ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 702

OCB GRIEVANCE NUMBER: 23-12-900613-0202-01-03

GRIEVANT NAME: FAIRBURN, LARRY E.

UNION: OCSEA/AFSCME

DEPARTMENT: MENTAL HEALTH

ARBITRATOR: SMITH, ANNA D.

MANAGEMENT ADVOCATE: MAWHORR, RICK

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: ROWLAND, BOB

ARBITRATION DATE: NOVEMBER 6, 1991

DECISION DATE: DECEMBER 9, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: SIX DAY SUSPENSION FOR NEGLECT OF DUTY (SLEEPING OR UNALERT ON DUTY) AND INSUBORDINATION (REFUSING MANDATED OVERTIME)

HOLDING: AS TO THE INSUBORDINATION CHARGE, THE ARBITRATOR FOUND JUST CAUSE. GRIEVANT WAS AWARE OF THE OVERTIME POLICY AND HAD IN FACT BEEN DISCIPLINED PREVIOUSLY FOR REFUSING OT. AS TO THE SLEEPING CHARGE, THE EVIDENCE PRESENTED BY THE UNION CORROBORATED GRIEVANT'S STORY THAT HE USED EYE DROPS AND THAT HIS EYES WERE ONLY PARTIALLY SHUT SO HE WAS AWARE OF HIS SURROUNDINGS. IN VIEW OF THE FACT THAT A 6 DAY SUSPENSION IS NOT AN UNREASONABLE THIRD PENALTY FOR INSUBORDINATION, THE EMPLOYER'S CHOICE OF PENALTY IS UPHELD.

COST: $793.22

702

In the Matter of Arbitration Between	OPINION and AWARD
STATE OF OHIO, DEPARTMENT OF MENTAL HEALTH	Anna D. Smith, Arbitrator
	Case 23-12-900613-0202-01-03
and	Larry E. Fairburn, Grievant
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO	Discipline

Appearances

For the State of Ohio:

Rick Mawhorr; Labor Relations Officer, Oakwood Forensic Center; Advocate
Rodney Sampson; Assistant Chief of Arbitration Services, Ohio Office of Collective Bargaining; Second Chair
Ronald G. Gilroy; Captain (Retired), Oakwood Forensic Center; Witness
John Allen; Chief Executive Officer, Oakwood Forensic Center; Witness
Janet Campbell; Psychiatric Nurse Supervisor, Oakwood Forensic Center; Witness

For OSCEA Local 11, AFSCME:

Bob Rowland; Staff Representative, OCSEA Local 11, AFSCME, AFL-CIO; Advocate
Larry E. Fairburn; Grievant
Gary Hobbes; Chapter President, OCSEA Local 11, AFSCME, AFL-CIO; Witness
Clementine Bates; Psychiatric Attendant, Oakwood Forensic Center; Witness.

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Clementine Bates; Psychiatric Attendant, Oakwood Forensic Center; Witness.

Hearing

Pursuant to the procedures of the parties a hearing was held at 9:30 a.m. on November 6, 1991 at Oakwood Forensic Center, Lima, Ohio before Anna D. Smith, Arbitrator. The parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. The record was closed upon conclusion of oral argument at 2:30 p.m., November 6, 1991. This opinion and award is based solely on the record as described herein.

Issue

By agreement of the parties, the issue to be decided by the Arbitrator is:

> Was the six (6) day suspension issued for just cause? If not, what shall the remedy be?

Joint Exhibits and Stipulations

Joint Exhibits

1. 1989-91 Collective Bargaining Agreement
2. Grievance Trail
3. Discipline Trail
4. Sign-In/Sign-Out Sheet, September 8, 1990
5. Call-In Log, September 8, 1990
6. Daily Schedule, First Shift, September 8, 1990
7. Daily Schedule, Second Shift, September 8, 1990
8. Daily Schedule, Third Shift, September 8, 1990
9. Statement of Ron Gilroy, October 13, 1989
10. Patient I.D. Card of Larry Fairburn
11. W-2-N Ward Log, October 13, 1989
12. Patient Verification Sheet, October 13, 1989
13. Corrective Action Policies, July 19, 1988 and August 15, 1989
14. Overtime Policies, June 21, 1988 and August 15, 1989
15. Policy Acknowledgement Sheets, August 9, 1988 and September 29, 1989
16. Position Description
17. Medical Restriction

18. Statement of Joe Horstman, November 5, 1991
19. Statement of Ken Hollar, November 5, 1991
20. Annual Performance Evaluation, 1989.

Joint Stipulations of Fact

1. Mr. Fairburn was a psychiatric attendant at Oakwood Forensic Center on first shift (7:00 a.m. - 3:00 p.m.) and has been employed since December 29, 1983.

2. Mr. Fairburn was mandated for overtime on September 8, 1989. He refused and signed off duty at 3:00 p.m., his normal quitting time.

3. Mr. Fairburn was aware of the corrective action policy.

4. The overtime hiring procedure at that time was:
   a. Contact all persons on the overtime roster within classification;
   b. Contact persons who volunteered for overtime outside classification;
   c. Mandate least senior on work site.

5. All appropriate contact had been made by the supervisor prior to mandating.

6. Mr. Fairburn had eye surgery in 1987.

7. There is a typographical error in the Order of Suspension and Order of Removal. The current date should be October 13, 1989.

8. This grievance is properly before the Arbitrator.

Case History

Oakwood Forensic Center is an acute-care maximum-security facility for the mentally ill who have been probated to the Ohio Department of Mental Health from the Ohio Department of Rehabilitation and Correction. The patients under the care of the facility are dangerous to themselves or others. Their behavior is unpredictable and can be volatile. The Grievant has been employed at the facility since 1983. At the time of his discipline for neglect of duty (sleeping or unalert on duty) and insubordination

(refusal to work mandated overtime), he was a psychiatric attendant on the first shift. As such, he was responsible for supervising patients' daily activities and for their safety and security. Because of the nature of the patient population, psychiatric attendants rarely work alone and must be alert at all times. In September of 1989, Management was hiring overtime because of chronic understaffing (according to the Union) and/or scheduled vacations (according to the Employer). Section 13.07 of the Collective Bargaining Agreement permits the Employer to require the least senior employee who normally does the work to perform overtime if it is not filled by volunteers. On September 8, 1989, such a situation arose. Following established procedure, the Employer was unable to fill two second-shift positions with volunteers. It therefore mandated the two least senior employees, including the Grievant, to work. The Grievant refused, saying he had other plans, but did not explain further. The nurse supervisor advised him of disciplinary consequences. He nevertheless left at the end of his regular shift and was thereafter written up for insubordination.

Before the pre-disciplinary conference on this incident took place, a second alleged infraction occurred. On October 13 at 1:59 p.m., Captain Ronald Gilroy entered the dayhall where the Grievant was working and observed him sitting with his eyes closed and his feet on the chair in front of him. Patients and another psychiatric attendant were present. A fourth employee, Mr. Cooper, came on to the unit a minute later. Capt. Gilroy watched the

Grievant for three or four minutes, after which he approached him and called him by name. The Grievant opened and blinked his eyes. Gilroy informed him he would write him up for sleeping on duty and left. The Request for Corrective Action was issued October 31, 1989, charging the Grievant with "sleeping/unalert" on duty.

These two charges were consolidated for subsequent processing and a pre-disciplinary conference was held on November 15, 1989. At this time the Grievant provided explanations for his behavior. As to the refusal to work overtime, the Grievant stated he had to meet his child's school bus. In arbitration the Grievant further explained that he and his wife were separated, that he had made plans to pick up his son at the bus and spend the weekend with him, that his in-laws (who usually care for the boy) were gone, and that he had a legal obligation not to leave his children unattended. He further stated that he had previously informed his employer of his childcare responsibility and that it had never been taken into consideration. This history and his emotional state was why he did not explain his refusal to work on this occasion.

As to the incident of October 13, Mr. Fairburn has a documented history of eye trouble, including surgery and intraocular lenses. His eyes were bothering him that day because of cigaret smoke in the dayhall. Shortly before Capt. Gilroy came on the ward, the Grievant had used eyedrops. When Gilroy came in, the Grievant says he was sitting with his eyes partially closed watching television. He could see Capt. Gilroy and Mr. Cooper when they came in. He asserts he was not asleep and had, in fact, taken

a phone call a few minutes before Gilroy arrived. He gave this explanation to his immediate supervisor before being written up and again when presented with the Request for Disciplinary Action. The other attendant on duty, Tina Bates, supported his explanation at the pre-disciplinary conference and in arbitration. Also offered as a joint exhibit was a written statement from the person with whom the Grievant had the phone conversation. The pre-disciplinary hearing officer, Mr. Allen, testified that he spoke to Mr. Cooper, who saw nothing. Neither side called Cooper or submitted a statement from him in arbitration.

The result of the pre-disciplinary conference was a removal order, signed by the Director on December 17, 1989. However, this action was held in abeyance pending completion of an Employee Assistance Program Participation Agreement. The Grievant completed this program on April 5, 1991, whereupon Mr. Allen recommended modification to the removal action. Discipline for the two alleged offenses was consequently reduced to a six-day suspension beginning June 26, 1990.

The Grievant's performance evaluation for 1989 was acceptable on all dimensions. His prior disciplinary record is as follows:

9/3/86	Oral Counseling	Unprofessional Conduct
1/22/87	Written Reprimand	Patient Abuse
7/15/87	1-day Suspension	Insubordination
3/21/88	2-day Suspension	Refusal to Work Mandated Overtime

Mr. Allen testified and documents were submitted to show that a previous superintendent of the institution dropped an additional charge of refusal to work overtime in 1988 where the Grievant

claimed extenuating circumstances. The superintendent at that time directed the Grievant's nurse supervisor and Union representative to work with him to resolve his mandatory overtime problems. Mr. Allen also testified that he had advised the Grievant at another pre-disciplinary conference to explain his reasons to his supervisor when he is unable to work overtime so they can work on the problem together. Additionally, from February 6 through June 1, 1989, the Grievant was medically restricted to working a maximum of eight hours per day. This overtime restriction was not in effect at the time of either of the incidents.

Following notification of the suspension, a grievance was filed, alleging violation of the "Preamble, Article 24, and all pertinent articles and sections" of the Contract (Joint Ex. 2). Article 24 of the Collective Bargaining Agreement states in relevant part, "Disciplinary action shall not be imposed upon an employee except for just cause....The Employer will follow the principles of progressive discipline....Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment." The parties being unable to resolve their differences at Step 3 of the grievance procedure, the case was appealed to final and binding arbitration, where it presently resides free of procedural defect.

Arguments of the Parties

Argument of the Employer

The Employer argues that the Grievant is guilty of both offenses and that the penalty imposed is appropriate. On the

overtime charge, Management states that the extenuating circumstances were its own, not the Grievant's. Management took precautions to assure staffing sufficient to meet its needs under the mission of the institution by hiring overtime in advance. When four called off, it hired outside the bargaining unit and a supervisor to fill positions before mandating bargaining-unit employees. Management tries to avoid this when possible, but it is within its rights under Section 13 of the Collective Bargaining Agreement. As to the Grievant, he knew he could be mandated. At one time he was on medical restriction. Either he became capable of working more than eight hours a day or he chose not to have the restriction renewed. This was his choice. Regarding the plans he had made that conflicted with the overtime, he is not unique in his family responsibilities. All who have children face similar challenges. It was his responsibility to explain his situation to the nursing supervisor that day so they could work together on the problem. Despite being cautioned to do so, he did not. Neither did he make any attempt to change his plans, nor did he have an alternative course of action prepared for use in the event he had to work. His failure to make prior arrangements does not mitigate the fact that he walked off duty when ordered to stay and work. The appropriate response was to work, then grieve.

On the second charge, the testimony of Management's witness was detailed and specific: he saw the Grievant in an unalert or sleep condition for some minutes. Patients were in the area. The Union might have called Cooper or submitted his statement to rebut

this testimony, but it did not do so. Management witnesses also testified to the necessity for psychiatric attendants to be alert at all times. The Grievant had alternatives. He could have waited for another employee, or called another unit for relief. His choice showed poor judgment, placing himself and others in jeopardy. Management cannot tolerate lack of altertness on duty and has disciplined others for their failure in this regard.

Management goes on to point out that, given the Employee's record, either of these separate charges could result in a six-day suspension under the disciplinary guidelines (Joint Ex. 13). It therefore asks that the grievance be denied in its entirety.

Argument of the Union

The Union does not believe Management has shown just cause for discipline. Regarding the charge of insubordination, it argues the Grievant was between a rock and a hard place. While mandatory overtime is not uncommon at the facility, employees do not know until the last minute that they will have to work. The Grievant had notified Management of his circumstances in the past and it made no difference. He therefore knew it would be fruitless to mention his family responsibility this time. Moreover, the record shows that the Employer had alternative means for filling the position, for management staff was available.

On the charge of being asleep/unalert on duty, Capt. Gilroy testified that he could not see the Grievant's eyes from his position at the desk, yet Mr. Allen testified that he made his disciplinary decision based on Gilroy having observed the

Grievant's closed eyes. Capt. Gilroy should have confirmed his suspicion by checking further. Upon being confronted, the Grievant immediately told his supervisor about the eyedrops. There is also independent corroboration of the phone call the Grievant received just prior to Capt. Gilroy's observation.

The Union concludes and argues that the disciplinary action here is more punitive than corrective. It seeks restoration of six days back pay and benefits and that the Grievant's record be expunged of the action.

Opinion of the Arbitrator

Charge of Insubordination

That the Grievant walked off the job at the end of his regularly scheduled shift after being ordered to work a second shift is an undisputed fact. So is his failure to explain his inability to work to the nursing supervisor who issued the order. This employee has been cautioned before to identify special circumstances to the supervisor so that they can work together to find a mutually agreeable solution, or at least one superior to the outcome experienced here. The Grievant says he provided this information in the past to no effect. No doubt his frustration explains his failure to seek an accommodation this time, but it does not relieve him of the duty to apprise his employer of his situation when he wants special consideration. It may not always be possible to give an employee his preferred result or even to accommodate him at all, but the testimony of the nurse supervisor shows alternative solutions meeting critical requirements of both

parties were available. Failure to consult with his Employer deprived the Employer from considering the extenuating circumstances the Grievant now claims. In short, if an employee wants extenuating circumstances considered when overtime assignments are made, he must make them known while the decision can still be affected.

The Union argues that Management might have ordered a supervisor to work instead. This is true. However, the Union does not argue and the Arbitrator does not see a contractual requirement for Management to exhaust all other alternatives before mandating the least senior bargaining unit employee who normally does the work. Indeed, in following established procedure, Management did obtain personnel outside the unit before exercising its right to mandate and meeting its obligation to choose the least senior individual. Again, if the Grievant wished Management to consider this or another solution to the problem, the thing to do was to explain his predicament at the time.

The Arbitrator is sensitive to the Grievant's dilemma, but Management's point about the responsibility of all employees to balance work and family obligations is well-taken. This employee was well aware of the consequences both of refusing to work mandatory overtime and of neglecting his childrens' needs. He also knew the possibility of mandatory overtime with little notice. Despite this knowledge he did not have a contingency plan. Now he blames his employer when the decision not to plan backup coverage for his children was entirely his own. One can hardly blame him

for choosing his family when the chips were down, and certainly one sympathizes with those who live with challenging role conflicts, but the employee must be accountable for the decisions he makes. Discipline is warranted for insubordination.

Charge of Being Unalert/Asleep on Duty

Unlike the first charge, the Grievant's guilt on the second charge is in dispute. Management's witness to the incident made a prima facie case against the Grievant. However, the Grievant's explanation of his behavior as corroborated by the testimony and statements given by other Union witnesses raises considerable doubt as to Capt. Gilroy's interpretation of the Grievant's posture. The phone call immediately prior to Gilroy's appearance and recent use of eyedrops necessitated by the Grievant's physical condition and smokey environment persuade me that there was little opportunity for the Grievant to doze off before Gilroy arrived. Additionally, his behavior upon being called by name is not clearly that of one who was sleeping or daydreaming. While I do not doubt Capt. Gilroy's testimony about the Grievant's posture or the reasonableness of his suspicion, I do think the Grievant could have been alert in that position and aware of his surroundings, even though his eyes were not fully open.

Apprioriateness of Penalty

Having found the Grievant guilty of insubordination for refusing to work mandated overtime and innocent of being asleep/unalert on duty, it remains to determine whether the six-day suspension was justified under the circumstances. This is the

Grievant's third recorded instance of insubordination resulting in discipline in a little over two years. Previous penalties were a one- and a two-day suspension. The principle of progressive discipline as specified in the Contract and the Employer's policy calls for a lengthier suspension such as was imposed post-EAP completion. The question is whether this penalty ought to be mitigated by the reason the Grievant refused the order and/or by completion of the EAP. In view of the fact that the Grievant had been previously counseled to give his reason for being unable to work at the time he receives an overtime order, and he did not do so, the penalty should not be reduced on account of the employee's extenuating circumstances.

As to the EAP, this is one of several instances in which the Employer demonstrated willingness to work with this employee to solve or accommodate his problems. At some point the employer's patience wears thin and it calls upon the recalcitrant employee to experience the consequences of failing to amend his behavior. In such cases discipline is not for punishment, as the Union argues, but for correction. That point has arrived in this case.

There is also considerable doubt in the Arbitrator's mind as to whether the EAP is responsible for the Grievant's record since he completed it, since he testified that the psychiatrists said they could not help him with his problem and he stated that he only went to save his job. Thus, in view of the fact that a six-day suspension is not an unreasonable third penalty for insubordination, the Employer's choice of penalty is upheld.

Award

The six day suspension was for just cause. The grievance is denied in its entirety.

Anna D. Smith, Ph.D.
Arbitrator

December 9, 1991
Shaker Heights, Ohio