VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION,	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	
and	*	Case No. 34-23-080922-0255-01-09
	*	
	*	Kim Penn, Grievant
OHIO BUREAU OF WORKERS'	*	Removal
COMPENSATION	*	

APPEARANCES

For the Ohio Civil Service Employees Association:

Tim Rippeth
Ohio Civil Service Employees Association

For the Ohio Bureau of Workers' Compensation:

Bradley A. Nielsen
Ohio Bureau of Workers' Compensation

I. HEARING

A hearing on this matter was held at 9:15 a.m. on May 21, 2009, at the offices of the Ohio Bureau of Workers' Compensation in Portsmouth, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment 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 Civil Service Employees Association ("Union") were Wanda Kuhns, Patti Evans, Catherine Miller, Cindy Blevins, Tammy Harris and the grievant, Kim Penn. Testifying for the Ohio Bureau of Workers' Compensation ("Employer") were Karen Wesney and Belinda Smith. A number of documents were entered into evidence: Joint Exhibits 1-13, Union Exhibits 1-2 and Employer Exhibits 14-17. The hearing concluded at 2:30 p.m. following oral argument. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Ohio Bureau of Workers' Compensation and the Ohio Civil Service Employees Association are parties to a collective bargaining agreement governing the terms and conditions of employment of numerous employees in various classifications. Among these prior to her removal was the Grievant who began her employment with the State on February 6, 1994, as a Clerk 3 with the Ohio Adjutant General. In December of 1998 she transferred to the Ohio Bureau of Workers' Compensation and in the process took a demotion from Secretary to Clerk 3. Her annual performance ratings for 2004 through 2007 show her meeting or exceeding targets and dimensions during these years but she was downgraded from "above" to "meets" on two dimensions in her most recent review. Her counseling and active discipline history began on July 31, 2006, when she received a written counseling for three separate incidents of sleeping in the

workplace (Joint Ex. 4). She thereafter moved into and through the discipline grid to discharge for violation of the same rule:

Date	Infraction	Penalty
Oct. 11, 2006	Sleeping while on duty (19 occasions over 2 days) & general neglect	Written reprimand
March 23, 2007	Sleeping while on duty (3 days) & inappropriate comment to a supervisor	2-day suspension
June 18, 2007	Sleeping while on duty (4 days)	6-day suspension
Oct. 4, 2007	Sleeping while on duty (2 days)	15-day suspension

The 15-day suspension was grieved and, on November 26, 2007, prior to arbitration, the parties entered into a settlement agreement wherein the Grievant agreed to participate in a 180-day EAP. Upon successful completion she was to receive five days of back pay. She was to receive an additional five days if she was discipline-free for 180 days following completion of the EAP and, if there was no intervening discipline within 12 months of the EAP agreement, her suspension was to be removed from her record (Joint Ex. 9). It is also pertinent to this case that she has suffered from spastic paraparesis since childhood, has been wheelchair-bound since 2003, and takes medication which has a sedative effect. She has not, however, pursued reasonable accommodation under the ADA although she has taken FMLA leaves.

On April 28, 2008, her supervisor, Karen Wesney, documented in email to herself having seen the Grievant in her pod sitting before her computer with her eyes closed (Joint Ex. 2, p. 13). The next day she told the Grievant that if she could not keep her eyes open, she should consider taking leave. She also warned her that if she saw it again she would have to address it. Despite this warning, during the morning of July 10, Ms. Wesney documented another sleeping incident which she described as the Grievant being "in front of her computer with her eyes closed. I observed her for about 1 minute, I then said her name, her body jerked, and her eyes opened." (Joint Ex. 2, p. 15) An investigative interview was held on July 18 at which time the Grievant said she "must have been" in a posture of rest but doubted she was sleeping. (Joint Ex. 2, p. 8, 11) Then, on July 28 at approximately 9:35 a.m. when Ms. Wesney again noted she saw the

Grievant in her pod with her eyes closed and no movement, she got another supervisor, Belinda Smith, to confirm her observation (Joint Ex. 2, p. 16). Three days later (July 31), Ms. Wesney documented a third occurrence. This, too, was added to the charge for which a pre-disciplinary hearing was held August 14, 2008.

At the pre-disciplinary hearing the Grievant said she had felt unwell on July 10 and needed a break. In support of this claim she offered that she took the following day off work for a doctor's appointment. As for July 28, she said she was having problems with her eyes which her doctor told her was due to an allergic reaction to her medication and was remedied. On the 31st, she said, she had just taken her eye drops after which she routinely closes her eyelids for 60 seconds.

Notwithstanding the Grievant's explanations and her Union's arguments, the Grievant was removed from her position on September 11, 2008. When she was served her removal notice, she was quite upset and referred to her supervisor as a "fucking bitch." A grievance was timely filed four days later citing absence of just cause and disability discrimination. Step 3 was waived. The case thereafter came for arbitration on May 21, 2009, as aforesaid, free of procedural defect on the sole issue of *Did the Ohio Bureau of Workers' Compensation possess just cause for removing Clerk 3 Kim Penn from her employment at the Portsmouth Service Office? If not, what shall the remedy be?*

In arbitration several bargaining unit witnesses testified in the Grievant's behalf. Patti Evans, secretary to the office manager, testified that Ms. Wesney had asked her to watch the Grievant for sleeping while Ms. Wesney was on vacation. Ms. Evans did as requested and sent Ms. Wesney email about it. She testified she had seen the Grievant sleeping at work for quite some time and "almost everyone knew" that the Grievant slept at work. A former employee, Catherine Miller, testified she thought Management singled out the Grievant. She saw Ms. Wesney watching the Grievant and kept a log of it, but she lost that log when Management packed up her possessions after she resigned. Cindy Blevins, who was friends with the former

supervisor, testified that that supervisor treated the Grievant fairly and didn't watch her all the time. She was aware that Ms. Wesney was watching the Grievant when Wesney became the Grievant's supervisor. Though she, herself, has seen the Grievant sleeping, she thinks the Grievant "gets the job done." Tammy Harris "felt there was conflict there" but could not say why she thought so.

III. ARGUMENTS OF THE PARTIES

Argument of the Employer

The Employer cites two panel cases[1] standing for the proposition that circumstantial evidence of sleeping (such as was available here) must be given in arbitration because direct evidence of this mental state is not available in the workplace. It then summarizes the testimony of the Grievant's supervisor and corroborating witnesses to be that on three separate occasions she was observed sleeping at work. She has a discipline history of such violations and even four of the Union's five witnesses have seen her asleep. The fifth witness's testimony should be viewed with skepticism because she was a disgruntled employee. As for the claim that the supervisor was out to get the Grievant, her evaluations of the Grievant do not support this. Moreover, the disciplinary grid permits removal for fourth offense, but the Employer imposed only a 15-day suspension and then settled the grievance of that action with a quasi last-chance agreement in an attempt to salvage this 15-year employee. The former supervisor may have overlooked the Grievant's naps but her replacement was not willing to tolerate sleeping on the job though she also gave the Grievant every opportunity to change.

The Arbitrator should also consider the Grievant's behavior when she was given her termination notice, which constitutes separate grounds for dismissal.

The Employer acknowledges the Grievant's disability, but she nevertheless needed to be responsive to legitimate direction, knowing full well from progressive discipline that removal

[1]Ohio Department of Mental Retardation and Developmental Disabilities and OCSEA/AFSCME Local 11 (B. Washington, Grievant), July 13, 1998 (R. Brookins, Arb.). Ohio Department of Rehabilitation and Corrections and State Council of Professional Educators/OEA/NEA (C. Curnutte, Grievant), June 25, 1999 (A. Smith, Arb.)

was going to be the next step. It concludes that it made a good faith effort to reform the Grievant and asks that the grievance be denied in its entirety.

Argument of the Union

The Union argues that the Grievant was a good, 15-year employee whose discipline troubles began when she came under the scope of a new supervisor who was out to get her, even questioning her transfer to the Bureau in 1998. More recently, she got another employee to watch the Grievant while the supervisor was out of the office. Two other employees testified they knew the Grievant was being watched. Additionally, this supervisor kept sloppy records of her observations, and this calls their accuracy into question.

The Grievant, the Union points out, is handicapped by her illness. Wheelchair bound, she cannot get up and walk around for stress relief. Despite its denial, Management was aware that she had multiple issues, including with her eyes for which she was given a special screen and lights. Under these circumstances, discharge is not warranted.

Finally, the Union responds to the Employer's citations. Arbitrator Brookins, it avers, erred in that he advised stimulants. Arbitrator Smith's case was factually different in that the grievant there was not in a wheelchair.

For all these reasons, it asks that the grievance be granted.

IV. OPINION OF THE ARBITRATOR

It is always sad when a long-term, otherwise acceptably performing employee's dismissal must be upheld because the discipline and employee assistance programs have failed to correct unacceptable behavior. Regrettably, such is the case here. While the supervisor may have had some ancient animosity, she gave the Grievant plenty of opportunity to learn that dozing at work was not acceptable on her watch. Yet the Grievant, knowing full well she was on a last chance for sleeping, gave her plenty of material, even disregarding the April incident for which the Grievant was not disciplined.

To begin, the fact that her former supervisor apparently tolerated the Grievant's naps is not helpful to her case because all an employer need do to end lax enforcement is to put the employee on notice. Here, the Grievant clearly was on notice by virtue of the counseling in 2006 and subsequent discipline.

Second, the Grievant displayed several indicia of sleep, eyes closed on all three dates, head tilted down (July 28) or back (July 31), and a startle reaction when spoken to (July 10). Third, in her investigatory interview on the July 10 incident, she did not deny that she had been asleep, saying she doubted she had been asleep and "must have been" in a posture of rest. Knowing she was unwell and needed a break, in the face of losing back pay from her grievance settlement and near-certain discharge if found sleeping again, why would she not take a break or sick leave unless she misjudged the risk of discovery or unintentionally dozed off?

Fourth, at her pre-disciplinary hearing she raised the fact that for years she had had a common aging problem with dry eyes and was taking a drug which made the condition worse. She testified that her eyes were bothering her on all three days for which she was found guilty of sleeping but that the 28th was the worst. She was managing this condition with application of eye drops four times a day, closing her eyes for at least a minute and sometimes holding her head down. But when asked on cross-examination why she had not disclosed to her superior her need to medicate them, she answered that she did not think about it and had only mentioned having eye strain and dry eyes, not that she ever needed more than contact solution. It seems to the Arbitrator that a person on a last-chance agreement for sleeping at work and who has been interviewed for an alleged sleeping infraction (as was the Grievant), would take the precaution of either letting her supervisor know in advance about this treatment, take the treatment while on break and away from her work area, or get a witness. As it stands, this defense amounts to post hoc rationalization and cannot be credited.

Fifth, even the Union's other witnesses (save the disgruntled former employee) admitted they, too, had seen the Grievant asleep at work, lending credence to the supervisors' claims that this was a chronic problem which neither discipline nor the EAP had been able to correct.

Finally, by the July 28 incident, she had had her investigatory interview on the July 10 incident and so she knew she was in the discipline process and likely facing termination according to the terms of the Last Chance Agreement. Yet still she could not or would not take measures to remain awake. This, too, indicates little or no prospect for reform. I must therefore conclude that the Grievant is either unwilling or unable to conform to her employer's reasonable expectation that she be awake and alert while on duty.

V. AWARD

The Ohio Bureau of Workers' Compensation had just cause for removing Clerk 3 Kim Penn from her employment at the Portsmouth Service Office. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 11, 2009

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