

ARBITRATION DECISION NO.:

159

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Western Reserve Psychiatric
Habilitation Center

DATE OF ARBITRATION:

October 20, 1988

DATE OF DECISION:

November 30, 1988

GRIEVANT:

Houston Terrell

OCB GRIEVANCE NO.:

23-18-(88-02-23)-0030-01-04

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Steve Lieber

FOR THE EMPLOYER:

Jennifer Dworkin

KEY WORDS:

Just Cause
Sleeping On The Job

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.05-Imposition
of Discipline
 §24.08-Employee
Assistance Program

FACTS:

Grievant was employed at Western Reserve Psychiatric Habilitation Center in October, 1984, as a Therapeutic Program Worker. Grievant was assigned to third shift where his duties primarily involved monitoring the patients and ensuring the security of the Unit. In 1987, Grievant was disciplined for sleeping on duty and being intoxicated while on the job, receiving a written reprimand, a two day suspension and a six day suspension. A second six day suspension was held in abeyance when grievant agreed to enter an EAP program for alcoholism. Following treatment, Grievant was cleared to return to work on November 14, 1987. On December 14, 1987, Grievant was observed sleeping on duty and was subsequently discharged.

EMPLOYER'S POSITION:

The Third Shift Nurse Supervisor found grievant slumped in his chair with his shoes off, pants open at waist, hands folded across his chest, and eyes closed. The supervisor called him by name in a normal to loud voice but grievant failed to respond until the third call. Approximately an hour and a half later, grievant was observed in the same position and again he failed to respond until the third call. Grievant was disciplined for just cause. Grievant had previously received progressive discipline for sleeping on duty and failed to improve after EAP. The employer received no evidence to support an allegation of racial discrimination.

UNION'S POSITION:

Grievant was not asleep and was disciplined only because he is black. The penalty was too harsh because grievant had recently undergone by-pass surgery and participated in an EAP for alcoholism and was on medication which made him drowsy. In addition, grievant's supervisor has a history of racial discrimination and the institution maintains a racial discriminatory attitude.

ARBITRATOR'S OPINION:

Charging an employee with sleeping on duty requires some objective measure short of using sophisticated and expensive machinery. The supervising R.N., the other TPW, and the grievant himself all agree on the objective facts. Twice on the evening in question, the supervisor found the grievant slumped in a chair, head back, eyes closed, shoes off, pants unzipped at the waist and hands resting on his body. Grievant did not respond to the supervisor until he was called three (3) times. The only difference between the testimonies is the characterization of the objective facts. Grievant testified that he was "merely resting his eyes" and did not answer because he did not want to. A deliberate refusal to answer constitutes insubordination. Either the grievant was asleep or deliberately insubordinate. The arbitrator concluded grievant's behavior constitutes inattention to duty; sleeping on the job.

Although testimony was given by two credible witnesses related to charges of racial discrimination, neither was able to testify to incidents that they either witnessed or participated in or produced any direct, non-hearsay evidence of any incidents. The burden of proof was not met concerning racial discrimination.

The Union offered no medical evidence to substantiate the "drowsiness by medication" defense. Grievant's testimony which was the only proof offered, was inconsistent. The by-pass surgery occurred 2-1/2 years before the incident and grievant admitted he was no longer taking antibiotics associated with that illness. Grievant's testimony about current medications was inconsistent with statements in his disability application. The arbitrator noted that if required medications made grievant "drowsy," a question arises as to whether grievant was fit for duty.

Grievant underwent EAP for alcohol dependency. As neither grievant nor employer argued that the discipline involved in this grievance was related to the alcohol problem, the requirements of

EAP Section 24.08 have been met. Grievant was asleep on the job and dismissal is commensurate with the offense. Considering grievant's previous discipline, the dismissal is progressive in nature. The Union offered no evidence to mitigate either the nature of the offense or the extent of the penalty.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11
AFSCME, AFL-CIO**
Union

and

**Ohio Department of
Mental Health**
Employer.

Grievance:

23-18-(2-23-88)-030-01-04

Grievant:

(Houston Terrell)

Hearing Date:

October 20, 1988

Opinion Date:

November 30, 1988

For the Union:

Steve Lieber

For the Employer:

Jennifer Dworkin

Present: In addition to the Grievant (Houston Terrell) and the advocates named above, the following persons were present: Robert Robison (Union witness), Juanita Brown (Union witness), George R. Nash (Labor Relations, ODMH), Betty Lou Melstead (Labor Relations, WRPHC-ODMH), Susan Freeder, R.N. (employer witness), Elizabeth Tarpley, T.P.W. (employer witness: subpoenaed).

Preliminary Matters:

The Arbitrator asked permission to record the proceedings for the sole purpose of refreshing her memory and on condition that the tapes are destroyed on the day the opinion is rendered. The employer and the union both consented.

The Arbitrator asked permission to submit the opinion for possible publication. The employer and the union both consented.

Neither party requested sequestration of witnesses. All witnesses were sworn. Both parties agreed that the matter was properly before the Arbitrator.

Stipulated Facts:

The parties stipulated to the following facts:

1. Grievant was employed as a Therapeutic Program Worker (TPW) at Western Reserve Psychiatric Habilitation Center at the time of his removal.
2. Grievant was hired on October 15, 1984.
3. Susan Freeder, Psychiatric Nurse Supervisor 2 was Grievant's supervisor.
4. Grievant worked third shift on Cottage 27.
5. On December 14, 1987 Grievant and Elizabeth Tarpley were the only employees on Cottage 27 during third shift.
6. Susan Freeder came to Cottage 27 at approximately 1:20 a.m. and 3:00 a.m. on December 14, 1987.

Issue:

The issue as agreed to by the parties was as follows.

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

Relevant Contract Sections:

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden or proof to establish just cause for any disciplinary action.

§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. Verbal reprimand (with appropriate notation in employee's file);
- B. Written reprimand;
- C. Suspension;
- 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.

§24.05 - Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action.

Facts:

This Grievance concerns the dismissal of the Grievant, a Therapeutic Program Worker (TPW) at Western Reserve Psychiatric Habilitation Center (WRPHC).

Western Reserve is located in Northfield, Ohio and is the largest of sixteen psychiatric hospitals operated by the Department of Mental Health. The facility employs approximately 850 staff and houses 600 patient beds. It is an intermediate care hospital designed to provide treatment and rehabilitation services to adults in need of care beyond an acute phase of mental illness. Care and treatment is provided by professional staff who rely on the observations of direct care workers such as TPW's in making many of their clinical decisions.

As a TPW, Grievant's responsibilities included training patients in daily living skills, assisting in educational and recreational activities, and structuring patients' leisure time. Grievant was assigned to third shift which begins at 11:15 p.m. and ends at 7:15 a.m. The responsibilities placed on each third shift employee is in some senses greater than that of other shifts because fewer TPW's are on duty. The patients are asleep during most of third shift so that the bulk of employee duties are in monitoring the patients and ensuring the security of the unit. The TPW is responsible for making irregular consistent checks throughout the night paying special attention to patients who are suicidal, violent, bed-wetters, or in restraints. Employees must also check for medication reactions, smoking, fires, and signs of escape attempts. The observations are passed on to the oncoming shift and documented in the patient files for use by doctors, psychologists, nurses, and social workers in planning the patient's treatment. (See Joint Exhibit No. 6 "Position Description.")

The Grievant was hired as a TPW at WRPHC on October 15, 1984. Prior to the incident at issue, the following disciplinary actions existed with regard to this Grievant (consistent with §24.06).

Grievant received a written reprimand dated 7/25/87 for 2 incidents of sleeping on duty on June 8, 1987. Grievant was suspended on August 13, 1987 for two (2) days for sleeping on duty on June 19, 1987. On September 16, 1987, Grievant was suspended for six (6) days for being intoxicated on the job on June 27, 1987 and for sleeping on duty on July 3, 1987. On October 30, 1987, Grievant was given a second six (6) day suspension for sleeping on duty on September 1, 1987 and September 15, 1987 (Joint Exhibit No. 8). This last discipline was held in abeyance because on September 28, 1987, Grievant agreed to enter an EAP program for alcoholism. He was granted disability leave from October 17, 1987 to November 14, 1987. He was an in-patient in an alcohol treatment program from October 17, 1987 to November 14, 1987 when he was certified by his doctor as "ready to return to work" (Employer's Exhibit No. 3).

On December 14, 1987, the incident which is the subject of this Grievance occurred. The Grievant was dismissed as of February 12, 1988 and filed his Grievance on February 13, 1988

(Joint Exhibit No. 3).

The Grievant stated his Grievance as follows.

“On 2/12/88 I was given a letter of removal from state service. While it is known that I have a problem and have attempted to correct such by going through the Ohio EAP plan **part of the charges against me are not true.**

I had made it known to management that almost all of the charges that have been brought against me was done by the **same RN supervisor**. I and many other BLACK staff have had problems with this **same supervisor**. It has even been brought to managements attention more than once that **this RN supervisor** and others will overlook a white staff member sleeping and charge a black staff with sleeping and send the black staff for a pre-disciplinary conference. **I am aware that its a violation to sleep on duty but I'm also saying that most of the charges of sleeping by this RN is fictious and the conditions that had caused earlier problems have been in the process of correction before this removal.”**

Susan Freeder, R.N., was on the date at issue Third Shift Nurse Supervisor. That evening at 1:20 a.m. she came to C-27 Unit and found the Grievant in the following position: slumped in his chair, shoes off, pants open at waist, hands folded across his chest, and eyes closed. She testified that she called him by name in a normal to loud voice three (3) times and that after the third call he responded. She asked him to get up and move around to become alert. He got up and went to bathroom, came back, and resumed his former position. This incident was observed by Elizabeth Tarpley, the other TPW on the unit, who so testified consistent with her written statement (see Employer's Exhibit No. 2).

Ms. Feeder testified that she returned at 3:00 a.m. Again the Grievant was slumped in a chair (a different chair), head back, eyes closed, hands over his abdomen, shoes off, pants unzipped at waist. Again Ms. Feeder called the Grievant by name three (3) times. Again he did not respond until after the third (3rd) call. This second incident was observed by Ms. Tarpley who so testified. The Grievant maintained in his testimony that he was not asleep, "merely resting my eyes." He testified that he could close his eyes and "be well aware". He testified that he heard Ms. Feeder call him all three times on both occasions but chose not to answer until after the third call. The Grievant also testified that his medications at that time were making him drowsy. At first, he said that his antibiotics were making him drowsy and subsequently he testified that the over-the-counter drugs taken for itching were making him drowsy. The testimony given by the Grievant about his various medicines and their various effects was confusing and inconsistent.

The Grievant charged that he was only written up because Ms. Feeder was discriminating against him because he was black. He claimed that Ms. Feeder was "constantly writing me up because I am black."

On cross-examination, Ms. Feeder was asked if she had ever disciplined any white employees. She named D. Gorowitz, P. Holly, and M. Dorsey.

Mr. Robert Robison, TPW, and Union official at WRPHC also testified. Mr. Robison alleged that the professional staff at WRPHC discriminated against black employees and that in his opinion Ms. Feeder so discriminated. He provided no testimony of incidents which he directly witnessed. Nor would he provide names of other black employees who were discriminated against. Ms. Juanita Brown, TPW, Union night shift steward, testified that she had trouble getting released time to investigate allegations of discrimination. She could provide no testimony as to alleged incidents of racial discrimination which she saw or investigated.

Employer's Position:

The Grievant was disciplined for just cause. He was found sleeping on duty twice. He had previously received discipline for this very same offense; the prior discipline was progressive and followed the grid. Moreover, his second six (6) day suspension was held in abeyance pending his EAP. His return to work after EAP constituted a second chance and he failed. The employer will investigate any allegation of racial discrimination which can be supported by evidence; but to date, the employer has not received such evidence.

Union Position:

1. The Grievant was not asleep;
2. The Grievant was only written up because he was black. Ms. Feeder has a long time record of racial discrimination and the whole institution (WRPHC) maintains a racial discriminatory attitude;
3. The penalty was too harsh as the Grievant was made drowsy by needed medication, had just undergone a bypass operation, and was in EAP.

Discussion

A perusal of arbitration decisions reveals that proving a person is asleep on the job is a difficult burden of proof to meet. The question is did the employer meet that burden here. Under Center Policy #2-13, violation No. 21 requires "sleeping on the job; inattention to duty" (Joint Exhibit No. 4). Guidelines for Disciplinary Action under Neglect of Duty provides that "sleeping on duty or unalert on duty" is an offense where safety or persons or property are endangered and sleeping on duty "is also an offense when persons or property is not endangered". On both the IOC dated 12/14/87 (Joint Exhibit No. 3) and the Step 3 (date 12/29/87), the Grievant was charged under No. 21 of #2-13. Something less than full REM sleep is required; proving the level of "sleep" of any person without the aid of machines is impossible. Charging an employee with sleeping on duty requires some objective measure short of using sophisticated and expensive machinery. In the case before the Arbitrator, the Supervising R.N., the other TPW, and the Grievant himself all agreed on the objective facts. Twice in one evening, the supervisor found the Grievant slumped in his chair, head back, eyes closed, shoes off, pants unzipped at waist, hands resting on the body. Each time the Grievant did not respond until after he was called three (3) times. The only difference between three testimonies is the characterization of the objective facts. Ms. Feeder characterizes the Grievant as "sleeping." Ms. Tarpley refused (wisely considering her position) to characterize the Grievant's behavior. The Grievant says he was "merely resting his eyes". He maintain he did not answer because he did not want to. A deliberate refusal to answer constitutes insubordination. The Grievant cannot have it both ways. By his own testimony, he was "very drowsy", "feeling real comfortable". Either he was asleep or deliberately insubordinate. The Arbitrator finds that the Grievant violated No. 21; he was inattentive to duty: sleeping on the job.

The second argument of the Union was that the Grievant was the subject of racial discrimination both by Ms. Feeder, in particular, and WRPHC, in general. This charge is extremely serious, and the Arbitrator treats it seriously. In the testimony of the Grievant, Mr. Robison or Ms. Juanita Brown not one piece of evidence was adduced to support this charge. Both Mr. Robison and Ms. Brown impressed the Arbitrator as serious, decent persons; however, neither of them could testify to incidents which they either had witnessed or in which they had participated which related to charges of racial discrimination. Both witnesses had heard many stories. However, when asked directly they could not produce direct, non-hearsay evidence of any incidents. If any

witnesses existed who could support this charge, they were not produced. The Grievant's testimony of racial discrimination by Ms. Feeder was inconsistent. During his testimony, he changed his testimony three times about what words transpired between he and Ms. Feeder that night. None of his testimony on his words was consistent with Ms. Tarpley's testimony about that night.

The Arbitrator finds that the Union did not meet its burden of proof with regard to racial discrimination.

The Union's next argument has two (2) prongs. First, that the penalty should be mitigated because the Grievant's drowsiness was caused by medicines he needed to take. Again, the Union did not offer any proof other than the Grievant's own testimony which, to be generous, was inconsistent and confusing. The by-pass operation referred to in the Union's opening statement occurred over 2-1/2 years before the incident at question and the Grievant, by his own admission, was no longer taking the antibiotics associated with that illness. The Grievant's testimony about current medications was inconsistent with his statements made in his disability application. The Union offered no medical evidence to substantiate the "drowsiness by medication" defense. The Arbitrator notes that if required medications made Grievant "drowsy", a second issue arises as to whether the Grievant was fit for duty or would be fit for duty.

The second prong of the Union's third argument is that dismissal of the Grievant undermines the purpose of the EAP program. On its face, the requirements of the EAP section 24.08 has been met. The employer held in abeyance the 2nd six (6) day suspension while the Grievant underwent EAP. The section mandates that at the end of 90 days after return to work that the employer give serious consideration to modifying the discipline. This discipline arising from a new incident unfortunately occurred before the 90 days were up. The Grievant underwent EAP for alcohol dependency. By his own testimony, he has been sober since then and continues in AA. He is to be commended. However, neither the Grievant nor the employer maintained that the discipline involved in this Grievance was related to his alcohol problem.

Award

The Arbitrator finds that (1) the Grievant violated No. 21 (Policy 2-13) by sleeping on the job; (2) that dismissal was progressive in light of previous discipline, (3) that dismissal was commensurate to the offense, and (4) that the Union introduced no evidence which would mitigate either the nature of the offense nor the quantum of the penalty.

Grievance denied.

November 30, 1988

Date

Rhonda R. Rivera

Arbitrator