

ARBITRATION DECISION NO.:

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UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Broadview Developmental Center

DATE OF ARBITRATION:

July 24, 1987

DATE OF DECISION:

September 28, 1987

GRIEVANT:

Anthony Banks

OCB GRIEVANCE NO.:

G-87-0482

ARBITRATOR:

Harry Graham

FOR THE UNION:

Linda K. Fiely

FOR THE EMPLOYER:

Michael P. Duco

KEY WORDS:

Removal
Just Cause
Sleeping On Duty
Progressive Duty
Credibility Of Witnesses

ARTICLES:

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

FACTS:

The Grievant was employed at Broadview Developmental Center as a Hospital Aide from March, 1984, until the grievant's discharge for sleeping on the job effective December 4, 1986. Grievant had been disciplined on two prior occasions for sleeping on the job and as a result received a ten (10) day suspension and a three (3) day suspension for the offenses. Other instances of discipline included a twenty (20) day suspension for being absent without leave, a written warning for neglect of his clients, a written warning for failing to report a seizure experienced by one of his clients, a verbal warning for improperly extending his lunch break, and a verbal warning for being AWOL and failing to call-in as required.

There was some dispute between the parties regarding the circumstances surrounding the incident which led to the Grievant's removal. While conducting his routine check on October 3, 1986, a Hospital Aide Supervisor allegedly observed the Grievant sleeping. He called security to serve as his witness and reported the incident to his supervisor. However, the Grievant denied being asleep on the job.

EMPLOYER'S POSITION:

It was management's position that the Grievant was discharged for just cause. As Grievant was sleeping on the job and had been disciplined for that offense on prior occasions, he was aware of the consequences of his action. Furthermore, the Grievant was responsible for supervision of approximately eight (8) residents termed profoundly retarded. These residents required his care on a constant basis and the Grievant had failed to meet his responsibilities. Given the Grievant's poor record and the absence of a history of animosity between the Grievant and the witness, management maintains that discharge is appropriate under the circumstances.

UNION'S POSITION:

The Union contends that the Employer failed to prove the Grievant was sleeping on the job. The Grievant's testimony differed substantially from that of the witness whose testimony should be given little weight given the witness' admission to telling less than the entire truth concerning a prior incident involving another Hospital Aide. In addition, the witness failed to follow the proper procedure in making the requisite telephone call to security to serve as witness and in confiscating the Grievant's log book immediately upon discovering him asleep. Further, the Union contends that the Grievant's performance evaluations are good and no complaints have been made concerning his work. Given these circumstances, the Union agreed that the Grievant's discharge is not warranted.

ARBITRATOR'S OPINION:

The Arbitrator denied the grievance based primarily on credibility factors. The weakness in the witness' credibility was offset by the lack of a history of animosity or discord between the Grievant and the witness which would provide some incentive for fabricating an account of the incident. The Arbitrator found the witness' course of conduct consistent with his account of the events and rejected the Union's contention that the witness' failure to follow proper procedures had any bearing on the dispute.

In addition, the Arbitrator determined that the Grievant's own record, which included two instances of sleeping on the job, lended further credibility to the witness' testimony. In light of the Grievant's very poor record and the credibility of the testimony of the state's witness, as well as the absence of mitigating circumstances, the Arbitrator concluded there was just cause for the Grievant's discharge and denied the grievance.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department
of Mental Retardation and
Developmental Disabilities,
Broadview Developmental
Center**

Case No.:

G87-0482

Appearances:

For OCSEA/AFSCME Local 11:

Linda K. Fiely

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For State of Ohio:

Mr. Michael P. Duco

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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on July 24, 1987 before Harry Graham of Beachwood, OH. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on September 9, 1987 on which date the record was declared to be closed.

Issue:

At the hearing the parties were able to agree upon the issue in dispute between them. That

issue is:

Was the removal of Anthony Banks for just cause under the Collective Bargaining Agreement? If not, what shall the remedy be?

Background:

The Grievant, Anthony Banks, was initially employed as a Hospital Aide at Broadview Developmental Center in Broadview Heights, OH. in March, 1984. At the time of his discharge he was assigned to the third shift, 11:00PM to 7:30AM. His responsibilities involved supervision of approximately eight (8) residents of the Broadview Center who lived in Cottage 281-B. The people for whom Mr. Banks was responsible are termed profoundly retarded. This means that they have IQ's from 0 to 25. Consequently, they require a great deal of care and attention.

On October 3, 1986 Sam Key, a Hospital Aide Supervisor, entered the cottage at 5:24AM as part of his routine check. He observed the Grievant and to his satisfaction, determined Banks to be asleep. After some seconds of observation by Mr. Key, Banks awakened. Again, this was to the satisfaction of Mr. Key. At that point Key crossed the cottage and observed Banks' co-worker, Randy Davis, sleeping as well. Key called security to serve as his witness and reported the incident to his own supervisor, Roy Billman, at 8:00AM on October 3, 1986.

Subsequently, after investigation satisfied the Employer that Banks had been sleeping on October 3, 1986, he was discharged effective December 4, 1986. A grievance protesting the discharge was filed and processed through the procedure of the parties. No resolution of that grievance was had and the parties agree that it is properly before the Arbitrator for resolution on its merits.

Position of the Employer:

According to the State the Grievant was well aware of the penalties for sleeping. This was due to the fact that he had received various directives indicating that sleeping was unacceptable. (Employer Ex. 6 and 7). He has signed for receipt of those directives and indicated that he understood them.

Furthermore, the Grievant had compiled a record of service replete with instances of discipline. These had included a ten-day suspension for sleeping on the job as well as a three day suspension for the same offense. Other instances of discipline included a 20 day suspension for being absent without leave, a written warning for neglect of his clients, a written warning for failing to report a seizure experienced by one of his clients, a verbal warning for improperly extending his lunch break and a verbal warning for being AWOL and failing to call-in as required. Given this poor record discharge is appropriate under the circumstances the Employer insists.

As the Employer views this case the testimony of Sam Key is worthy of belief. He testified that when he entered the cottage and observed the Grievant that Banks was seated at a table. He had his head down on a stack of towels and his eyes were closed. The position of the Grievant's body and eyes indicated unmistakably to Mr. Key that the Grievant was asleep. The State points out that no history of animosity between Banks and Key exists. There is no suggestion that Key was motivated by hostility in concluding that Banks was asleep. The standard for discipline set forth in the Agreement of the parties is that of "just cause." As Banks was sleeping on the job and had been disciplined for that offense on prior occasions he was aware of the consequences of his action. He was responsible for people who required his care on a constant basis. He failed to meet his responsibilities. Under these circumstances, the discharge of Anthony Banks was

justified the Employer insists.

Position of the Union:

The Union points out that the Grievant testified contrary to the testimony of Sam Key. That is, he denied being asleep on the job. According to Banks he was not sleeping in the position described by Key. Rather, he was seated, with his chair tipped back on the two back legs. He indicates that he heard Key enter the cottage, heard doors close and was then startled by Key's entry into the dining room so quickly after hearing the door close. This testimony is substantially different from that offered by Key and is more believable according to the Union.

In the Union's opinion, the credibility of Key is questionable. Under cross examination he admitted to telling less than the entire truth in regard to an incident involving another Hospital Aide, one Lorene Johnson. Given this history, little weight should be given to his story in the union's view.

Key's actions on October 3, 1986 were deficient. Banks was readily observable from the entry way kitchen area. Key apparently did not see him sleeping and make the requisite telephone call to security to serve as witness. Key also acted improperly in picking up Banks' log book after he had crossed to the other side of the cottage and observed Banks' co-worker, Davis. This was in violation of proper procedure which specifies that log books be confiscated by supervision immediately upon discovering staff asleep.

Banks' performance evaluations are good. There is no complaint about his work. Given these circumstances, discharge is not warranted according to the Union. It asserts that the Employer has not proved that Banks was sleeping on the job. Consequently, the discharge penalty is not appropriate in this case in the Union's view.

Discussion:

As is often the case, this dispute involves a determination of credibility. Key's credibility was weakened when it was determined he had been less than completely truthful in an incident involving Lorene Johnson. Set against that is the story related by the Grievant. Clearly he has every incentive to tell his tale so as to put him in the best light possible. To the contrary, it is not apparent why Key should fabricate his account of this incident. No history of animosity or discord exists between them. No reason was advanced why Key should wish to secure Banks' discharge.

Key's course of conduct on October 3, 1986 is consistent with his account of events. Why should he call security to witness the events in Cottage 281 if nothing was amiss? To do so unless something was out of order does not make sense. That Key called security lends credibility to his account. His failure to pick up Banks' log book immediately upon discovering him asleep is immaterial to this dispute. It certainly does not diminish the serious nature of Banks' offense.

Credibility is further provided to Key's account by Banks himself. His record includes two instances of sleeping on the job. This indicates he had a predisposition to nod off. While understandable, such activity is unequivocally forbidden by the State and for good reason. People in Banks' care are dependent upon him.

The Grievant is a junior employee. During the short course of his employment with the State he has established a very poor record. Nothing in that record would call into question the decision under review in this proceeding. As testimony from the State's principal witness was more credible than that of the Grievant and no mitigating circumstances exist no grounds have been provided to the Arbitrator to disturb the action under scrutiny in this dispute.

Award:

Based upon the preceding discussion the grievance must be DENIED.
Signed and dated this 28th day of September, 1987 at Beachwood, OH.

Harry Graham
Arbitrator