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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
STATE COUNCIL OF	*	
PROFESSIONAL EDUCATORS,	*	Anna DuVal Smith, Arbitrator
OEA/NEA	*	
	*	Case No. 27-25-980716-1428-06-10
and	*	
	*	
OHIO DEPARTMENT OF	*	Carol Curnutte, Grievant
REHABILITATION &	*	Suspension
CORRECTIONS	*	

Appearances

For the State Council of Professional Educators, OEA/NEA:

Henry L. Stevens
State Council of Professional Educators
Ohio Education Association
5026 Pine Creek Drive
Westerville, Ohio 43081

For the Ohio Department of Rehabilitation & Corrections:

David Burrus, Labor Relations Officer
Ohio Department of Rehabilitation & Corrections

Pat Mogan
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 10:00 a.m. on March 3, 1999 at the Office of Collective Bargaining in Columbus, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Department of Rehabilitation & Corrections (the "State") were William Joseph Scurlock, David Burrus and Paul Duke, the latter by subpoena. Testifying for the State Council of Professional Educators, OEA/NEA (the "Association") were Brent Carney, James Bowling, and the Grievant, Carol Curnutte. A number of documents were entered into evidence: Joint Exhibits 1-3, State Exhibits 1-4 and Association Exhibits 1-7. The oral hearing was concluded at 2:15 p.m. on March 3, 1999. Written closing statements were timely filed and exchanged by the Arbitrator on March 26, 1999, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant in this case was hired by the State on November 14, 1983. At the time of her suspension for sleeping on duty, she was a teacher at the Southern Ohio Correctional Facility in Lucasville, Ohio, a maximum security prison housing 1500 close/maximum inmates, where she and a number of the prison's approximately 600 employees are represented by the State Council of Professional Educators, OEA/NEA. She had been informed on the rules and had an active

discipline record consisting of two oral reprimands for violation of Rule 7 (Failure to Follow Post Orders, Administrative Regulations, Policies, Procedures or Directives), one on August 14, 1997, one on February 18, 1998. In her most recent performance appraisal she met her employer's expectations on every rated dimension.

The facts of the dispute leading to the suspension are fairly straightforward. At approximately 2:00 p.m. on April 24, Recovery Services Supervisor William Joseph Scurlock was standing outside his office (as is his custom when there is nothing pressing on his agenda) observing inmates coming and going from their class break. There was no teacher was present in the classroom, so he stepped farther out into the common area to see where she might be. Looking through interior windows into a passageway and from there into the copy room, he observed the Grievant sitting in a chair with her head back, her eyes shut and her jaw slack, mouth partially open. She appeared to be asleep. He watched for a few minutes, but she did not move. He then summoned two corrections officers, Brian Cox and Paul Duke, asking them if she appeared to be asleep to them, too. When they agreed with Scurlock, he walked over to enter the copy room, but by the time he got through the door into the passageway, she was coming out. Scurlock testified he thought the sound of the door opening might have awakened her. Scurlock said, "It's time to wake up." She replied, "I'm not asleep. I'm sick." Scurlock testified that altogether he observed her for 3 or 4 minutes.

On May 5, School Administrator Dave Colley conducted investigatory meetings with the Grievant and each of the three witnesses. Based upon his belief that the incident occurred as described by Scurlock, he requested disciplinary action. This request was approved by the deputy warden and warden. A predisciplinary conference notice was issued May 18 and said conference

conducted May 27. The hearing officer found just cause for discipline on two charges, Rule 10 (Sleeping on Duty) and Rule 11 (Inattention to Duty). A 3-day suspension notice was issued June 25, 1998, citing only the sleeping-on-duty violation.

A grievance was filed protesting this action on June 30, citing Articles 13.01 and 13.03 of the Collective Bargaining Agreement. Not having received a Step 3 response, the Association appealed the case to arbitration on July 13, 1998. The Step 3 hearing was finally conducted August 6, with a written response issued on January 5, 1999, but not received by the Association until February 19. Remaining unresolved, the case came to arbitration where it presently resides, free of procedural defect, for final and binding decision.

The Grievant denies she was asleep. She testified she had been having gastric problems, and offered a physician's statement in support. This statement, dated August 3, 1999, states in pertinent part,

> Carole Curnutte is requesting that we validate that she has been having headaches in May and June due to hypertension....In addition the patient has ... been taking ...which has caused some gastric irritation. (Association Ex. 6)

The Grievant further testified that she had gone home sick the previous day because of stomach cramps but they recurred on April 24. When break was called around 1:55 p.m. she went into the copy room and practiced a stress reduction technique learned in annual training. She testified she was not asleep but on break and fully aware of her surroundings.

III. ISSUE AS FRAMED BY THE ARBITRATOR

Did the State violate the Collective Bargaining Agreement when it suspended the Grievant? Was its action without just cause? If so, what is the remedy?

IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 - Purpose

The State of Ohio and the Association recognize that in the interest of harmonious relations, a procedure is necessary whereby employees are assured of prompt, impartial and fair processing of their grievances.

ARTICLE 9 - CLASSROOM CLIMATE

9.01 - Educational Climate

The Employer recognizes the responsibility to provide reasonable support and assistance to teachers and teaching coordinators with respect to the maintenance of control and discipline in the educational setting.

ARTICLE 13 - PROGRESSIVE DISCIPLINE

13.01 - Standard

Employees shall only be disciplined for just cause.

13.03 - Pre-Suspension or Pre-Termination Conference

...

The pre-disciplinary conference shall 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 shall be provided with all documents used to support the possible disciplinary action which are known of and available at that time. Documents which are not known or available at the time of the hearing shall be provided to the Association for examination prior to the issuance of a written decision....

V. ARGUMENTS OF THE PARTIES

Argument of the State

The State contends the facts are well established. Two witnesses testified the Grievant was asleep. Their observations were unobstructed, spanned several minutes and were immediately reported and documented. Their demonstrations of what they saw match the definition of "sleep" offered by the Association. The only rebuttal to their testimony came from the Grievant and her testimony that she was practicing stress reduction is just a ploy. What she said when confronted was that she was sick, but she had not previously informed her supervisor she was ill nor did she request leave. Her only support was an after-the-fact document from a doctor addressing dates subsequent to the incident. Moreover, she did not try to explain what she was doing in terms of

stress reduction until the predisciplinary conference when she had Association representation. The State asserts the only other relevant testimony came from Bowling who said their supervisor informed him he would be disciplined for practicing this particular form of stress management.

The State takes the position that it treats violations of this rule uniformly throughout the Department, asserting that the version of Standards of Employee Conduct submitted as Employer Exhibit 2 was promulgated and distributed without the narrative referred to by the Association. The Grievant works in a maximum security prison and was in an area to which inmates had access. In such an environment, no employee can sleep or practice a technique that gives the perception of sleep, for perception is reality in such a place. For these reasons, the State asks that the grievance be denied in its entirety.

Argument of the Association

The Association argues the State has the burden to prove that (a) the Grievant was asleep (Rule 10), (b) she was on duty at the time (Rule 10), (c) there was just cause for suspending her for 3 days (Article 13.01), (d) the predisciplinary hearing officer was not directly associated with the incidents leading to the disciplinary action (Article 13.03) and (e) that all documents used to support the discipline were provided to the employee (Article 13.03). The Association further contends that it established that the State did not hold a predisciplinary conference prior to making the discipline decision (in violation of Article 13.03), did not provide reasonable support with respect to maintenance of control and discipline in the educational setting (in violation of Article 9.01) and did not promptly, impartially and fairly process the grievance (in violation of Article 5.01).

With respect to proof of sleeping while on duty, the Association points out that in their written statements and testimony, the witnesses merely said the Grievant "appeared" to be asleep. She was not. She was taking a few minutes to practice a stress management technique during her regularly scheduled afternoon break. At the end of the break, she returned to class.

With respect to the just-cause standard, the Association reviews the Daugherty tests. First, since the Grievant's acknowledgment of the rules was not provided at the predisciplinary conference as required by Article 13.03, it does not exist for the purpose of this case. Thus, there is no proof the Grievant had foreknowledge of the consequences for sleeping on duty. Second, the Association admits that Rule 10 is reasonable, but reiterates its claim that the Grievant was not asleep at the time. Third, there was no investigation and what there was was not fair because it was conducted by the school administrator. Fourth, the State did not obtain factual evidence to prove the Grievant was asleep. Statements that she "appeared" to be asleep are not proof. In fact, the Grievant was responsive to her surroundings. Fifth, the State did not apply its rules in a uniform manner for no member of the bargaining unit has, until now, been disciplined for conduct during a break. Sixth, citing Arbitrator Rivera in ODRC v. SCOPE (27-16-901127-0394-06-01) who held that 5 days was too long a suspension for the first offense of a 6-year employee found guilty of sleeping on duty, the Association claims that the penalty imposed was not commensurate with the Grievant's record.

With respect to the predisciplinary hearing officer, the Association contends that when she conducted the hearing she was aware of the warden's decision because it was a part of the prediscipline package she received on May 18, two weeks before the hearing. She was therefore directly associated with the incidents leading to the disciplinary action.

Finally, the Association submits that at the predisciplinary hearing the Grievant was not provided with all documents used to support the discipline for she was not given the acknowledgment of receipt of rules, the investigation report or the record of predisciplinary action.

In sum, the Association states that the State did not prove it had just cause to suspend the Grievant for three days nor did any managerial employee offer the Grievant assistance in this case as required by Article 9.01. It therefore asks that the grievance be sustained and the Grievant made whole.

VI. OPINION OF THE ARBITRATOR

The Association challenges this suspension on every point: due process, proof of wrongdoing, and appropriateness of the penalty. I begin my analysis with the procedural objections.

First, the Association contends the investigation was nonexistent and not fair. I disagree. The fact that it was conducted by the school administrator does not, in itself, make the investigation biased and no proof of his alleged prejudice was offered. On the contrary, so far as I can tell from the evidence before me, the school administrator was not even present at the time of the incident. I also fail to see what element was missing from his inquiry that made it less than a full investigation. He interviewed the Grievant and all three witnesses, and he collected written statements. If there was a witness he should have talked to or some other investigatory task he should have done, it was incumbent upon the Association to bring it to the Arbitrator's attention.

Second, the Association alleges a number of flaws in the predisciplinary procedure. For one, it claims the decision was made prior to the conference and that the predisciplinary hearing

officer had knowledge of this decision before the conference and was thus "directly associated with the incident(s)." Again I disagree. The deputy warden's and warden's approval of Colley's May 4 memorandum to Personnel Officer Hairston signified their approval of his invocation of the predisciplinary process, not of its outcome. That is, they approved his request that charges be brought against the Grievant, not that she be disciplined. This being the case, the hearing officer was not prejudiced by having a copy of that memo, for the decision to suspend or otherwise discipline the Grievant still depended on what the hearing officer learned during the conference.

Another Association objection to the predisciplinary process is that a number of documents relied on by the State were not provided to the Grievant, namely her signed acknowledgment of receipt of the Rules, an investigative report, and record of predisciplinary action. The purpose of the predisciplinary conference is to give the employee a chance to hear and answer the charges against her. She might raise questions about the evidence against her, offer explanations of her conduct or bring mitigating circumstances to the attention of the State. In other words, it is a "meaningful opportunity to invoke the discretion of the decisionmaker" (*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)). As such, the documents required by Article 13 are those relevant to the charges. An investigatory report is relevant and the State is obliged to supply it if it exists. In this case, there is no evidence that an investigatory report other than what is contained in the school administrator's request for disciplinary action exists, and that memo does appear in the predisciplinary document list. I am uncertain what a "record of pre-disciplinary action" refers to, but take it to be the Grievant's active discipline record at the time of the predisciplinary conference. Such a document is not only irrelevant to the charges, but prejudicial. It would therefore be inappropriate to include in the predisciplinary package. As for the

Grievant's written acknowledgment of having received the Rules, again this is not relevant to whether the incident occurred as alleged and its omission did not inhibit her from answering the charges, for the predisciplinary notice clearly cites the rules she was alleged to have violated and the manner in which she is alleged to have done so. Moreover, a copy of these rules was attached to the predisciplinary notice. If the Grievant wanted to offer a defense of no prior knowledge of the rules and consequences for violating them, the omission of this document did not prevent her from doing so at the predisciplinary conference or in arbitration. Therefore, even if the acknowledgment were required by Article 13.03, its omission was a harmless error.

The final procedural flaw raised by the Association relates to the processing of the grievance. The State did violate the time lines of the Agreement with respect to the Step 3 hearing but the Association used the remedy provided by the Agreement, namely taking the case to the next level. The State also violated the explicit time lines and stated intent of the grievance procedure article in allowing 5 months to lapse before issuing the Step 3 response and it took another month for the document to reach the Association's advocate. I note the legitimate Association concern for the delay, but again find no prejudice to the Grievant as the case was scheduled for arbitration and heard within a year of the incident and the Association had an opportunity to request a continuance if more time was needed to prepare its defense in light of the Step 3 response.

Turning next to proof of wrongdoing, there is substantial evidence the Grievant was asleep on duty. The Association contends the statements and testimony were that the Grievant only "appeared" to be asleep. Given that sleep is a state of mind as well as of relative physical inactivity, a positive determination cannot be made by ordinary eyewitnesses. The best that can

be done is to observe the outward physical aspect, then draw inferences and check against the observations and inferences drawn by others. There will inevitably be some doubt, but proof beyond a reasonable doubt is not required in industrial relations discipline cases. In this case, there were three eyewitnesses, two of whom testified in arbitration. Both described the Grievant in a posture of sleep and demonstrated what they saw: her head was back, her eyes closed, her jaw slack and her mouth open. She was in this posture for some minutes after the class break was called over by the corrections officer and did not move until Scurlock opened the door. When confronted, she claimed she was not asleep, but ill. However, she was not alert enough to respond when the corrections officer called the break or evidently aware by the passage of time or observation of a time piece or returning inmates that it was over for she arose only after Scurlock opened the outer door.

Despite the time period referred to in her doctor's statement, I accept her claim that she was ill because the previous day she had gone off work on account of illness and she may simply not yet have consulted her doctor about its cause. However, illness does not absolve her of the responsibility to remain awake and alert when on duty, even when not performing assigned tasks, particularly when inmates are around. If she was too ill to do that, she was not fit for duty and needed to request sick leave or permission to move to a secure area until she regained her fitness. The responsibility to make such a request was hers, not her employer's.

As for the Grievant's claim that she was meditating to relieve stress as taught to her during inservice training, I agree with the State that asserting the defense for the first time in the predisciplinary conference when she had two previous opportunities to mention it raises questions about its veracity. But even if it were true, the Grievant still had the obligation to comport herself

in ways, even when managing stress during a class break, that would not put her at risk of dozing off.

With respect to whether the Grievant was on duty, although she was not in class at the time, she was also not at lunch or in a break room isolated from inmates. In fact, the class break was over when she was observed. Moreover, the fact that the inmates and the Grievant were on a break from class when she sat down in the copy room did not absolve the Grievant of her duty to remain fully alert whenever inmates are present or could be present. Her error was not that she was sleeping instead of teaching, but that her nap placed her and the institution at risk.

The Grievant knew from the rules and should have known from the nature of the institution and departmental practice that napping on the job is a disciplinable breach of security. I agree that without aggravating circumstances, a 5-day suspension such as was imposed in the *Hartwell* case would have been too harsh. However, given that this was a first offense for a long-term employee and there is no evidence of inconsistent treatment, 3 days is within the range of reasonableness in this environment.

VII. AWARD

The State did not violate the Collective Bargaining Agreement when it suspended the Grievant. Its action was with just cause. The Grievance is denied in its entirety.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 25, 1999
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