In the Matter of Arbitration		
Between		Case Number:
OCSEA/AFSCME Local 11		23-18-(92-07-06)-835-01-04
and		Before: Harry Graham
The State of Ohio, Department of Mental Health		

Appearances: For OCSEA/AFSCME Local 11:

Robert Robinson
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio, Department of Mental Health:

Linda Turner
Labor Relations Officer
Department of Mental Health
c/o Office of Collective Bargaining
106 North High St., 6th & 7th Floors
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on November 23, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the discipline rendered for just cause? If not, what

shall the remedy be?

Background: The circumstances leading to the discharge under review in this proceeding are a matter of dispute between the parties. What is not disputed is that the Grievant, Nathan Mims, was employed by the State as a Therapeutic Program Worker at Western Reserve Psychiatric Hospital in Northfield, OH. At the time of his discharge he had worked for the State in excess of ten years. On January 1, 1992 the Grievant was scheduled to work the first shift. He and one other employee were assigned to work cottage 22D. They were responsible for 29 residents of that facility. On January 1, 1992 there was one supervisor on duty, Carol Peters. As a normal part of her tasks she toured the facility in order to ensure all was in order. At this point accounts of the event leading to the discharge of the Grievant differ. According to the State, Ms. Peters arrived at cottage 22D and found one employee on duty, Kevin Tarver. According to standard operating procedure there are to be two employees on duty at all times. Upon inquiring of Mr. Tarver about the whereabouts of Mr. Mims she was told he had left the area for a moment. Testimony from Ms. Peters indicates that she walked to the staff break room and found the door locked. She unlocked it and found Mr. Mims, the Grievant, in the break room with his shoes off, asleep. He was wrapped in hospital blankets. Ms. Peters reported the incident and in due course Mr. Mims was discharged.

The Union claims that the events related by Ms. Peters did not occur. According to the Union when Ms. Peters arrived at cottage 22D she asked Mr. Tarver about the absence of Mr. Mims. She was told he had stepped out of the unit for a moment to get something from his car. He then went to break room to use the telephone. According to Mr. Mims he has physical problems with his feet. They frequently hurt him. When he got to the break room he took off his shoes. When Ms. Peters entered the room he was not asleep. He was not covered by hospital blankets. Ms. Peters took blankets from the break room and threw them on the floor upon exiting.

This incident was subsequently reported by Ms. Peters and in due course Mr. Mims was discharged. A grievance protesting that discharge was properly filed and processed through the procedure of the parties without resolution. They agree that it is properly before the arbitrator for determination on its merits.

Position of the Employer: The State acknowledges that it is describable in instances when discipline for sleeping on the job occurs for more than one person to witness the sleeping employee. In this instance that did not occur. There was good reason for no more than one employee to observe Mr. Mims asleep on the morning of January 1, 1992. It was New Year's Day. Ms. Peters was the only supervisor on duty at the time. Under the circumstances it was impossible to secure two

witnesses to Mr. Mims sleeping.

In this situation denials by the Grievant that he was asleep should be disbelieved by the Arbitrator according to the State. He was in the break room. The door was locked. He was wrapped in blankets. There was no doubt in the mind of Ms. Peters, an experienced nursing supervisor, that she witnessed Mr. Mims sound asleep.

While Ms. Peters was the only person to observe Mr. Mims sleeping her testimony should be believed according to the State. The Grievant has a history of discipline. In June, 1987 he received a verbal reprimand for use of intoxicants on the grounds of the hospital. In September, 1987 he was administered at two day suspension for sleeping on the job. One year later, in September, 1988, he received a six day suspension for the same offense. Subsequently, in January, 1989 he was given another six day suspension for substandard performance. In October, 1990 he was discharged for leaving his work area and going home early. This was modified to a six day suspension and entrance into the Employee Assistance Program. In essence, the State says "enough is enough." The Grievant has had numerous opportunities to mend his ways. He has not done so. Ms. Peters saw him sleeping on January 1, 1992. Given his history of discipline including two prior instances of discipline for sleeping on the job, the State urges that the discharge under review in this proceeding be

sustained.

Position of the Union: The Union points out that the Grievant has indeed experienced discipline in the past. However, there has been no recent discipline on his record. The discipline immediately prior to this incident occurred in October, 1990. From that time to the date of the alleged sleeping of the job in January, 1992 Mr. Mims had a discipline-free record. Under these circumstances the Union asserts that the discharge under review in this proceeding is unwarranted.

Turning to the specific event of January 1, 1992 which prompted the State to discharge the Grievant the Union presents a different picture of events than does the Employer. According to the Union there is a fatal flaw in the action of the State. That is, it has only one witness. There is no person available to corroborate the testimony of Ms. Peters. This establishes the proverbial "it's your word against mine" situation. There is no basis for believing either Ms. Peters or Mr. Mims in this case. As that is the fact, the discharge cannot stand according to the Union.

The Union views this incident as being tainted with racial hostility. Mr. Mims, the Grievant, is black. Ms. Peters, the supervisor, is white. According to the Union Ms. Peters dislikes black employees. She has administered discipline to black employees and overlooked identical infractions committed by white employees. In this situation

that Mr. Mims is black prompted the discipline against him. Given that situation, it cannot be permitted to stand according to the Union.

In this situation Mr. Mims was not sleeping. He was in the break room to check on a telephone number. He had taken off his shoes as he has chronic foot pain. In the account of the incident proffered by Mr. Mims he was not in the break room with the door locked. Rather, he was in the break room but the door was opened. He was on duty, caring for the patients in his charge. As that is the case, no discipline is appropriate in this situation according to the Union.

Discussion: This case presents the paradigm of the situation where the parties present sharply different versions of the events of January 1, 1992. Inquiry in such situations is often directed to the burden of proof that must be met by the Employer. There are various standards that are applied to the proof which must be met by the Employer in order to sustain a discharge action. The Union will normally argue for application of the standard of "beyond all reasonable doubt." Employers will frequently proclaim that the appropriate standard to be utilized is that of "clear and convincing evidence." This debate which is of longstanding in the industrial relations community will doubtless never be resolved. What should be clear is that in the final analysis the Employer bears the burden of convincing the arbitrator

that the events occurred as claimed and that the discipline is appropriate to the offense.

That only one witness observed the Grievant asleep on January 1, 1992 weakens the State's case. It does not fatally compromise it. January 1 is a holiday. The institution was operating with its holiday staffing complement. Fewer than the normal number of people were on duty. One person, Ms. Peters, reported Mr. Mims to be sleeping. His work history furnishes a basis to believe her account of events. He has been disciplined on two prior occasions for sleeping on the job. Thus, there is furnished to the Arbitrator reason for crediting the account of Ms. Peters in this situation.

There was no undue delay in commencing the disciplinary process which ultimately lead to this proceeding. On the day after this incident, January 2, 1992 Ms. Peters reported it in writing. The conference concerning discipline was originally scheduled to be held on February 7, 1992. Mr. Mims was not available to attend. When he was able to present himself, in April, the employer held the requisite meeting. Had the hospital conducted the disciplinary conference in the absence of the Grievant the Union would have cried foul. It cannot cry foul when the disciplinary procedure was delayed in order to accommodate the Grievant.

In disputes of this nature there occurs a weighing of the probabilities. That is, whose testimony seems to be a more

likely account of events? In this situation it appears to the Arbitrator that the account provided by the State's principal witness, Ms. Peters, is more credible than that provided by the Grievant. Interest, standing alone, does not furnish a basis for either crediting or discrediting testimony. It does provide an element in the decisionmaking process. In this situation, the denial by the Grievant that he was sleeping in the face of the record he has compiled is viewed skeptically by the Arbitrator.

The allegations of racial hostility raised by the Union must be and are taken seriously by the Arbitrator. Offsetting them is the fact that no evidence of personal animosity exists between Ms. Peters and the Grievant. In essence, the Union asks the Arbitrator to believe that for no reason whatsoever other than alleged racial prejudice Ms. Peters wrote-up the Grievant for sleeping. She then participated in the disciplinary process including the giving of testimony in the arbitration hearing in order to secure the discharge of Mr. Mims. This is not believed by the Arbitrator. There must be some evidence, something other than allegations, in order to support the claims made by the Union. In this case no such evidence is on the record.

Award: The grievance is denied.

Signed and dated this 7th day of December, 1992 at South Russell, OH.

Harry Graham
Arbitrator