay;
4. Demotion or discharge.

Disciplinary action shall be commensurate with the offense.

Contract Sections (Selected by the Arbitrator)

Article 3.01 - Management Rights

Except to the extent expressly abridged only by specific articles and sections of this Agreement, the Employer reserves, retains, and possesses, solely and exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. the sole and exclusive rights and authority of management include specifically, but are not limited to the following:

1. Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public Employer, standards of services, its overall budget, utilization of technology, and organizational structure;
2. Direct, supervise, evaluate, or hire employees;
3. Maintain and improve the efficiency and effectiveness of governmental operations;
4. Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
5. Suspend, discipline, demote, or discharge for just cause, reduce in force, transfer, assign, schedule, promote, or retain employees;
6. Determine the adequacy of the work force;
7. Determine the overall mission of the Employer as a unit of government;
8. Effectively manage the work force;
9. Take actions to carry out the mission of the public Employer as a governmental unit;
10. Determine the location and number of facilities;
11. Determine and manage its facilities, equipment, operations, programs and services;
12. Determine and promulgate the standards of quality and quantity and work performance to be maintained; and

13. Determine the management organization, including selection, retention, and promotion to positions not within the scope of this Agreement.

Article 6.04 - Arbitrator Limitations (in part)

Only disputes involving the interpretation, application or alleged violation of provisions of this 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 the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

Article 6.06 - Issues

Prior to the start of an arbitration hearing, the representatives of the Employer and the Association shall attempt to reduce to writing the issue(s) to be placed before the arbitrator and any stipulations as may be agreed upon. At the meeting, if the parties cannot agree upon the issue(s) they shall at that time submit their separate versions of the issue(s) in writing to each other, and shall submit copies to the arbitrator at the hearing. Where such a statement is submitted, the arbitrator's decision shall address itself solely to the issue(s) presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue(s).

Article 13.01 - Progressive Discipline Standard

Employees shall only be disciplined for just cause.

Article 13.02 - Investigatory Meeting

An employee shall, upon request, have an Association representative present during a meeting with representatives of the employing agency held for the purpose of obtaining information which might reasonably lead to disciplinary action against that employee. The employee shall be required to respond to the allegations unless he/she is subject to criminal penalties. The right to representation does not extend to day-to-day communications which occur between an employee and the Employer, such as: performance

evaluations, training, job audits, counseling sessions, work-related instructions, or to inform an employee of the disciplinary action.

Article 14.01 - Work Rules

Work rules shall be all those written policies, regulations, procedures, and directives which regulate3 conduct of employees in the performance of the Employer's services and programs.

Work rules shall not conflict with any provision of the Agreement. The Association will be furnished with a copy of the work rules in advance of their effective date. The Association shall designate an address for receipt of this communication.

Work rules shall be made available to affected employees prior to their effective date.

In emergency situations, as defined by the Employer or the employing agency, the provisions of this Section may not apply. The Association and affected employees will be notified promptly of such declared emergencies and their duration.

Article 14.02 - Uniformity

It is the intent of the Employer that work rules shall be interpreted and applied uniformly to all affected employees.

Issue

Union's Statement of the Issue

Did Management at the Marion Correctional Institute violate the 1989-92 Agreement between the State Council of Professional Educators and the state of Ohio when they suspended Mr. Charles Hartwell, Guidance Counselor, for five (5) working days without pay?

Employer's Statement of the Issue

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

Facts

At the time of the incident leading to this Arbitration, the Grievant was a Guidance Counselor at the Marion Correctional Facility. He had been employed at MCI in that position since March 30, 1986. His original date of hire with ODRC was April 15, 1985. The prior discipline properly in his file on the date of the incidence was a three day suspension (See Joint Exhibit 4). The Grievant's work hours were 7:30 a.m. to 4:00 p.m. He was permitted a lunch period of 45 minutes. According to his testimony, he took his lunch period on the day in question from 10:45 a.m. to 11:15 a.m. He had received copies of all work rules and had notice of them (See Employer Exhibit 2).

On August 15, 1990, Correction Officer Mike Aldridge was in the main office of the Education Department for the Grievant. A call came in for the Grievant; Mr. Aldridge answered the phone and sought to find the Grievant. Mr. Aldridge went to the door of Grievant's office and glanced in. He testified that, at first glance, he thought the office was empty. Simultaneous with his glance, the officer placed his hand on the door knob of the office and noticed that the door was locked. Officer Aldridge said that upon further observation he could see the Grievant sitting in the office, his feet propped up on a piece of furniture, and his head bowed. The officer said that he "rattled

the door knob" and called out the Grievant's name a number of times. Mr. Aldridge said that then he asked Mr. Hansen to come to the door. Hanson beat on the door and yelled "Hey Charlie, telephone." Aldridge said that the Grievant then jumped up quickly and answered the phone in the office. Mr. Aldridge said that he yelled the Grievant's name 4 or 5 times but that during that period the Grievant made no movement and made no response. Aldridge estimated the actual time during his yells as 5-10 seconds. He said that Hanson hit the door 4 or 5 times "hard" before the Grievant responded. On cross examination, the officer stated that he had said: "I believe the man is asleep." (Officer Aldridge signed a statement on 8/15/90. See Employer's Exhibit 3.) Robert Hanson testified that he was in his office and he was asked by Officer Aldridge to come to Grievant's door. He said that the officer called Grievant's name 4 or 5 times. Hanson said he could see the Grievant through the window in the door. His feet were up on the desk, his head was bent down in "a sleeping position," a book was open in his lap, and his hands were lying palms upward on the chair arms. Hanson said he rattled the door knob twice, banged on the door 3 or 4 times and called out the Grievant's name. In the middle of the knocking, the Grievant rolled around on the chair, his feet came off the desk and hit the floor, and he picked up the phone. (Mr. Hanson signed a statement on 8/15/90. See Employer's Exhibit 4.) Mr. Hanson reported this incident.

On August 24, 1990, Mr. Nelson, Administrative Assistant to the Warden, conducted an investigatory interview with the Grievant. The Grievant waived his right to Union representation at that interview (See Employer's Exhibit 5). That interview from Mr. Nelson's perspective is reported in a report to the Warden dated August 27, 1990 (Joint Exhibit 3). Mr. Nelson testified at the Arbitration hearing. Mr. Nelson said that he interviewed Officer Aldridge, Mr. Hanson, and an inmate prior to his interview with the Grievant. The Grievant told Mr. Nelson that he had not responded to either the phone rings, the first knock, or 2nd knock. The Grievant said that he was not sleeping but reading. He described his posture as "feet on table, back against the wall, book on lap." He said he had been prescribed "Vistaril," an antianxiety drug which can cause drowsiness. He said he could take it 3 times a day if needed but that he only takes it twice a week. He said he could not recall if he took the medicine on the day in question. He said he only heard two knocks (Mr. Hansen's) and did not hear the phone. He described his reaction to the knocks as "startled." According to Mr. Nelson, at the end of the interview, he said to the Grievant

> It is my opinion that you returned to your office, sat down in the chair in the corner, put your feet up on the computer table, leaned back against the wall, and while reading the computer book on your lap, you "dozed" off.

According to Mr. Nelson, the Grievant replied "I agree, that is exactly what happened." Mr. Nelson concluded that just cause existed for discipline.

A Predisciplinary Conference was held October 26, 1990, October 31, 1990, and November 8, 1990. Mr. Dean Millhorne was the Hearing Officer. He filed a report dated November 13, 1990 which concluded that just cause for discipline existed (Joint Exhibit 3). Mr. Millhorne testified at the Arbitration hearing. He said that Marion Correction Institution housed convicted felons including murders, rapists, and armed robbery. He stated that sleeping in areas accessible to inmates is dangerous. He said his conclusions as to just cause were based primarily on the testimony of Mr. Hanson and Mr. Aldridge. He said the two witnesses provided by the Grievant had no first hand knowledge of the incident in question.

Ms. Carrie Smolik testified for the Union. Ms. Smolik is President of the State Council. She said that the Union had sent a letter about the Standards of Conduct (Union Exhibit 2) in response to the Employer's letter of May 10, 1990 (Union Exhibit 1). The gist of the Union's stated objection was that the discipline cited in the work rules were not progressive, i.e., did not start with verbal reprimands. Ms. Smolik stated that some violations should not start with verbal reprimands, i.e., murder and drugs, rather she said that all discipline should be commensurate with the offense. Ms. Smolik also stated that the only way "progressivity" can be amended is as provided in the Contract per 39.02.

Under cross examination, Ms. Smolik stated that no grievance was filed against the implementation of the work rules, rather,

the problems were addressed within other grievances. She acknowledged that Article 5.03 provided for the filing of class grievances within 15 working days of the date when employees had knowledge or could have had knowledge of the incident from which the grievance arose. Ms. Smolik stated that the letter (Union Exhibit 2) was timely. However, she agreed that the letter was not "a grievance" but an "objection."

The Grievant testified that he was not sleeping, rather he was reading a book. He further testified that he had heard the phone ring and the knocks. He said his door was locked because of security. He said he did not "doze" off and that the "beating" on the door "startled" him. He said that Mr. Aldridge was lying because he (the Grievant) had written Mr. Aldridge up two times. He said he had not told Mr. Nelson that he dozed off on the day in question; he only only told Mr. Nelson that on other occasions under the influence of his medications that he (the Grievant) had dozed off in front of his supervisor, Mr. Hanson. He said he did not tell Mr. Nelson "I agree that's exactly what happened." The Grievant said Mr. Hanson also lied, so he (Mr. Hanson) would not be considered contributorily negligent. The Grievant said he had "dozed off" during his lunch periods but that "dozing off" was not sleeping. He inferred that the discipline was retaliatory for reports he had written about prison conditions.

Employer Position

The State of Ohio has shown that Grievant was suspended for just cause. Grievant was suspended for violation of a work rule which prohibits sleeping on duty. The evidence adduced at hearing has shown convincingly that Grievant was both "asleep" and "on duty" in his office on August 15, 1990.

Furthermore, the work rule, which forms the basis for the discipline imposed in this matter, is reasonably calculated to accomplish a proper purpose of the State in its capacity as an Employer. The work rule seeks to foster safety in the work place. The Grievant and his bargaining agent were aware of the existence of the rule forbidding sleeping on the job in August, 1990. Neither the Grievant nor his bargaining agent made a timely effort to protest the implementation of the work rule as established by the Employer, although the collective bargaining agreement demands that such protests be filed in accord with the language of the grievance procedure set forth in that Agreement.

At least two different individuals actually saw the Grievant sleeping during his work hours: Michael Aldridge, the Correction Officer assigned to the school area of the prison, and Robert Hansen, the Grievant's supervisor. Ron Nelson, although he did not witness the incident of sleeping, did hear the Grievant admit that he had slept on the job.

The State has shown that the Grievant was asleep, but more importantly the State has also proven that he was on duty when the sleeping occurred. Grievant's work hours have clearly been

shown. According to his own testimony, he had taken his lunch and returned to paid duty status at the time when the sleeping incident took place.

The State's rule against sleeping was formulated to prevent breaches of security in the penal institutions of Ohio. Prison environment is inherently dangerous. The prison at Marion houses convicted murderers, robbers, rapists, and assorted other felons. That environment is rendered proportionately more dangerous when those employed by the facility established to secure those convicts, spend their working hours sleeping.

The Grievant knew that the State had a work rule which prohibits sleeping on the job. Neither the Grievant nor any reasonable worker until this hearing has dared to suggest that such a rule violates either common sense or the terms of the labor agreement. To make such an argument requires that one has the reasonable expectation to doze at one's employer's expense. Since the State cannot think of any good which can be produced by sleep nor any service which can thereby be rendered, the argument shows no logical merit and must be rejected.

Union Position

The Association will utilize Arbitrator Carroll R. Daugherty's "Seven Tests for Just Cause" (Brief Bros. Cooperage Corp. (42 LA 55) to illustrate Management's numerous violations of the 1989-92 Agreement between the State Council of Professional Educators and the State of Ohio.

More specifically, the Union will show Management's obvious violation of Article 13 Progressive Discipline, Section 13.01 Standard. "EMPLOYEES SHALL ONLY BE DISCIPLINED FOR JUST CAUSE."

TEST 1 - NOTICE

Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Item 11, sleeping on duty, like most of the items found in the Standards of Employee Conduct, was established primarily for correction officers who work different shifts, and not other employees, and especially not for those in Bargaining Unit 10. Test 1 requires Management to properly promulgate the intent of Item 11 to all employees. Proper promulgation requires Management to do more than publish a set of rules. Management must do more than place a set of rules in any administrative manual. Management must make sure that each employee understands the rule. Management did not do this in this case.

TEST 2 - REASONABLE RULE

Was the Company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Company's business and (b) the performance that the Company might properly expect of the employee?

Because of the ambiguous way that Management addresses Item 11 of the Standards of Employee Conduct it is not certain what their true intent is concerning this rule, Sleeping on Duty. If Management would apply Item 11 as it reads, adhering to Article

23 Hours of Work, of the Agreement this could be a good work rule. However, as Management has applied it in this instance, the rule is unreasonable and not related to the orderly, efficient, and safe operation of the company's business.

TEST 3 - INVESTIGATION

Did the Company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of Management?

The basic criteria for an adequate investigation into a disciplinary case requires three elements. (A) All potential witnesses have been questioned. (B) All relevant physical and documentary evidence has been obtained. (C) The investigation has been pursued in a timely manner. The Association will use these three criteria to show Management's inadequate investigation.

A. In this case, Management only questioned those witnesses necessary to sustain their charge. Mr. Hartwell submitted to Management, a list of witnesses that were never questioned and in most cases, never contacted. (Exhibit J-3 Investigatory Interview and Predisciplinary Conference Hearing Officer's Report.) Mr. Millhorne in the pre-disciplinary conference hearing officer's report admits to denying Mr. Hartwell the opportunity to call certain witnesses that maybe have been pertinent in this case thus denying him due process.

B. Mr. Ronald Nelson, Jr., took accurate measurements of the room. He also investigated the medication and studied the employee work history. Mr. Nelson failed to examine the Agreement between the parties. (Article 23 Hours of Work.)

C. This incident occurred on August 15, 1990. In accordance with Exhibit J-3, an investigatory interview was held on August 27, 1990, eleven (11) days later. However, the date the result of the interview was delivered to the Warden is not certain. Exhibit J-3, Mr. Nelson's investigatory interview, has three dates on it. Page 1 has September 28 and 29, and the last page has September 26. The last page has comments by the Warden dated August 29, 1990. Mr. Hartwell was not charged until November 16, 1990, some three (3) months later.

TEST 4 - FAIR INVESTIGATION

Was the company's investigation conducted fairly and objectively?

For an investigation to be successful it must be objective. For it to be objective, someone from Management must make certain that the evidence that has been collected is evaluated carefully, not just from a partisan, management-oriented perspective but from the perspective of a disinterested third party. This investigation was from a partisan management-oriented perspective. Mr. Ronald E. Nelson, Jr. has only been serving in his capacity as Administrative Assistant to the Warden for eight (8) months. He could hardly be viewed as a disinterested third party.

TEST 5 - PROOF

At the Investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Arbitrator Whitney in (Midwest Telephone Co., 66 LA 311, 314, 1976) states: "As countless arbitration decisions demonstrate, in a disciplinary case the employer bears the burden of proof. In short, the employer must supply convincing evidence that the employee committed the offense for which he was charged. It is up to the employer to prove the employee 'guilty' and not the employee who must prove himself 'not guilty'."

In this case, Management does not have a scintilla of evidence to support their charge. Officer Aldridge's testimony ranged from conflicting to unbelievable. Mr. Ron Hanson's testimony and illustration clearly vindicated Mr. Hartwell. Anyone's vision would have been hampered when looking at Mr. Hartwell from that vantage point. There were papers on the window. Management has in no way offered convincing evidence that would indicate Mr. Hartwell to be asleep. Reading or eyes closed for 5-10 seconds, but not asleep. Here are the facts. Mr. Hartwell was in his office with the door locked on August 15, 1990 at about 3:15-3:30 p.m. He was sitting in a corner adjacent to the door with his feet on a table. This was not student contact time (classroom instructional activity or group instructional activity). There was a radio playing in that office. Mr. Hartwell had taken some medication that could make

him appear drowsy. Mr. Hartwell was on his feet within twenty (20) seconds of notification of a telephone call. Mr. Hartwell has been employed at Marion Correctional Institute for more than nine (9) years. He or no other bargaining unit members have been charged with sleeping on duty. Management has no direct knowledge nor is their evidence clear and convincing.

TEST 6 - EQUAL TREATMENT

Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

While this question would be answered with a yes, it will illustrate why this rule (sleeping on duty) was designed for AFSCME members and not those of Bargaining Unit 10. Unit 10 members have never been charged voluntarily with this rule. To the contrary, correction officers who work both 2nd and 3rd shift are often charged with this violation. Whether just cause is established, the frequency to the charge would indicate the reason for this rule with other bargaining units.

TEST 7 - PENALTY

Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

Arbitrator Whitney P. McCoy in Huntington Chair Corporation, 24 LA 490/491 (1955) states:

"Offenses are of two general classes (1) those extremely serious offenses such as stealing, striking a

foreman, persistent refusal to obey a legitimate order, etc., which usually justifies discharge without the necessity of prior warnings or attempts at corrective discipline. (2) Those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, which call for some milder penalty aimed at corrections."

Exhibit E-1 on Pages 3, 4, 5, and 6 of the Standards of Conduct outline those offenses that would be considered extremely serious.

Clearly, this offense would fall in the second category (less serious infraction of plant rules call for some milder penalty aimed at correction).

Mr. Hartwell's only other disciplinary action was a suspension for the loss of GED examination materials. That explains why he now locks his office door. Management offers no other concerns during his nine years of service.

Test 7 - Mr. Hartwell should have received some milder penalty (oral or written) aimed at correction.

To the question of should the document itself (Revised Standard of Employee Conduct) Exhibit E-1 have been grieved. As discussed in Test 2 - Reasonable Rules, Elkouri and Elkouri, "How Arbitration Works", 3rd Edition, Page 319 states:

"1. Company-issued booklets, manuals, and handbooks which have not been negotiated or agreed to by the union are said to constitute 'merely a unilateral statement by the Company and not sufficient to be binding upon the Union.' It can be expected that arbitrators ordinarily will be inclined to give such publications little or no weight in the interpretation of disputed contractual language."

The Revised Standard of Employee Conduct is a company issued document that has not been negotiated or agreed upon by the parties.

The document itself states in pertinent parts:

"References:

Ohio Revised Code Section 124.34 sets forth statutory provisions governing the conduct of union exempt state employees. Unionized employees are governed by the terms and conditions of the collective bargaining agreements between the State and the bargaining units." (Page 1).

"D. This document does not take the place of, or otherwise alter, the provision contained in Ohio Administrative Code Section 5120-9-45, entitled, 'Employee Grievance Procedure' or in the negotiated Collective Bargaining Agreements." (Emphasis added) (Page 10).

"Progressive Discipline:

The purpose of this policy and procedure is to provide a measure of consistency. The consistency being sought does not require the Employer to administer the discipline indicated in the Standards of Employee Conduct exactly the same in every case. Every distinguishing fact must be considered first. Arbitrators are not bound by prior arbitration cases like the courts are bound by case law. They diligently adhere to the philosophy that 'every case turns on its facts' and although they may be persuaded by prior decisions, they do so only if the facts are nearly indistinguishable." (Page 15).

Corrective counseling is always an option and may be utilized prior to any disciplinary action as well as in between the various steps of progressive discipline. Ultimately, the proper application of this Standards of Employee Conduct policy will satisfy the goal for which it was intended, and that is to assess a discipline commensurate to the offense." (Page 16).

"Finally, a consistent application of discipline should take into account other relevant data such as work record or other unique circumstances surrounding the offense." (Emphasis added)

Based on the above statements found in the document, and the letter to Mr. Joseph B. Shaver, dated May 23, 1990, the Association objects to the document (A-2), and Article 14, Work Rules, Section 14.01 in pertinent part: "Work rules shall not conflict with any provision of the Agreement."

The Association saw no reason for grieving this document prior to a violation.

Discussion

The Grievant is a 6 year employee of ODRC with only one discipline currently in his record.

The Arbitrator finds that on August 15, 1990, the Grievant was sleeping on duty. Whether Grievant was sleeping or dozing is a semantic difference without meaning. Dozing may be a short "sleep" or a "light" sleep, but dozing is still sleeping. The Grievant was "on duty." The time period in question was during work hours and not during lunch. Whether anyone could or could not directly see his eyes in the circumstances as presented is unimportant. The Grievant was clearly and admittedly in the posture of sleep -- his head slack, his hands upturned. Moreover he was unresponsive to door rattling, name calling, phone rings, loud knocks etc. He jumped up, startled! All these circumstances taken as a whole indicate to the reasonable observer that the Grievant was asleep at work. How long he had been in that mode is unknowable and unknown.

The Union's argument that the rule was designed only for correction officers, etc. is without merit. No employer wants an employee to sleep on duty. No one pays an employee to sleep. A rule prohibiting sleeping at work is clearly reasonable. The difference is that in a prison sleeping is not merely "not working when being paid," sleeping presents a security issue. Sleeping represents a potential danger to the employee himself, rendering the employee vulnerable. Just because, in this particular instance, the employee's door was locked does not undermine the principle that sleeping by prison employees is dangerous. In addition, Guidance Counselors who work in prisons are expected to be security conscious. Prison Guidance Counselors are clearly on notice that prisons are not public schools; they are clearly on notice that security is inherent in their job. Moreover, the Grievant was on notice through the work rules that sleeping on duty was a prohibited activity. Moreover, the Grievant was also on notice that the Employer believed that sleeping was an offense of some seriousness since the Employer listed a 3-5 day suspension for a first offense.

The key issue in this Grievance is whether the suspension handed out complies with the contract which mandates progressive discipline which is commensurate with the offense. The Employer's position about the failure of the Union to appropriately grieve the total set of Revised Work Standards is well taken. The Union had notice of the Standards on May 23,

1990. No grievance was ever filed. Ms. Smolik admitted that the Union's letter was an objection not a grievance.

On the other hand, the Union's position that the work rules can not supercede or conflict with the contract is equally well-taken. The question is whether in this grievance the discipline meted out to the Grievant complies with Article 13.04. The Employer's work rules must be reasonable and under 14.01 must not conflict with the Contract.

The Arbitrator finds a work rule prohibiting sleeping on duty which applies across the board to all employees of the prison inherently reasonable. Both the Union and the Employer agree that not all discipline need begin with an oral reprimand. Some offenses which are serious in nature may be disciplined by beginning with suspension and dismissal. Moreover, the past discipline record of the particular employee is also a factor in determining the severity of a discipline for a particular offense. Every offense on every occasion need not warrant only an oral reprimand. If this situation were so, an employee could selectively violate rule after rule, meriting only an oral reprimand for each new "1st" offense.

The Grievant here was a 6 year employee. Six years shows stability and longevity. He had one prior discipline -- a three day suspension for failing to follow policy of the Department. Hence, the Grievant was by his record a responsible employee with minor discipline in a 6 year period. The Grievant had never been counseled or reprimanded for sleeping on the job.

By implication, the use of a medicine which could cause drowsiness was cited in mitigation. No evidence was offered that the medicine was used on the day in question. Moreover, the medicine was not newly prescribed. The Grievant knew about his job and knew about the medicine. His responsibility was to integrate those factors successfully. If he could not, his responsibility was to consult his doctor and/or his supervisor.

Sleeping on the job in many work situations could arguably, in a reasonable person's lexicon, merit only an oral reprimand on first violation. Where medicine was involved, counseling and a suggestion of a medical consult seems appropriate. The Arbitrator finds reasonable that in a prison where security is inherent in every job and where people are in danger, that sleeping on duty is more serious than in non-prison jobs. However, a 3-5 day suspension for a first offense without more seems unduly harsh to this Arbitrator as a standard. However, the harshness of the standard is not before the Arbitrator. The sole question is whether a 5 day suspension is commensurate with the Grievant's offense and whether the principle of progressive discipline in his case has been followed.

The Arbitrator, having found just cause for discipline in this case, must hesitate to interpose her judgment for that of the Employer. However, the Arbitrator also finds that a 5 day suspension for a first offense of sleeping on the job for a 6 year employee with the discipline as discussed is not

commensurate with the offense, rather the amount of the discipline is punitive.

Award

The Grievance is denied in part, upheld in part. The suspension is reduced to one (1) day. the Grievant shall be made whole for the 4 days improperly imposed.

April 23, 1991
Date

Rhonda R. Rivera