

**ARBITRATION DECISION NO.:**

436

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Bureau of Workers' Compensation

**DATE OF ARBITRATION:**

March 27, 1992

**DATE OF DECISION:**

May 18, 1992

**GRIEVANT:**

Ralph Jones

**OCB GRIEVANCE NO.:**

34-04-(91-06-06)-0096-01-09

**ARBITRATOR:**

John Drotning

**FOR THE UNION:**

John Fisher

**FOR THE EMPLOYER:**

Rodney Sampson

Paul Kirschner

**KEY WORDS:**

Removal

Sleeping on Duty

Illness as a Basis for

Termination of the

Employee

Sleep Apnea

**ARTICLES:**

Article 24-Discipline

§24.01-Standard

§24.02-Progressive Discipline

**FACTS:**

The grievant was a data technician 2 at the Bureau of Worker's Compensation who worked third shift and generated computer claim reports for various users. He was removed on June 4, 1991 for sleeping on the job. The grievant had been disciplined on six prior occasions for sleeping on duty.

The grievant had repeatedly been found asleep at his computer terminal or elsewhere in the building. The grievant was diagnosed as a diabetic in 1988 and he is on medication to control this problem. In

addition to diabetes, he also suffers from a disease known as "sleep apnea" or insufficient oxygen to the lungs. This sleeping disorder often causes drowsiness and frequent uncontrollable sleeping.

The state removed the grievant, citing his sleeping on the job as inconducive to the completion of his duties and creating morale problems.

**EMPLOYER'S POSITION:**

The grievant has repeatedly been spoken to and reprimanded for his chronic sleeping while on duty. Evidence shows that he slept almost every day and he intentionally sought places to sleep in order to avoid detection. The state was unaware of his medical condition and it is the employee's responsibility to provide this information. Therefore, based on his discipline record and apparent disinterest in his job, the termination was for just cause and should be sustained.

**UNION'S POSITION:**

The state has not proved just cause for the removal of the grievant. Testimony from the state's witnesses confirmed that management knew of grievant's sleeping disorder and could have placed him on disability. The union also produced evidence that, if treated properly, sleep apnea should not be the basis for retirement or job dismissal. The grievant provided the state with documentation from various doctors to show that he is currently receiving treatment for his sleeping disorder. An illness is not just cause for termination, therefore, the grievant should be reinstated and made whole.

**ARBITRATOR'S OPINION:**

Medical problems are not just cause for terminating an employee who falls asleep at work. The grievant's doctor described grievant's sleep disorder as "potentially dangerous and should be regarded as any other medical illness such as heart disease, stroke . . ." Even though management was aware of grievant's illness, it continually disciplined him, rather than advising him to take a disability leave.

Management is not responsible for detecting an employee's illness. While the grievant should have explained his problem and requested disability leave, his failure to do so is not reason to terminate him. Presently it is clear that he cannot perform his job and that he should seek sick leave or disability. If it is determined that he can never work again, he should resign or be terminated.

**AWARD:**

The grievant should be reinstated and placed on disability or sick leave. If his disability cannot be overcome then he should resign, be terminated or retire.

**TEXT OF THE OPINION:**

**IN THE MATTER OF ARBITRATION  
BETWEEN**

**OFFICE OF COLLECTIVE BARGAINING  
STATE OF OHIO**

**AND**

**OCSEA/AFSCME LOCAL 11**

**ARBITRATION AWARD**

**CASE NUMBER:**

**34-04-910606-0095-01-09**

**ARBITRATOR:**  
John E. Drotning  
**HEARING DATE:**  
March 27, 1992

## **I. HEARING**

The undersigned Arbitrator conducted a Hearing on March 27, 1992 at the OCSEA offices, 1680 Watermark Drive, Columbus, Ohio. Appearing for the Union were: John Fisher, Denis Williams, Mark Tincher, and the grievant, Ralph Jones. Appearing for the Employer were: Rodney Sampson, Paul Kirschner, Tom Gulla, Michael Cooper, Stan Latham, Kevin Lucas, Sharon Hilliard, and Gretchen Green.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. Post hearing briefs were filed on or about April 17, 1992 and the case was closed. The discussion and award are based solely on the record described above.

## **II. ISSUE**

The parties jointly asked:

Was the Grievant, Ralph Jones, removed for just cause?  
If not, what shall be the remedy?

## **III. STIPULATIONS**

The parties jointly submitted the exhibits marked Joint Exhibits #1 - #9.

## **IV. TESTIMONY, EVIDENCE, AND ARGUMENT**

### **A. MANAGEMENT**

#### **1. TESTIMONY AND EVIDENCE**

Mr. Michael A. Cooper, a computer operations supervisor on the third shift with the Bureau of Workers' Compensation, testified his task was to provide on-line service for claims and he and his employees produce reports at night for various users.

Cooper said there were two laser printers, three plain printers, and three other units. In the computer room, said Cooper, there are two main frames, tape drives, about fifty disks and many fixed disks to do quality control.

He said ten employees worked the third shift: one data technician 2, two data technician 1's, and seven operators.

Cooper said the room is fairly noisy and there is air conditioning equipment in the room to cool the various units. He said the machine called a "burster" separates forms and trims the edges of various output.

Cooper said he supervised the grievant who started with the Bureau of Workers' Compensation about two and one-half years ago. Cooper said that Jones was a data technician 2 and he oversaw the work of data technician 1's. Cooper went on to say that Jones major problem was that he slept all the time and he (Cooper) would have to wake Jones up and on a number of occasions, he wrote him a personal letter about his sleeping (see Management Exhibit #1).

Cooper went on to say that he wrote up Jones on May 16, 1990 for sleeping on the job (see Management Exhibit #2). He went on to say that Jones would fall asleep several times a day and be found in various places such as the bathroom, the printer room, etc.. In short, Cooper said that Jones slept all the time on the job. He went on to say that he tried to get Jones to adjust his sleeping but with no success.

Cooper said he wrote up a written reprimand for Jones (see Management Exhibit #3) and he went on to

say that he would have to wake up Jones and when he did so, the latter would "bitch" at him and become angry.

Cooper went on to say that Jones said he had a sleeping disorder because of depression and Cooper said that Jones brought him a prescription which was dated long ago. In short, Cooper said Jones gave him documents about diabetes and the latter never explained any of his problems. Moreover, Cooper said that other employees complained about Jones sleeping on the job and, therefore, they had to pick up slack or the task that Jones should have been doing.

Cooper said that Jones would fall asleep right at the keyboard and he went on to say that he would usually sleep at his console about 75% of the time whereas 25% of the time he would sleep elsewhere. Cooper said Jones did not change his behavior and it became worst. Cooper noted that Jones used to position himself in the right spot so he could go to sleep. Cooper said he always had to wake Jones up from his snoring position.

Cooper said that Jones had a C-PAP machine which he used on the first day after a ten day suspension and on that day he was asleep again. Jones, said Cooper, did not say that he had a sleeping disorder.

Cooper said that Jones was sleeping on 5/6/91, 5/15/91 at about 7:15 or 7:35 a.m., on 5/16/91 at about 2:40 a.m. Cooper said he simply could not wake Jones up and he finally had to slap him to wake him up.

Cooper said that Jones never apologized for sleeping although he once asked for time off because he was using a C-PAP machine.

Cooper said that Joint Exhibit #8A, a daily attendance record, indicates that Jones did not show up for work on May 8, 1991 and he never called in. Joint Exhibit #8B, said Cooper, indicates that Jones called in an hour and forty-five minutes late. He went on to say that Jones did not submit a form on May 8, 1991.

Cooper said a third offense is suspension or removal.

Cooper said that he thought Jones always used up his leave and he noted that Management Exhibit #4 indicates that Jones had no leave.

On redirect, Cooper said that, Jones did give him some notes about his sleeping disorder.

Mr. Tom Gulla testified that after the pre-disciplinary situation, he was to take care of Jones's additional sleeping problems.

Ms. Gretchen Green testified that as a Hearing Officer, she acted as a neutral and made various recommendations. Green noted that in her letter to Jones, the latter was charged for sleeping on duty on April 3th, 4th, 8th, 10th, 18th, and 19th, 1991. She said those April dates occurred prior to his discipline because that occurred between April 21st and May 5th where he received a ten day suspension as a result of the hearing on 3/28/91.

Green said she was aware of Jones' prior discipline and she looked at a variety of things in order to come to a decision.

Green noted that Jones could have applied for a disability leave of absence but he never did so.

Green said that she knew Jones had a sleep problem and he did go to a physician. She said the machine he used is a C-pap and it deals with the circulatory system. Moreover, disability leaves can be requested by the Employer as well as the employee.

Mr. Stan Latham, a computer operator, testified that he supervised Jones on the second and third shift. Latham said that Jones frequently slept but Jones never asked him for leave.

Latham said that at times he would wake Jones up and the latter would respond and at other times, he was quite hostile. He went on to say that he always had to wake him.

Latham said that he talked to Jones about his sleeping problem and Jones eventually brought him some pills.

Latham said that Jones slept in the printer room most of the time and sometimes in the computer room and, as a matter of fact, he slept a lot right in front of all other employees.

Mr. Kevin Lucas testified that he delivered a pre-disciplinary letter to Jones as noted on Joint Exhibit #3A because the latter had been off work for a week because of swollen kneecaps and blisters.

On redirect, Lucas said that Jones told him he was off work because of cracked kneecaps.

Management cross examined Ralph Jones who testified that his wife told him that he slept excessively and he believed he was sleeping excessively. Excessive sleep means, said Jones, that he could doze off

while he was talking to someone.

Jones testified that there is a distinction between lethargy and drowsiness. He said he went to see a specialist in November 1990. He went on to say that he scheduled an appointment on December 3rd and it was postponed and consequently he had his first suspension issued on 11/26/90.

Jones said that a doctor told him that he should not drive until December 27th.

Jones said had no discipline prior to December 27, 1989. He said he was suspended in 1985 as noted in Management Exhibit #6.

Jones said he had applied for disability in the past.

Jones testified that he saw other people sleep.

## **2. ARGUMENT**

The Director's decision to terminate Jones was based on a number of factors; namely, a verbal reprimand on 12/27/89, written reprimands on 6/24 and 8/20, 1990 for sleeping on duty, a one day suspension for sleeping on duty on 11/26, and a five day suspension reduced to three days on 2/4/91 for sleeping on duty, and finally a ten day suspension for sleeping on duty which was reduced to seven on 4/21/91.

Management notes that the testimony is that Jones slept almost every day while at work and he slept openly in the presence of co-workers and sometimes he would sleep in places to avoid detention.

The supervisors, notes Management, told Jones that sleeping on the job was unacceptable and if that did not stop, disciplinary action would result.

The testimony and evidence indicated that the supervisors were concerned over Jones's sleeping problems because it caused a hardship for the work unit and created morale problems. Moreover, other employees had to pick up the slack while Jones was asleep.

Management notes that Jones's own doctor, Dr. DeMaria, stated in part that sleep apnea is a potentially serious disorder which can lead to excessive daytime sleepiness and jeopardize job safety etc.

Management notes that Jones fell asleep over the keyboard on occasion.

The testimony and evidence indicates that Jones had prior reprimands back in January of 1986 for tardiness and in May of 1986 for tardiness and unexcused absences and also in July of 1985 and two in 1987 in April and September.

Management also noted the Union claim that Management was aware of the grievant's sleep apnea problem. The Union's argument that the Employer should have sent Jones to be examined is not really the problem - rather it is the employee's decision to provide information to the Employer and he never told the Employer that he was unable to work because of a sleep apnea problem.

The State asserts that the sleep apnea problem is not the same as narcolepsy. The Union argues that sleep apnea is a situation which is not uncontrollable but it does not fit with the grievant's behavior. Sleep apnea, asserts Management, is the condition resulting from insufficient oxygen going to the lungs. Management argues that this situation is not one in which an employee dozed off involuntarily from time to time but rather it is a situation in which he tried to go to sleep in places to avoid detection and he slept almost on a daily basis and had to be awoken by management and co-workers.

The Employer argues it has shown restraint, patience and tried to do everything possible in order to work with the grievant. In short, the grievant's behavior is such that he clearly is disinterested in his job and shows no respect for management and co-workers and therefore, the grievance should be denied in its entirety and his termination should be upheld.

## **B. UNION**

### **1. TESTIMONY AND EVIDENCE**

Mr. Ralph Jones, a data technician 2 in the computer operations, testified that he slept on the job. He said that his sleeping disorder occurred quite often and he went on to say that his former wife told him that he slept excessively over a ten year period. Jones went on to say that he also has been diagnosed as having very high blood pressure. He testified that over-medication can cause drowsiness.

Jones testified that he learned he was diabetic in 1988. He went on to say that a doctor told him that

medication and diet could produce good status. However, he said no doctor told him to see a specialist until October 27, 1990.

Jones said that he went to see a doctor and he was asked to sit down for a minute and he fell asleep and the doctor had to come and wake him. Jones said he had what is called "sleep apnea". He went on to say the doctor propped up his head and gave him a decongestant.

Jones went on to say that he was referred to a Dr. DeMaria. He said the earliest date he could visit with the doctor was about 3/12 or 3/13 of 1991 at Riverside Hospital. He said he was at Riverside for two different days and the results led him to be able to use the C-PAP machine.

He said the C-PAP machine is used when one is sleeping at night.

Jones said that he is still under a doctor's care. He said the State has never asked him to its doctor.

Jones said he has seen others sleep while on the job about fourteen different times. He said he thought some were disciplined.

The Union cross examined Management witnesses. Mr. Michael Cooper on cross testified that he had been involved in all of Jones' sleeping problems. In fact, on cross, Cooper said that he has seen Jones asleep while standing up.

Cooper said that Jones' task was to oversee the data technicians 1 and he was in charge of the printer, overseeing all print quality, etc.

Cooper said that Jones returned from discipline on May 5th and did give him some medical information.

Cooper said that he thought Jones had a sleeping disorder.

Mr. Tom Gulla on cross testified that there was hearing on May 15th and he was at the hearing.

Ms. Gretchen Green testified on cross that she held a hearing on May 15th and on May 28th.

Green said the State can put someone on disability.

Mr. Stan Latham on cross testified that he observed Jones sleeping. He also said that he saw another employee sleeping once.

Latham said that Jones showed him a bottle of pills and a brochure (see Joint Exhibit #9) in late 1990.

Mr. Kevin Lucas on cross testified that he gave Jones Joint Exhibit #3A on May 23rd.

Lucas said that Jones told him that he replaced a motor in his van.

## **2. ARGUMENT**

The Union asserts that the State has not proved just cause for removing Ralph Jones. The Contract, notes the Union, in Article 24 states that "disciplinary action shall not be imposed upon an employee except for just cause".

The Union notes that Management was aware of the Grievant's medical condition. Mr. Cooper testified that the grievant did have a sleeping disorder. Moreover, Gretchen Green acknowledged that the State could put an employee on disability.

In this case, the Union notes that the Grievant gave the State documentation from various doctors and he also produced what is called a C-PAP machine which is used to treat a sleeping disorder.

The Union goes on to say that the Grievant is still being treated for sleep apnea and if that is treated properly, it should not be the basis to require retirement or job dismissal.

The Union states that the grievant had a sleeping disorder and therefore, there is no just cause for the termination and he should be reinstated and made whole.

## **V. DISCUSSION AND AWARD**

There are obvious reasons for terminating an employee who sleeps while at work if that employee has no medical problems. However, Grievant Jones clearly had at least two relatively serious medical problems. He was an overweight diabetic and, in addition, Jones has a sleeping disorder which his physician described as:

"... a long term and potentially very serious disorder .... The disorder is a medical one and should be regarded the same as any other medical illness such as heart disease, stroke ...."

(See Joint Exhibit #4C)

Because Jones slept at work, he was given a verbal reprimand along with two (2) written reprimands in 1990. In addition, he received a one (1) day suspension in November 1990 followed by three (3) and seven (7) day suspensions in February and April 1991 for sleeping on the job. Thus, while Management was "aware" of Jones' "illness", it disciplined him rather than advising him to take disability leave. Even Ms. Gretchen Green pointed out that Grievant Jones could have applied for disability leave and that the State can place an employee on disability leave.

To some extent, one cannot fault Management in that their task is not to identify medical problems. While Management may have been told by Jones that he had a disorder (known as sleep apnea), it is reasonable to conclude that they were not fully cognizant of the significance of that Disability. However, the testimony and evidence is that Jones was, in fact, ill and should have been on disability leave in order to see if he could overcome his medical problems.

That Mr. Jones failed to request disability leave is not reason to terminate him. However, it is clear that Jones could not perform his job; that became very obvious in the testimony. Moreover, Jones made no real effort to assess his medical problem and he certainly did not carefully explain his problem to his superiors.

Jones was an ill man; thus, termination is inappropriate; rather, he shall go on disability or sick leave, assuming that such leaves are available. If Jones cannot work again, he must resign or the Employer will have to terminate him.

John E. Drotning  
Arbitrator  
May 18, 1992