

ARBITRATION DECISION NO.:

247

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health
Youngstown Developmental Center

DATE OF ARBITRATION:

March 22, 1990

DATE OF DECISION:

April 5, 1990

GRIEVANT:

Todd Revis

OCB GRIEVANCE NO.:

24-15-(88-09-14)-0019-01-04

ARBITRATOR:

John Drotning

FOR THE UNION:

Daniel S. Smith, Esq.
Staunton Lynd, Esq.

FOR THE EMPLOYER:

Edward L. Ostrowski
Michael Duco

KEY WORDS:

Just Cause
Removal
Sleeping on Duty
Pre-Discipline
Credibility

ARTICLES:

Article 24-Discipline
 §24.01-Standard
 §24.06-Prior
Disciplinary Action

FACTS:

The grievant was a Hospital Aide employed by the Ohio Department of Mental Health. On the night when the incident occurred for which he received discipline he was seen sitting with his eyes closed, and he did not acknowledge the presence of the other person. The T.V. was on with no program on, only snow. The shift

supervisor spoke to the grievant about sleeping on duty that night. Later that night other employees saw the grievant sitting in a chair with his eyes closed and his head leaning against a door. The grievant was removed for sleeping on duty.

EMPLOYER'S POSITION:

There is just cause for removal. The grievant is assigned to supervise clients who need constant care. He was observed by several employees at different times throughout the night while he was sleeping on duty. He had been warned previously not to sleep earlier the same night. The grievant has a poor disciplinary record including suspensions up to ten days for similar offenses, therefore, removal is appropriate.

UNION'S POSITION:

There is no just cause for removal. The grievant was seen working on the night in question. The grievant was aware of the witnesses in the room that night even though he said nothing to them. He may have been nodding off, but was not asleep. The grievant also stated that he had been meditating. The grievant stated that he was not sleeping to one witness because he had been accused of sleeping earlier that night and was warned not to sleep. The guidelines on sleeping at the facility were implemented after this incident. Additionally, nothing happened to the clients on the night in question. There is also disparate treatment when compared to other incidents of employees sleeping.

ARBITRATOR'S OPINION:

There is testimony on both sides as to whether the grievant was sleeping. The testimony of the witnesses is credible and outweighs that of the grievant. Therefore, it has been shown that the grievant was sleeping. The grievant has prior discipline including a ten day suspension for similar offenses. The grievant has received a number of disciplines including suspensions of varying lengths dating back to 1983. The grievant was notified of further discipline for similar offenses in a prior arbitration. Therefore, there is just cause for removal.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN

STATE OF OHIO
YOUNGSTOWN DEVELOPMENTAL CENTER

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

ARBITRATION AWARD

ARBITRATOR:
John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on March 22, at the offices of the Youngstown Developmental Center, Austintown (Mineral Ridge), Ohio. Appearing for the Union were: Daniel S. Smith, Esq., Staunton Lynd, Esq., Gerald Burlingame, Donald Feltner, and the grievant, Todd Revis. Appearing for the Employer were: Edward L. Ostrowski, Michael Duco, Gary Janes, Steve Rosati, John McCarthy, and Sandra Rosier.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 3/22/90. The discussion and award are based solely on the record described above.

II. ISSUE

The parties agreed that the question is:

Was the grievant discharged for just cause?
If not, what shall be the remedy?

III. STIPULATIONS

1. The grievance is properly before the arbitrator for consideration; no procedural defects exist within the disciplinary process.
2. The grievant was a hospital aide at the Youngstown Developmental Center from his initial hire October 19, 1980 until his October 23, 1989 discharge.
3. There are no pending grievances or appeals concerning the grievant's prior discipline (identified as joint exhibit #5).

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Mr. Steve Rosati testified he had been employed by the Center since January of 1989 and that initially he was a part-timer but had been promoted to a police officer on the midnight shift. He stated that he ensures safety, enforces rules and regulations of the State and the Center, and patrols the grounds, checks buildings and houses, and looks for safety hazards. Rosati testified that he records all activities every half hour.

Rosati went on to say that on 9/4 and 9/5, 1989, he worked from 9:00 p.m. on 9/4 to 5:30 a.m. on 9/5. He went on to say that House #10 is on a one-to-one basis which means that a staff person is always with the clients. He testified that he entered House #10 and went to the living room on the A side and saw the TV on and it was all snow and there was no picture (see Joint Exhibit #6). Rosati said that he looked toward the TV and then observed grievant Revis on the couch with his arms outstretched and his head was turned to one side and his eyes were closed. Rosati said that he called to Revis twice and got no response. Rosati said that Revis's feet were on the floor and that there was a light or lights on in the room; namely, a lamp.

Rosati said that it might have been twenty-five feet between himself and Revis. He went on to say that he left the room and went to the other side of House #10, the B area, and looked on the first bedroom on the left side of House #10 and talked to Don Faulkner who was apparently watching the two clients in that bedroom. Rosati said that he said nothing to Faulkner about his observation of Todd and then he left and went to the laundry room between A and B and talked to Donna Gray but did not mention that he had observed Revis sleeping.

Rosati said that he then re-entered the living room on the A side and Revis was in the same position as he was earlier with his eyes closed. Rosati said he made no effort to be particularly quiet and he does not tip-toe because he wants people to know that he is coming in.

Rosati said the staff knows him as a police officer. He noted that he had not reported any employee for sleeping earlier, although he was present when Management witnessed an employee sleeping on the job.

Rosati said the TV was still on and it was snow or static.

Rosati testified that he left House #10 and went to House #9 and reported the incident to Jill Hoffman, a hospital aide coordinator who suggested that he check House #10 again and if Revis was still asleep, he should get in touch with Sandy Rosier in House #12. Rosati said that he went back to House #10, unlocked the door and went into the living room and Todd Revis was still asleep with his eyes closed. Revis, said Rosati, did not acknowledge his presence and the TV was still on with snow and there was some noise like a hiss.

Rosati said that he then went to the laundry room and saw Donna Gray and asked if she knew whether Revis was on break and she said she did not know.

Rosati said he went back a fourth time and the TV was still on and there were no changes in the position or posture of Todd Revis at House #10.

Rosati said that he went to House #12 to report the incident to Sandy Rosier and she said she would check House #10 while he stayed at House #12. He went on to say that there was about a twenty-five minute lapse between his first observation of Revis and the time when he talked to Sandy Rosier and she went to check on Revis at House #10. He noted that Sandy came back within five minutes and indicated that Todd was working in the hall.

Rosati went on to say that Jack McCarthy came to work later on his shift and he talked to him about the incident and both he and McCarthy went through House #12 and then went to House #10 and entered that latter house from the B side. McCarthy walked up the hall on the B side and Rosati said he went into the B side living room and McCarthy came back to him and said in a whisper, "Come here, he is sleeping again."

Rosati said he and McCarthy went to the B bedroom and he observed Revis sitting in a chair leaning back with his head near the doorknob and his eyes were closed. McCarthy, after about fifteen seconds, called, "Todd." and the latter responded sluggishly in about ten seconds and his eyes opened up and he straightened himself up in his chair and then spoke to them and got up and said, "I wasn't sleeping. You guys can't catch me sleeping."

Rosati said that Todd said to him, "Everything is cool." and shook their hands.

Rosati said that he left House #10 at 4:55 a.m. and wrote supplemental report #2.

Rosati said that he gave Revis plenty of chances to clean up his act; that is, four times.

Mr. John M. McCarthy, a supervisor on the third shift as a hospital aide coordinator, testified that both Sandy Rosier and Jill Hoffman are in his unit and he noted that he worked on Tuesday, 9/4/89 at around 3:30 a.m.. He went on to say that Rosati told him that Todd Revis was sleeping in House #10. McCarthy said that he responded to Rosati by saying that after he did some rounds, they would meet in House #12 in about an hour and they did so and everything was okay in House #12.

McCarthy testified that he and Rosati entered House #10 on the B side and he went towards the bedroom at approximately 4:20 or 4:30 a.m. to check the residents in the bedroom. McCarthy said that as he looked to the left, he observed Revis in a chair next to the wall and his head and shoulder were leaning against the door and his eyes were closed and his arms were folded across his chest or stomach.

Revis, said McCarthy, did not acknowledge his presence and McCarthy said he left the room and went back down the hall to Rosati and called to Rosati and said to him, "You won't believe this. He is sleeping again."

McCarthy said that he and Rosati re-entered the bedroom where the clients were sleeping and Revis's posture was unchanged and his eyes were closed and he observed him for about fifteen seconds and he called, "Todd" and there was no response and he waited for about ten seconds and was about to call again when Revis stretched his arms and looked straight ahead and then saw us in a startling manner.

McCarthy said that Todd responded by saying, "You guys are trying to catch me sleeping."

McCarthy responded by saying to him, "What are you doing then?" and Todd said, "I'm sore. I can't sit

here all night." and McCarthy responded again by saying, "If you need relief, call for someone. Go perform your duties."

On redirect, McCarthy testified that he received \$40 or \$45 for installing a sink for his superior.

He testified he issued Joint Exhibit #8 to help break up the duties a bit.

Ms. Sandra Rosier testified that she was a hospital aide coordinator on the third shift and that Rosati informed her that Revis was sleeping. She testified that she told Rosati to stay with her situation and she would go to House #10 and check and in so doing, she observed Todd Revis in the hallway working. She told him that security had said he was sleeping.

Rosier said she told Revis not to "let it happen again" and she testified he did not say anything to her.

Mr. Gary Jones, the Operations Director of the Center, testified that the Center has about 170 clients who have behavioral problems with associated physical infirmities and all of them need supervision and care.

He noted that Duane and David, the two clients in the bedroom in question in hospital room #10, needed constant supervision because both of them can do harm to themselves. In addition, both of them are devious and deceptive, said Jones, and they can quickly cause damage to themselves.

Jones said that he recommended Revis's discharge because the latter had been sleeping twice that night and attempts had been made to wake him. Moreover, he has a poor disciplinary record which the Employer has tried to correct without success, said Jones.

I Jones went on to say that he was a bit upset over the sleeping charge because Revis had just returned to work and, therefore, he gave the case very close scrutiny.

Joint Exhibit #7 which is entitled "Sleeping Employee Guidelines" was penned after the incident involving Revis.

On redirect, Jones said that he was aware of the verbal reprimand issued to Feltner. He testified that Feltner and a lady were observed in a building by Rosati as he looked through the window and shortly thereafter Rosati returned and observed that both of these employees were awake.

Jones said they were viewed as inattentive and there was no prior discipline in Feltner's record. He said the lady in question received a written reprimand since she had prior discipline.

Jones also said that the program that Revis was listening to; namely, "Five Minutes to Live By" stopped broadcasting at 1:47 a.m..

The Management cross examined Union witnesses. Ms. Donna Gray, on cross, testified that the word, "sanitizing" means cleaning leather and wood. She said she always keeps the laundry room open and the washer and dryer are always operating.

She went on to say that only a minute or two passed between the time she heard the door shut and saw Todd Revis.

On recross, she said that while sitting in D & D's bedroom, she would get tired in the middle of the night and if she felt that way, she would get up and walk about or ask someone to spell her.

Mr. Todd Revis, on cross, testified that he recognized that he had a long disciplinary record, but he thinks it is inappropriate.

He testified that he meditates a bit after the TV show, "Five Minutes to Live By".

Revis said that he observed Rosati come back to his room and he was still on the couch, but he was not meditating.

He said that the TV was still on and that it stayed on with no program after the end of the Five Minutes to Live By program.

2. ORAL CLOSING ARGUMENT

The Center asserts that both Rosati and McCarthy claimed that grievant Revis was sleeping. The grievant did not respond and was called two times in both situations and he did not respond. The Center points out that grievant Revis came back to work after being off for about one year and shortly thereafter, he is found asleep with his arms outstretched and he does not acknowledge the fact that a police officer is present in the living room.

There is no doubt, argues Management, that he was sleeping. He was put on notice not to sleep, yet two

hours later, he is seen asleep again in the room or clients D & D on the B side. His first words to both McCarthy and Rosati are, "I'm not sleeping."

Management points out the Union asserts that his disciplinary record began after his Union activities, yet there is no evidence that his Union work affected his discipline.

The Management notes that his record is in the exhibit and all of his discipline in 1986 could have been appealed.

Article 24.06 of the Contract, notes the Employer, indicates that prior discipline is not useable if it is over twenty-four months old, but discipline less than twenty-four months can be utilized.

Just cause is reason for discipline, asserts the Employer. Management points out that the testimony of witnesses Rosati and McCarthy is clear and there is no reason why either one would attempt to fabricate any of the events.

B. UNION

I. TESTIMONY AND EVIDENCE

Mr. Donald L. Feltner testified that he worked on the evening of 9/4 and morning of 9/5, 1990. He testified that he saw Todd Revis mop the dining room floor a bit after 2:00 a.m.

Feltner testified that he also saw Todd Revis with D & D and that he was toileting those clients.

He said it was easy to fall off asleep on the third shift.

Ms. Donna Gray, a hospital aide, testified that a bit after 2:00 a.m., Rosati asked her if Todd was on break and told her that Revis was sleeping and she said she'd wake him and he said he would give him one more chance.

Gray testified that she saw Todd go from A side to B side whistling and she went on to say that she relieved Todd from D & D's room after Rosati and McCarthy left the building.

Todd Revis testified that he began work in 1980 as a hospital aide and he became involved in the Union in late 1981 and that was when the discipline started.

Revis testified that he was president of the chapter in 1986 and prior to 1986, it was an AFSCME, not OCSEA unit.

He testified that he was fired in the fall of 1988 and reinstated with full back pay and returned to work in either late July or very early August 1989.

Revis testified that he never seemed to be able to get his record clean. He went on to say that prior to 1986, he could not appeal anything less than a four day suspension; that is three day suspension were not appealable at the time.

Revis testified he observed the TV show called Five Minutes to Live By and that he takes his Bible with him. He testified that he heard Rosati open the door and that Rosati stood in the doorway for about half a minute and neither of them said anything to each other and Rosati walked away.

Revis testified that Rosati did not call his name and he was aware of Rosati's presence.

Revis went on to say that Rosati returned and stood in the doorway and said nothing and left. Revis said that he got up, walked to the window, and watched Revis go to Building #12.

Revis testified that he meditates a bit after listening to the TV show, Five Minutes to Live By, and, in fact, he said that he could argue that he was on his fifteen minute break.

Revis testified that he is under a good deal of scrutiny because he has the worst record in the facility.

Revis testified that when Rosati first came in, he was leaning forward and his glasses were on.

Revis testified that he made the A side bed check and Sandy Rosier saw him and that was about five minutes after Rosati observed him. He went on to say that he mopped the floor after Sandy saw him and that only takes a short time.

Revis said that he relieved Don Feltner who was looking after D & D and both of them have to be watched and he was in their room for three or four hours. In that capacity, Revis said, he had toilet both of those individuals and he has to be very careful to observe both of them. He said that about twenty minutes after toileting D & D, both McCarthy and Rosati came in. He went on to say that the two clients, D & D, do

not go to sleep right away. Moreover, Revis said he heard that door open in the B side and also could hear their footsteps.

Revis said that when McCarthy came into the room, he said, "I'm not asleep" and he asserted that because Sandy had previously told him not to fall asleep.

Revis said that McCarthy said to him, "You leaned back and your eyes were shut." and Revis said he responded by saying that he didn't have to sit straight up but he could slouch and McCarthy responded by saying, "Don't let me catch you sleeping. I'm only going to tell you one time."

Following that, Revis said he shook hands with both of them.

Revis testified that when he gets tired, he gets coffee, although he indicated he really wasn't a big coffee drinker.

The Union cross examined Management witnesses. Rosati, on cross, testified that he did not turn the TV off on A side although he thought he turned it off on the B side. He acknowledged that Todd Revis was not hiding in any of the fashions noted on Joint Exhibit #7.

Rosati said that as of 9/4/89, he had been a police officer for about eight months and he also acknowledged that it is easy to nod off on third shift. He went on to say he thought he had some guidelines about sleeping prior to the preparation of Joint Exhibit #7.

Rosati said that he was not aware that Revis had been out of work for over a year.

Rosati testified that he did not want Donna Gray to wake Todd because he wanted to observe him a second time.

Jack McCarthy on cross testified he was familiar with the sleeping guidelines noted in Joint Exhibit #7, but prior to that document, he knew of no written guidelines on sleeping.

McCarthy said that he thought that Todd Revis was sitting where he was supposed to be and that he was not nesting. He acknowledged that he did not observe Todd for two minutes before calling his name.

McCarthy said he cannot distinguish between nodding off and sleeping and he thought it was easy to nod off on third shift.

McCarthy acknowledged that no problems occurred as a result of Todd's position and there was no harm to the patients at all.

McCarthy acknowledged that he told Todd, "I don't want to catch you sleeping." He went on to say that in his view, Todd was sleeping and he warned him not to do it again.

Ms. Sandra Rosier, on cross, testified that Revis did not respond verbally to her statement saying that he had better not sleep or something of that nature.

Rosier said that she never had to tell others not to sleep.

Mr. Gary Jones on cross testified that Joint Exhibit #7 was drafted because of the incident. He acknowledged that all the guidelines of Joint Exhibit #7 were not followed in that there was no witness and there was no nesting and grievant Revis woke himself. In addition, no untoward events occurred as a result of the allegation that Revis was sleeping.

Jones said that none of the guidelines noted in Joint Exhibit #7 affected his decision.

Jones said that Revis had a significant disciplinary record and that upon his return in the summer of 1989, he expected that there would be no problems and within about six weeks, a sleeping incident occurred again.

On recross, Jones said that Rosati testified he saw Feltner and the lady with their heads down. At the time, no written guidelines on sleeping were in place.

Jones said the difference between head down and sleeping is, for example, when he had his head down with his eyes closed but he heard the questions that Attorney Smith was asking.

2. ARGUMENT

The Union argues that the evidence showed that there is a question as to whether Revis was sleeping. Was he inattentive or sleeping as recognized in the Company policy on sleeping (see Joint Exhibit #7). Did he intend to sleep or did he nod off? The Union points out that the third shift is a difficult shift and in any event, just before and after the incident in question, Revis was working and mopping the floors.

The Union goes on to say that within a half an hour of the instance involving Revis, he was toileting the

two clients by the name of D & D.

The Union asserts that Todd's testimony is credible and an employee is allowed to read and do a certain amount of activities such as watching TV while he is taking care clients. Moreover, he is entitled to a break.

Revis's attitude toward his Employer may not have been the best, but he was reinstated and received full back pay.

The Union points out that Officer Rosati did not touch Revis and did not make any real effort to wake him.

In the second instance, the Union asserts that Revis was not asleep and, in fact, his name was mentioned and he responded if not immediately, quite soon, and therefore, how can he be viewed as having been asleep.

The Union has demonstrated that the removal is without merit.

The Union also asserts that the Employer gave Feltner who was apparently involved in sleeping the benefit of doubt, but it did not give the same treatment to Todd.

For all these reasons, the Union asks that the grievance be sustained and that Revis be reinstated with full back pay.

V. DISCUSSION AND AWARD

The question is whether the grievant, was sleeping on the job on either one or two occasions in the evening of 9/4 or early morning of 9/5, 1989 and therefore justly terminated?

To answer this question, one must consider the testimony of Rosati and McCarthy as contrasted to that of Revis and decide whether Revis's claim that he was awake overwhelms the testimony of Rosati and McCarthy. If it is determined that Revis was sleeping, one has to consider Revis's record to determine whether discharge is the appropriate penalty.

Rosati testified that he walked in House #10 and observed Revis sitting in a couch with his feet on the floor and his head turned to one side with his arms outstretched and his eyes closed. Rosati asserted that Revis was sleeping. Rosati observed him at least twice over a period of twenty-five minutes and in these instances, Revis did not move. Countering Rosati's claim is Revis's testimony that he heard Rosati open and close the outside door; that he knew that Rosati was in the living room doorway for at least thirty seconds and neither of them talked; and that Rosati returned a second time and stood in the doorway and said nothing. In short, Revis claims that he was awake and observed Rosati. It is difficult to conclude whether Revis was asleep, but at the same time, the testimony of Rosati is that he observed Revis with his eyes closed. If Revis's eyes were closed, certainly there is some question as to whether he actually observed Rosati.

But countering this possibility is Revis's testimony that after Rosati left the second time, he (Revis) rose from the couch and walked to a window and observed Rosati walk to house #12.

Can one accept the testimony of Revis that he was not asleep but was meditating with closed eyes after viewing a late night TV show called Five Minutes to Live By? If one were meditating, one might expect to see not an individual with arms outstretched and his head turned to one side but perhaps one sitting with his head somewhat down and moving his lips as if in prayer, an act Revis indicated he liked to carry out. One might expect some change in position from when Rosati first observed him to the time Rosati returned for a second observation, yet Rosati asserted that Revis's position remained unchanged.

Another problem with Revis's testimony concerns the lack of communication between himself and Rosati. It would not be unusual for employees, including Revis, to acknowledge the presence of a police officer as he makes rounds. Is it likely that Rosati goes about checking the buildings without any small talk with employees. This may not be particularly important, but it seems likely that third shift employees would engage in some talk, if only for a change of pace when an officer or any other employee enters a room.

The other situation involved two separate occasions. Initially John McCarthy walked into the bedroom in Side B of House #10 and observed Revis asleep. He called his name and Revis did not respond. McCarthy walked back and met Rosati and they both returned to the bedroom in question. McCarthy called Revis's name again and Revis, according to their testimony, looked up in a surprised fashion and then observed both of them and said, "I wasn't asleep." What does that mean? If one says, "I wasn't sleeping," there is some basis for concluding that there would be no need to make such an assertion if, in fact, one was not sleeping.

The testimony of Revis was that he responded with "I wasn't sleeping. You can't catch me sleepin." because he had earlier been apprised by Rosier that Rosati had observed him sleeping and told him not to let it happen again. If, however, he were not sleeping or been nodding off quite soundly, one would expect that he would have exclaimed that he was not sleeping when McCarthy first called his name.

In the second situation on the B side of the house, he may have been nodding off as the Union argued and not totally asleep, but it is also clear that he has the task of caring for the two clients, D & D, who are capable of carrying out self-inflicted problems. Whether he was nodding off or sleeping, it took some time before Revis responded to McCarthy and Rosati. Although the time may not have been extensive, it can be concluded that he was not alert and ready to respond quickly to any problems or noises created by the patients he was watching.

In short, it is difficult to conclude that the testimony of Rosati and McCarthy is totally false and that that of Revis is totally true.

Revis's record indicates that he was suspended for three days back in 1983 for sleeping on the job; that there was a ten day suspension in 1984 for sleeping on the job; and it is also noted that he has been issued a number of oral, written, verbal, and disciplinary suspensions between 1986 and 1987. Specifically, he received a three day suspension in January of 1987, a six day suspension in August of 1987, and a ten day suspension in December of 1987.

The testimony of Rosati and McCarthy outweighs that of Revis. To conclude otherwise is to decide that Revis's self-serving testimony is true and that of Rosati and McCarthy is false, even though there is no evidence or reason to find that the latter two employees were out to get Revis. The only reasonable conclusion is that Revis was sleeping.

Moreover, Arbitrator Sharpe in his award noted that Revis's record could still furnish the basis for disciplinary action if the grievant fails to improve his performance. Clearly his performance did not improve.

For all these reasons, the grievance is denied.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
April 5, 1990