ARBITRATION DECISION NO.:
276

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

EMPLOYER:
Department of Youth Services,
Cuyahoga Hills Boy School

DATE OF ARBITRATION:
June 12, 1990

DATE OF DECISION:
July 12, 1990

GRIEVANT:
Langston B. Jones

OCB GRIEVANCE NO.:
35-03-(89-08-21)-0052-01-03

ARBITRATOR:
Patricia Thomas Bittel

FOR THE UNION:
Tim Miller

FOR THE EMPLOYER:
Deneen Donaugh, Advocate

KEY WORDS:
Removal
Sleeping On Duty
Disciplinary Grid
Pre-Disciplinary Notice

ARTICLES:
Article 24 - Discipline
§24.02-Progressive Discipline
§24.04-Pre-Discipline
Article 25 - Grievance Procedure
Article 43 - Duration
§43.03-Work Rules

FACTS:

The grievant was a Youth Leader 2 employed by the Department of Youth Services since January 1985. He was assigned to a unit housing 35-40 youth and he worked the 11 p.m. to 7 a.m. shift. He was

responsible for the security and safety of the facility and the youth. The Superintendent and Assistant Superintendent of his facility conducted a surprise inspection because of complaints about the night shift. The grievant was found in an office, allegedly face down with his head in his hands. It was concluded after an investigation that the grievant was sleeping, he was notified of possible discipline and removed from his position ten weeks later. He continued to work his regular job until he was removed.

EMPLOYER'S POSITION:

There is just cause for removal of the grievant. The Superintendent and Assistant Superintendent found the grievant sleeping on duty. They entered his unit and walked around the office and they tried to get his attention by waving their hands. His head was down and he did not move until the supervisors entered the office, at which time he jumped up. He was obviously sleeping. Removal is justified because of the important safety and security needs of the facility and the potential for injury to youth or the community around the facility.

The grievant's testimony on the events is not credible due to his interest in keeping his job. The grievant was aware of the possibility of removal through the employer's published directives. The pre-disciplinary notice need not specify the contemplated discipline. The grievant's removal occurred ten weeks after the incident because he was on vacation for part of the time. Other employees found sleeping at the time were not removed due to practical needs of the facility. Overtime would have had to be used to staff the facility fully and budgetary restrictions prohibited that possibility.

UNION'S POSITION:

The grievant's removal was improper for substantive and procedural reasons. The grievant was not sleeping the night the Superintendent and Assistant Superintendent conducted their inspection. He responded normally when the supervisors entered the office he was in. Additionally, because of understaffing the night shift gets no rest breaks and supervision has been seen sleeping on the shift as well.

The employer did not consider the grievant's five yeas employment without discipline in deciding upon his removal. Removal in this case provides no opportunity for improvement and therefore violates progressive discipline. The grievant also received disparate treatment when compared to other employees found sleeping at the facility. Others have received suspensions ranging from one day to seven days for sleeping. That the grievant remained on the job for ten weeks after the incident weighs against the seriousness of the offense claimed by the employer.

The grievant and the union were prejudiced by the lack of specificity of the pre-disciplinary notice. There was no mention that the grievant was to be removed. Combined with the fact that others had received suspensions the union was led to believe this grievant would receive a suspension as well.

ARBITRATOR'S OPINION:

The employer's witnesses to the incident were credible while the grievant's testimony is not. A person would not remain slouched in a chair while his Superintendent and Assistant Superintendent waved their arms trying to get his attention. That the grievant did not hear the outer door of the unit close leads to the conclusion that the grievant was asleep. Because of the nature of the grievant's job and his responsibility for the safety and security of the facility he should have reacted to the door closing.

The employer's published disciplinary grid is not sufficient notice of possible discipline. It is ambiguous because progressive discipline is specified based on the level of danger from remote to imminent. The employer's argument that different levels of discipline can be meted out based on whether the employee has direct youth contact or indirect contact is not contained in the rules.

The employer's past practice did not put the grievant or the union on notice that removal would be the penalty in this instance. The fact that other employees had received suspensions for sleeping led the union to believe that a suspension would follow from this incident. Therefore, the grievant was prejudiced because neither the employer's rules, other similar incidents, or the pre-discipline hearing notice served as proper notice of the possible discipline.

Progressive discipline was violated here. The grievant's five year record of no discipline was not

considered. No opportunity for improvement was afforded the grievant. Additionally, the grievant was allowed to remain on the job for thirty-five days and went on vacation after the incident. The employer cannot claim a serious failure by the grievant and then leave him on the job for extended periods of time.

AWARD:

The grievance is sustained. The grievant is to be reinstated within twenty days with full back pay, seniority and benefits. Any unemployment or other compensation should be deducted from the award and no overtime pay for missed overtime opportunities is awarded.

TEXT OF THE OPINION:

Case No.:
35-03-(89-08-2l)-0052-01-03

In the Matter of Arbitration
between

The State of Ohio
Department of Youth Services
Cuyahoga Hills Boy School

and

Ohio Civil Service Employees
Association, Local 11,
AFSCME, AFL-CIO

Grievant:
Langston B. Jones

July 12, 1990

APPEARANCES

For the State:
Deneen Donaugh, Advocate
Tim Wagner, Office
of Collective Bargaining
Crystal Bragg, Superintendent
Harry Edwards,
Assistant Superintendent
Edgar Jacobs, Shift Supervisor

For the OCSEA:
Dorothy Brown, Chapter President
Langston Jones, Grievant
Tim Miller, Staff Representative

ARBITRATOR:
Patricia Thomas Bittel

BACKGROUND

This matter was heard on June 12, 1990 on the premises of the Cuyahoga Hills Boys School before Permanent Panel Arbitrator, Patricia Thomas Bittel in accordance with Article 25 of the Collective Bargaining Agreement. The parties stipulated the matter was properly before the Arbitrator, there being no issue of arbitrability in the case.

The Cuyahoga Hills Boys School is a medium security facility of confinement for juvenile offenders aged 16 through 21. All of the youths incarcerated there are felons. The institution was originally built as a 200-bed capacity facility, however at the current time, population at the school exceeds 300. It is run by the Department of Youth Services of the State of Ohio (hereinafter referred to as DYS).

The Grievant in this case was working third shift as a Youth Leader 2. His shift ran from 11 p.m. to 7 a.m. The unit to which Grievant was assigned housed 35-40 youth. During the majority of Grievant's shift, the youth were asleep. It was Grievant's responsibility to remain alert during the night and to insure there were no incidences of escape or potential harm to either employees or youth.

The parties have stipulated as follows:

"1) The Grievant was hired as a Youth Leader 2 at the Cuyahoga Hills Boys School on January 6, 1985.
2) Grievant was removed from his position of Youth Leader 2 on August 22, 1989, for Neglect of Duty for violation of DYS Directive B-19, Work Rule #7, Sleeping During Working Hours.
3) The matter is properly before the arbitrator."

On June 10, 1989, Superintendent Crystal Bragg and Assistant Superintendent Harry Edwards planned and executed a surprise entry into the facility during third shift in order to assess the validity of complaints received about that shift. As a result of this inspection, a number of employees were allegedly found sleeping on the job. Grievant was one of these employees. His Notice of Investigation was issued June 10, 1989. His Notice of Pre-Disciplinary Hearing dated July 3, 1989 stated:

"You have received a copy of the Notice of Investigation subjecting you to discipline for Neglect of Duty (sleeping). In order to bring this investigation to a possible conclusion, a third party hearing will be held on the matter on Wednesday, July 12, 1989. . . ."

The Notice of Pre-Disciplinary Hearing did not specifically refer to the possibility of removal. Grievant's final Notice of Removal, dated July 17, 1989, was not effective until August 22, 1989. During the two and a half months between the incident and Grievant's removal, he continued to work as a Youth Leader 2, midnight shift.

The rule alleged to have been broken is contained in the DYS General Work Rules (B-19) which states in pertinent part under Section III (Implementation), B (Policy):

"Violation of this Directive and other Department of Youth Services directives as well as those directives developed by each Managing Officer shall constitute cause for corrective action, up to and including removal depending on the gravity of the situation."

B-19 lists "sleeping during working hours" as an activity in violation of the DYS work rules. Grievant signed off on Directive B-19 on January 8, 1985.

DYS Directive B-38 bears the date June, 1988. Employees signed off on this directive at different times; Grievant signed off on October 6, 1988. The title of this directive is "Disciplinary Actions." Sleeping on Duty is listed under Disciplinary Guidelines with the first offense resulting in a verbal reprimand; the second, a written reprimand; the third, suspension; and the fourth, removal. A subheading listed "Causing danger to life, property or public safety" as resulting in suspension or removal upon first offense and definite removal upon a second offense. 'Neglect of Duty' was divided into two categories, major and minor. A major neglect

of duty called for suspension or removal upon first offense and removal on second, while a minor incident results in a progression of verbal reprimand followed by written reprimand, suspension and removal.

Article 24.02 of the Collective Bargaining Agreement entitled "Progressive Discipline" states as follows in pertinent part:

"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 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."

Article 24, Section 24.04 entitled "Pre-Discipline" states as follows in pertinent part:

“An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline."

The stipulated issue in this case is "Was the Grievant removed for just cause?" If not, what shall the remedy be?

CONTENTIONS OF THE EMPLOYER

The Employer maintains Grievant was properly disciplined for sleeping on the job and neglect of duty. Management's tour of the building on June 10, 1989 was in response to repeated complaints received from both employees and youth at the facility, it asserts. Shift Supervisor Edgar Jacobs accompanied Bragg and Edwards when they entered Grievant's unit. Both testified Grievant was in the Youth Leader's office with the door closed. Bragg described Grievant as having his head in his hand, face down and bent over. Edwards assumed Grievant was sleeping; he said he could not tell if Grievant's eyes were open but Grievant never moved and had his head down. He said he watched Grievant three to four minutes before Bragg entered the office, at which point Grievant jumped up. Bragg then asked whether Grievant needed a break and he replied he was ok, said Jacobs.

Bragg described much the same scenario. She said the door made a noise as they entered the unit, and claimed she walked around the glass walls of the Youth Leader office waving her arms and trying to get Grievant's attention. She said he did not respond at all to her gestures. The gesturing continued for approximately three minutes before she entered the office and Grievant jumped up, said Bragg. She stated she found more than 50% of the building asleep during her building tour that evening.

Edwards confirmed that Bragg walked around the glass walls of the office waving her arms and motioning for Grievant to open the door, without response. He also confirmed that Grievant jumped up and looked surprised when Bragg put her key in the door.

The Employer attacks the credibility of Grievant's testimony as being both self-serving and conflicting. It points out he failed to hear the sound of the door closing or to notice Bragg's arms waving -- factors which confirm he was asleep.

As to Directive B-38, Bragg described this as a guideline for discipline, not etched in stone. Grievant had signed off on both directives and therefore was fully aware removal was a possible consequence of sleeping,

claims the Employer. In its view, since Grievant was aware of possible removal, it was not necessary for the Notice of Pre-Disciplinary Hearing to specify removal as a possible result. Since Grievant was not disciplined after signing off on B-38 until his removal, there was no reason for him to think it would not apply, argued the Employer. Because pre-disciplinary hearings are held only for suspensions and removals, Grievant was not prejudiced in any way by failure to cite removal in the Notice, it claimed.

The Employer described the incident as a serious lapse of security which resulted in a very real potential for danger to employees and youth, as well as to the community. Bragg explained B-38, stating sleeping on the job by employees having no direct contact with the youth is much less dangerous than the same conduct by persons directly responsible for them. Accordingly, there is a distinction in the seriousness of the resulting penalty, she said.

She described the review process, stating it goes through the deputy to her, and she makes a recommendation to the director. This recommendation must be approved by the Central Office, including the Disciplinary Coordinator, EEO, Legal and the Deputy Director before reaching the Director.

Bragg stated on July 31st she scheduled a disposition conference for Grievant to be held August 4, 1989. However, Grievant was on vacation August 4 through 16. For this reason, his removal was delayed until August 24, explained Bragg.

She further explained it was impractical to remove all the employees found sleeping during the processing of their discipline because so many were involved. She said Grievant kept working because the superintendent does not have authority to put employees on administrative leave. To do so would have necessitated excess overtime and violated budgetary constraints, stated Bragg.

As to past practice, the Employer refers to Article 43.03 of the Agreement entitled "Work Rules" which states:

"After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement."

On cross-examination, Bragg admitted another Youth Leader, Randy Garrett, received a suspension for sleeping after he had signed off on B-38, this being his second suspension for sleeping at work. She said Garrett should have been removed and admitted "this is a mess up". She distinguished the case of Youth Leader Jerry Stevens who was removed after two incidents of sleeping on the job, explaining Stevens' second incident occurred before the first incident had been brought to closure.

Management argued strongly that sleeping on duty by a Youth Leader who is alone and responsible for over 30 youths constitutes a major breach in security and warrants the most severe disciplinary penalty. It further argued its hands could not be tied in achieving efficiency and security.

CONTENTIONS OF THE UNION

The Union strongly challenges Grievant's removal as lacking just cause on both substantive and procedural grounds. Grievant was not asleep on duty, it claims, and no harm came to anyone on June 10, 1989. Grievant testified he saw Bragg, Edwards and Jacobs looking at him through the glass. He said he did not react because it was not unusual for Jacobs to be on the dorm. He claimed he arose when the door opened, but did not jerk or jump up. Grievant responded normally when the door opened, argued the Union, pointing out that no one asked if he had been sleeping.

Grievant said he does not get breaks on his job because there is never enough staff to serve as replacement. He further claimed to have seen supervision sleeping on the job.

The Union contends mitigation is required by the contract and deserved by Grievant based on his record of five years' service without discipline. In addition, Article 24.02 requires progressive discipline, argues the Union, pointing out this was Grievant's first violation of the rules. Management failed to take his good record into consideration, claims the Union, alleging he should have been given an opportunity to improve. It

contends his summary removal was a violation of progressive discipline within the meaning of the contract.

The Union also argues sleeping was not a dischargeable offense at Cuyahoga Hills Boys School. It gives several examples. First, employee Garrett, who signed off on Directive B-38 on October 6, 1988, was suspended for sleeping on December 15, 1988. If B-38 was intended to place employees on notice that sleeping was a dischargeable offense for direct care employees, the notice was defeated by Management's subsequent failure to follow through. The Union also cited the disciplinary record of Jerry Stevens which showed the following:

"01/11/88 - Suspension, 7 days - (Neglect of Duty)
01/09/88 - Suspension, 5 days - (Neglect of Duty)
10/10/88 - Sign-off on Directive B-38
10/17/88 - Suspension, 3 days - (Neglect of Duty)
08/05/87 - Suspension, 1 day - (Neglect of Duty)"

The Union asserts both Garrett and Stevens have been reinstated at arbitration since their removal for sleeping on June 10, 1989. The Union also cites the reinstatement of Isaac Brand, another Youth Leader found to have been sleeping on the job on June 10. Each of the awards reinstating these employees cited procedural deficiencies as rationale for the reinstatement.

The Union also points to the suspension of Raymond Battle, a youth leader at the Maumee Youth Center, another DYS facility subject to Directive B-38. The one-day suspension of Battle, dated January 13, 1989, was preceded by two letters of reprimand and one verbal reprimand for absence without leave.

Chapter President Dorothy Brown testified about more lenient treatment of sleeping on the job in the past, and stated this history, when coupled with the language of Grievant's Notice of Pre-Disciplinary Hearing, operated to mislead both Grievant and the Union as to the possibility of removal. She referred to B38's distinction between 'Sleeping on Duty' and 'Sleeping on Duty, Causing Danger', stating she interpreted the distinction to mean actual harm must come to bear before the higher standard is applied. She further pointed out the failure of B-38 to mention that the higher standard applies to direct employees while a lower standard applies to the indirect staff.

Brown stated she did not think Grievant would be discharged because he had no prior discipline and no one had been discharged for sleeping before. She said when a case involves removal, she usually makes telephone calls to other locations to determine consistency. She stated she does not inquire or call around regarding suspensions, but only regarding removals. She said she did not make calls in Grievant's case because she saw no reason to.

She interpreted the word "discipline" in the Pre-Disciplinary Notice to mean suspension, she said, and referenced a number of Notices of Pre-Disciplinary Hearing given to other employees which clearly specified "suspension up to and including removal" could be the result.

Grievant remained actively employed during the entire 7-1/2 week time lapse before his removal, states the Union, pointing out this is wholly inconsistent with any perception that he posed a risk to the facility.

The Union further pointed out the Employer violated its own policy B-34 in two regards: first, the policy requires "the Department of Youth Services shall investigate all allegations of employee wrongdoing within a reasonable time after discovery of the allegations"; and secondly, as to pre-disciplinary meetings: "Notice of the meeting, including reason for contemplating discipline, possible form of discipline, date, time and location is to be given in writing."

The Union also referenced the Wiley King decision by Arbitrator Pincus which found the State's failure to cite specific provisions from the Collective Bargaining Agreement in the removal letter constituted a procedural deficiency. Grievant's letter of removal cited only "violation of Neglect of Duty" for sleeping while on duty.

The Union argues Grievant's misdeed, if any, was one of misjudgment. Because his actions were not willful, the Union contends progressive discipline is appropriate. Because notice is an element of just cause, there can be no just cause in this case, it asserts. Given the questionableness of the offense in the first place and the numerous procedural deficiencies, the Grievance must be sustained, argues the Union.

DISCUSSION

A. <u>Did Grievant Violate B-19's Prohibition Against Sleeping on the Job</u>?

Three management witnesses consistently testified Grievant was found with his head down and failed to respond to broad gesturing for over three minutes. If Grievant had been awake he would have noticed Bragg waving her arms and gesturing for him to open the door. His claim of a conscious decision to stay slouched in the chair while the Superintendent stood outside gesturing is totally incredible. While Jacobs' appearance in the unit may have been common, the presence of Bragg and Edwards was highly unusual. Because Superintendent Bragg is the highest ranking officer at the facility, and because she rarely appeared on third shift, Grievant's claimed reaction cannot be credited.

Grievant testified he did not hear the door to the unit slam when management representatives entered. This also is inconsistent with the claim he was awake. The Arbitrator went to the unit and stood inside the Youth Leader's office to determine whether the sound of the door closing could be heard. At the time the television was going in the outer room and there were a number of youth talking. In addition, inside the Youth Leader's office, other persons were talking in normal tones of voice. Despite this, the Arbitrator was able to clearly hear the door close. On third shift, when all the youth are asleep and there are no other noises on the unit, the sound of the door closing would be much more distinct.

Given the function of the Youth Leader to remain alert and to guard the youths' safety and welfare, the sound of the door opening should most certainly have alerted Grievant. His admission that he did not hear the door simply reinforces the credibility of the Employer's case. The Employer has proved with clear and convincing evidence that Grievant was asleep on the job on June 10, 1989 and did not awake until Bragg opened the door to the Youth Leader's office and entered the room.

B. <u>Was Grievant/Union Given Proper Notice that Sleeping is a Dischargeable Offense</u>?

1. B-19

While B-19 describes a general policy including the prerogative of removal, none of the listed offenses are broken out by seriousness. There is no indication, for example, that sleeping during work hours would be treated any differently than a grooming violation. B-19 is therefore lacking in the requisite specificity to place either Grievant or the Union on notice sleeping is an offense which would result in removal.

2. B-38

B-38 lists sleeping on duty as an offense to be dealt with in a progressive disciplinary manner with the first offense warranting a verbal reprimand, the second, a written reprimand, the third, suspension and the fourth, removal. A sub-heading increases the penalty for a first offense to suspension or removal where danger to life, property or public safety is involved.

The Union's confusion on the meaning of this language is understandable. There are many possible levels of 'danger' at Cuyahoga Hills Boys School, ranging from the speculative and remotely possible to the imminent or actual. Management's perception of a sleeping Youth Leader as a dangerous situation is quite reasonable. To have a Youth Leader who is not in a state of consciousness is essentially equivalent to having no supervision at all. This, indeed, creates a situation of 'danger', though the danger is not imminent.

'Danger' is defined in Webster's New Collegiate Dictionary as "Exposure or liability to injury, pain or loss." The concept of actual exposure to harm is more closely aligned with the Union's interpretation than with Management's. It is fair to say that both parties' interpretations are reasonable.

B-38 is simply not clear. Management's testimony about a different standard for direct and indirect care employees is not articulated in B-38, nor was there any evidence this distinction had been presented to the Union -- either orally or in writing. Because B-38 is unclear in its presentation of disciplinary standards, it

does not adequately serve as notice to the Union that a first offense of sleeping on the job could result in removal.

3. Past Practice

Management's manner of dealing with prior incidences of neglect of duty and sleeping on the job in no way placed the Union on notice of Grievant's removal. To the contrary, suspensions, some very short, were consistently utilized in the progressive disciplinary process for this offense with no clear notice to the Union of a change in this practice.

Management correctly points to contractual language which states past practice is not binding on the parties during the term of the Agreement. While past practice is not binding, prior discipline can be legitimately be relied upon by either party as an indication of what to expect in the future, unless and until there is specific notice to the contrary. As already indicated, neither B-19 nor B-38 constitute proper notification of a modification. Hence, the Union had every reason to think sleeping offenses would continue to be handled through progressive discipline.

4. Article 24.04: Pre-Discipline

In very clear mandatory language, Article 24.04 requires "the employee and his/her representative shall be informed in writing of the . . . possible form of discipline." Grievant's Notice of Pre-Disciplinary Hearing merely states he was subject to discipline. His Notice was issued in the context of notices to other employees which clearly specified the employee could be disciplined up to and including removal. This was plainly in violation of the specific mandatory language of Article 24.04.

The Union and Grievant were deluded and misled as to the potential disciplinary action to be taken. Past disciplinary actions, suspensions given for the same offense after B-38, inherent ambiguity in the wording of B-38 and Grievant's pre-disciplinary notice -- all operated together to establish a clear and reasonable understanding on the part of both Grievant and the Union that Grievant's job security was not at risk.

C. Did the Employer Violate 24.02?

1. Progressive Discipline

The evidence proved other employees with spotty disciplinary records breached the rule against sleeping on duty but were suspended, not removed. Grievant's record of five years' satisfactory performance and no disciplinary action warranted consideration as a mitigating circumstance in this case. Given a history of treating sleeping as a offense subject to the progressive disciplinary approach, the Union reasonably expected the Employer to grant Grievant a chance to learn from his mistake. The Employer has breached its duty to follow the principles of progressive discipline, and in so doing, has violated Article 24.02.

2. Timing

Grievant's Notice of Investigation was dated June 10, 1989. His removal was not effective until August 22. Indeed, he continued on the payroll for 35 days after his removal letter. The Employer simply cannot be heard to argue Grievant constituted a danger to the security of the facility, while simultaneously keeping him on duty for weeks on end. Article 24.02 expressly mandates expediency in taking disciplinary action. The fact that Grievant took a two week vacation at the end of this extended period simply cannot defeat the proven untimeliness of the Employer's actions. Employees have a right to be timely advised of their status. This right, preserved by contract, was violated in this case.

AWARD

The Grievance is sustained. The Employer in this case has violated Sections 24.02 and 24.04 of the Collective Bargaining Agreement. Grievant's removal was without just cause. He will be reinstated within 10

working days of receipt of this award and will be given full back pay for the period of time he was away from work within 20 working days of receipt of this award. His seniority will be restored and he will be entitled to all benefits he would have received had he remained an employee. Unemployment compensation or any funds otherwise earned from another employer or employers will be deducted from Grievant's back pay and he will not be entitled to compensation for any overtime he would have received during his absence.

Respectfully Submitted,

Patricia Thomas Bittel,
Arbitrator

Dated: July 12, 1990