

OPINION AND AWARD

**IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Mental Retardation and
Developmental Disabilities Columbus Development
Center**

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For the State

Carolyn Borden Collins, Labor Relations Officer
Debra D. Buccilla, Superintendent
Diana Lanning, Human Resources Specialist
Brenda Gerhardstein, H. B. Director/CDC
Heather Reese, 2nd Chair, OCB

For the Union

John Hall, Staff Representative, OCSEA
Robert Abbott, Therapeutic Program Worker
Barbara Washington, the Grievant

Case-Specific Data

Hearing Held
June 18, 1998

Case Decided
July 18, 1998

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Discharge—Sleeping on Duty

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I. Facts

The Ohio Department of Mental Retardation and Developmental Disabilities Columbus Development Center (CDC or the Employer) supports, serves, and rehabilitates moderately to severely retarded individuals. CDC's mission is to help these residents or patients establish their independence and take their place in the general community. To accomplish this challenging mission, CDC must look to well-trained, reliable, and highly motivated employees. This is particularly true with respect to Therapeutic Program Workers who are responsible for the day-to-day activities of CDC patients. For example, upon beginning their shifts, Therapeutic Program Workers receive reports from the previous shifts and make "walking rounds to account for the safety of all residents, carefully observing the clients to prevent injury to the resident and other residents. . . ."¹. Rather than run an understaffed shift, CDC will mandate overtime to insure the safety of residents,

After employing Ms. Barbara Washington (the Grievant) for approximately 14 years, CDC terminated her, on November 29, 1994, for sleeping on the job—"Neglect of Duty/Sleeping." When she was terminated, the Grievant was a Therapeutic Program Worker. On October 23, 1994, she was working on the third shift and assigned to observe and care for Tommy—a most challenging client who requires around-the-clock, one-on-one supervision. Tommy is unpredictable, moves quickly, and poses a threat to property, himself, and others. He has injured at least one CDC employee. Because of Tommy's unpredictable and potentially dangerous behavior, CDC has special guidelines for his care:

"Staff should be within arms length of Tommy at all times with the following exceptions:

(1) When Tommy is asleep staff should be outside the bedroom. Tommy prefers to

¹ Joint Exhibit 4.

sleep with his bedroom door shut. Staff should be aware that at the slightest sound of commotion coming from his bedroom, staff are to check on him to see if things are ok.

* * *

(2) If Tommy is having a good day, staff may give him a bit more space (not to exceed 3 arms lengths). Should Tommy exhibit any of the antecedent behavior mentioned in the behavior plan, staff should immediately close into arms length and begin program implementation."

* * *

Staff Directions

* * *

Staff will check on Tommy's sleep status every half hour.²

On November 29, 1994, the Grievant was assigned to the Carlson Building in the Carlson 5 Section (Carlson 5) which contained 4 bedrooms, a bathroom as well as an open living area. Tommy occupied a bedroom. Carlson 5 is adjacent to Carlson 4 which is somewhat smaller. Carlson 4 and 5 are separated by a coffee nook that was once a closet. In addition, on October 23, 1994, the morning in question, the coffee nook was separated from Carlson 4 and 5 by two doors. The first door led from Carlson 4 down a short hallway past the coffee nook and through a second door into Carlson 5.

Because she normally worked the third shift, the Grievant was accustomed to this midnight-to-morning shift. Moreover, she came to work on October 23 after having October 22 off. Upon arriving at work on October 23, the Grievant told Ms. Gibson (her supervisor) and Mr. Robert Abbott (a coworker assigned to Carlson 4) that she had a headache for which she later took two aspirins. As time passed the Grievant became chilled due to the cold air emitted from four rather noisy air vents in Carlson 5.

Several events indicate the Grievant was awake at least 15 minutes before Ms. Buccilla and

² Employer exhibit 9 at 2.

Ms. Lanning entered Carlson 5 at approximately 3:45 a.m. First, when Ms. Gibson made her rounds between 3:00 and 3:15 a.m., the Grievant spoke with her and mentioned that her headache had intensified but that she could finish her shift. Second, between 3:00 and 3:30 a.m., the Grievant used her walkie talkie to make the required, hourly check-in because of her one-on-one situation with Tommy. Third, between 3:00 and 3:30 a.m., when Mr. Abbot passed through Carlson 5 to deliver some laundry, the Grievant was awake and complained of her headache. Finally, the Grievant had a cup of coffee between 3:00 and 3:30 a.m.

Two reasons prevented the Grievant from asking to be excused from her duties due to illness. First, she thought it would be difficult to extemporaneously call in an employee at 3:00 a.m. Second, because she had been accused of "Pattern abuse" and of "calling off," the Grievant was concerned about asking for sick leave.

Between 3:30 and 3:45 a.m. Ms. Buccilla and Ms. Lanning entered Carlson 4 and briefly spoke with Mr. Abbott at a normal conversational level. At that time, it is unclear whether either or both of the doors separating the coffee nook from Carlson 4 and 5 were shut. Although Ms. Buccilla was wearing a warm-up suit composed of material that "swished" when she walked, Mr. Abbott heard no "swishing" when Ms. Buccilla and Ms. Lanning entered Carlson 4. Ms. Buccilla and Ms. Lanning exited Carlson 4 through the door that connects Carlson 4 to the coffee nook, walked past the coffee nook and stood in the second doorway that opens to Carlson 5. There they saw the Grievant sitting in a rocker recliner facing the doorway. The foot rest was down and the back of the rocker was vertical. The Grievant was sitting on her right side with the right side of her head resting against the back of the chair. Her chin was lowered but was not touching her chest and her eyes were closed. Her left leg rested upon her right and both legs were curled close to her body.

Her feet rested on the edge of the chair, and she had a coat that was either draped over her like a blanket or that she wore backwards. At this time, the door to Tommy's room was shut, and he was apparently inside sleeping.

Upon seeing the Grievant in this position, Ms. Buccilla pointed toward her wrist watch, signaling Ms. Lanning that she intended to record how long the Grievant remained asleep. They observed the Grievant for approximately three minutes—3:45 to 3:48 a.m.—before she heard Ms. Lanning speak to Ms. Buccilla, opened her eyes, and stared around in a confused or disoriented manner. Ms. Lanning then said, "Good morning," but the Grievant offered no response. The Grievant did not hear Ms. Buccilla and Ms. Lanning enter Carlson 5.

Ms. Buccilla instructed the Grievant to go to the restroom, wash her face, and wake up. The Grievant refused, however, because she was cold and did not wish to get wet. She also refused to wash her face because she did not think she was asleep. Later, when she turned in her walkie talkie at the end of her shift, the Grievant again complained to Ms. Gibson that she had a headache.³

Finally, on October 23, 1994, CDC had subjected the Grievant to the following disciplinary actions:

12/31/92	Written Reprimand/ Failure of Good Behavior
1/18/93	Twenty-day Suspension/ Inappropriate Intervention upheld in arbitration. ⁴
11/8/93	Five-day Suspension/ Insubordination (Improper Conduct)/ upheld in arbitration. ⁵

³ Ms. Gibson's inter-office memorandum of 10/23/94.

⁴ Employer exhibit 2.

⁵ Employer exhibit 3.

II. The Issue

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

III. Relevant Contract Language

Offense	penalties			
	1st offense	2nd offense	3rd offense	4th offense
Unapproved Behavior Intervention Inconsiderate Treatment	10 day Suspension to Removal	20 Day Suspension to Removal	Removal	N/A
Improper Conduct failure to accept authority or supervision (abusive language, lack of cooperation, argumentative, disrespect of authority, untimely compliance to an order)	Letter of Reprimand to 3 Day Suspension	5-10 Day Suspension	10 Day Suspension to Removal	Removal
Sleeping on Duty	10 Day Suspension	Removal	N/A	

Article 24 - Discipline

24.01- Standard

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

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 oral reprimand(s) with appropriate notation in employee's file;
- B. One or more written reprimand(s).

* * *

- A. One or more day(s) suspension(s)
- B. Termination

IV Positions of the Parties

A. Union's Position

- The Grievant was not asleep, and neither Ms. Buccilla nor Ms. Lanning verified that she was in fact asleep. Neither witness stood next to the Grievant. Nor did either try to wake her or to photograph her .
- The extensive overlap between Ms. Buccilla and Ms. Lanning's statements suggest that they

- were coached.
3. CDC subjected the Grievant to disparate treatment because it did not terminate another employee, Ms. Johnson, for sleeping on the job.
 4. On another occasion, CDC reprimanded the Grievant instead of suspending her, thereby ignoring the progressive disciplinary measures set forth in its own penalty table.
 5. Ms. Buccilla and Ms. Lanning plotted against the Grievant.
 6. Ms. Buccilla and Ms. Lanning did not determine whether the Grievant had completed her chores on the night in question.

B. CDC's Position

1. The Grievant was observed sleeping on the job. Her lack of response to sounds and activities around her, her posture in the chair, her closed eyes, her being covered, and her disorientation upon opening her eyes suggest that she was sleeping.
2. Sleeping on the job is egregious where the employee is watching residents like Tommy. Such behavior places Tommy and everyone else at risk.
3. The Grievant had a prior disciplinary record and was aware of the consequences of another major offense.
4. The Grievant had an opportunity to prove she had a migraine headache.
5. There was no disparate treatment because the circumstances of the Grievant's case were different from those of Ms. Johnson's. Overtime and a discipline-free work record were mitigating factors in Johnson's case. However, the Grievant was not working overtime and her headache was unsubstantiated and thus not mitigating.

V. Discussion

A. Analytical Framework and Evidentiary Standards

The pivotal issue in this case is whether the Grievant was asleep or simply relaxing in an attempt to ease her headache when Ms. Buccilla and Ms. Lanning observed her from approximately 3:45 to 3:48 a.m. Before analyzing the specifics of this case, a statement about the nature of the case and the evidentiary standards is indicated.

The pith of this type of case is credibility and circumstantial evidence. Credibility comes into play because of disputed allegations about the Grievant's conduct upon opening her eyes and the surrounding conditions. Also, in the nature of things, the charge of sleeping can only be established

through circumstantial—rather than direct—evidence. Circumstantial evidence requires an inference to establish a disputed fact—direct evidence does not. Strictly defined, sleep involves a distinct mental state.⁶ It is, therefore, highly unlikely that a casual—as opposed to a scientific—observer can ever obtain direct evidence that a person was asleep, unless the observer uses scientific instruments to make that determination.

As a result, all that one can reasonably expect is that employers—or other casual observers—offer credible evidence that the alleged behavior is commonly and reasonably associated with sleeping. Such *circumstantial evidence* justifiably and reasonably supports a logical inference that the observed employee was sleeping. In other words, sleeping must be a logical explanation for the observed conduct. It is manifestly unreasonable and unfair to expect more from employers.

In addition, circumstantial evidence ranges from strong to weak and supports a corresponding range of inferences. Strong circumstantial evidence of sleeping—snoring, rapid eye movements, or deep rhythmic breathing—supports strong inferences of sleeping. Relatively weak circumstantial evidence—closed eyes—spawns weak inferences of sleeping. Also, strong inferences tend to resist other legitimate explanations such as “resting the eyes.” Weak inferences are more vulnerable to such explanations.

Nevertheless, employees may counter logical inferences from circumstantial evidence of sleeping by offering credible, legitimate reasons or explanations for their observed behavior. Because

⁶ Reference to the definition of sleep quickly establishes this point. Sleep is defined as: “A natural, periodic state of rest for the mind and body, in which the eyes usually close and consciousness is completely or partially lost, so that there is a decrease in bodily movement and responsiveness to external stimuli. During sleep the *brain* in human beings and other mammals undergoes a *characteristic cycle of brain-wave activity that includes intervals of dreaming*. . . .” The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 866 (1973) (emphasis added).

one engages in behavior normally associated with sleeping does not necessarily mean that one is in fact sleeping. Other “legitimate” reasons may explain the observed conduct as well as or better than sleeping. For example, employees observed with their eyes closed and heads propped up in their hands might contend that they were “resting their eyes” and not “sleeping.” Thus, “resting their eyes” rather than sleeping is offered as an alternative, competing, and legitimate explanation of the observed conduct.

Finally, and perhaps most important in this case, the inferential strength of even weak circumstantial evidence can be cumulative. Numerous pieces of relatively weak circumstantial evidence suggesting that an observed employee was sleeping can combine to support a strong inference of sleeping. With this discussion as a backdrop, we turn to the analysis of this case.

B. CDC’s Circumstantial Evidence

Although neither Ms. Buccilla nor Ms. Lanning observed the classical snoring, deep rhythmic breathing, or rapid eye movements associated with sleep, these witnesses established two pieces of circumstantial evidence—one of which was strong—suggesting that the Grievant was indeed sleeping on the morning of October 23, 1994. First, the witnesses approached Carlson 5 and stood in the doorway for three minutes before the Grievant detected their presence despite the “swishing” of Ms. Buccilla’s warm-up suit and the witnesses’ verbal exchange with Mr. Abbott in Carlson 5. The strong piece of circumstantial evidence is that the Grievant’s stared at Mses. Buccilla and Lanning after she finally recognized their presence and required time to clear her head. Although the Grievant denied being disoriented, nothing in the record justifies discrediting the witnesses’ testimonies on this point.

C. The Grievant’s Countervailing Evidence

The Grievant offered evidence that: (1) addresses the likelihood that she was asleep; and (2)

offers plausible alternative explanations for some of the conduct that Ms. Buccilla and Lanning observed. However, nothing in the Grievant's account explains her disorientation. For example, she had not taken any medication that would cause disorientation or confusion.

Regarding the likelihood that the Grievant had an opportunity to fall asleep around 3:45 a.m., Mr. Abbott credibly testified that she was awake between 3:00 and 3:30 a.m. Ms. Buccilla and Lanning observed her from approximately 3:45 to 3:48 a.m. Thus, the Grievant was awake 15-30 minutes before Ms. Buccilla and Lanning observed her. The Union properly suggests that this time-line reduces the likelihood that the Grievant was asleep when Ms. Buccilla and Lanning observed her. Indeed, this time-line reduces but does not eliminate the likelihood that an employee with a severe headache would fall asleep within 15-30 minutes. Consequently, the time-line does not counter the logical inference—based on the Grievant's disorientation—that she was asleep at 3:45 a.m.

With respect to alternative explanations for her observed behavior, the Grievant offered several. First, she had a rather severe—perhaps migraine—headache. The resulting malaise and pain might explain why she curled up, relaxed, and closed her eyes. For example, the lights in Carlson 5 together with the headache might have caused her to close her eyes, since severe headaches can sensitize the eyes to light. Although the headache might explain the need to relax with closed eyes, this relaxed state also increases the likelihood of falling asleep which would be merciful relief from the headache.

Second, the Grievant established that the chill in Carlson 5 had gradually “sunk in,” causing her to use her coat as a blanket against the cold. Thus, she might not have covered herself for the purpose of sleeping. Third, the Grievant pointed out that air vents in Carlson 5 were somewhat

noisy, a fact that might explain why the Grievant did not hear Mses. Buccilla and Lanning approaching.

Taken together, the Grievant's evidence affords legitimate explanations of the vast majority of her observed behavior. The difficulty is that her evidence does not address the relatively strong inferences to be drawn from her disorientation and confusion upon opening her eyes and recognizing the presences of the witnesses. Moreover, the strong inference that the Grievant was asleep is consistent with the rest of her observed behavior—curled up, covered, eyes closed, et cetera. Still, the Grievant merely denies that she was either disoriented or asleep. Given the evidence, the Arbitrator has no choice but to find that this fourteen-year employee was indeed asleep as alleged.

D. Issues of Credibility

As mentioned earlier, irrespective of the strength of circumstantial evidence, it must first be established. Credibility of the witnesses accomplishes that task in this case. Highly probative circumstantial evidence is largely useless if the source is incredible. Although credibility is always a problem in this type of case, testimonial weakness permeates all testimonies and, thus, tends to cancel itself out. Accordingly, no witness' credibility was unblemished.

1. Credibility of Mses. Buccilla and Lanning

Inconsistencies between the testimonies of Mses. Buccilla and Lanning prevent their credibility from being placed beyond question. For instance, Ms. Buccilla said the lights were on in Carlson 5; Ms. Lanning said they were off. Furthermore, only Ms. Lanning heard the Grievant complain of a headache when Ms. Buccilla asked the Grievant to wash her face. Nevertheless, these are not major inconsistencies and do not destroy the witnesses' credibility. Therefore, Mses. Buccilla and Lanning's credibility survive scrutiny.

2. Credibility of the Grievant

Perhaps the major inconsistency in the Grievant's account is her claim that the noise of the vents prevented her from hearing Mses. Buccilla and Lanning approaching. But, as CDC pointed out, if the noisy vents prevented her from hearing approaching visitors, how could she have reasonably expected to hear Tommy who was behind closed doors. More important, perhaps, the Grievant insists that the recliner's footrest was up, while Ms. Buccilla, Ms. Lanning, and Mr. Abbott—the Grievant's own witness—stated that the footrest was down.

3. Credibility of Mr. Abbott

Under cross examination, Mr. Abbott stated that it is unacceptable for employees to close their eyes during their shifts. Under direct examination, however, he stated that no rules prohibited employees from closing their eyes if they were ill. Because each witness's testimony suffers from internal inconsistencies, such discrepancies are not very useful as calibrators of credibility.

E. Disparate Treatment and Penalty Assessment

The Union argues that terminating the Grievant for sleeping on the job constitutes disparate treatment, since CDC only orally reprimanded Ms. Johnson for sleeping on the job.⁷ Because disparate treatment is an affirmative defense,⁸ the Union must allege and prove it. The essence of disparate treatment is imposing different disciplinary actions against employees who are similarly situated with respect to the relevant circumstances of their individual cases. Relevant circumstances are either aggravating or mitigating and warrant greater or lesser discipline respectively. Differential

⁷ Joint Exhibit 5 at 2.

⁸ Note however, that some arbitrators believe that the Employer should establish the regularity of its disciplinary decisions rather than have unions establish it.

discipline unsupported by sufficiently different circumstances is unreasonable, arbitrary, or capricious and subject to modification.

In the instant case, CDC properly subjected the Grievant to harsher discipline because her case has more aggravating circumstances than Ms. Johnson's, except perhaps for one factor—Ms. Johnson was observed sleeping for 10 minutes; the Grievant for 3. All other circumstances in Ms. Johnson's case are mitigating, as opposed to the Grievant's which are aggravating. For example, relative to the Grievant, Ms. Johnson was less adapted to the third shift where she was observed sleeping. Working the third shift could easily disturb a first-shift employee's sleep patterns and induce drowsiness. Furthermore, Ms. Johnson was working the third shift without having a day off during the previous four days. In contrast, the Grievant was a regular third-shift employee who was working the third shift when she was seen sleeping and had taken the previous day off.

The Union argues that the Grievant's headache is as much a mitigating factor as Ms. Johnson's working a relatively strange shift. The Union is correct. At this particular juncture of the analysis, the two situations are insufficiently distinguishable to warrant different disciplinary measures. Given the nature of their duties and responsibilities to patients, both employees could and should have taken steps to avoid falling asleep on duty. Ms. Johnson could have taken a stimulant or some other measure to remain alert. And, given the severity of her headache, the Grievant should have requested leave to go home rather than risking the potential consequences of falling asleep while assigned to observe Tommy.

The distinction that makes the difference and, hence, justifies differential discipline in this case lies in the disciplinary histories of Ms. Johnson and the Grievant. Ms. Johnson was a nineteen-year employee with only a disciplinary counseling on her record, while the Grievant is a fourteen-year

employee with three more severe disciplinary actions on her record. The Grievant's disciplinary history is, therefore, a significant aggravating factor.

The Union unsuccessfully contends that this disciplinary difference is somehow insufficient to warrant discharge because in one disciplinary episode CDC did not strictly follow its penalty table. Specifically, on December 31, 1992, CDC reprimanded the Grievant in writing for failure of good behavior—"unapproved behavior intervention inconsiderate treatment"—even though CDC's penalty table called for discipline ranging from a ten-day suspension to removal. Presumably the basis for the Union's position is that CDC's leniency frustrated one of the primary purposes of progressive discipline—to alert employees that their misconduct is inappropriate, will not be tolerated, and if continued will trigger harsher discipline. In short, imposing less severe discipline than called for by the penalty table arguably denies the Grievant an opportunity to correct her errant behavior.

This position overlooks a significant point, however. After being reprimanded for Failure of Good Behavior, the Grievant was suspended for twenty days for inappropriate intervention. Even though CDC committed a procedural error under section 24.02 by not following "the principles of progressive discipline" and by not taking "Disciplinary action commensurate with the offense," that procedural error was harmless. It did not adversely affect the outcome of this case. If the oral reprimand deprived the Grievant of an opportunity to correct her behavior, the twenty-day suspension filled that void and effectively cured the procedural error. Finally, it is hardly unusual for employers to use differences in employees' disciplinary records as grounds for imposing different measures of discipline.

V. The Award

Sleeping on the job is a serious offense in any work environment and triggers even greater

concerns given the environment and mission of the CDC and the weighty responsibilities of Therapeutic Program Workers like the Grievant. These circumstances warrant holding the Grievant to a higher standard, and they warrant termination where, as here, she has accumulated a substantial disciplinary history and committed another offense that warrants discipline ranging from ten days to discharge.⁹ For all of the foregoing reasons, the grievance is **DENIED**. The discharge is for just cause.

⁹ Joint Exhibit 4 at 6.

Notary Certificate

State of Indiana)

)SS:

County of MARION

Before me the undersigned, Notary Public for MARION County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 29th day of July, 1998

Signature of Notary Public: Lee Kirkwood Randolph

Printed Name of Notary Public: LEE KIRKWOOD RANDOLPH

My commission expires: 1/12/08

County of Residency: MARION

Robert Brookins
Robert Brookins