

**ARBITRATION DECISION NO.:**

77

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Rehabilitation  
and Correction, Marion  
Correctional Institute

**DATE OF ARBITRATION:**

December 9, 1987

**DATE OF DECISION:**

December 17, 1987

**GRIEVANT:**

James Fox

**OCB GRIEVANCE NO.:**

G-87-1703

**ARBITRATOR:**

Andrew J. Love

**FOR THE UNION:**

Brenda Persinger

**FOR THE EMPLOYER:**

**KEY WORDS:**

Suspension  
Just Cause  
Sleeping On Duty  
Neglect Of Duty

**ARTICLES:**

Article 24 - Discipline  
    §24.01-Standard  
Article 25 - Grievance  
Procedure  
    §25.01-Process  
    §25.02-Steps

**FACTS:**

Grievant was employed as a Corrections Officer 2 assigned to the Marion Correctional Institute. Grievant was observed by Grievant's supervisor asleep in the assigned area of responsibility. After the Grievant admitted being asleep on duty, a departmental hearing was held in which a three-day suspension was recommended and approved. A grievance was timely filed.

**ARBITRATOR'S OPINION:**

The Arbitrator found there was just cause for finding that the Grievant was neglectful of duties by sleeping on duty; however, the Arbitrator did recognize that the Grievant's medication might have been the causative factor of that behavior. In weighing the need for the Grievant to remain alert on duty in an area housing violent offenders, and balancing that with the Grievant's lack of knowledge of the effects of the medication, the Arbitrator held that the disciplinary action was not commensurate with the offense and there should have been a two-day suspension rather than a three-day suspension. Accordingly, the grievance was denied, but the Grievant was reimbursed in the amount of one day's pay.

**AWARD:**

The grievance is denied, but the Grievant shall receive back pay in the amount of one day's pay.

**TEXT OF THE OPINION:**

**ARBITRATION**

**MARION CORRECTIONAL  
INSTITUTION**

AND

**O.C.S.E.A. LOCAL 11  
A.F.S.C.M.E. A.F.L.-C.I.O.**

**ARBITRATOR:**

Andrew J. Love

**CASE NUMBER:**

G87-1703

**(James Fox Grievance)**

**For Grievant:**

Brenda Persinger

**DECISION AND AWARD**

The issues presented in this proceeding are whether the three day suspension of the Grievant by the Marion Correctional Institution (hereinafter "MCI") on June 24, 1987 through June 26, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective

Bargaining Agreement; whether the disciplinary action taken was commensurate with the offense; and whether the grievance was improperly filed, pursuant to Section 25.02 of the contract between the State of Ohio and OCSEA Local 11 AFSCME AFL-CIO.

The following joint exhibits were admitted into evidence:

1. Contract between the State of Ohio and OCSEA Local 11 AFSCME.
2. Employee rules and standards.
3. Grievance trail.
4. Disciplinary trail.
5. Signed receipt of standards by Grievant on August 14, 1986.

It should be noted that, although joint exhibit 5 has been admitted into evidence, the Grievant, through his representative, states that the labor organization did not agree with such standards and rules because said labor organization was not a party to the development of such standards and rules.

The facts are as follows:

On April 24, 1987, during the third shift, the Grievant, a Corrections Officer II for approximately twenty-two months, was observed by his supervisor, Captain Joseph Ustaszewski, apparently sleeping in the day room, which is his area of assigned responsibility over inmates at MCI. The Grievant admitted that he was asleep while on duty. A departmental hearing was held on the matter, and the hearing examiner recommended a three day suspension. Such suspension was approved. A grievance was timely filed.

Turning to the issue raised by MCI that the grievance should be withdrawn due to improper filing, this Arbitrator determines that said grievance form (joint exhibit 3) was properly filed. Section 25.01(B) states, in pertinent part:

Grievances may be processed by the Union on behalf of a Grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievants.

The grievance form itself allows for the Grievant or Union representative to sign and date the form. Therefore, this grievance is subject to arbitration.

This Arbitrator finds that "just cause" existed for finding that the Grievant was neglectful of his duties by sleeping while on duty. The applicable standard of employee conduct for the Ohio Department of Rehabilitation states, pursuant to Rule No. 5, that sleeping on duty is a violation of such standards. Captain Ustaszewski, who has been employed for twenty-five years in corrections and has been a Captain since 1980, testified that, on April 24, 1987, he and his staff were taking the routine count, which requires the correction officers on duty to call in their inmate body count in their assigned area. When the Grievant's telephone call was not made, Captain Ustaszewski went to the Grievant's assigned area. There he found the Grievant sleeping in his chair. He awakened the Grievant at that time. The Grievant admitted to Captain Ustaszewski that he had been asleep. He then reported the incident to John Morgan, Deputy Superintendent of Programs, who subsequently recommended disciplinary action.

John Morgan, who has been employed for eighteen years in corrections, testified that he reviewed the discipline reports by Captain Ustaszewski. As a result of his investigation, Mr. Morgan determined that the Grievant admitted that he was asleep and recommended further action. He testified that he recommended that the Grievant be suspended for a period of five days, pursuant to the disciplinary penalty under Rule No. 5 of the previously stated standards. He

testified that, upon departmental hearing, the hearing examiner felt that there were mitigating circumstances due to the medication that the Grievant was taking. That hearing examiner also took into account the Grievant's lack of any prior discipline. At that point the hearing examiner reduced the suspension to a period of three days.

Mr. Morgan stated that the reasons employees must not sleep while on duty are because they could be harmed or inmates could take them hostage in a violent situation. Furthermore, inmates themselves may be harmed or their belongings may be stolen. He further stated that MCI is a close security institution, which contains inmates who have committed violent crimes, and therefore correction officers must be alert at all times.

Mr. Morgan was advised of a case involving another officer who was apparently caught sleeping while on duty, but that officer received only a written reprimand. Mr. Morgan stated that, true enough, this officer (an Officer Soper) was observed apparently sleeping. When that officer was approached, he denied that he was sleeping. Based on the hearing, MCI determined that not enough evidence was available to clearly establish that Officer Soper was sleeping, because he had made his normal call just moments before he was seen with his eyes closed. As a result, the hearing examiner in that case found that Officer Soper was guilty of being inattentive to his duties and issued a written reprimand.

James Harris, a Union Steward and a Corrections Officer II, stated that Captain Ustaszewski observed another officer (Officer Schaffer) apparently sleeping while on duty, but the Captain, to his knowledge, did not recommend discipline. On cross-examination, however, Mr. Harris stated that he did not know whether disciplinary action had been taken against Officer Schaffer.

The Grievant stated that he was sleeping while on duty, however it was not an intentional act. The Grievant stated that he was on medication for high blood pressure. He stated that the medication prescribed by his physician was a new type of medication, and that not much testing had been done on it to determine its possible side effects. The Grievant stated that he had been on this medication for approximately two years. He further stated that he was not clearly aware of the side effects of this medication, because the changes in his condition were gradual. Over time, however, the Grievant discovered that he was constantly tired. This was due, apparently, to this medication's propensity to make his neck muscles and other muscles tense. Approximately one month before the date of this hearing (December 9, 1987), the Grievant went to his doctor about his constant fatigue. The doctor advised him that the medicine's side effect was indeed making the Grievant tense. The doctor then changed the prescription to one which enables the Grievant to relax. The Grievant states that he has not been drowsy due to fatigue ever since the new medication was prescribed.

In finding that "just cause" existed for the imposition of disciplinary action against the Grievant, this Arbitrator does not find that the evidence relating to other employees possibly sleeping on the job to be sufficient to show that there is disparate treatment as to Grievant. In one instance, one employee was disciplined to a lesser extent than the Grievant because of the lack of sufficient evidence as determined by MCI personnel. The other example of disparate treatment put forth by the Grievant does not indicate through the testimony whether that Grievant was disciplined.

This Arbitrator does, however, recognize (and is persuaded by evidence rendered by the Grievant) that the Grievant was unaware that his medication was causing muscle tension. The Grievant did take steps to resolve that problem with new medication. In weighing the need for the Grievant to remain alert on duty in an area housing inmates who may be violent offenders, and balancing that with the Grievant's lack of knowledge of the effects of his medication, this Arbitrator finds that the disciplinary action commensurate with this offense is more appropriately a two day suspension rather than a three day suspension. Even though MCI considered the fact that the Grievant was taking medication, it was not aware of the medication's side effects. That

information was not known until long after the suspension was ordered. This additional evidence should be considered regarding the matter of the appropriate penalty.

Accordingly, the grievance is DENIED, but the Grievant shall receive back pay in the amount of one day's pay.

December 17, 1987

DATE

ANDREW J. LOVE, ARBITRATOR

COUNTY OF MARION

STATE OF OHIO