

IN THE MATTER OF THE ARBITRATION BETWEEN

The State of Ohio

Department of Rehabilitation and Correction

AND

The Ohio Civil Service Employees

Association, AFSCME Local 11

GRIEVANT: Robert Pitzen

GRIEVANCE NO.: 27-35-20130327-0057-01-03

OPINION AND AWARD
ARBITRATOR: Meeta Bass Lyons
AWARD DATE: April 18, 2014

APPEARANCES FOR THE PARTIES

EMPLOYER:

Richard Shutek, Employer Advocate, First Chair

Megan Schrenk, Second Chair

Tera Pinski, Third Chair

UNION:

Derek Urban, Union Advocate, First Chair

Ryan Ochmanek, Second Chair

Angela Brandel, Third Chair

Grievant: Robert Pitzen

PROCEDURAL HISTORY

The Ohio Department of Rehabilitation & Correction is hereinafter referred to as "Employer". The Ohio Civil Service Employees Association, AFSCME, Local 11 is hereinafter referred to as "Union". Robert Pitzen is the Grievant.

Grievance No. 27-35-201-30327-0057-01-03 was submitted by the Union to Employer in writing on March 27, 2013 pursuant to Article 24 of the parties' collective bargaining agreement. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Article 25, Section 25.03 of the 2012-2015 Collective Bargaining Agreement.

Pursuant to the collective bargaining agreement between the Union and Employer, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on January 30, 2014 in Toledo, Ohio. During the course of the hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered. The parties submitted post-hearing briefs on or before March 3, 2014. The hearing record was closed on March 3, 2014.

The parties stipulated that the grievance and arbitration were properly before the Arbitrator. The parties did stipulate to the issues as follows:

Was the grievant Robert Pitzen removed for just cause? If not, what should the remedy be?

PERTINENT PROVISIONS OF THE 2006-2009 AGREEMENT

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases, which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04.

24.02 - Progressive Discipline

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

JOINT DOCUMENTS

1. Contract: 2009-2012 State of Ohio OCSEA AFSCME Local 11, AFL-CIO
2. Disciplinary Trail
3. Grievance Trail
4. November 1, 2009 Edition of Standards of Employee Conduct

BACKGROUND

Grievant was hired on February 7, 2000 as a correction officer at the Toledo Correctional Institution. On January 30, 2013 Grievant and another correction officer were assigned to guard an inmate who was on suicide watch at St. Vincent's Hospital. Grievant and the other correction officer were each armed with a 40 caliber Glock Handgun and 32 rounds of ammunition. On January 31, 2013 the Institution received notice from the staff at the hospital that Grievant and the other correction officer were caught sleeping on duty. Nurse Miller, a registered nurse at St. Vincent's Hospital, made the report.

Nurse Miller is regularly scheduled to work nightshift from 7:00p.m through 7:00a.m. She described the patient flow as steady on the date in question; she had approximately five (5) patients. She was the nurse assigned to the patient care of the Inmate. According to Nurse Miller, she walked into the patient's room and saw the two officers sleeping. Nurse Miller distinguished the officers as one who wore a hat, and the other did not. Grievant did not wear the hat. Nurse Miller described Nurse Miller did not say anything to the officers and took no action to rouse or determine if the officers were in fact asleep prior to exiting the room. She stayed in the room approximately thirty (30) seconds; she left to get a witness because "nowadays you need a witness for everything." Nurse Miller left to report the situation to the charge nurse, Nurse Foley.

Nurse Miller and Nurse Foley returned to the inmate's room. Both nurses described their return as within minutes. The patient room was lit by the television, bathroom and hallway lights; Nurse Foley described the room as dark. Nurse Foley said "Excuse me" to the officers. The other correction officer did not respond but remained seated in his chair with the bill of his cap pulled down over his face. Grievant opened his eyes about ten (10)

seconds later. Nurse Foley then said "You were sleeping", and Grievant responded "No, I was not". Nurse Foley said "Yes, you were", and then left. Nurse Miller proceeded to take vitals, and then left the room to document what she observed.

Grievant and the other correction officer were relieved from duty. Grievant denied he was sleeping throughout the grievance process. The employer investigated the allegations and took disciplinary action resulting in the removal of Grievant.

On March 26, 2013 Employer served a notice of removal upon Grievant. The removal was based upon the following violations of the Standards of Employee Conduct, Rule 10- Sleeping on Duty, and a Rule 38- Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or member of the general public. Grievant received the Standards of Employee Conduct (November 2009 and November 2012 editions). Grievant attended Pre-Service Training when his ODRC employment began and subsequent Annual In-service Training each year thereafter. Grievant had a written reprimand in effect until 8/1/2013 for a violation of Rule #5 at the time of his removal. The Union filed its grievance on March 27, 2013 alleging a violation of Article 24 of the Collective Bargaining and any/all other rules, articles, code, orders, and policy. The grievance was not resolved within the procedure established by the collective bargaining agreement, and was properly advanced to arbitration.

POSITION OF MANAGEMENT

Management contends that Grievant was removed with just cause for violations of Rule 10-Sleeping on Duty and Rule 38-Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or member of the general public. On January 31, 2013, Grievant who was armed and assigned to guard an inmate in an unsecure area at St. Vincent Hospital fell asleep in violation of the aforementioned rules of conduct. Employer relies on the situational aspects of the incident to support the Rule 38 violation. Employer had just cause to discipline.

Employer asserts that based on the gravity of the situation, removal was appropriate. Grievant and the other correction officer were each armed with a 40 caliber Glock Handguns and 32 rounds of ammunition. The inmate was serving a 14 ½ year sentence for voluntary manslaughter with a gun specification. Both officers were asleep, and the inmate was handcuffed to the bed by one arm and one leg, thus creating a possibility for escape. Had this inmate escaped while the officers were asleep, the safety risk is unimaginable. The discipline was commensurate with the offense.

Employer contends that the discipline was progressive. Grievant had a two-day working suspension at the time of his removal, and was at the second level offense in the performance grid. Due to the seriousness of his conduct, removal was appropriate.

Employer contends that it conducted a fair investigation. The report consists of eighty-two (82) pages. All witnesses having potential knowledge of the events giving rise to the grievance were interviewed. Grievant and the other correction officer were interviewed twice, once immediately following the

incident and the second during the Agency investigation. The investigative report appropriately identifies inconsistencies in the statements of Grievant and the other correction officer. The testimony of the investigator supports the completeness and the factual determination of the events giving rise to the grievance.

Employer requests that Grievance No. #27-35-20130327-0057-01-03 be denied in its entirety.

POSITION OF UNION

Union contends that Employer has failed to provide just cause for the removal of Grievant for alleged violations of the Standards of Employee Conduct Rule 10-Sleeping on Duty and Rule 38-Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or member of the general public. The proven facts of the case do not establish violations of the Standards of Employee Conduct. The nurses failed to make a proper assessment of whether or not Grievant was asleep. Grievant was awake for the duration of his duty, and therefore there was no threat to safety and security of staff and general public. The grievance should be sustained.

Union contends that Employer failed to conduct a full, fair and objective investigation. The investigator made faulty assumptions that tainted the investigation. The report contained "misleading assertions, mischaracterization of events, confused timelines and even an occasional falsehood." The Warden made a decision based upon the "facts" as presented to him. Union demonstrated at the arbitration hearing numerous inconsistencies and discrepancies within the report, and that if known by the Warden, would have resulted in a different outcome, no discipline.

Union requests that Grievance No. #27-35-20130327-0057-01-03 be sustained, and Grievant be reinstated to his position as a correction officer, the termination be stricken from Grievant's work records including any electronic record, all lost wages, less any interim earnings and appropriate deductions including union dues, all leave balances that would have accrued from the date of removal, no loss in seniority, post, shift, and good days which Grievant held prior to his removal be returned, and any payment for any medical, vision, or dental expense Grievant has incurred since the date of removal that would have been covered under their insurance plan less appropriate deductibles and copayments.

DISCUSSION:

In a discharge case the burden of proof rests with the Employer. Typically, the employer must show by the preponderance of the evidence in an ordinary discipline case that the employee committed the rule violation as alleged. Grievant was charged with violations of the Standards of Employee Conduct, Rule 10-Sleeping on Duty, and a Rule 38-Any act or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or member of the general public. Employer must therefore demonstrate by a preponderance of the evidence that Grievant was sleeping on duty, and because he was asleep while armed, created a threat to security of staff, inmate, and members of the public occurred.

The investigation report into this incident is largely predicated on the statements and documents provided or given by the nurses to support the charge of sleeping while on duty. The investigation report gives weight to the assertion of Nurse Foley that in her professional opinion Grievant was asleep. Sleep is a period of rest for the body and mind, during which volition

and consciousness are in abeyance and bodily function are partially suspended.¹ However both nurses testified that they made no medical assessment of sleep for Grievant.

The preliminary facts section of the report states as follows:

Nurse Miller reported that she found both officers were sleeping while conducting her hourly rounds at approximately 0304. Nurse Miller subsequently contacted Ms. Colleen Foley, who was the Clinical Care Coordinator (Charge Nurse) on duty at this time; and that at approximately 0315-0320 hours Nurse Foley accompanied Nurse Miller to the inmate/patient's room (#444). Nurse Foley reportedly entered the room #444 and also observed both officers sleeping.

The testimony of Nurse Miller and Nurse Foley at the arbitration hearing establishes that Nurse Miller entered the room at approximately 0300-0304, and observed that the officers in her opinion were sleeping. Nurse Miller was in the room for thirty (30) seconds. The time lapse from the patient room to the nurses' station was about one minute. The nurses immediately returned to the room. The estimated return time of the nurses is approximately 0303 -0304 or 0307 to 0308 hours. It is noted that Nurse Miller in her Questions & Answers stated that it was approximately ten (10) minutes from the time she observed the officers sleeping until the the time Grievant acknowledged their presence, and she established a time frame of 3:00 until 3:15 or 3:20 with the investigator. At the arbitration hearing, Nurse Miller denied that much time had passed. Grievant testified that Nurse Miller entered into the inmate patient room, and returned approximately seven (7) minutes later. He thought she had forgotten something due to the abrupt manner in which she left the room. He opined that she was in the room approximately seven minutes, the time to enter toward the patient bed make a slight turn, and then abruptly leave after "smacking her lips".

¹ Dorland's Medical Dictionary for Health Consumers © 2007 by Saunders, an imprint of Elsevier, Inc.

The preliminary fact section goes on to state as follows:

At this time Nurse Foley stated, "Excuse me" to which neither officer reportedly responded. It was further reported that one of the officer's (later identified as being Officer Pitzen) awoke approximately one-minute later and claimed that he was not sleeping...

Nurse Foley testified that Grievant responded within ten (10) seconds. At the arbitration Nurse Miller maintained that Nurse Foley stated "Excuse me" twice on direct examination but modified her response to express some uncertainty under cross examination. She also stated in her written response that Grievant responded a minute later after Nurse Foley stated "Excuse me."

The investigation record reflects that the other correction officer stated that Grievant was not asleep at anytime in the hospital. The captain notes in the investigation record that this statement is refuted by the testimony of both Nurse Miller and Nurse Foley, and the inmate statement. Notwithstanding, at the arbitration hearing, Nurse Foley and Nurse Miller acknowledged that they made no medical assessment of sleep; they were of the opinion that Grievant was asleep because his eyes were close and Grievant did not respond until about ten (10) seconds after she exclaimed "Excuse me." Nurse Foley stated that she was three (3) to four (4) feet away from Grievant and the room was dark. Nurse Miller stated that she was five (5) feet away from Grievant and the room had sufficient lighting to see that his eyes were closed. Nurse Miller testified that generally she has only small talk with the correction officer, coffee, tea and in this case a chair. Grievant testified that the hospital staff come and go as they please in the patient room to do their jobs; he does not interrupt them unless their actions are contrary to institutional policy. Grievant testified that he was aware of their presence, and assumed that the nurses were discussing matters between

themselves. He was seated with his hand postured somewhat over his eyes. It was only after Nurse Foley said "You were sleeping" that he understood the comment to be directed to him, and responded "No, I was not sleeping".

Nurse Miller testified that the inmate was asleep with a sheet pulled over his face. She did not enter the room on rounds unless there was a vital check in order not to disturb the sleep of the inmate. It is noted that in her Questions & Answers Nurse Miller stated that the inmate woke up for a brief moment. The inmate states as follows in his confidential statement:

01/31/13. I inmate Black 430-309 was at St.V's and I saw C/O with the beard sitting by the door asleep. then a nurse came in to check my vital signs saw the C/O asleep and told him that it is not tolerated to be asleep with a prisoner, then she left right back out, then came back with another nurse who also stated something to the C/O...

The investigation report finds that this statement "Inmate Black stated that a nurse came into the room to check his vital signs, saw the CO asleep and told him that it is not tolerated to be asleep with a prisoner. Inmate Black stated that the nurse then left the room and came back with another nurse who stated the same thing to the officers," is consistent with both Nurse Miller and Nurse Foley's statements. The nurses did not make such a response in their Questions & Answers. At the arbitration hearing, both nurses denied saying that "it is not tolerated to be asleep with a prisoner" as reported by the inmate.

There is no question and answer for the inmate. But the investigation report contains additional statements not found in the inmate confidential statement.

"This writer asked inmate Black #A430-309 if he was sleeping or awake when Nurse Miller entered his room at approximately 0300 on January 31, 2013. Inmate Black stated that he had his eyes closed and the nurse must have thought that he was actually asleep but that he

was actually awake. (Emphasis Added) Inmate Black stated that he did eventually open his eyes but that the nurse must not have seen him..."

The investigator relies on this reported statement of the inmate that he had his eyes closed but was not asleep in his report, but finds that Grievant had his eyes closed but was asleep. Grievant testified that inmate was upset with him regarding a clothing dispute while on constant watch status, and was simply getting back at him. The inmate did not testify to challenge the credibility of his statements on cross examination, and the investigation did not address this allegation.

The investigation report states "When he was asked by this writer if a nurse had entered room #444 between the hours of 0300 and 0325 on January 31, 2013 to attend to the inmate; Officer Pitzen stated "She did after she came back the second time." This statement is refuted by Nurse Miller and the confidential statement. Nurse Miller had entered the room on two occasions during this time period; however neither officer acknowledged her presence." The testimony of Nurse Miller at the arbitration does corroborate the assertion of Grievant. Nurse Miller entered the inmate patient's room at approximately 3:00-3:04 to check vitals, and observed the Grievant and other correction officer in her opinion sleeping. She immediately left the inmate patient room without checking the vitals and returned with the charging nurse. The charging nurse left after a minute. Nurse Miller testified that she then did the vitals. It is also noted at the arbitration hearing Nurse Miller acknowledged some discrepancies in the hospital log and her account of the events.

The investigation record of Grievant conducted by the captain on January 31, 2013 notes that Grievant stated that he "believed the nurse was afraid to come into the room because we were guarding a convicted felon.

We did not see the nurse for well into half of the shift in the room.” In an attempt to refute his belief, the investigation report states that hourly rounds were noted by Nurse Miller and were documented in the hospital computer. Also, Nurse Miller stated to the captain that she had provided care for inmates and at no time was she scared or too afraid to enter the inmate patient room. Nurse Miller explained at the hearing that when she does rounds it may not necessarily mean that she enters the patients’ rooms and do physical checks upon them. If the patient is sleeping, she will generally look at the patient through the entrance of the door to observe them unless she has to do vitals, administer medications and so forth at which point she enters the room; she does not need to awaken patients during all the rounds. Nurse Miller testified that the inmate was asleep with the sheet over his face, and admitted under cross examination that she did not enter the patient room on every round. She did vitals twice during her shift for inmate. A reconciliation of these facts provides a satisfactory explanation of the mistaken belief of Grievant that nurse was afraid to enter the inmate patient room. There were a number of more inconsistencies established during the hearing that are not addressed in this opinion.

The investigation report details what the investigator finds to be inconsistent statements of the Grievant and other correction officers. Prior inconsistent statements of a witness may be introduced for impeachment purposes but the statements do not establish substantive evidence. The investigation report gives weight to the assertion of Nurse Foley that in her professional opinion Grievant was asleep, and does not make an independent determination of the signs of sleep, or question the nurses of their observations to support a charge of sleeping while on duty.

Lastly the report highlights ways in which Grievant failed to perform his duty assignments to establish that he must have been asleep. These

actions would constitute separate violations of the standards of conduct and do not independently establish that Grievant was asleep while on duty. Thus, Employer failed to establish that Grievant was sleeping, and that because he was asleep while armed, he engaged in an act which constituted a threat.

Based upon the foregoing, the Arbitrator finds that Employer failed to meet its burden of proof and show that the actions of Grievant were in violation of Rule 10 and Rule 38 of the Standards of Employee Conduct. The Employer did not have just cause to discipline or for removal.

AWARD

Having heard, read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance No. 27-35-20130327-0057-01-03 is sustained. Grievant is reinstated to his position as a correction officer and the termination be stricken from Grievant's work records including any electronic record, all lost wages, less any interim earnings and appropriate deductions including union dues, all leave balances that would have accrued from the date of removal, with no loss in seniority, post position, shifts and good days which Grievant held prior to his removal be returned, and any payment for any medical, vision, or dental expense Grievant has incurred since the date of removal that would have been covered under their insurance plan less appropriate deductibles and copayments is restored to him.

April 18, 2014

/s/ Meeta Bass Lyons
Arbitrator Meeta Bass Lyons
Steubenville, Ohio