

ARBITRATION DECISION NO.:

291

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

The Division of Public Works
Health, Ohio Blind School

DATE OF ARBITRATION:

July 30, 1990

DATE OF DECISION:

September 4, 1990

GRIEVANT:

Catherine Zwiebel

OCB GRIEVANCE NO.:

02-03-(90-03-15)-0124-01-03

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

John Fisher
John Porter

FOR THE EMPLOYER:

Shirley Turrell
Rodney Sampson

KEY WORDS:

Removal
Fair Investigation
Neutral Hearing Officer
Sleeping On Duty
Wearing Improper Uniform
Stacking Charges

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.02-Progressive
Discipline
 §24.04-Pre-Discipline
 §24.06-Prior
Disciplinary Actions
Article 25 - Grievance

Procedure
§25.03-Arbitration
Procedures

FACTS:

The grievant was a Security officer I and worked at the Ohio Blind School. She was expected to screen people entering and leaving the premises and log in messages at her station. The Work Rules at the Ohio Blind School required her to wear a uniform, stay alert, call-in one hour prior to the start of her shift, remain at her desk unless there was an emergency and to notify her supervisor if she needed to leave her station. The grievant had a long history of discipline for sleeping, working out of uniform, and being away from her post without authorization. The grievant also called off several times under questionable circumstances. It was known by the employer that the grievant had a second job and the time sheets from both jobs revealed that the grievant was calling in sick at the Ohio Blind School from her second job. Sometimes grievant even worked at her second job after calling in sick for her Ohio Blind School shift.

EMPLOYER'S POSITION:

The grievant consistently violated several work rules. She was notified of her inappropriate uniform, wearing pink house shoes to work, and continued to wear them. The grievant fell asleep on two known occasions and repeatedly called off when she was actually at another job. The grievant also did not notify her supervisor when leaving her post and would not answer phones, which was part of her job description. The removal is progressive and for just cause.

UNION'S POSITION:

The employer knew of the grievant's second job, but continued to allow her call offs and therefore did not give her proper notice of her impending discipline. There is also a procedural flaw in that the Third Step Hearing Officer and the Labor Relations officer who made part of the investigation were the same person. It is impossible to receive a neutral decision. The employer also stacked the charges to justify the removal of the grievant.

ARBITRATOR'S OPINION:

An investigation must be fair and objective to prove just cause for removal by the employer. The fact that the Third Step Hearing Officer and the Labor Relations Officer were the same person and as the Union argued is not "neutral" is irrelevant. The contract does not require a "neutral" party; the Third Step Hearing officer is always a member of management and can never be "neutral." There was no evidence that the investigation was unfair or not objective.

The arbitrator found that the grievant was away from her post without authorization on numerous occasions, slept on duty, and did not wear the proper uniform. The grievant's long history of discipline along with these infractions would justify removal. There is another serious violation of the rules by the grievant: when she received sick leave, vacation leave or comp time while working at the other job she committed fraud. It is no bar to say that the employer knew that the grievant had a second job. The employer did not know at the time that the grievant was working at the second job when calling off or calling in late.

The argument that the employer stacked the charges has some merit; there should not be a listing of both the general inclusive charge and the specific charge since the charges are in fact the same. The Work Rule of "Neglect of Duty" may be encompassed by the specific charges of being away without authorization. Even with this consideration the grievant was removed for just cause.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of the

Arbitration Between

**The Division of Public Works
Health**

Employer

and

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

Union.

Grievance:

#02-03-(90-03-15)-0124-01-03

Grievant:

(Zwiebel)

Hearing Date:

July 30, 1990

Opinion Date:

September 4, 1990

Advocates for the Employer:

Shirley Turrell

Rodney Sampson

Advocates for the Union:

John Fisher

John Porter

In addition to the Grievant Catherine Zwiebel and the Advocates, the following persons were present at the hearing: Kenneth Bowers, Security Supervisor (witness), Les Hughes, Building Superintendent O.B.S. (witness), Crystal L. Fletcher, Ohio Highway Patrol Dispatcher (witness), Edward J. Painter, Purchasing Administrator (witness), Donald G. Slenmek, Highway Patrol Captain (witness) and Gary L. Hilton, Security Supervisor (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 Stipulations of Fact

1. Grievant was properly classified as a Security Officer I.
2. Grievant worked in the Old Blind School, for the Public Works Division of the Department of

Administrative Services.

3. Grievant's date of hire -- March 30, 1981.
4. Grievant's working hours were 7:00 a.m. - 4:00 p.m., Monday through Friday.

Joint Exhibits

1. 1989 Collective Bargaining Agreement
2. Notice of Removal and Pre-disciplinary Notice
3. Grievance Trail
4. Position Description
5. Classification Specifications
6. Previous Discipline of Record
7. Work Rules - Security Officers
8. Time Records - Olentangy Inn
9. Time Cards - Department of Administrative Services

Joint Issue

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

Relevant Contract Sections

§24.01 - Standard (in part)

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.

§24.02 - Progressive Discipline (in part)

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 of 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.

§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 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 a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

§25.03 - Arbitration Procedures (in part)

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

Facts

The Grievant is a Security Officer I hired on March 30, 1981. At the time of the discipline, she was stationed at the old Blind School. Her shift was 7:00 a.m. - 4:00 p.m. Monday through Friday.

Prior to the discipline under review, the Grievant had received the following discipline (Joint Exhibit 6).

10-31-85 Written reprimand for failure to make rounds (Rule 1a)

11-04-86 2 day suspension for Failure of Good Behavior to wit, watch TV while supposed to be on duty (Rule 13).

4-23-88 Neglect of Duty which included (1) leaving post without permission, and (2) using property of a tenant (i.e. typewriter). (Rules 2 and 3)

11-19-88 15 day suspension for Neglect of Duty which included (1) leaving post without notice, (2) sleeping on duty, and (3) failure to wear a complete uniform (Rules 8, 9, 11).

9-6-89 Written reprimand for being out of uniform on 9/4/89 after previous counseling in month of July re Uniforms (Rule 15).

The Department of Administrative Services employs Security Officers through the Bureau of Buildings to provide 7-day, round-the-clock security service to six (6) different state facilities. Various state agencies are housed within these facilities; each agency is charged a monthly fee for the security services provided. The Classification Specification for a Security Officer I requires among many other duties, 1) screening persons entering and leaving premises, 2) logging messages. The Classification Specification also specifies that Security Officers are expected to "work in isolation" (Joint Exhibit 5). The Position Description is congruent (Joint Exhibit 6). Work Rules for Security Officers are 19 in number (Joint Exhibit 7). Work Rule 8 requires the wearing of the uniform. Work Rule 9 prohibits sleeping on duty. Work Rule 3 requires a guard to remain at the main desk unless for an emergency. Work Rule 1 on General Duties requires that a Security Officer "f. adhere to any specific verbal or written instruction given for a particular state building." Work Rule 2 requires a Security Officer to notify the supervisor if, because of illness or some other reason, the officer must leave the post. Rule 5 requires call-in one hour prior to shift. Work Rule 15 is descriptive of how

violation of work rules can result in discipline. Work Rules 16, 17, 18, and 19 explain proper leave procedures.

This Arbitration arises from the removal of Grievant for the following alleged violations:

- 10-3-89 Away from post without permission
- 10-31-89 Away from post with permission
- 11-2-89 Away from post without permission

Work Rules 2 and 3

- 9-24-89 Asleep at post
- 9-26-89 Asleep during duty (away from post)

Work Rule 9

- 8-22-89 Wearing pink house shoes at work - out of uniform
- 8-23-89 Wearing pink house shoes at work - out of uniform
- 8-24-89 Wearing pink house shoes at work - out of uniform
- 11-6-89 No badge - out of uniform
- 11-7-89 No uniform

Work Rule 3

- 10-6-89 Refused to answer phone
- 10-12-89 Refused to answer phone

Work Rule 1

- 7-12-89 OBS -- Called in sick for shift at 3:00 a.m.
Inn -- Clocked out at 8:57 a.m.
- 7-19-89 OBS -- Did not punch in on security timeclock.
Paid from scheduled start time of 7:00 a.m.
Inn -- Clocked out at 7:05 a.m.
- 7-26-90 OBS -- Arrived at 8:56 a.m. Did not call to report you would be late.
Used 2 hours of comp time, requested in arrears.
Inn -- Clocked out at 7:04 a.m.
- 8-9-89 OBS -- Called at 5:10 a.m. and said you wouldn't be in.
Used vacation leave, requested in arrears.
Inn -- Clocked out at 8:29 a.m.
- 8-16-89 OBS -- Clocked in at 7:05 a.m. Did not call to report you would be late.
Inn -- Clocked out at 6:53 a.m.
- 8-18-89 OBS -- Did not report for shift. Used vacation leave, requested in arrears.
Inn -- Clocked out at 7:13 a.m.
- 9-1-89 OBS -- Called in sick for shift at 4:05 a.m. Used comp time, requested in arrears.
Inn -- Clocked out at 9:41 a.m.

- 9-6-89 OBS -- Clocked in at 7:09 a.m. Did not call to say you would be late.
Inn -- Clocked out at 6:53 a.m.
- 9-13-89 OBS -- Called at 6:45 a.m. to report you would be an hour late. Never reported. Used vacation, requested in arrears.
- 9-20-89 OBS -- Called at 6:38 a.m. to say you would be late. Arrived at 7:35 a.m.
Not leave taken.
Inn -- Clocked out at 7:17 a.m.
- 10-4-89 OBS -- Called in, did not work. Used comp time, requested in arrears.
Inn -- Clocked out at 8:05 a.m.
- 10-10-89 OBS -- Called in sick for shift at 10:30 p.m. the previous evening.
Inn -- Worked from 10:54 p.m. on 10/9 until 7:06 a.m. on 10/10.
- 10-11-89 OBS -- Called in sick for shift at 6:02 p.m. on 10/10.
Inn -- Worked from 10:49 p.m. on 10/10 until 7:56 a.m. on 10/11.

(When you returned to work at the OBS, you submitted a Dr.'s excuse to be off work for 10/10 and 10/11. Used comp time for both days, requested in arrears.)

- 10-17-89 OBS -- Called in sick. Used comp time, requested in arrears.
Inn -- Worked from 10:55 p.m. on 10/17 to 6:45 a.m. on 10/18.
- 11-1-89 OBS -- Called in sick at 6:00 a.m. No leave granted.
Inn -- Clocked out at 8:02 a.m.

One request for removal was made December 25, 1989 by Gary Hilton, Supervisor, based on the December 25th sleeping-on-duty incident (Employer Exhibit 8). During that time, an investigation was already under way with regard to improper use of leave (see IOC Bowers to Trout) (Employer Exhibit 10). After the Pre-disciplinary Meeting of January 23, 1990, the Grievant was notified of her removal. She grieved on March 15, 1990. Step 3 was held on March 29, 1990, and Step 3 report was issued April 30, 1990. On May 10, 1990, a request for Arbitration was made by the Union (Joint Exhibit 3). Relevant testimony at the Arbitration hearing was as follows:

Captain Slemmer of the Highway Patrol, whose job was Facility Manager of the Facility, testified that on numerous occasions the Grievant failed to perform her duty by reading newspapers and magazines on the job, failing to challenge entering persons, sleeping, and being out of uniform. He said he had made numerous verbal complaints and then on November 9, 1989 he wrote to Mr. Hughes about uniform violations on November 7, 8, 9, 1989 (Employer Exhibit 1).

Edward Painter, a purchasing agent, testified that while leaving the facility on September 24, 1989, he observed the Grievant in a "relaxed pose, slumped in her chair, eyes closed, hands on lap." He further testified that she did not challenge him (or his companions) and merely opened her eyes briefly as they passed. He reported these facts to Captain Slemmer who wrote to Mr. Hughes on October 10, 1989 (State Exhibit 2).

Ms. Fletcher, the Ohio Highway Patrol Dispatcher, testified that on December 25, 1989, she observed the Grievant at her desk through a monitor. Dispatcher Fletcher said the Grievant "appeared to be asleep." Furthermore, Dispatcher Fletcher observed Gary Hilton come in the building behind the Grievant, walk up behind her (the Grievant) and tap her shoulder. Until Mr. Hilton tapped the Grievant's shoulder, the Grievant did not move. Dispatcher Fletcher also testified that she had seen the Grievant asleep on duty on other

occasions and had seen her wearing pink houseslippers at work.

Mr. Kenneth Bowers, Security Supervisor, testified that he had assigned the Grievant to the 7-3 Monday-Friday shift at her personal request. He also said that the Grievant had received two (2) copies of the Work Rules (Joint Exhibit 7). He testified that he was involved in the investigation of mis-use of leave. He said he knew she had another job, part-time at the Olentangy Inn and that when she called in sick on 11/1/89, he called there to check on her. Mr. Bowers also stated that the State had, in 1985, furnished the Grievant with uniform skirts rather than uniform pants because of her religious objection to pants.

Mr. Hughes, OBS Building Superintendent, said that he had received numerous verbal complaints about the Grievant's work from Captain Slemmer and from other tenants. He said she was told to knock on his door when she needed to take restroom breaks. He received a letter from Cathy Mock on October 3, 1989 (Employer Exhibit 3) complaining that the desk was unstaffed several times (during Grievant's duty).

Mr. Hughes also said that he directly ordered the Grievant to answer his phone (which rang at the guard's desk when he was not there) when he was out of his office and that the Grievant replied "that's not my job, I'm not your secretary." A meeting was held between Mr. Hughes, the Grievant, and the Union Steward about the phone. At that meeting, Grievant's only reply was "I heard you." Subsequently, on October 6, 1989, a temporary custodian was asked by Mr. Hughes to observe the Grievant not answering the phone. The custodian signed a statement as to what he had witnessed (Employer Exhibit 5). Mr. Hughes also received the statement (Employer Exhibit 4) from another employee, Jeanetta Roarh, who claimed she found the Grievant lying down in the restroom during the Grievant's shift.

Mr. Hughes said that during the leave violation investigation, he went with Mr. Bowers to the Olentangy Inn and picked up time cards. He said he consulted with Shirley Turrell as to whether he was allowed to do that. He also testified that around 12/1/89 he worked with Ms. Turrell to match the time cards with State payroll records.

Mr. Gary Hilton, Security Supervisor, also testified. He said that on 12/25/89, he had to tap Grievant on her shoulder to awaken her; she was sleeping at her post. The Grievant stated that on 12/25/89 she was not sleeping, that on 9/26/89 she was not lying on the couch, and that she could not recall the incident of 10/3/89. Moreover, she said she only ever left her post to go to the bathroom and that she did not inform Hughes because he was "not available." She said "no one had ever questioned her about her request for leave forms." She said she had no uniforms because "everyone else got their new ones in July and I did not, so I turned my old ones in." Under cross examination, she said the old ones did have skirts, and she was aware that the State claimed to be having trouble getting skirts that fit her in the new model. She admitted calling in 16 times to notify the Employer that she was not coming in, when for part of the time requested she was working at the Olentangy Inn as a receptionist. She adamantly denied that her behavior constituted "fraud." She said "one could get sick at any moment" or that "perhaps she had a dr.'s appointment that day." On rebuttal, Advocate Turrell took the stand and was questioned by Co-Advocate Sampson. She testified that she was the only Step 3 designee for her department and had been so for many years. In her job as Labor Relations Officer, she did speak with Hughes and Bowers to advise them on the proper procedures to obtain the time cards. She maintained she never personally obtained evidence at the Olentangy Inn until 7/18/90, in preparation for the Arbitration. As a Labor Relations Officer, she reviews all requests for just cause and denies requests for discipline where she believes just cause does not exist.

The Exhibits were introduced which contained the Grievant's time cards from Olentangy Inn, phone messages with Grievant's call-ins, and Grievant's requests for leave (Joint Exhibits 7 and 8 and Employer's Exhibits 6 and 7, and Union Exhibit 2).

Union's Position

1. Step 3 Hearing Officer was Shirley Turrell who was involved in the investigation; therefore, Ms. Turrell was not "neutral" as required. Union cites to Decision of Arbitrator Rivera in G-24-09(04-01-88)-40-01-04 (1/13/89).
2. The charges against Grievant are "stacked," i.e., duplicative. Union cites to Decision of Arbitrator Rivera

G-31-05-880314-0018-01-06 (6/6/89).

3. The State was aware that Grievant had a second job and the State approved all her requests for leave.

Employer's Position

The Employee had a long record of misconduct for many of the violations alleged in this discipline (sleeping, uniform, away from post). She had been progressively and properly disciplined. Moreover, Grievant has been proven to have intentionally, repeatedly, and fraudulently alleged illness to acquire leave. Removal is commensurate and progressive.

Discussion

The evidence is clear and convincing that the Grievant was away from her post on numerous occasions without authorization. From prior counselings and disciplines, she had clear notice. If she was denied opportunities to go to the bathroom, the issue could have been raised much earlier or grieved. Moreover, she could have left the Supervisor notes when she had to leave. Thus, the Grievant violated Work Rule No. 3. The evidence is also clear and convincing that Grievant has slept on duty. Both Dispatcher Fletcher and Mr. Painter are objective witnesses whose testimony was credible. The Grievant violated Work Rule No. 9. The Grievant also failed on numerous occasions to wear her uniform. The State had provided her with skirts to meet her religious needs. However, she still was out of uniform. Grievant violated Work Rule 8. The Arbitrator is also convinced that the Grievant failed to follow an order of her supervisor, to answer the phone (Rule #1). Given her prior disciplines for these same infractions, including a 15 day suspension, a strong argument could be made that removal was justified on these grounds alone. However, the Grievant displayed a clear and obvious pattern of calling-in from one job to report sick, to report late, or to report non-attendance and then continuing to work at the other job when she should either have been traveling to arrive at her Security Post on time or when she was supposed to be at her Security Post.

In those cases where she received sick leave and was working at the other job, she committed fraud. (See 7/12/89 where she worked at the Inn while allegedly sick from 7:00 a.m. to 8:57 a.m. (her shift). (See 9/1/89 where she worked at the Inn until 9:41 a.m. when her shift began at 7:00 a.m.; the same shift which she was too sick to work.)

When Grievant called in from the Inn and subsequently requested either vacation or comp time, she was after claiming sickness but taking comp or vacation time because her sick leave was exhausted. This behavior violated the leave policies of Rules 16-19.

Many times she called-off late or reported late when either working at the Inn or traveling from the Inn because she clocked out at the Inn with insufficient time to arrive at her job as a Security Officer.

The Union's rebuttal that the Employer knew of her second job and also approved the leave requests is totally irrelevant. The Employer knew she had another job; however, the Employer had no knowledge that she was working at the second job while claiming sick leave, vacation leave, and comp time from the Employer. Secondly, the approval of the leave requests is not binding on the Employer when the Employer had no knowledge of the Employee's behavior

The stacking charge has some minor merit. In the Grosenbaugh Award, Arbitrator Rivera found that some charges were duplicative and some irrelevant. The Arbitrator favors being specific and clear in charges and not stacking by listing both the general inclusive charge and well as the specific charge. In this case, Work Rules #2 and #3 are the same offense in essence, i.e., being away without authorization. (If one is away from the post, the proper way is to notify the superior.) Work Rule #15 is mainly a description of possible discipline with groupings under larger headings, i.e., "Neglect of Duty." Hence, if one lists the specific actions, listing Rule #15 may be duplicative. Therefore, the Arbitrator finds violation of #1, #3, #8, #9, and a violation of #5 on Reporting and Call-Offs. The behavior re: false reports on sickness, etc. could have been violations of 16-19, however, they best fit #15 (3) Dishonesty.

Lastly, the Union alleged that the discipline is unjust because of a procedural flaw, namely, Ms. Turrell was both the Labor Relations Officer and the Third Step Hearing Officer. The Union claims she was not

"neutral." The contract does not require a "neutral;" in fact, since the Third Step Hearing Officer is always management, such a person could not be "neutral." The only person required in the process to be "neutral" is the Arbitrator. The Contract specifies little about the characteristics of a Step 3 person, i.e., only that he or she is an Agency "designee" (see Article 25.01). However, as pointed out by Arbitrator Rivera in the Pentecost decision, a "fair and objective" investigation is part of "just cause." No evidence was introduced that the investigation was unfair nor not objective. The evidence of Ms. Turrell's alleged pre-discipline visits to the Inn was weak and successfully rebutted. One of the main purposes under the Contract for Step 3 is for the Employer at a higher level to review the evidence and hear the Employee's version. The Step 3 response of Ms. Turrell is a clear review; however, the Grievant chose not to be heard (as, of course, is her right). The double duty served by Ms. Turrell may pose some problems not brought to light in this Grievance and as such should be a proper subject for Union-Employer discussions and if unresolved, a Grievance. However, the Arbitrator finds no evidence of impropriety during this Grievance.

Award

Grievance denied.

September 4, 1990

Date

Rhonda R. Rivera

Arbitrator