ARBITRATION DECISION NO.:
270

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

EMPLOYER:
Department of Youth Services,
Cuyahoga Hills Boys School

DATE OF ARBITRATION:
May 10, 1990

DATE OF DECISION:
June 29, 1990

GRIEVANT:
Raymond Samuels, Jr.

OCB GRIEVANCE NO.:
35-03-(89-08-10)-0047-01-03

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Tim Miller

FOR THE EMPLOYER:
Crystal E. Bragg

KEY WORDS:
Removal
Sleeping On Duty
Procedural Defects
Disparate Treatment
Delay In Imposing Discipline
Lax Enforcement Of Rules

ARTICLES:
Article 5 - Management Rights
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive Discipline
    §24.04-Pre-Discipline
    §24.05-Imposition of Discipline
Article 25 - Grievance

Procedure
§25.03-Arbitration
Procedures
§25.04-Arbitration
Panel
Article 43 - Duration
§43.03-Work Rules

FACTS:

The grievant had been employed for ten months as a Youth Leader 2 by the Department of Youth Services. His work shift began at 11:00 p.m. and ended at 7:00 a.m. Due to complaints of rowdy behavior at night, the facility's Superintendent, Deputy Superintendent and the Security Chief began monitoring the midnight shift. On June 10, 1989 the grievant's Duty Officer found him sleeping. He was warned but not given a reprimand. Later the same night the grievant's Duty Officer, the Superintendent and Deputy Superintendent found the grievant sleeping again. On June 28, 1989 another Duty Officer found the grievant sleeping and called the grievant's Duty Officer to observe the grievant. A notice of investigation was then sent and discipline was imposed for the June 10 and 28, 1989 incidents. In the pre-disciplinary hearing the basis for discipline was a violation of work rule B-38. The grievant was ultimately removed for violating work rule B-19 and Ohio Revised Code section 124.34 on July 10, 1989.

EMPLOYER'S POSITION:

There was just cause for removal. The grievant was observed sleeping on June 10, 1989 by three management personnel whose observations of the grievant were consistent. He was wrapped in a blanket with his eyes closed and was not responsive to attempts to get his attention. On June 28, 1989 the grievant was again observed with his eyes closed and was heard snoring. The grievant admitted that he had dozed off. There is no disparate treatment present. The present facility administration cannot be prevented from enforcing work rules because the former administration was lenient. Further, the collective bargaining agreement rejects all past practice as not binding.

The work rules and penalties imposed are reasonable under the circumstances. Youth Leaders are charged with maintaining security at a facility housing juvenile felony offenders. Sleeping on duty creates serious security risks to the youth, staff members and the community. The grievant had notice of work rules B-19, and B-38 through orientation procedures. The union was also aware of the work rules and had an opportunity to discuss them during a Labor-management meeting. The grievant denied any need to be relieved on the nights he was found sleeping. Discipline was timely imposed and any delays in imposing the discipline were caused by the grievant's absence from work.

UNION'S POSITION:

There is no just cause for removal. On June 10, 1989 the grievant was wrapped in a blanket because the air conditioner control was broken. His Duty Officer never asked him if he was sleeping. The grievant had nodded off on June 28, 1989 but valid mitigating circumstances existed. The grievant's fiance had a broken ankle and he has a fourteen month old daughter, consequently he has assumed many household chores which cause him to lose extensive amounts of sleep. There was no rowdy behavior, escape attempts or other security violations on the grievant's shift. If the grievant was a security risk he should have been placed on administrative leave during the investigation.

The employer violated section 24.04 of the agreement by citing Ohio Revised Code section 124.34, which does not require just cause, in support of discipline. The Pre-disciplinary hearing notice did not specify removal as the penalty for the offenses, which prejudiced the grievant as no other employee had been removed for sleeping. The employer's Letter of Removal was ambiguous. Directive B-19 was specified as having been violated but discipline was imposed according to B-38. Additionally, the employer failed to clearly notify employees of the effective date of Directive B-38. The employer also failed to impose discipline in a timely manner. The grievant was removed sixty-two days after the first incident. The employer also failed to warn the grievant about possible discipline after the first incident, therefore, the grievant had no

opportunity to correct his behavior. Lastly, the grievant received disparate treatment. Other employees found sleeping at the facility received suspensions while this grievant was removed.

ARBITRATOR'S OPINION:

There is just cause for discipline, however due to procedural defects the penalty imposed must be reduced. There was credible testimony to the fact that the grievant was sleeping on June 10 and 28, 1989. The inference that the grievant was sleeping was unequivocally supported by the testimony and the grievant admitted to dozing off. Personal problems argued as mitigating circumstances are not valid. If the grievant realized he was too tired to work he should have requested relief. The employer has the authority to issue new work rules. The time span between the incidents and the imposition of discipline was excessive. There was no evidence introduced showing that the grievant was at fault for the delay in imposing discipline.

The grievant was not given an opportunity to correct his behavior. He was not made aware of the seriousness of the offense until after the second incident. The employer also violated sections 24.01 and 24.04. Use of Directives B-19 and B38 created ambiguities because different penalties are imposed by each Directive. The notice requirement was deficient due to these differences. Notice was also deficient because the Third Party Hearing notice stated only that discipline was being imposed for Neglect of Duty. The employer also failed to give adequate notice of the effective date of the Directives. Although the grievant had received the Directives, no effective date was given. Lastly, the employer did not impose work rules consistently. The union introduced evidence of other employees who received suspensions for sleeping on duty which the employer failed to distinguish from the grievant's situation.

AWARD:

The grievance is sustained in part. The grievant is to be reinstated without back pay. This action is to put the grievant on notice of the seriousness of the offense committed.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, OHIO DEPARTMENT OF YOUTH SERVICES, GUYAHOGA HILLS BOYS SCHOOL

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE:
Raymond Samuels Jr. (Discharge)

OCB Case No.:
35-03-(89-08-10)-0047-01-03

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
June 29, 1990

APPEARANCES

For the Employer
Crystal E. Bragg, Superintendent
Harry Edwards,
Deputy Superintendent
Deneen Donaugh, Labor
Relations Administrator
Edgar M. Jacobs, Duty Officer
Herman L. Dickinson,
Youth Leader
Donald E. Elder, Deputy Director

For the Union
Raymond Samuels Jr., Grievant
Dorothy Brown, Chapter President
William Bell,
Chapter Vice President
Tim Miller, Staff Representative

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Mental Youth Services, Cuyahoga Hills Boys School, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1989 - July 1, 1991 (Joint Exhibit 1).

The arbitration hearing was held on May 10, 1990 at the Cuyahoga Hills Boys School, 4321 Green Road, Warrensville Township, Ohio 44128. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUE

Was Raymond Samuels Jr., the Grievant, discharged without just cause? If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the

Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in the Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

(Joint Exhibit 1, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 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.

Section 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 evalua-tion 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.

(Joint Exhibit 1, Pgs. 37-38)

. . .

Section 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

. . .

(Joint Exhibit 1, Pgs. 38-39)

ARTICLE 43 - DURATION

. . .

Section 43.03 - Work Rules

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.

. . .

(Joint Exhibit 1, Pg. 71)

STIPULATED FACTS

1. The grievance is properly before the Arbitrator.
2. The Grievant had no prior discipline.
3. The Grievant's effective date of hire as a Youth Leader 2 was December 4, 1988.

CASE HISTORY

Cuyahoga Hills Boys School, the Employer, has the primary mission of confining and rehabilitating juvenile felony offenders. The Employer is a maximum security facility; and at the time of the matter in dispute housed 339 juveniles. The inmate population exceeded the designated capacity of 200 beds. In terms of logistics, the facility is a self-contained unit and is structured as an open dorm setting. Eight dormitories house the youths which are divided into three major areas: a day room; bed area; and bathroom area. In the middle of this arrangement sits a Youth Leader's office encased in glass to allow clear observation opportunities of the previously described areas. Each dorm, moreover, houses on the average of forty-five youth offenders.

Raymond Samuels Jr., the Grievant, was originally hired as a Youth Leader 2 on November 7, 1988 in an interim capacity. Grievant's status was changed to a full-time permanent position on December 4, 1988; he

was removed on August 11, 1989. As such, Grievant was employed for approximately ten months prior to his removal for sleeping on duty during work hours. In his capacity as a Youth Leader 2, Grievant was involved in a number of supervisory responsibilities: maintaining control and security in the dormitories, and supervising recreational activities outside of the dormitories. All of these activities require a great deal of alertness because the staff is outnumbered and the hardened nature of the youth population.

Crystal Bragg, the Superintendent, and her Deputy, Harry Edwards, discussed the general circumstances which led to an investigation on the midnight shift dealing with alleged sleeping activities. It should be noted that at the time of the incidents in dispute Grievant was working on this shift which commences at 11:00 p.m. and terminates at 7:00 a.m. Both individuals testified that they received a number of complaints concerning rowdy behavior on the midnight shift which negatively impacted rehabilitative efforts. Other complaints were initiated by supervisors alleging that they had caught employees sleeping while on duty; but that they could do nothing about it because they had no witnesses to support their contentions.

As a result of these complaints, Bragg, Edwards and the Security Chief decided to directly monitor the situation by evaluating the situation on the midnight shift. They also decided on certain security procedures to preclude a potential alert perpetrated by the work force. The date selected by these individuals as the date for their audit was June 10, 1989.

Several sleeping incidents involving the Grievant took place on June 10, 1989. Edgar W. Jacobs, the Grievant's Duty Officer, reviewed an initial incident which took place at approximately 1:30 a.m. Jacobs was conducting his initial rounds, by himself, and arrived at Dormitory "D", the Grievant's post. Jacobs testified that he found the Grievant sleeping and woke him up. Jacobs, moreover, claimed that he warned the Grievant that "you can't be sleeping around here." He did not, however, formally issue a reprimand nor solicit a witness because "I gave him a break the first time because he hadn't been there long enough to be talked to about sleeping."

Another incident took place on June 10, 1989 at approximately 3:30 a.m. This incident once again involved the Grievant and surfaced as a consequence of the audit initiated by Bragg. Bragg, Edwards, and Jacobs entered Dormitory "D". As they approached the Youth Leader's office, they observed the Grievant sitting with a blanket draped around his body and his eyes closed. They moved to different locations during this observation period; and made waving movements to determine whether the Grievant would respond. No response was elicited and it was determined the Grievant was asleep. Bragg entered the office and the Grievant seemed startled. She then asked the Grievant whether he was "ok" and needed a break.

A final incident took place on June 28, 1989. At approximately 3:20 a.m., Herman L. Dickinson, a Duty Officer, contacted Jacobs and asked him to report to Dormitory "D". Upon arriving at this unit, both individuals observed that he was asleep. They alleged that they heard the Grievant snoring. Jacobs, moreover, opened the office door which startled the Grievant. The Grievant was also allegedly advised that sleeping was a violation and that he would be written up. The Grievant maintained that after Jacobs and Dickinson entered his office he admitted that he dozed off for a few minutes; but that he offered some mitigating circumstances.

After Jacobs and Dickinson submitted their Notice of Investigation (Joint Exhibit 5) regarding the June 10, 1989 and June 28, 1989 incidents, a Third Party Hearing Notice was issued on June 30, 1989 by Deputy Superintendent Robert L. Jackson. It contained the following relevant particulars:

“. . .

Dear Mr. Samuels:

You have received a copy of the Notice of Investigation subjecting you to discipline for Neglect of Duty as described in the N.O.I. dated June 10th & June 28th (2). In order to bring this investigation to a possible conclusion, a third party hearing will be held on the matter on Thursday July 6, 1989 at 6:00 A.M. in my office.

Should you decide to exercize (sic) your right to a hearing, you may obtain the assistance of a Union Representative to present testimony to substantiate why you believe the proposed allegation is not justified. At the hearing, you will be provided with a list of witnesses and/or documents used to support the allegation against you.

After the hearing, I will consider the evidence and testimony submitted and make a written recommendation to the Superintendent.

This letter will be the only formal notice of the hearing. If there are any changes, you will be notified. Absent any extenuating circumstances, failure to attend this hearing, as scheduled, will result in a waiver of your right to a hearing.

. . ."

(Joint Exhibit 4, Pg. 1)

It appears that a pre-disciplinary hearing was never held on July 6, 1989. Rather, it was re-scheduled two additional times. The hearing was eventually held and conducted by Jackson on July 18, 1989. Jackson found that the Grievant was sleeping while on duty on both June 10, 1989 and June 28, 1989 and recommended removal. As partial justification he noted in his report:

". . .
Department of Youth Services Directive B-38, Disciplinary Action, lists sleeping on duty as a serious infraction of DYS work rules. It recommends suspension or removal of the first infraction of sleeping on duty.
. . ."

(Joint Exhibit 4, Pgs. 4 and 5)

On July 25, 1989, Bragg issued a Letter of Removal. It contained the following relevant particulars:

". . .
On June 10, 1989 and June 28, 1989 you were observed sleeping while on duty. As a result, you not only jeopardized yourself, but your co-workers, the youth and the community.

Sleeping on duty is in violation of DYS Directive Chapter B-19 and constitutes neglect of duty under Section 124.34 of the O.R.C.

You are hereby removed from your position of Youth Leader 2 effective: 8-11-89

You are to turn in your institutional keys, and any contact you have with this institution during the term of this Removal shall be through the Personnel Office.

A copy of this Letter of Removal will be placed in your personnel file.
. . ."

(Joint Exhibit 4, Pg. 6)

On August 10, 1989, the Grievant challenged the removal decision by filing a grievance. It contained the following Statement of Facts:

". . .
Statement of Facts (for example, who? what? when? where? etc.):

Management is in violation of the above Articles and Sections of Union contract. We make such claims when on 8-11-89 Mr. Samules (sic) was removed as Youth Leader # at CHBS on the 11-7 shift.

Mr. Samules (sic) was charged with B19, the whole section and neglect of duty under Section 124.34 of the ORC. The Union contract superseed (sic) such Articles and Sections of ORC and under past practices no one has ever been removed for sleeping for twenty years as I know of.
. . ."

(Joint Exhibit 6, Pg. 1)

In terms of a remedy, the Grievant sought to be made whole and given back his job with full back pay and other monies due him.

On August 21, 1989, a Step 3 Grievance Hearing was held at the facility. The Hearing Officer determined that the Union failed to rebut the Employer's just cause allegations (Joint Exhibit 6).

The Parties were unable to resolve the grievance. Since neither Party raised any objections regarding substantive nor procedural arbitrability, this grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to remove the Grievant because he was found to be asleep on duty on two separate occasions. The Employer, moreover, vigorously challenged the litany of procedural defects raised by the Union.

The Employer maintained that it established that the Grievant was asleep on June 10, 1989 and June 28, 1989. With respect to the first incident, three management representatives made consistent and common observations. The Grievant was wrapped in a blanket and his eyes were closed. He, moreover, seemed to be unresponsive to a number of attention getting attempts. Bragg also testified that the Grievant became startled when she and the other participants entered his office. This testimony, moreover, was corroborated by a number of written statements (Employer Exhibits 2 and 3) authored by the observers shortly after the incident.

Similar accusations were offered regarding the June 28, 1989 incident. Both Jacobs and Dickinson observed the Grievant asleep; and were sensitized to this condition because they heard him snoring prior to their entrance into his office. He was also startled when they opened his office door. Again, these observations were supported by a number of written statements (Joint Exhibit 5, Employer Exhibits 5 and 6). Interestingly, the Grievant, himself, admitted that he nodded off for a few moments as a result of personal problems experienced earlier in the day.

The Employer argued that under Article 5 it has reserved the right to manage and operate its facilities and programs. As such, it has every right to upgrade the efficiency of operations by rigidly adhering to the requirements specified in Directive B19, entitled Disciplinary Actions (Joint Exhibit 8). The Employer asserted that it should not be bound by past administrations who leniently administered these same policies; which resulted in no prior terminations for sleeping on the job infractions. This interpretation, moreover, is supported by Section 43.03 which specifies that "all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement."

The above mentioned work rules were also considered to be quite reasonable in light of the facilities mission and Youth Leaders' job responsibilities. Sleeping on the job is a very serious infraction because it can result in injuries to the staff and inmates. Escapes engendered by a lack of attentiveness can also impact the surrounding community by causing thefts, vandalism, and other related offenses.

These considerations justified the removal of the Grievant in accordance with Work Rule 9A (Joint Exhibit 8). Such a violation was thought to be so serious as to warrant removal for a single offense of sleeping on duty. The Employer emphasized "that there are no degrees of sleeping on duty in a security institution." Bragg maintained that the only mitigating circumstances she would consider involve situations where her supervisory staff was somehow at fault, or the infraction was engaged in by non-security personnel. Bragg, moreover, contended that the causal inference suggested by the language of Work Rule 9A (Joint Exhibit 6) contemplates potential circumstances rather than actual occurrences. For the above stated reasons, the Employer asserted that Section 24.02 requirements were not violated.

Even though the Employer considered the Grievant to be a security risk, it did not feel obligated to invoke the administrative leave option specified in Section 24.05. Con-tinued employment was deemed reasonable in light of due process considerations and a desire to retain favorable employees as long as reasonably possible.

In a related fashion, the Employer opined that it did not violate Section 24.02 requirements dealing with the timely initiation of discipline. The Employer alleged that the pre-disciplinary hearing had to be rescheduled because the Grievant was AWOL on the initially scheduled date. Bragg, moreover, discussed the routing procedure (Employer Exhibit 1) used by the Department of Youth Services when reviewing a recommended disciplinary action. A number of individuals are a party to this process to ensure that employees receive due process rights. In this instance, the routing process and an unavoidable delay engendered the time lag.

The potential procedural defect resulting from the specification of Ohio Revised Code Section 124.34 in the Letter of Removal (Joint Exhibit 4, Pg. 6) was rebutted by the Employer. It was maintained that this section of the Code was subsumed in Section 24.01.

For a number of reasons, the Employer contested a variety of Section 24.04 violations dealing with notice concerns. First, the Grievant received and reviewed a copy of Directive B-38 (Joint Exhibit 8) on November 7, 1988 as evidenced by a document (Employer Exhibit 7) submitted at the hearing. It was asserted that the Directive became effective once the Grievant signaled her reception and review of this document. He, moreover, acknowledged that he was aware of Directive B-19 (Joint Exhibit 7) regarding the sleeping on duty proviso. It appears that Directive B-19 (Joint Exhibit 7) was reviewed during an orientation process and other training received after his appointment.

Second, the previously described notice mechanisms mitigated the lack of specificity contained in the Letter of Removal (Joint Exhibit 4, Pg. 6). The Employer admitted that this document did not specify that the disciplinary action may result in termination. Since the Grievant was aware of the reasonable and appropriate rules dealing with sleeping on the job, any alleged procedural error was viewed as inconsequential.

Third, in accordance with Section 43.03, the Union was notified prior to the implementation of Directive B-38 (Joint Exhibit 8) and had the opportunity to discuss it. This process was complied with during a Labor-Management meeting held on October 13, 1988. At the meeting, the Employer discussed its intent to remove employees found sleeping on duty for the first offense where danger to life, property or public safety occurred.

Mitigation arguments proposed by the Union were rebutted by the Employer. The Grievant did not receive any prior discipline because he had only realized eight to ten months of seniority prior to the removal decision. On both disputed dates, the Grievant never asked to be relieved. This indicated that he did not anticipate any difficulty in his ability to remain attentive.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to terminate the Grievant for sleeping on the job on June 10, 1989 and June 28, 1989. Evidentiary differences were raised as well as a number of procedural objections.

The Union contended that the Grievant was not sleeping on June 10, 1989. The Grievant testified that he had a valid reason to cover himself with the blanket. During the shift changeover he was informed that the air conditioner was malfunctioning which required no tampering with the switch. He was listening to the radio with his eyes closed when he heard Bragg and the others open the door to his office. The Grievant acknowledged that Bragg asked him a number of questions but never asked him whether he was asleep nor whether he had any explanation.

With respect to the June 28, 1988 incident the Grievant admitted that he was nodding off but never asleep. However, he contended that valid mitigating circumstances engendered his condition. At the time of the incident, his daughter was fourteen months old and his fiance was recovering from a broken ankle. As a consequence, he had to perform many of the household duties prior to work which caused him to miss an extensive amount of sleep.

Several other considerations were offered as mitigating circumstances. On both occasions Dormitory "D" was quiet without any realized injuries or attempted escapes. Grievant's actions might be construed as acts of misjudgment but not as willful misconduct. As such, his behavior can be easily modified because his actions were instinctive rather than purposeful.

The Employer's reliance and emphasis on the security ramifications of the Grievant's behavior seemed contrived. The Employer could have placed the Grievant on administrative leave as specified in Article 24.05. If this concern was indeed legitimate, the Employer should not have allowed the Grievant to continue his normal work schedule during the disciplinary process.

The Union maintained that Section 24.04 was violated by the inclusion of Ohio Revised Code Section 124.34 in the Letter of Removal (Joint Exhibit 4, Pg. 6). The Union asserted that this Section diminishes due process and procedural rights guaranteed by the Agreement (Joint Exhibit 1) because it does not require just cause in progressive discipline standards. Such reliance, moreover, supplements and indirectly usurps provisions negotiated by the Parties.

A number of additional Section 24.04 violations were proposed in support of the notion that proper notice of the reasons for the contemplated discipline and the possible form of discipline were not provided. First, neither the Union nor the Grievant were properly notified because the Letter of Removal (Joint Exhibit 4, Pg. 6) and the Pre-disciplinary Hearing Notice (Joint Exhibit 4) did not specify that discharge was contemplated. Since no other employee had ever received anything greater than a suspension for engaging in similar activities, the Union and the Grievant could not anticipate such a penalty.

Second, the Letter of Removal (Joint Exhibit 4, Pg. 6) was also mis-specified which led to additional ambiguity. It indicates that the Grievant violated Directive B-19 (Joint Exhibit 7). Yet, this Directive does not specify the possible types of contemplated penalties associated with a sleeping on duty infraction. Also, the Employer initiated disciplinary action under rules specified in Directive B-19 (Joint Exhibit 7), and yet, completed disciplinary action under another set of rules specified in Directive B-38 (Joint Exhibit 8).

Third, the Employer supported the removal by citing Directive B-38 (Joint Exhibit 8) which does list a range of penalties for sleeping on duty offenses in Work Rule 9A. Even though the Directive was distributed, a great deal of uncertainty was generated concerning the effective date of the policy. The Employer's notification procedure placed employees on notice at various intermittent time periods. This caused a great deal of confusion which was not necessarily cleared up when raised at a Labor-Management meeting.

Timeliness concerns regarding Section 24.02 violations were also proposed by the Union. This provision specifies that disciplinary action should be initiated as reasonably as possible. Yet, it took the Employer sixty-two days to remove the Grievant after the June 10, 1989 incident was discovered. Also, the Third Party conference took place four and one-half weeks after the June 10, 1989 incident, while formal notification of discharge took place two and one-half weeks after the actual decision to remove had been made by the Administration. These various delays raised considerable doubt concerning whether due process rights were properly afforded the Grievant.

Another Section 24.02 violation dealing with the absence of a prior warning concerned the Union. The Grievant was never formally warned that discipline was contemplated after the June 10, 1989 incident. As such, the Grievant never had a chance to change or correct his alleged sub-standard behavior.

The Union claimed that Section 24.02 was additionally violated because disciplinary action was not commensurate with the offense. Discharge, in this instance, was viewed as excessive and too harsh. No one was harmed or injured due to these incidents and the dormitory was never left unattended. This view was supported by Dickinson who recommended a suspension (Employer Exhibit 6) and an EEO Officer who similarly felt that discharge was excessive (Employer Exhibit 1).

Unequal treatment charges were raised by the Union. It was alleged that Randy Garrett,[1] a similarly situated co-worker, was suspended on two occasions after he signed-off on directive B-38 on October 6, 1988 (Joint Exhibit 10). The Grievant, however, never received any prior discipline prior to removal. A recent decision by Arbitrator Anna D. Smith[2] was distinguished from the instant matter. In Stevens, the employee had a record of four prior violations which placed him at risk regardless of the directive used to implement discipline.

THE ARBITRATOR'S OPINION AND AWARD

In the opinion of this Arbitrator, the Employer had just cause to discipline the Grievant for sleeping while

on duty. Just cause for removal, however, was not justified as a consequence of a series of procedural defects which require a modification of the implemented penalty.

Based upon the evidence and testimony introduced at the hearing, the Grievant was asleep while on duty on June 10, 1989 and June 28, 1989. The observations made by the Employer witnesses were all consistent and highly credible. It is quite difficult for any Arbitrator to determine the relative degree of consciousness when evaluating any sleeping scenario. Rather, the more objective method requires one to focus upon objective observations and the probable inferences that may be drawn. The Grievant's eyes were closed and he was wrapped up in a blanket. The Grievant, moreover, failed to respond to a number of independent attempts made to garner his attention and become startled when Employer representatives opened his office door. All of these circumstances serve as valid and unequivocal indices of sleeping behavior.

A determination that the Grievant was sleeping on June 28, 1989 is a bit more self-evident. The Grievant admitted that he "dozed off" for a few minutes. The Union would have this Arbitrator distinguish between one "dozing off" and sleeping. This Arbitrator fails to acknowledge that such a distinction is warranted; the Grievant was sleeping regardless of the label attached to this activity.

The personal problems raised by the Grievant do not serve as valid mitigating circumstances. These matters could have been easily anticipated by the Grievant. If he was indeed extremely tired he should not have attempted to work. Once he decided to work, he could have asked for relief to minimize his drowsiness or his sleepy state. Such precautions are imperative in a corrections institution which houses convicted felons. An unattentive Youth Leader cannot only place himself in physical jeopardy but jeopardizes the safety of other staff members, inmates, and the surrounding community.

It is axiomatic that the Employer has every right to promulgate new policies or attempt to improve upon efficiencies by strictly adhering to policies already promulgated. These rights are properly codified in Article 5 but they are not totally unfettered. Article 24 provisions and Section 43.03 place certain restrictions on these rights in the form of notice and other due process obligations. Some of these requirements were not adhered to which forces this Arbitrator to modify the administered penalty.

The Employer violated Section 24.02 because disciplinary action was not initiated as reasonably as possible. The Arbitrator appreciates the Employer's concern for providing employees with due process as evidenced by the routing review procedure (Employer Exhibit 1). The time spans previously discussed, however, seem excessive and unreasonable which tend to dampen the Employer's due process justification. The record, moreover, does not support the AWOL justification proposed by the Employer. Nothing was formally introduced into the record which indicated that the Grievant's behavior precipitated the tardy initiation of the pre-disciplinary hearing process. The Grievant remarked that on one occasion he was on vacation. The Employer, however, never submitted any Request For Leave form or other documents suggesting that it refused this request.

The Arbitrator is also troubled by Employer actions which preclude an employee's opportunity to correct his conduct. Jacobs testified that at approximately 1:30 a.m. he caught the Grievant sleeping but did not engage in any formal warning attempt. In fact, he never filled out a Notice of Investigation. The circumstances surrounding the June 10, 1989 incident are well documented. And yet, the Grievant only became formally aware of the attached ramifications when he engaged in a similar offense on June 28, 1989. This incident resulted in formal notification. If, in fact, the Employer viewed all sleeping incidents with equal disdain, then the formal disciplinary policy, with the related notice requirements, should have been implemented prior to June 28, 1989. By failing to impose discipline in a timely fashion, unwarranted expectations can easily be engendered leading to perceptions that infractions will be dealt with leniently.

The Employer also violated Sections 24.04 and 24.01 in a number of ways. First, several documents specified Directive B-19 (Joint Exhibit 7), and yet, the Employer relied extensively on Directive B-38 and its Work Rule 9 (A) (Joint Exhibit 8). Throughout the disciplinary process the Grievant was charged with violating Directive B-19 (Joint Exhibit 7). This particular was specified in the Notice of Investigation (Joint Exhibit 5) and the Removal Letter (Joint Exhibit 4, Pg. 6). Such modifications are especially perplexing in light of the severely different penalties attached to both policies. Directive B-19 (Joint Exhibit 7) does not specify any penalty while Directive B-38 (Joint Exhibit 8) not only specifies a range of penalties but also

spells out the charge in greater detail. These conditions, unfortunately, raise serious notice concerns.

Second, the Third Party Hearing Notice (Joint Exhibit 4, Pg. 1) was also deficient in terms of notice requirements. It merely noted that the Grievant was subject "to discipline for Neglect of Duty."

Third, circumstances surrounding the issuance of Directive B-38 (Joint Exhibit 8) caused the Grievant and the Union to question the timing of the implementation date. The process employed for information purposes was staggered, and at different times some segment of the bargaining unit had not been properly advised of the policy and its consequences. As such, the Employer never announced the date that the Directive would be uniformly applied to the entire bargaining unit. The Employer's reliance on the effective date specified on the Directive (June, 1988) as providing sufficient notice seems misplaced. Also, the document signed by the Grievant evidencing his reception and review of Directive B-38 (Joint Exhibit 8) does not specify any effective date of implementation. Discussions at a Labor-Management meeting do not automatically provide clear notice concerning the effective date of implementation nor the manner a work rule is to be implemented. This information must be clearly and unequivocally conveyed to all members of the bargaining unit.

It also appears that the Employer has applied Work Rule 9A in an inconsistent manner. Garrett[3] seems to be similarly situated and yet was given several prior reprimands prior to removal. These prior suspensions, moreover, were issued after Garrett had acknowledged reviewing Directive B-38 (Joint Exhibit 8). The Employer failed to offer any substantial evidence or testimony to rebut the Union's unequal treatment charge. The Stevens[4] case can be readily distinguished. The grievant in that matter was provided with progressive discipline and could reasonably foresee the consequences of his behavior.

As this Arbitrator previously stated, these various procedural defects force this Arbitrator to modify the administered penalty. This approach, which is the one held to be appropriate by most arbitrators, recognizes that an employer must be penalized for compliance failures with contractual procedures agreed to by the parties. At the same time, however, this approach does not necessarily disregard the infractions engaged in by a grievant.

Sleeping on the job within this type of institutional setting, and the number of incidents involved, cannot be condoned by this Arbitrator. As such, this Arbitrator has decided to reinstate the Grievant without back pay. This penalty should not be construed to minimize the sleeping offense. It is indeed quite serious and should provide the Grievant with clear notice that future similar conduct will not be tolerated.

AWARD

The grievance is sustained in part and denied in part. The Employer is ordered to reinstate the Grievant to his former position without back pay and full seniority. It should be noted that no back pay is given to evidence the seriousness of the offense. But for the procedural defects described above, the Grievant would have been removed. Thus, the Grievant should be placed on notice that he must obey the rules.

Dr. David M. Pincus
June 29, 1990

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[1] The State of Ohio, Department of Youth Services, Cuyahoga Hills Boys School and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Grievant Randy Garrett, OCB Case No. 35-03-(08-02-89)-41-01-03 (Smith, 1990).

[2] The State of Ohio, Department of Youth Services, Cuyahoga Hills Boys School and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Grievant Jerry Stevens, OCB Case No. 35-03-(08-10-89)-46-01-03 (Smith, 1990).

[3] Supra Note 1.

[4] Supra Note 2.