

In the matter of Arbitration between

Ohio State Troopers Association,
Union

And

Case no.15-03-20130605-0050-04-01
Rufus V. Irby III, Grievant

State of Ohio, Department of Public Safety,
Employer

Umpire's Decision and Award

Introduction

This matter was heard in Columbus, Ohio on December 18, 2013. Lieutenant Charles Linek represented the Employer. Associate General Counsel Elaine Silveira represented the Union. All witnesses were sworn. No procedural matters were raised. There were several joint exhibits presented: Jt. 1- the collective bargaining agreement; Jt. 2- the grievance trail; Jt. 3- the discipline package. Additional exhibits were introduced by the parties and admitted during the hearing.

Issue

Was the Grievant issued a three (3) day suspension for just cause? If not, what shall the remedy be?

Applicable CBA Provision: Article 19

Facts

The facts giving rise to the instant discipline are not disputed. Grievant is assigned as a Motor Vehicle Inspector Trooper in the Wilmington District. His primary duties include school bus and roadside vehicle inspections.

[REDACTED]

He saw a [REDACTED] on September 28, 2012. His [REDACTED] was [REDACTED] test) was ordered. No work restrictions were noted. Union Ex. 3.

On January 28, 2013 Grievant was determined to be sleeping at the school bus garage site for the Mt Healthy school district. Grievant was asleep in his Patrol car which was parked in the open. Grievant's co-worker MVI Bailey reported him to Sgt. New. Grievant admitted he was asleep. The length of time he was asleep was not determined.

During the investigation it was stated by the School Bus manager that Grievant was asleep at the bus garage several days per week. The Manager also stated that he didn't want to get Grievant in trouble. M-2.

Another like incident occurred on February 13, 2013. Grievant had failed to show up at a scheduled inspection. When he failed to show up Sgt. New determined his location and had the office secretary awaken him. Grievant was found asleep at the Ross School district bus garage. He awoke when the secretary tapped on the window of the patrol car. Grievant admitted he was asleep on that occasion for about an hour. He believed it was his [REDACTED] that caused him to sleep. M-2.

According to his two MVI co-workers Grievant had a history of sleeping on the job for a number of years. M-2 p.2-3. Grievant stated during his investigation that the two MVIs he works with are out to get him and also sleep on the job. He reported in the AI that Troopers and officers have been caught sleeping on duty by him over the years.

Sgt. New reported during the AI another incident occurring in the fall of 2012 where Grievant fell asleep twice during a meeting. M-2.

On February 14, 2013 Grievant was found unresponsive in his Patrol car on the median of the highway. He had been out of radio contact for ninety (90) minutes. He was sent by [REDACTED]

[REDACTED]. The principal [REDACTED] on discharge was [REDACTED]. It was suggested he [REDACTED]. There was a concern expressed by the doctors [REDACTED]

[REDACTED]. The suggestion was to rule out [REDACTED] [REDACTED]. [REDACTED].

His specific work restrictions detailed in the discharge summary were as follows:

He should not be driving any state/company vehicles related to his work. He may not be "on-duty" as a highway patrolman out on the Ohio roadways until he is further cleared by [REDACTED] [REDACTED] if necessary [REDACTED]. In returning to work he

¹ No explanation was provided for this term.

must be on desk duty/light duty. This has been explained to the patient in great detail.

Union Ex. 1.

He was released to work light duty on February 25, 2013.

Additional sleeping on the job occasions occurred on March 18, 19 and 20, 2013 when Grievant was assigned to light duty working at the Wilmington District Salvage facility at Cincinnati operations. He was observed by customers to be asleep and comments were made to another Trooper working at that location. Photographs recorded him sleeping on March 19, 2013.

Multiple co-workers reported that he was asleep on more than one occasion on each of the cited dates. Periods of sleep would vary but some lasted up to two hours. His coworkers did not try to wake him up usually. Attempts to wake him up with a police whistle failed. Door slamming did not wake him up.

Grievant himself stated he was in a deep sleep. He stated that [REDACTED]

[REDACTED]. M-3.

Grievant [REDACTED]

[REDACTED]. He was cleared for return to work. Union Ex. 3.

Grievant saw [REDACTED] again on March 25, 2013. He reported being much more alert [REDACTED]. He was kept off work an additional three weeks. Union Ex. 3. ²

Disability leave was approved for a one week period in April 2013. Union Ex. 2.

Grievant was charged with violation of Rule 4501:2-6-02 (B)(1) Performance of Duty³ and Rule 4501:2-6-02 (I)(1) Conduct Becoming an Officer. ⁴ The charge stated "you brought discredit to the Division when you were found sleeping on duty on several occasions".

Grievant's department record showed a one (1) day suspension for a preventable car crash. There was no evidence that the matter was grieved.

Employer Position

The Employer followed its disciplinary grid and issued a three (3) day suspension. Grievant brought discredit to the Patrol when he was found asleep at

² No testimony reconciled the seemingly contradictory findings of his physician on March 20 and March 25, 2013, The sleep test conducted on 3-25-13 cleared him for return to work; the office visit on March 25, 2013 stated he should be off another three (3) weeks.

³ A member shall carry out all duties completely and without delay, evasion or neglect. Members shall report for duty at the time and place specified or scheduled by their supervisor, properly attired, and ready to assume on-duty status.

⁴ For conduct, on or off duty, that may bring discredit to the division and/or any of its members or employees. A member shall not engage in any conduct which could reasonably be expected to adversely affect the public's respect, confidence, or trust for Ohio state highway patrol troopers and/or the division.

two (2) different bus garages and on three (3) different dates at the Cincinnati operation. Members of the public viewed him. One commented that the Trooper was allowed to sleep in the workplace and the other complained he had to wait longer because Grievant was asleep. His actions brought discredit to the Patrol.

Grievant admitted he knew as long as he [REDACTED] he could function but chose [REDACTED] which caused him to neglect his duty. Grievant was aware he would fall asleep but still came to work in that condition.

Based upon his department record the next level of discipline was a three (3) day suspension. He could have received a greater discipline because there were multiple instances of sleeping.

The discipline is for just cause and the grievance must be denied.

Union Position

Grievant cannot be penalized for [REDACTED]. The Patrol did not treat him as someone who was ill. No one did follow-up with him [REDACTED]. The Patrol was disrespectful and mocking when it took his photographs. Grievant was not cooping or napping. His sleeping was [REDACTED]. He deserves empathy not discipline. Grievant was treated in a non compassionate manner. The sleeping was not a performance issue [REDACTED].

The grievance should be granted and Grievant made whole.

Opinion

This is an unfortunate set of circumstances.

Grievant is a very long-term employee of the Patrol-33 years. Clearly he fell asleep on the dates and times indicated due to medications and/or medical conditions. As Union counsel pointed out he wasn't catnapping or "cooping." He was in a deep sleep that required significant effort to rouse him. He stated he didn't know he was falling asleep. But he stated that he knew he was sleeping on the job.

As a matter of note the arbitrator had some concern with the co-workers' lack of attention to Grievant. He was allowed to sleep deeply in front of customers in public view both in the Cincinnati operations and at the school bus garages. His sleeping was not a recent occurrence but had occurred at many different dates and times for a number of years according the information in the AIs. There appeared to be little concern for his health, safety or welfare. Someone could have tried to see what was going on with a repeatedly deeply sleeping co-worker. But it isn't his co-workers' or managers' conduct that is the subject of this discipline.

Grievant knew and was on direct notice [REDACTED]. According to Grievant his two fitness for duty examinations cleared him for duty so long as he was off [REDACTED].

The grievance itself states:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

What the grievance does not state is that both his personal and the Patrol physician advised him [REDACTED]

[REDACTED].⁵ And the fact he had direct awareness he was sleeping and did nothing proactive about it strikes the arbitrator as curious at the least and irresponsible at the worst. He is in a very public position- he also drives a motor vehicle. Both require extreme alertness and attention to duty. The rules and policy of the Patrol require an employee to notify the supervisors that medicine is being taken that could affect alertness. Grievant testified that he wasn't sure that he had told his supervisors.

Grievant is in a dilemma due [REDACTED]. If he took the [REDACTED]
[REDACTED] he perhaps at that time could not perform his duties effectively. It is a Hobson's choice perhaps but indeed it was the Grievant's choice.⁶

Regardless Grievant cannot report to work and sleep. It is dangerous to him and potentially dangerous or deadly to others, depending on if he is driving at the time. He is not performing his duties while asleep.

Sleeping on the job is prohibited conduct. It is neglect of duty per se. Grievant described it as one of the "deadly sins." Grievant slept for unknown periods of time on each of the dates and times set forth on the disciplinary notice. Incidents were repeated in the course of the day; sleeping periods lasted even up to an hour.

Grievant needs to make some important decisions about [REDACTED]
[REDACTED]. This discussion is far beyond the scope of the submission. But the issue of notice is critical to the appropriateness of this discipline. Grievant admittedly knew the likely consequences of his [REDACTED]
[REDACTED], he would likely fall asleep. He decided to come to work [REDACTED]
[REDACTED] and fell asleep. Repeatedly. His sleeping could have occurred while

⁵ Dr. Kovac is a physician working at or for the Academy. He apparently advised Grievant to get off the tranquilizers. According to Grievant the doctor also told him he might not sleep well either then. Dr. Kovac's report is not in evidence.

⁶ Union Ex. 1 states that he may have a sleep related disorder in addition to the sleep apnea the record shows after the fact that he was cleared for return to full duty.

driving. It is lucky for all that this did not occur. He did fall asleep on the highway on February 14, 2013 while in the median. He was not cited for this incident.

But regardless of the lack of harm Grievant is not performing any service to the State while asleep. The amount of time asleep is undocumented with specificity but it is more than de minimis. In no way is the arbitrator condoning *any* amount of sleeping but another case will be decided on its facts. Grievant's sleep was profound and fairly obviously a drugged sleep.

Grievant should not be reporting to work in the condition [REDACTED] as the Union would have it. Employees are required to report to work in a fit condition to perform their duties. M-1. The sleeping occurred at least six (6) documented times in a relatively short time frame. The first instance should have caused Grievant to take some proactive steps to deal with his unfortunate circumstances. The second time- even greater reinforcement for his need to take corrective action. By the time he fell asleep for the fourth time of record (the third time being when he was found on the median on the highway and sent by squad to the hospital) -then on two more consecutive additional dates- there is no justification or excuse at all for his failure to attend to [REDACTED].

The Patrol's Drug Free Workplace policy (M-1) allows for recognition of situations where medicine creates impairment issues. The policy speaks to reasonable accommodation and specific work rules for persons taking prescribed medications. These were not detailed at hearing but clearly Grievant had some accommodations made because when he fell asleep at the Cincinnati operation, he was on light duty.

Grievant knew he was sleeping on the job but did nothing to help himself or alert the Patrol he had a [REDACTED]. Although it is unfortunate that [REDACTED] the job it cannot be said under these circumstances Grievant was blameless. He had a duty and responsibility to report to work fit for duty.⁷

AWARD

The grievance is Denied.

IT IS SO HEREBY ORDERED.

Issued this 6th day of January 2014 in Columbus, Ohio.

S/ Sandra Mendel Furman

Sandra Mendel Furman, Arbitrator

⁷ According to the record as of late March 2013 he is not taking the problem medicines.