ARBITRATION DECISION NO.:
400

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

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

DATE OF ARBITRATION:
October 25, 1991

DATE OF DECISION:
November 26, 1991

GRIEVANT:
Margaret Boyd

OCB GRIEVANCE NO.:
24-03-(90-07-30)-0329-01-04

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Robert Robinson

FOR THE EMPLOYER:
Edward Ostrowski
Paul Kirschner

KEY WORDS:
Ten Day Suspension
Sleeping on Duty
Just Cause
Employer's Duty to
Consider Employee's
Circumstances
Supervisory Harassment
Anti-Union Animus

ARTICLES:
Article 2-Non-Discrimination
§2.02-Agreement Rts.
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.03-Supervisory Intimidation

FACTS:

The grievant was a Therapeutic Program Worker (TPW) who had been employed by the Department of Mental Retardation and Developmental Disabilities since June 4, 1979. On May 31, 1990, at approximately 4:30 a.m. two supervisors found her allegedly sleeping while on duty in her assigned cottage. However, the grievant had been heard talking to another TPW between 4:00 a.m. and 4:25 a.m. that night. One supervisor attempted to awaken the grievant before the other realized she was sleeping, but was not successful. Nothing was said to the grievant that night, but she received a ten day suspension for neglect of duty.

The grievant had received no prior discipline until she became a steward in 1990. She then received a verbal reprimand for neglect of duty when she failed to remove an ice cream carton from a refrigerator she was ordered to clean, and another verbal reprimand for parking in an unauthorized place. Her performance evaluations had also been above average until 1990. Evaluations in 1990 indicate that the grievant was below average in several categories, however her evaluations returned to above average in 1991. Additionally, a wooden paddle with the words "union buster" had been seen hanging in the supervisors' lounge.

EMPLOYER'S POSITION:

There was just cause for the grievant's ten day suspension for sleeping on duty. The grievant is solely responsible for eight patients on the night shift which has less staff than the other shifts. This fact makes the potential for harm to residents greater than on other shifts. The penalty for sleeping on duty is a ten day suspension which is reasonable due to the nature of the facility and the grievant's position in direct care. Additionally, the union failed to prove that the grievant was the victim of supervisory harassment.

UNION'S POSITION:

There was no just cause for the grievant's ten day suspension. The grievant was the victim of supervisory harassment. She had been employed since 1979, yet received no discipline until she became a union steward in 1990. She then received a verbal reprimand for neglect of duty for failing to remove an ice cream carton from a refrigerator which she had been ordered to clean, and another reprimand when she parked in an unauthorized place. Her performance evaluations had also been above average until that time, at which point she was rated below average in several categories.

The employer failed to prove that the grievant was sleeping at approximately 4:25 a.m., May 31, 1990. She had been heard talking to another TPW between 4:00 a.m. and 4:30 a.m. Also, the supervisors who found the grievant said nothing to her at the time. The supervisors in fact fabricated the incident afterwards due to anti-union animus (animosity toward the union). Additionally, a ten day suspension following verbal reprimands is neither reasonable nor commensurate with the offense.

ARBITRATOR'S OPINION:

The arbitrator found that the grievant had dozed off on May 31, 1990. The testimony proved that she had been awake and speaking to another TPW shortly before her supervisors entered the cottage. However, the supervisors, testimony showed that the grievant was sleeping. One supervisor turned off the TV in the room, walked directly in front of the grievant attempting to awaken her, and the grievant had to be called twice before she responded.

However, the arbitrator found that the anti-union animus was the cause for the ten day suspension which resulted from the incident. The fact that a paddle with the words "union buster" on it was hanging in the supervisors' lounge is evidence of this. But for the hostility toward the union, the grievant's sleeping may not have been reported at all. That management condoned the paddle in the lounge shows reckless disregard for harmonious relations with the union. The supervisor's testimony that she did not know when the grievant became a union steward was not credible; she was operating within the tainted atmosphere which existed at the facility. Because of this atmosphere there was no just cause for the penalty imposed.

Just cause encompasses the reasonableness of the rule and whether the rule was reasonably imposed in the specific instance. The employer failed to prove that the rule was applied appropriately to the grievant. A

ten day suspension is not mandated by the employer's rule against sleeping, although the rule itself is reasonable. Any discipline must be corrective and commensurate with the offense. A mandatory penalty does not provide for a just cause analysis before discipline is imposed and as such is not reasonable. Therefore, the ten day suspension was not imposed for just cause because its mandatory imposition did not provide for consideration of the grievant's particular circumstances.

AWARD:

The grievant's ten day suspension was reduced to a one day suspension.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

State of Ohio
Employer.

Grievance No.:
24-03-(7-30-90)-329-01-04
Grievant:
(M. Boyd)
Hearing Date:
October 25, 1991
Award Date:
November 26, 1991

Arbitrator:
R. Rivera

For the Employer:
Edward Ostrowski
Paul Kirschner

For the Union:
Robert Robinson

Present at the Hearing in addition to the Grievant and Advocates were Alfreda Sharp, RCS (witness), Sandra Clepper, RCS (witness), Tamala A. Solomon, LRO-MR, Robert Ellis, TPW (witness), and Wanda Blackmon, TPW (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and

the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

J-1 The Agreement

J-2 The Suspension Order

J-3 The Grievance

J-4 The Step Three Response

J-5 Staff Incident Report

J-6 Sandra Clepper Statement

J-7 Alfreda Sharp Statement

J-8 Beatrice MacIntyre Statement version 1

J-9 Beatrice MacIntyre Statement version 2

J-10 Beatrice MacIntyre Statement version 3

J-11 Wanda Blackmon Statement

J-12 Building 290 Diagram

Union Exhibits

1. Staff incident report dated February 16, 1990 by Clepper on Grievant re: neglect of duty - failure to clean out refrigerator.

2. Verbal Reprimand by S. Clepper on Grievant dated February 23, 1990 re: incident report (Union Exhibit #1)

3. Verbal Reprimand by S. Clepper on Grievant dated May 14, 1990 for parking in an unauthorized area.

4. Incident Report dated April 30, 1990 by Clepper on Grievant describing alleged unauthorized parking.

5. Personnel Action dated July 27, 1990 re: suspension.
6. Pictures of wooden paddle with words "Union buster" hung in supervisor's lounge.

7a Evaluation of Grievant dated June 1, 1991.
b Evaluation of Grievant dated June 16, 1990.
c Evaluation of Grievant dated July 29, 1989.
d Evaluation of Grievant dated June 11, 1988.
e Evaluation of Grievant dated May 29, 1986.

Joint Stipulations of Fact

The Grievant was solely responsible for the safety and care of eight individuals with mental retardation while working on May 31, 1990.

The Grievant was aware that Broadview Developmental Center's disciplinary policy requires imposition of at least a ten day suspension when an employee is determined to be sleeping on duty and no mitigating circumstances exist.

The discipline is free of procedural flaw.

Joint Issue

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

Relevant Contract Provisions

§ 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

§ 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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
B. One or more written reprimand(s);
C. One or more suspension(s);
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 indicating 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.

§ 24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

Facts

The facility involved is the Broadview Developmental Center, a facility of the Department of Mental Retardation and Developmental Disability. The incident in question took place on the third shift in a cottage which houses patient-residents of the facility. The Grievant was the Therapeutic Program Worker (TPW) in Cottage A on the third shift and was so solely responsible for the safety and care of the eight individuals with mental retardation housed in that facility.

The Grievant's date of hire was June 4, 1979 (Union Exhibit 5). At the time of the alleged incident, the Grievant was an employee with nearly 11 years of service. At the time of the incident, the Grievant had two relevant prior disciplines. On February 16, 1990, Supervisor S. Clepper wrote an incident report which stated that Grievant, when cleaning a refrigerator, "refused to complete the work you were instructed to do" i.e., the Supervisor found open ice cream carton in the refrigerator on the night after the Grievant had been instructed to clean out the refrigerator (Union Exhibit 1). For this infraction, neglect of duty, the Grievant received a verbal reprimand on February 21, 1990 (Union Exhibit 2). On April 30, 1990, Eddie Mae Caldwell filed an incident report indicating that the Grievant was parked in an unauthorized place (Union Exhibit 4), and on May 14, 1990, the Grievant was Verbally Reprimanded for that infraction by Sandra Clepper (Union Exhibit 4). The Grievant had a better than average evaluation in 1986 by her (then) supervisor Alfreda Sharp who said that the Grievant "is dependable and seldom needs checking." (Union Exhibit 6E) In 1987, the Grievant received a very good evaluation by Supervisor Sharp who again said "She is reliable and seldom needs checking" (Union Exhibit 6D). In 1987, the Grievant received a good evaluation by two (2) raters: a Ms. Hillman and Ms. Clepper wherein the review commented "the Grievant is an excellent worker" (Union Exhibit 6C). On May 29, 1990, however, the Grievant received an evaluation which in three areas rated her "below" expectations (Union Exhibit 6B). In June 1991, the Grievant' s evaluation was again excellent with three areas "above" expectations, six areas at "meets" expectations, and none (0) "below" expectations (Union Exhibit 6A).

On May 31, 1990, Supervisor Sandra Clepper filed an incident report stating that the Grievant was "observed asleep on the couch in the dayroom." (Joint Exhibit 5) On July 11, 1990, the Grievant was suspended for 10 days for the alleged infraction (Joint Exhibit 2). On July 29, 1991 a Step Three Response was made upholding the discipline (Joint Exhibit 4). On July 30, 1990, a Grievance was filed (Joint Exhibit 3). The arbitration of this grievance was held October 29, 1991.

Supervisor S. Clepper testified that on May 31, 1990 at approximately 4:25 a.m. she entered the cottage in question on her rounds. With her was Supervisor Alfreda Sharp. Upon entering the cottage, she and Ms. Sharp saw and talked to Ms. Wanda Blackmon. They then proceeded through the halls and made a required stop in the kitchen area to sign a "round" sheet. They then proceeded through the hall in the attached cottage (A) on their way out. As they came up to living room in the second (attached) cottage, she observed the Grievant sitting on the couch, her head resting on her hand, her mouth open, and her eyes closed. Supervisor Clepper saw Supervisor Sharp cross the living room and turn off the TV (which was on). The Grievant did not move or change position. Supervisor Sharp walked directly in front of the Grievant and called her name once; no response ensued. Supervisor Sharp called the Grievant's name twice. Upon the second call, Grievant responded. According to Supervisor Clepper, Supervisor Sharp handed the Grievant a form which the Grievant had previously requested, and they left. (See Joint Exhibit 6)

Supervisor Alfreda Sharp testified that she accompanied Supervisor Clepper on rounds on May 31, 1990. She said that about 4:35 a.m. they entered the cottage; they saw and spoke to Ms. Blackmon in the first cottage (B). Then they stopped in the kitchen, and Ms. Clepper signed the sheet. They then proceeded through the hall of the second cottage (A) on their way out. Supervisor Sharp said that she was carrying the Request for Leave Form because she expected to see the Grievant and give it to her. She said they found the Grievant apparently asleep in the living room. Ms. Sharp said she walked across the room to turn off the TV and that as she did so "I was so hoping she'd wake up and make a movement." However, the Grievant

did not respond until Ms. Sharp had called her name twice, raising her voice the second time. She said she handed the Grievant the form, and they left. (See Joint Exhibit 7)

Ms. Blackmon testified that she was on the B side of the cottage and that shortly before the two supervisors entered she heard the Grievant talking to Nurse MacIntyre about the cold in the cottage. Ms. Blackmon estimated that from the time the two supervisors entered on the B side until she heard the door close when they left on the A side was only two (2) minutes. She said she glanced at the clock "because I always check when supervisors come through." Ms. Blackmon gave a statement on June 1, 1990 wherein she stated that the Grievant and Nurse MacIntyre had been talking at 4:25 a.m. (Joint Exhibit 11). Joint Exhibits 8, 9, and 10 consist of three statements signed by Nurse MacIntyre. In all three statements, Nurse MacIntyre indicates that she talked to the Grievant on the night in question and that the conversation was about the coldness of the cottage. In Joint Exhibit 8, made June 1, 1990, the nurse signed a statement written by the Grievant which gave the time as 4:30 a.m.; Joint Exhibit 9 has no time mentioned; Joint Exhibit 10, made June 21, 1990, indicates a time period between 4:00 and 4:30 a.m.

On cross-examination, Supervisor Clepper said she did know that the Grievant was a Union Steward but said she did not know when the Grievant had become a Union Steward. Supervisor Clepper said she did not know if the previous write ups (Union Exhibits 1-4) were made before or after the Grievant became a Union Steward. Supervisor Clepper was asked why neither she nor Supervisor Sharp spoke to the Grievant about the infraction when they found her sleeping. Supervisor Clepper was unable to coherently articulate why they did not speak to the Grievant; "we just didn't" she said. Supervisor Clepper said she did know that a wooden paddle with the words "Union buster" was hanging in the Supervisor's room, but she said it did not symbolize "discipline." She stated that she had not put the paddle there, had not removed it, did not know who put it there, or who removed it. She said "it came up missing" when the Grievant and Mr. Ellis filed "some kind of paper." She said she did not treat the Grievant differently because of her Union Stewardship. She said the Grievant was no longer under supervision since late 1990 early 91.

Supervisor Sharp testified that she did know the Grievant had become a Steward but did not know when. She said "it never occurred to her" to talk to the Grievant when they allegedly found her (the Grievant) sleeping. Ms. Sharp said that the Grievant's work was very good prior to 1990 but in 1990 she was not her direct supervisor and had no knowledge. Supervisor Sharp recalled the paddle in the office, but said she had no knowledge of how it got there. She said that the paddle was a symbol of discipline.

Mr. Robert Ellis testified for the Union. He testified that the Grievant became a Steward in January, 1990 and that all the discipline, the two verbal reprimands, as well as the ten day suspension, came after the Steward position. (See Union Exhibits 1-4) He testified that he had also been disciplined after he became a Steward and that prior to that time, he had had no discipline in 9 years of employment. He testified that almost all union officials were disciplined more in the period in question.

The Grievant testified that on the day in question that Ms. Sharp walked into the room, turned off the TV, walked over to her, handed her the Request for Leave, left the room, and then left the cottage with Supervisor Clepper. She said with the TV on and the dryer on Supervisor Sharp might have had to call her twice because Supervisor Sharp speaks in a low voice and a lot of noise existed. However, she maintained that she was not asleep. She said she did not learn of the accusation until the following evening. The Grievant said that prior to assuming the Steward position that she and Ms. Sharp were close friends; however, subsequently, she had to write grievances against her and that she believed that the grievances caused animosity towards her.

Employer's Position

The Grievant was solely and directly responsible for 8 residents, in particular, their safety and security. She was asleep on the job. The third shift has less workers and therefore, the potential for harm is great. Any charges of harassment are vague and unsubstantiated. The ten (10) day suspension is commensurate to the violation and the discipline was for just cause.

Union's Position

The Grievant was the victim of supervisory harassment due to her position of Union Steward. The climate of Employer-Union relationship at this time was extremely poor. Management appeared to be out to bust the Union. The paddle with "Union buster" was prominently displayed in the Supervisor's lounge.

The facts around this discipline clearly indicate harassment. The Grievant was a 11 year employee with good evaluations. Suddenly, her evaluations deteriorate significantly. Within a three month period, she receives three disciplines. The facts of this alleged violation do not make sense. Blackmon heard the Grievant talking to MacIntyre "shortly" before the Supervisors claim the Grievant was sleeping. Nurse MacIntyre remembers the conversation and places it about the same time. The fact that neither supervisor spoke to the Grievant at the time that she allegedly was found sleeping indicates that the incident was fabricated subsequently.

No just cause exists. Moreover, a ten day suspension is neither commensurate nor progressive. The Grievance should be upheld.

Discussion

The testimony of Ms. Blackmon taken together with the written statements of Nurse MacIntyre indicate that the Grievant was awake and functioning shortly before the arrival of the two (2) supervisors. The Grievant claimed that because the TV was on and the dryer was running that she would not have heard Ms. Sharp's first call. However, that explanation is inconsistent with Ms. Sharp's (collaborated by Supervisor Clepper) statement that she first turned the TV off, then walked toward the Grievant, and when directly in front of the Grievant, called her name. Ms. Sharp said "as I walked across the room I hoped that she (the Grievant) would awake." The Arbitrator believes that Ms. Sharp wanted the Grievant to awake so that her colleague, Ms. Clepper, would not have the opportunity to discipline the Grievant. The Arbitrator likewise believes that the Grievant had dozed off for a rather short time between her conversation with Nurse MacIntyre and the arrival of the supervisors.

The Arbitrator also suspects that, in a different atmosphere, without the clear and manifest hostility between Management and the Union which existed at that time that the incident might never have been reported. Here was a long term employee with an excellent work record with no discipline for similar incidents (i.e., sleeping) and with no discipline for serious issues. On another day, the Arbitrator suspects, when the Grievant immediately awoke, the supervisors would have said "Don't ever let that happen again; this is a clear warning" and left. However, technically, the Grievant had been asleep, even if the time was short and even if the event was highly unusual. Potentially, if the incident were to be repeated, the harm could be quite serious; sleeping when in charge of 8 mentally retarded residents could lead to serious problems. The Grievant was in the wrong.

However, the evidence about the "paddle" indicates that management acted with reckless disregard for the purpose of the contract as found in the Preamble: "This Agreement ... has as its purpose the promotion of harmonious relations between the Employer and the Union;." The Employer cannot control its managers at every moment. However, the paddle with its obvious message ("Union buster") was allowed to remain in the Supervisor's room. Certainly, such a display, condoned by the management of the facility, tainted the atmosphere. This taint was revealed in her testimony by Ms. Clepper. The Arbitrator believes Ms. Clepper was disingenuous when she claimed not to have known approximately when the Grievant became a Union Steward and equally disingenuous when she claimed that the paddle was not a symbol of discipline. The Arbitrator believes that the Supervisor was operating within this tainted atmosphere when she found the Grievant dozing.

The penalty imposed by the Employer was a ten (10) day suspension. The parties stipulated that the Grievant was aware of the alleged 10 day suspension rule for sleeping, and the Union stipulated that no mitigating circumstances existed.

One element of just cause is that work rules be reasonable, that is, the Arbitrator must ask, 11 was the company's rule or order reasonably related to efficient and safe operations?" The Arbitrator agrees that a rule that prohibits sleeping on the job is a reasonable work rule. The Arbitrator also agrees that in the context of a mental retardation facility that if a caretaker sleeps such a violation is a reasonably serious problem.

However, the Employer did not introduce the work rule into evidence. Nor did any management person testify as to how the discipline in this case was applied to this Grievant under these circumstances nor did any manager testify as to the rationale underlying the alleged "required 10 day suspension." While a work rule against sleeping on the job is universally recognized as "reasonable," a mandatory ten (10) day suspension has no such universal recognition as manifestly reasonable. Just because the Grievant had adequate notice of a rule and its mandated discipline, such notice does not automatically impart "reasonableness" to either the rule or its mandated discipline.

Article 5 of the Contract gives management the right to manage its facilities "except to the extent expressly abridged ... by this Agreement." The contract explicitly abridges management rights as to the imposition of discipline. Disciplinary measures are explicitly subject to just cause (Article 24.01) and are to be administered by the principles of progressive discipline (Article 24.02) and any disciplinary action shall be commensurate with the offense (Article 24.02). Well recognized principles of "Just cause" mandate that in imposing discipline that discipline be corrective and not punitive (see Grievance Guide 7th Edition at p. 2), and this principle is imbedded in the Contract (§24.05). Moreover, "Just cause" requires, inter alia, that "Before disciplinary action is taken, the employee's motive and reasons for violation of rules be investigated. Then the penalty is adjusted to the facts -- whether the employee's action was in good faith, partially justified, or totally justified" (Grievance Guide 7th Edition at p. 6). This requirement is sometimes referred to as "mitigation." In this case, the Union stipulated the mitigation requirement away. However, "just cause" requires even more: "Before disciplinary action is taken, the employee's past record is taken into consideration. **A good work record and long seniority** are viewed as factors in the employee's favor, particularly where a minor offense is involved, or where it is a first offense." (Grievance Guide 7th Edition BNA at p. 6) (emphasis added)

A mandatory penalty which does not permit factors specific to the particular employee to be considered is facially unjust. No testimony was adduced about the rationale of the alleged rule or how the rule was applied in the case of this Grievant. In this instance, an imposition of a ten day suspension against an employee with long-seniority and a good work record for a first offense strikes the Arbitrator as punitive in nature and failing to be corrective in purpose. This conclusion is supported by evidence of the reckless disregard by the employer of Its duty to promote a harmonious work place. The Arbitrator knows that her job is not to substitute her judgment for that of the Employer. However, where the Employer has failed to supply the Arbitrator with any evidence of the basis for its judgment and where the contract explicitly requires progressive, commensurate, corrective discipline, the Arbitrator finds little choice but to overrule the Employer's action and follow the contract's mandate.

Award

Grievance is upheld to the extent that the ten (10) day suspension is reduced to a one (1) day suspension.

Date: November 26, 1991
RHONDA R. RIVERA, Arbitrator