VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 23-10-20081031-0036-02-05
GRIEVANT: DENNIS MATHIEU

OFFICE OF COLLECTIVE BARGAINING, THE STATE OF OHIO	:	
The Employer	:	
and	:	OPINION AND AWARD
THE FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC., UNIT 2	:	
The Union	:	

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LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

Pat Mogan, Advocate
Victor Dandridge, 2nd Chair
Jennifer Klipfer, Managment Representative
Jeremy Wertz, Witness
Daniel Rutt, Witness
Lee Duffy, Witness
Mark Roman, Witness

For the Union:

Paul Cox, Chief Counsel
Joel Barden, Staff Representative
Dennis Mathieu, Grievant
Renee Engelbach, Paralegal
Scott Stoney, Witness

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on March 12, 2009, at the conference facility of the employer in Massillon, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant who describes himself as a seventeen-year veteran is employed at the employer by the State of Ohio as a policeman at a facility operated by the Ohio Department of Mental Health. On October 24, 2008 the grievant was removed from his seniority with the following Order of Removal:

> "Mr. Dennis Mathieu
> 2478 8th Street
> Cuyahoga Falls, OH 44221
>
> Mr. Mathieu:
>
> This will notify you that you are being removed from your position as Police Officer 2 from State service. The Chief Executive Officer will notify

you of the effective date of your removal.

The reason for this action is that you have been found guilty of violating Hospital Policy #3.14, Disciplinary Action Guidelines, Neglect of Duty, Sleeping/Not Alert During Work Shift; Specifically, on July 30, 2008, it was determined that you were in a position of rest during work hours while in the HBH Police Vehicle. You were observed with your head back and eyes closed with your coat draped over top of you.

If you wish to appeal this action, you must file a written grievant with the Agency Director within fourteen (14) days of notification of this action. To file the written grievance, send it to:

Labor Relations Section
Department of Mental Health, State Office Tower - Suite 1180
30 East Broad Street, Columbus, OH 43266-0414

Action Approved by:
/s/ Date: 10-24-08
Director, Ohio Department of Mental Health"

Unilateral disciplinary guidelines under Policy #3.14 of the employer showed that the grievant who was charged with allegedly sleeping on duty was subjected to disciplinary removal on the basis that the first offense under that category is a five-day suspension, that the second offense under that category is also a five-day suspension and that the third offense under that category is a removal. It might be noted that the contract of collective bargaining at Section 19.05 revealed the following:

"**19.05 Progressive Discipline**

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. At the

Employer's discretion, disciplinary action shall include:

1. Verbal Reprimand (with appropriate notation in employee's file);
2. Written Reprimand;
3. One or more fines in the amount of one (1) to five (5) days pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days pay;
4. Suspension;
5. Leave reduction of one or more days(s);
6. Working suspension;
7. Demotion;
8. Termination.

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action.

The Employer, at is discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an employee's wages shall not require the employee's authorization for the withholding of fines from the employee's wages."

Now, it might be noted that the contract was bilaterally executed by the parties. It might also be noted that Policy #3.14 was unilaterally invoked without the permission of the union, the union claims that Section 19.05 must be followed and not Policy #3.14, if there is a conflict between the clauses.

The record of discipline in this matter revealed that a protest was filed upon the Notice of Removal and the grievance report form filed in a timely fashion stated that the grievance is as follows:

"STATEMENT OF GRIEVANCE (GIVE TIMES, DATES, WHO, WHAT, WHEN, WHERE, WHY, HOW) BE SPECIFIC.

Mr. Mathieu was terminated without just cause and without regard to progressive discipline."

The bargaining unit performance summary for the grievant revealed his record of discipline to be an activity as follows:

"**RECORD OF DISCIPLINE**

INSTITUTION: **Heartland Behavioral Healthcare**

EMPLOYEE NAME: **Dennis Mathieu**

DATE OF EMPLOYMENT: **November 25, 1991**

DATE	CORRECTIVE ACTION TAKEN	CHARGE
09/06/06	Verbal Reprimand	Neglect of duty - Failure to follow policies, procedures
04/25/07	Five Day Suspension	Failure to follow Policies and Procedures; Carelessness with sate(sic) property which resulted in an unsafe act, Failure of Good Behavior - Poor judgment; Actions that could potentially harm the employee, co-worker or member of the general public, and Interference in an Investigation - Giving false statements."

It further appears that the grievant was also employed on a part-time basis as a deputy sheriff. Further, his review period at the facility herein for the period of May 11, 2007 to May 11, 2008 was determined to be satisfactory. The record further revealed that the grievant placed into the record of this cause some letters of recommendation from people described as those involved in police work in and around the facility herein. A coworker by the name of Stoney testified on behalf of the grievant. He stated that he did not know that the grievant herein slept on duty, nor did he ever suspect the grievant to be sleeping on duty. An email given to the grievant revealed that a lieutenant who was involved in the discovery of the grievant allegedly sleeping was a person who was targeting the grievant for discipline. A coworker by the name of Rutt forwarded to the grievant an email which revealed the following:

> "Dennis,
>
> A return e-mail has advised me not to discuss this issue with anyone, as this is an on going situation. I can tell you that in my e-mail I stated I had knowledge of what I felt was targeting of you by the Lt. via statements made to me while employed in the HBH police department.
>
> This message, including any attachments, is intended solely for the use of the named recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution of this communication is expressly prohibited. If this e-mail reached you by mistake or you are not the intended recipient, please contact the sender at your earliest convenience by reply e-mail or at the telephone number listed below. Thank you."

The record further revealed that on the date in question in which the grievant was allegedly sleeping or resting on duty, a detailed radio check journal was placed into the record and it revealed

that the grievant all, during the night in question, answered each one of his radio checks when made and that included the hourly times of 9:00 p.m. on July 29 to 6:00 a.m. on July 30, 2008.

Thus, the real facts in this particular case stem from the idea that the grievant, at approximately a few minutes before 6:00 a.m. on the morning of July 30, while on duty, took the police cruiser and went to a far-reaching building on the facility in the area of the generator building. A few moments later, a lieutenant, who allegedly disliked the grievant, drove up to the area, found the grievant with his eyes closed, a service jacket over him and allegedly sleeping at approximately 6:00 a.m. or a few minutes thereafter. A picture was taken and people identified the person in the picture sleeping as that of the grievant. The grievant denies this activity of sleeping and said that while he had his eyes closed, the lieutenant who discovered the grievant called the grievant by direct radio and the grievant answered and stated therefore that he was not asleep and was merely resting his eyes. Thus, we have on one hand an allegation of sleep and, on the other hand, a denial.

Not only is the questionable sleeping or resting allegation an issue in this particular case, but the use of Policy #3.14 as it interfaces with contractual clause 19.05 is also an issue in this case.

It was upon these facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

A discussion must be considered concerning the use of Policy #3.14 as at interfaces with

contract clause 19.05. It must remembered by the reader that Policy #3.14 is a unilateral activity of the employer of creating a policy which was not signed off, agreed to, nor in any way acquiesced to by the union. The contract is a bilateral agreement and forms a part of the contract of collective bargaining by and between the parties. Its use is a document that must be followed in this particular matter. Policy #3.14 provides a grid for discipline and, in this particular case, sleeping on duty triggers a termination after two five-day suspensions for prior offenses. Section 19.05 of the contract which is stated in full hereinabove allows the employer the discretion of eight disciplines and demands that the employer follow the principals of progressive discipline.

Upon reviewing the record of discipline of the grievant, his prior discipline is only a verbal reprimand and a five-day suspension. The grid provided in Policy #3.14 demands two five-day suspensions prior to termination. So even though the employer predicated their termination upon #3.14, #3.14 was not followed which is clear on its face. #3.14 demands two offenses prior to removal, both of which includes a five-day suspension. The grievant was not guilty of receiving two-five day suspensions prior to termination.

The more important question, however, is whether Policy #3.14 has any standing in light of the language of clause 19.05 of the contract. Clause 19.05 is a bilateral contract and demands that the employer follow the principals of progressive discipline. In this particular matter, the grievant's prior discipline was a verbal reprimand in 2006 and a five-day suspension in 2007. It appears that under the questionable circumstances of this factual pattern as revealed in this case, the termination

was too harsh a penalty, especially in light of the mandate of 19.05 of the contract of collective bargaining.

Upon review of the evidence it is noted that the grievant did not miss any phone checks or radio checks during the course of his shift on July 29 and July 30, 2008. It is apparent that there was an interlude of some ten minutes at approximately 6:00 a.m. on July 30, 2008 at which the grievant might have had his eyes closed. However, I cannot determine whether or not the grievant was sleeping, from either the picture or from the activity. The activity, in fact, shows that the grievant answered the radio calls. Evidence further reveals that the grievant answered the lieutenant when he put his window down and talked to the grievant.

It further appears that there is no clear corroborative testimony whatsoever. As a matter of fact, all of the testimony reveals that the grievant's background is excellent, that the grievant had a minimal amount of discipline at the facility, that the grievant is an experienced police officer serving not only the job herein, but also as a part-time deputy sheriff, that the grievant's co-worker's thought well of him and that the co-worker gave the grievant information that the lieutenant who found the grievant allegedly sleeping was one who had a problem with the grievant. I am not inclined, therefore, to find that the grievant was sleeping.

The facts of this case reveal that the grievant didn't miss a radio call on the date involved and that the grievant wasn't sleeping. There simply isn't any meaningful evidence that the grievant was

sleeping. There is no doubt that a security guard cannot be on duty with closed eyes and for that reason the grievant must be disciplined. Arbitral modification of management decisions of discipline are based upon facts not considered by the employer. Mere change without reason is not correct. In this case, management reacted to unilateral rule rather then to contractual bilateral mandate.

The possible circumstances of this case are very tenuous and the use of Policy #3.14 is not only inappropriate as it was followed, but also inappropriate when given the facts of clause 19.05 which demands progressive discipline which the grievant did not receive. Based upon all of the facts of this particular case, I find that the grievant should be restored to duty after a thirty-day suspension without back pay but without loss of seniority or benefits.

Discipline under the contract demands progressive discipline. In an effort to comply, the following award is made.

IV. AWARD

The grievant shall a receive thirty-day suspension without back pay but without loss of seniority or benefits.

Marvin J. Feldman, Arbitrator

Made and entered
this 30th day
of April 2009.