ARBITRATION DECISION NO.:
37

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Mental Retardation
and Developmental Disabilities,
Broadview Developmental Center

DATE OF ARBITRATION:
June 25, 1987

DATE OF DECISION:
July 31, 1987

GRIEVANT:
Carletta Brown

OCB GRIEVANCE NO.:
G-87-0874

ARBITRATOR:
Marvin J. Feldman

FOR THE UNION:
John Porter

FOR THE EMPLOYER:
Michael P. Duco

KEY WORDS:
Discharge
Progressive Discipline
Neglect Of Duty
Sleeping On Duty

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline

FACTS:
The Grievant was a Direct Care Worker at the Broadview Developmental Center. Grievant

was hired by the Agency on September 30, 1984. On June 26, 1986, the Grievant received a letter of reprimand concerning her attendance. That reprimand was not protested. On August 29, 1986, the Grievant received a three-day suspension for being absent without leave. That suspension was not protested. On February 5, 1987, the Grievant was discharged because of neglect of duty and sleeping on duty. A grievance was filed and taken through the grievance process without being resolved.

ARBITRATOR'S OPINION:

The Arbitrator denied the grievance for the following reasons: the Grievant had two prior forms of discipline over a short period of time. The idea that progressive discipline must be triggered by the same type of event is erroneous. Progressive discipline is for the purpose of forewarning an employee that any substandard conduct violative of a facility's rules or the agreement, can lead to further discipline. In this particular case, the Grievant had received a written reprimand and a three-day suspension. As a result, the Grievant could well believe that any further conduct of a nature which violated the facility's rules or the Agreement would trigger a third discipline which, if serious enough, could result in discharge. Furthermore, major offenses do not necessarily trigger progressive discipline.

In addition, there was no indication that the rules of the facility were not published, were not evenhandedly applied, and/or were not reasonable.

Under the circumstances of the case, the Arbitrator held the Grievant was progressively and correctly disciplined. The offense merited discipline in the form of discharge especially when impacted by the prior discipline Grievant received. The discharge was for just cause and the grievance was denied.

AWARD:

The grievance is denied.

Note:

The Union disagrees with this position. There is case law to support the position that wrongful acts have to be of a same or similar nature to prior acts before a more severe penalty is justified.

TEXT OF THE OPINION:

VOLUNTARY ARBITRATION PROCEEDINGS
DISCHARGE OF CARLETTA BROWN
GRIEVANCE NO. G87-0874

STATE OF OHIO, MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES DEPARTMENT
The Employer

-and-

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AND ITS LOCAL UNION NO. 11, A.F.S.C.M.E., AFL-CIO

The Union

OPINION AND AWARD

APPEARANCES

For the Employer:
Michael P. Duco, Advocate
Ellen R. Flowers,
Office of Collective Bargaining,
State of Ohio
Mike Fuscardo,
Department of Mental Retardation
Dorothy Sivic,
Director of Personnel,
Broadview Developmental Center
Louise Hustak, R.N.,
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James Wuliger, Officer,
Police Department,
Broadview Developmental Center

For the Union:
John Porter,
Associate General Counsel
Carletta Brown, Grievant
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Staff Representative

MARVIN J. FELDMAN
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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 been unable to resolve this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the conference facility of the union in Columbus, Ohio, on June 25, 1987, 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 but not separated from hearing and that post hearing briefs would be filed in this matter no later than July

15, 1987. It was upon the evidence and argument that this matter rose to arbitration for Opinion and Award.

II. STATEMENT OF FACTS

The grievant was first hired at the facility on September 30, 1984. On June 24, 1986, the grievant received a letter of reprimand concerning her attendance. That incident was not protested. On August 29, 1986, the grievant received a three-day suspension for being absent without leave. That incident was not protested. On February 5, 1987, the grievant's seniority was terminated because of neglect of duty and sleeping on duty. The particulars of that particular incident, as revealed in the termination notice, revealed the following:

"On or about 12/26/86 at approximately 4:30 AM you were sleeping in the kitchen of Cottage 287. Two of your assigned clients were awake and out of bed. Fecal matter was on one of the clients and on the couch on which he was laying in the dayroom. The last entry in your log book was at 3:00 AM. Sleeping on duty will not be tolerated.
This action follows Letter of Reprimand dated 6/24/86 and 3 Day Suspension effective 9/8/86."

In place at the time of hire of the grievant, were certain rules. Those were published to the grievant at time of hire. One of those rules stated that the employee should stay awake at all times and another one of those rules indicated that the employee should not sleep. Also in place at the time of hire of the grievant, was a policy stating that neglect of duty which involves sleeping on duty in a life-endangering situation would be dealt with by way of discipline up to and including removal. The guidelines of the Department which were forwarded to each facility of the agency indicated that the first offense of sleeping on duty whereby the safety of persons or properties is in danger may trigger the minimal amount of a ten-day suspension of discipline or further discipline up to and including removal. The second such event would trigger removal according to those guidelines. The contract of collective bargaining by and between the parties states at Article 24 paragraph .01 and paragraph .02 the following:

"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.

§24.02 - Progressive Discipline

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

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicting the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

It is noted at .05 of that article that the following is stated:

"Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

At any rate, a staff incident report was made of the instant matter and that staff incident report revealed the following:

"On the morning of December 26, 1986 at approximately 4:52 a.m., you were discovered asleep in the kitchen of Cottage 287. You were behind in your log documentation approximately 1 1/2 hours. Resident Michael Klein was discovered in the dayroom lying on the couch in B.M."

That staff incident report was as a result of an investigation report of the inspecting officer. His report revealed the following:

"ON THIS DATE 12-26-86 AT APPROX. 4:30 AM THIS OFFICER, SUPERVISOR CORNETT AND SUPERVISOR PARKER ENTERED COTTAGE #287 VIA THE SOUTHWEST ENTRENCE. THIS OFFICER IN THE COMPANY OF SUPERVISOR CORNETT AND PARKER PROCEEDED THROUGH THE COTTAGE, AND WHEN AT THE ENTRENCE TO THE KITCHEN RM. 42 STAFF CARLETTA BROWN WAS OBSERVED SLEEPING. STAFF BROWN WAS SITTING AT THE METALIC TABLE FACEING EAST HER LEFT ARM WAS ON THE TABLE WITH HER HEAD RESTING ON THE LEFT ARM. STAFF BROWNS RIGHT ARM WAS LAYING ON THE TABLE NEXT THE LEFT ARM. STAFF BROWNS EYES WERE CLOSED. THIS OFFICER AND SUPERVISORS CORNETT AND PARKER OBSERVED STAFF BROWN IN THIS POSITION FOR APPROX. 2 MIN. AT APPROX. 4:32 AM SUPERVISOR CORNETT CALLED OUT STAFF BROWNS NAME WHO THEN LIFTED UP HER HEAD AND OPENED HER EYES. STAFF BROWNS LOG BOOK WAS THEN VEIWED AND THE LAST ENTRY BY STAFF BROWN WAS MADE AT 3:00 AM THE ENTRY READS, ALL CLIENTS ASLEEP EX. KLIEN AND BAKER. THE LOG BOOK WAS TAKEN BY SUP. CORNETT. WHEN FRIST ON THE COTTAGE THE SMELL OF BM WAS STRONG, AFTER AWAKENING STAFF BROWN THE B SIDE WAS CHECKED AND CLIENT M KLIEN WAS FOUND LAYING ON A COUCH IN LIVING RM 21 LAYING IN BM. SUPERVISORS CORNETT AND PARKER GAVE STATEMENTS ON THIS INCIDENT AND WILL INFORM THE UNIT DIRICTOR." (sic)

The grievant requested that this matter be processed through the grievance procedure and it was. At step three the employer ruled as follows:

"This matter came on for hearing on March 16, 1986. Grievant appeared and was represented by Ben Davis, Steward, OCSEA/AFSCME. Broadview Developmental Center was represented by Dorothy Sivic, Personnel Officer.

Issue: Removal effective February 20, 1987.

Union Position: Alleged violation of Article 24, Sections 24.02, 24.04 and 24.05. No other specific Articles or Sections were identified by the Union. Discipline was not progressive and not commensurate with the offense.

Management Position: Discipline was for just cause and commensurate with the offense and the grievant's past record.

Finding of Fact: At approximately 4:30 - 4:45 a.m., December 26, 1986, two (2) supervisors and Police Officer entered Ms. Brown's Unit and observed her sleeping. Her log book was pulled and the last entry was made at 3:00 a.m. The witnesses smelled B.M. and a check was made and they found a client asleep in the livingroom on the couch with B.M. on him and there was also B.M. on the couch. Ms. Brown testified the client had B.M. on him and she showered him. She also testified she cleaned the B.M. off the couch.

Conclusion: Discipline was for just cause and commensurate with the offense. Ms. Brown testified that she was only asleep from 4:00 to 4:30 because she went on break at 3:30 a.m. and she folded towels on her break. However, there was no entry at 3:30 a.m. to indicate that she was going on break. When staff goes on break it is noted in the log book. Whether Ms. Brown was asleep for approximately 1 1/2 hours as her log would indicate or 1/2 hour as she states, sleeping on duty is a serious offense. This was third (3rd) shift (11:00 p.m. to 7:30 a.m.), two clients were up as noted at 3:00 a.m. in her log. She was the only staff with the clients. The clients could have been injured. The witnesses as well as the grievant testified that one client had B.M. on him and there was B.M. on the couch where he was found.

Ms. Brown has in the past received a letter of reprimand in June, 1986 and a three (3) day suspension in September, 1986. The Removal is commensurate with the offense of sleeping and the circumstances surrounding this incident as well as her prior disciplinary record.

Grievance denied."

Some background information might be of interest to the reader in this particular matter. The director of nursing at this particular mental retardation facility testified. She testified that she had been nursing director at that facility for four years; that she was the assistant nursing director prior; that she is a registered nurse and that she has many hours of formal learning in developmental disabilities. The witness further testified that there were presently 192 clients at the mental retardation facility and that each of them are profound mentally retarded. She testified that a profound mental retard person has an I.Q. of approximately twenty to twenty-five; that they are very dependent; that they need a great amount of personal care; that they have a need for continuing and ongoing supervision and that many of them are medically handicapped. The witness further testified that these profound mentally retarded persons live in cottages in as homelike a situation as possible. She further testified that they live two to a room and there is usually supervision of eight or ten such individuals to one staff person. The witness further testified that the skills of each of these clients are very minimal and that all of them are ambulatory. The witness further testified that these individuals may or may not be toilet trained and may or may not be able to feed themselves. The witness further testified that all the needs of the clients are provided and that they are escorted from place to place.

The witness further testified that these individuals are nonverbal; that sometimes some of them gesture and that sometimes some of them may respond to verbal commands. The witness further testified that the individuals in the care of the grievant on the night in question were the most fragile of the profound mentally retarded people at the facility. These people therefore triggered hands on care, had seizures although they were controlled for the most part and that medical problems abounded in this particular cottage of eight over which the grievant presided from the hours of 11 p.m. to 7 a.m. in the morning as the caring person for these particular individuals. The witness

further testified that several of these individuals were blind and that several of them had major motor seizures, a seizure which lasts more than sixty minutes.

The witness further testified that one of the individuals had a loss of a hand and that sometimes the clients become self-abusive and very aggressive toward others also. The witness further testified that some of the individuals wall trail. Upon questioning the witness, she indicated that that individual may place their hand on the wall and walk following a smooth wall to its end. The witness further testified that self-abusive people lived in this particular cottage under the care of this particular grievant and that they were head bangers and biters. The witness further testified that there must be staff attention at all times of the day and night to these particular profound mental retarded person cottage. On the night in question, the evening of December 25, 1986, the grievant found such eight individuals in her care at cottage 287 of the Center.

It was indicated that the grievant reported for work and that she accomplished her duties until at least 3 a.m. in the morning because the log shows her comments until that hour. The grievant was discovered sleeping by the officer and two supervisors at approximately 4:30 a.m. The sleeping therefore may have started at any time from the 3 a.m. log write-in to the 4:30 a.m. discovery. The grievant stated and admitted that she slept from her break time expiration (4 a.m.) until she was discovered. The grievant did not contest sleeping but did indicate and state that she arrived for work; that she accomplished her duties until at least 4 a.m.; that she worked through her break from 3:30 a.m. to 4 a.m. folding clothes and that when she went to write the comments in her log, she fell asleep, while attempting to accomplish that task.

It is further indicated in the evidence and it was not refuted by the grievant that one of the individuals in the cottage was found full of feces lying upon a couch when the grievant was awakened. The investigative report reveals that commentary.

The grievant further states that it was Christmas Day when she arrived for work; that she visited with her family that day; that she had no sleep from the shift before and that she attempted to work too many hours without sleep. The grievant admits that she enjoys her employment at the Center and that she is in need of such employment and that she, therefore, believes that the arbitrator should reinstate her.

The union placed certain documents into evidence which revealed that the Department of Mental Health and the Department of Rehabilitation and Correction do not have such severe discipline for first time sleeping events. I might indicate further that the evidence was void of any duties of those particular individuals so as to compare the duties of the personnel of those two departments with the duties of the grievant in this particular cause. Evidence does not reveal, therefore, that the other Departments for which the rules were placed into evidence does have any profound mentally retarded persons under the care of bargaining unit members, as the grievant in this particular case has.

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

III. OPINION AND DISCUSSION

There is nothing in the contract of collective bargaining between the parties that indicates and states that the rules of the particular department involved in this matter must parallel rules used in other departments of the State. That defense of the union in this particular cause, therefore, must be held for naught. Each particular department of the employer may establish rules commensurate with the needs of those particular individuals employed in that particular department. The work duties between the departments differ. That is sufficient to trigger different work rules. If that be the case then, comparisons can hardly be made from one department to the other.

The next defense raised by the union in this particular cause was that the employer did not

progressively discipline the employee so as to finally trigger discharge for the event. The fact of the matter is that the grievant sustained two prior disciplines over a rather short period of time. She had one letter of reprimand and one three day suspension. The thought that progressive discipline must be triggered by the same type of event is erroneous. Progressive discipline is for the purpose of forewarning the employee that any substandard conduct violative of facility rules or the contract is protected against by further and greater discipline. In this particular case the grievant had memorialized activity of substandard conduct and was given a reprimand. She had a second memorialized activity of that sort and received a three-day suspension. The grievant could well believe that any further conduct of a nature violative of contract or rule would trigger a third discipline and if it was a major offense, then in that event, discharge could follow.

Furthermore, major offenses do not necessarily trigger progressive discipline. For example, sabotage to the facility or bodily harm to a supervisor or client may well trigger discharge on the first offense. In this particular case, the employer based its removal of the grievant upon not only the activity of which the grievant was found guilty of on December 26, 1986, but also on the fact that the grievant had been the recipient of two prior disciplines within a two year period, one such discipline being a suspension. Thus, it appears that the grievant was, in fact, progressively disciplined.

The union says that the activity of discipline by the employer was unreasonable and not commensurate with the offense. The fact of the matter is, the grievant was handling profoundly fragile mentally retarded individuals. The employer testified and it was not denied by the union or the grievant, that the individuals under the care of the grievant needed immediate and active attention twenty-four hours a day in every activity that they were involved in. This included feeding, escorting, dressing, showering and toilet training. The grievant knew the duties and knew how to do them, but fell asleep. She could hardly accomplish her workload to the fragile and profoundly mentally retarded human beings that were under her care that evening when she was asleep. The employer considered the activity of sleeping an endangerment to human beings. The evidence belies that assessment. Under the circumstances of this case it appears that falling asleep on the job can hardly be tolerated.

Under the circumstances of the case, I do find that the grievant was progressively and correctively disciplined; that the offense merited discipline in the form of discharge especially when impacted by the prior discipline and that the discharge was for just cause under the circumstances of this case, therefore.

There is nothing which indicates that the rules of the shop were not published; were not evenhandedly applied and were not reasonable. While there was an indication in some of the documents that there was lack of evenhanded treatment, the evidence to corroborate that allegation was not revealed at hearing. Nor was there an indication of lack of publication of rules in this particular matter. There was a statement and argument made by the union that, in fact, there was a lack of uniform rule throughout the state with employees accomplishing the same duties at several Centers. The fact of the matter is that that occurrence does not make the entire set of rules inappropriate. Each employee should know under which rule they work. Thus, there may be one set of rules for one center and another set for another center because of the particular situation in each of the centers but as long as the employee has published to him that set of rules under which he is employed, then in that event the rules meet the test of publication. From all of the evidence, from a review of the contract, from a review of the rules, the impact of the discharge is not too severe under the circumstance.

IV. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 31st day of
July, 1987.