

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: Rock Nissen

GRIEVANCE NO.: 27-35-20130327-0056-01-03

#1133

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: Rock Nissen

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OCSEA - OFFICE OF
GENERAL COUNSEL

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". Rock Nissen is the Grievant.

Grievance No. 27-35-201-30327-0056-01-03 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 Rock Nissen 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 October 16, 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 wore the hat. Nurse Miller described Grievant as slouched in his chair with his hat pulled over the top of his face. 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. Grievant did not respond. The other officer opened his eyes about ten (10) seconds later.

Nurse Foley then said "You were sleeping", and the officer 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 two-day working suspension in effect until June 1, 2013 for a violation of Rules #7, #8, and #38 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. #27-35-20130327-0056-01-03 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. #27-35-20130327-0056-01-03 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 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 observations of the five persons in the inmate's patient room on January 31, 2013 are relevant in determining whether or not Grievant was asleep. Grievant states that he was awake for the duration of his shift. During the arbitration hearing, Grievant demonstrated the manner in which he was seated and the covering of his face with the bill of his cap. Grievant further demonstrated his ability to observe the activity in the surrounding

area with the pulled-down bill of his cap. The other correction officer testified that Grievant was awake for the duration of the shift. Grievant and the other correction officer have a stake, continued employment, in the outcome of this hearing.

The nurses were present, and are also a source of information as to the events of that morning. Nurse Miller testified that "technically you would not know if the guy with the hat (Grievant) was sleeping or not." In her opinion Grievant could not do his job with the hat over his face. Nurse Foley testified that she could "not see the eyes of Grievant". In response to the question, "if you could not see his eyes, how would you know if he was sleeping", Nurse Foley responded, "Even if he was not sleeping, he was not looking at the prisoner. He was not doing his job. You are not supposed to sit there with your hat over your face. I don't think that is appropriate. Can I honestly 100% say that he was sleeping? No. But, did he respond to me when I walked into the room? No." Grievant who was armed at the time of the incident is charged with sleeping while guarding an inmate, not inattentive to duty, failure to follow post orders, failure to follow policy, etc.

Nurse Foley testified that Grievant failed to respond. Grievant explained that the other correction officer told her that he was not asleep; Grievant was not going to engage her. Whether a person is bound to respond when statements and declarations adverse to his interests are made is dependent on the circumstances. Here, Grievant is not at the Institution but rather a public place, the hospital. The nurse is not his supervisor but an employee at the hospital who in some manner is responsible for maintaining the security at the facility. Grievant must maintain his professionalism in a situation where the nurses are unreceptive to any explanation of the behavior or actions. The other officer already told her that he was not sleeping, and her response was "Yes you were", and immediately left. At the arbitration hearing both nurses made it abundantly clear in their responses,

tone and mannerism that they have no tolerance for this type of behavior. Grievant's silence in these circumstances may not be deemed to constitute acquiescence or admission to the statement that he was sleeping.

The last person in the room was the inmate. The inmate did not testify. Nurse Miller testified at the arbitration hearing that the inmate was asleep with the sheet pulled over his face. However, her written statement indicates that he was asleep and awoke for brief moment. Notwithstanding, the statement of the inmate indicates that he could not see if the other officer (Grievant) was asleep or not. Of the five persons present in the room, no one testified that Grievant was asleep.

The investigation report is largely predicated on the statements and documents provided or given by the nurses to support the charge of sleeping while on duty. 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 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. Notwithstanding, at the arbitration hearing, Nurse Foley acknowledged that she made no medical assessment of Grievant at all. Her only assessment of Grievant was that the bill of his hat was pulled down and Grievant did not respond to her "Excuse me." Nurse Foley could not state whether Grievant was asleep or not. Her concern was that Grievant could not do his job with the bill of his cap pulled down.

The investigation report then details what the investigator finds to be inconsistent statements of the Grievant and other correction officers in

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

comparison to the statements of nurses. Prior inconsistent statements of a witness may be introduced for impeachment purposes but the statements do not establish substantive evidence. Nurse Miller entered the room around 3:04a.m., and observed the officers sleeping. Nurse Miller testified that she was in the room for approximately thirty (30) seconds and left to get the charge nurse. Both nurses stated that they returned to the room within a couple of minutes, and Nurse Foley testified that she addressed the officers and left within a minute. According to the nurses' testimony at the arbitration hearing, the duration of the incident was approximately three (3) minutes and thirty (30) seconds, and not the eleven (11) to sixteen (16) minutes as determined in the investigation. The duration of the first observation was approximately thirty (30) seconds and the duration of the second was less than a minute. Further, the other correction officer during his interview on January 31, 2013 states that Grievant was not asleep. The Captain finds that this statement is refuted by the testimony of both Nurse Miller and Nurse Foley, and is contradictory to the information provided by inmate. The inmate did not state that Grievant was asleep. 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 his burden of proof that the actions of Grievant were in violation of Rule 10 and Rule 38 of the Standards of Employee Conduct. There was no independent evidence that Grievant was asleep on duty on January 31, 2013 while guarding an inmate while armed. 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. 27-35-20130327-0056-01-03 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