

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 656 EX

OCB GRIEVANCE NUMBER: 34-04-910227-0039-01-09

GRIEVANT NAME: JONES, RALPH

UNION: OCSEA/AFSCME

DEPARTMENT: BUREAU OF WORKER'S COMPENSATION

ARBITRATOR: LOVE, ANDREW

MANAGEMENT ADVOCATE: SAMPSON, RODNEY

2ND CHAIR: SEMAN, NANCY

UNION ADVOCATE: FISHER, JOHN

ARBITRATION DATE: AUGUST 15, 1991

DECISION DATE: AUGUST 26, 1991

DECISION: MODIFIED

**CONTRACT SECTIONS**

AND/OR ISSUES: FIVE DAY SUSPENSION FOR SLEEPING ON DUTY

**HOLDING:** ARBITRATOR FINDS THAT GRIEVANT DOES SUFFER FROM A SEVERE CASE OF SLEEP APNEA. GRIEVANT, HOWEVER, DID NOT SEEK TO RESOLVE THIS PROBLEM OR DETERMINE ITS CAUSE UNTIL AFTER HIS 5 DAY SUSPENSION WAS IMPOSED. ARBITRATOR FINDS THAT THE DISCIPLINE WAS NOT PROGRESSIVE AND REDUCES TO A THREE DAY.

COST: \$350.00



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ARBITRATION DECISION

IN RE:

RALPH JONES, : No. 34-04-910227-0039-01-09  
Grievant. : FOR THE OHIO BUREAU OF  
: WORKER'S COMPENSATION:  
: RODNEY SAMPTON  
: FOR THE GRIEVANT:  
: JOHN FISHER  
:

DECISION AND AWARD

This Grievance came on for hearing on August 15, 1991. This Grievance arose as a result of allegations that the Grievant violated Employee Handbook Memo 6.02(11), to wit: sleeping on duty. A predisciplinary meeting was held on January 24, 1991. As a result of the testimony presented thereat, the Grievant was suspended from employment without pay for five (5) working days, beginning February 4, 1991 and ending on February 10, 1991. The matter is now properly before this arbitrator.

The issues stipulated to by the parties are: Was the five day suspension imposed upon the Grievant for "just cause"; if not, what shall the remedy be?

The Grievant is a Data Technician 2, who works the third shift in the printing and operations section of the Ohio Bureau of Worker's Compensation (hereinafter "BWC"). Michael Cooper, Third Shift Supervisor 2 of Operations described the operation of the Data Processing Center, where the Grievant worked. He stated that there are three (3) very large printers, two (2) laser printers, and a burster trimmer. He stated that the speed in which these

machines print is quite rapid. Therefore, it is incumbent upon the data technicians to be alert in order to avoid potential danger to themselves or damage to the equipment if it jammed, or both. Mr. Cooper stated that the Grievant supervises all of the Data Technician 1's. He is also required to keep all stock current and to control all of the printers.

Mr. Cooper became aware of the Grievant's sleeping when he began his third shift duties. Mr. Cooper had awakened the Grievant on several occasions between November, 1989 and May, 1989. He further testified that he sent memos (Management Exhibits 1 and 2) to the Grievant advising him that disciplinary action would ensue if the Grievant continued to sleep while on duty.

The Grievant had a prior one day suspension, at which time the Grievant advised Mr. Cooper that he had a sleeping problem. Mr. Cooper requested copies of prescriptions that would indicate such a problem. However, the prescriptions provided to Mr. Cooper did not indicate that the medication caused drowsiness.

On November 29, 1990, Mr. Cooper observed the Grievant asleep at a table with his head back, hands to his side, and one foot on the table. On December 12, 1990, Mr. Cooper observed the same actions by the Grievant in the Computer Room. This was observed again on December 18, 1990, December 27, 1990, and December 29, 1990. In most of these instances, the Grievant denied that he was asleep. In addition to these previously mentioned dates, the Grievant was observed sleeping in the break room while not on break, in the library, and in the Supervisor's Pod. Furthermore, Mr. Cooper had received a number of complaints from the Data

Technician 1's and the Librarian. Mr. Cooper went on to say that it is the responsibility of the Grievant in his capacity as Data Technician 2, to make sure that the early morning mail goes out at 6:30 a.m. He reiterated that sleeping could cause injury to the Grievant or damage to the equipment, as well as not meeting the responsibilities of the morning mail requirements.

On cross examination, Mr. Cooper acknowledged that the Grievant had never been hurt on the job. When questioned about the Grievant's job performance evaluation, Mr. Cooper stated that the Grievant's performance was below average in the areas of sleeping while on duty. Furthermore, Mr. Cooper stated that he believes that the Grievant does have a sleeping disorder. He requested medical documentation from the Grievant's doctor, however none was received by the doctor.

Nancy Seaman, Labor Relations Manager with BWC, coordinates the Collective Bargaining activity and reviews disciplinary actions. Based on the evidence that she had received, Ms. Seaman authorized and authored the Level Three response.

Ms. Seaman stated that the Grievant should have applied for disability if he had a sleeping disorder. She acknowledged that she had become aware of letters from the Grievant's doctor, but these letters were received after the February disciplinary action. These letters received by Ms. Seaman indicate that the Grievant suffers from sleep apnea, a variant and intermittent cessation of breathing while sleeping. This condition can be dangerous, depending on the severity of the sleep apnea. It could result in heart stoppage or death. Moreover, this sleeping disorder can

result in sleepiness during the normal non-sleeping hours.

The Grievant testified that he has been employed with the BWC for ten years. He became a Data Technician 2 in 1989. The Grievant testified that he advised management that he would seek help for his sleeping problem. He was examined by Dr. Saul, a general practitioner who was treating the Grievant for hypertension and diabetes. Dr. Saul stated to the Grievant that he was not qualified to make a diagnosis of a sleeping disorder and referred the Grievant to Dr. Clark. The Grievant first saw Dr. Clark on December 27, 1990. Dr. Clark advised the Grievant that he did have a sleeping disorder and scheduled a series of tests on January 13 and 14, 1991. However, Grievant stated that his health plan, pursuant to the medical benefit plan with the State of Ohio did not cover Dr. Clark. Dr. Clark, nevertheless, provided an informational packet about sleep apnea and other sleeping disorders and suggested the Grievant obtain a C PAP machine. Eventually, Dr. DeMaria treated the Grievant for his sleep apnea and diagnosed it as severe in nature. Dr. DeMaria prescribed a C PAP machine. This machine forcibly pumps clean air into the user's mouth while the user is trying to sleep. The effect of this technique is to force open the passageway to the lungs for breathing. The Grievant brought his C PAP machine to this hearing and demonstrated its use.

On cross examination, the Grievant acknowledged that he received the C PAP machine on May 5, 1991 and notified Mr. Cooper at that time. The machine itself was ordered on March 25, 1991. The Grievant further acknowledged that he never requested leave for a sleeping problem, although he stated that he had consulted about

drowsiness since 1987. The Grievant testified that he did not realize that his problem was a sleeping disorder, such as sleep apnea.

#### AWARD

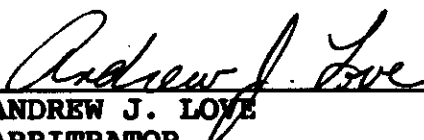
From the evidence presented by the Grievant and by BWC, there is no question that the Grievant suffers from a severe case of sleep apnea. The problem for this arbitrator was to determine to what extent the Grievant took the steps to resolve the situation in respect to his employment duties at BWC. The evidence presented shows that the Grievant was aware of a sleeping problem at early as 1989. However, there is no evidence that he took the necessary affirmative steps to resolve this problem or to determine its cause. At the same time, Management must consider the efficient flow of work and productivity, the potential for danger to employees and damage to equipment if a person is sleeping on duty. The Grievant, through his representative, forcefully argued that Management has a duty to refer the Grievant to one of its own doctors if Management determines that the Grievant has a sleeping disorder. Nevertheless, the Arbitrator is persuaded by the evidence that reveals that the Grievant did not acknowledge his sleeping disorder until well after the imposition of the five day suspension. Moreover, the Grievant could have requested leave without pay or even disability pending the treatment of any such disorder. This was not done until after the fact.

Therefore, the arbitrator finds that just cause existed for the finding of sleeping while on duty.

As to the issue of disciplinary action taken (five day

suspension), this arbitrator must take into account progressive discipline, whether the Grievant was put on notice that such conduct was not acceptable in the work place, and any mitigating factors on behalf of the Grievant. This arbitrator accepts the notion that oftentimes "the patient is the last one to know" of his or her illness, as stated by the Grievant. After he saw that the problem was severe enough for him to address this matter medically, the Grievant took affirmative steps, albeit after the fact. The Grievant had been placed on notice about this kind of conduct when he received the one day suspension for the same thing. It should have been at that point where the Grievant took affirmative steps to assist himself. This was not done at that time. It was not until the Grievant became aware of the danger to himself as a result of his sleep apnea, in this Arbitrator's view, did he make the necessary effort to solve the problem.

Accordingly, this arbitrator denies the grievance. However, a three-day suspension is appropriate in this instance, given the nature of the Grievant's illness.

  
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ANDREW J. LOVE  
ARBITRATOR