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LABOR & PERSONNEL DIVISION

In the Matter of Arbitration Between)
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)
TEAMSTERS LOCAL UNION 117,)
(Union),)
)
and)
)
WASHINGTON DEPARTMENT OF)
CORRECTIONS,)
(Employer of DOC).)
)
_____)

OPINION AND AWARD
FMCS Case No. 06-02238
B. Zwick Grievance

BEFORE: David W. Stiteler, Arbitrator

HEARING LOCATION: Spokane, Washington

HEARING DATE: May 16, 2006

APPEARANCES: *For the Union:*
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RECORD CLOSED: June 26, 2006

OPINION & AWARD ISSUED: July 18, 2006

OPINION

I. INTRODUCTION

In September 2005, the Employer discharged Grievant from his position as a Correctional Officer 2 (CO2) at Airway Heights Corrections Center (AHCC). The Union filed a grievance over the discharge. The parties were unable to resolve the dispute and selected David W. Stiteler from a list provided by FMCS to serve as their neutral arbitrator.

A hearing was held before the Arbitrator on May 16, 2006, in Spokane, Washington. The parties agreed the dispute was properly before the Arbitrator for resolution. The hearing was orderly and both parties had the full opportunity to argue their positions, examine and cross-examine witnesses, and present documentary evidence. All witnesses testified under oath. At the conclusion of the evidence, the parties agreed to waive closing argument and submit post-hearing briefs. The Arbitrator closed the hearing record on receipt of those briefs.

II. ISSUE

The parties agreed that the issue is whether the Employer had just cause to discharge Grievant from his position as a CO2 at Airway Heights Corrections Center in September 2005, and if not, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

ARTICLE 8 DISCIPLINE

- 8.1 Just Cause
The Employer will not discipline any permanent employee without just cause.
- 8.2 Forms of Discipline
Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions and discharge.

ARTICLE 9
GRIEVANCE PROCEDURE

9.4 Arbitrator Selection

The parties will select an arbitrator by mutual agreement or by alternately striking names supplied by the FMCS unless they otherwise agree in writing.

9.5 Authority of the Arbitrator

The arbitrator will have the authority to interpret this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement, nor will the Arbitrator make any decision that would result in a violation of this Agreement. The arbitrator will be limited in his or her decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it. The Arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement. *****

9.6 Arbitration Costs

The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties. *****

IV. SUMMARY OF RELEVANT FACTS

Grievant was hired by DOC in January 2002 as a CO1. He became a CO2 in January 2003, and completed his trial service in that position in July 2003.

From his date of hire until March 2004, he worked at the DOC's Monroe facility. While at Monroe, Grievant worked either day or swing shift. He had no performance issues there.

In March 2004, Grievant transferred to AHCC. He worked graveyard shift (1st shift at AHCC) because it was the only shift open to him at his seniority rank.

Grievant was assigned to the minimum security unit (MSU), which is physically separate from the main facility at AHCC. He worked two days a week as

one of two COs assigned to the C5 housing unit, two days a week as one of two officers assigned to the C4 housing unit, and one day a week as a response and movement (R&M) officer. The R&M officer duties include serving as backup to the housing unit officers, being available for emergencies, and being another CO “presence” to deter offenders from misconduct.

Grievant found it difficult to adjust to the work hours—9:30 p.m. to 6 a.m.—on 1st shift. He was often tired, and tried different strategies to stay alert, such as finding tasks that required physical movement and talking with other COs.

The work hours also contributed to difficulties in Grievant’s home life. He and his wife had two young children, and he found it hard to spend time with them and assist his wife in caring for them and still get the sleep necessary to be alert for work.

In October 2004, other COs and some offenders reported that Grievant had been asleep at his post in the C5 unit. In a meeting with Superintendent Maggie Miller-Stout, he denied that he had been asleep but admitted that his head might have bobbed. DOC policies require employees to remain alert and specifically prohibit sleeping or giving the appearance of sleep while on duty.

Miller-Stout issued Grievant a letter of reprimand in December 2004 for this incident. The reprimand was issued under the prior collective bargaining agreement between the parties. At that time, a reprimand was not listed as one of the forms of discipline, all of which involved some degree of economic sanction. A reprimand was considered a type of corrective action. He did not grieve the reprimand.

Grievant discussed his personal problems and the impact they were having on his work with Sgt. Ray Greenwalt, who offered some suggestions for addressing the issues. Among the suggestions were for Grievant to seek counseling from the employee assistance program and to bid for a different shift.

After discussing the shift bid with his wife, Grievant decided to try to bid for a day shift position. He was not successful because of his seniority rank. He did not bid

for a swing shift position because his wife felt that the child care and other issues would be largely the same on that shift. He continued to work on 1st shift.

A. May 2005 Incident

By May 2005, Grievant's personal problems had become more acute. He was separated from his wife, but was seeking reconciliation. His efforts further interfered with his ability to get enough sleep.

On May 25, Grievant was working in the R&M position. Some time after midnight, Grievant went to the C5 unit and entered the sergeant's office. The C5 officers that shift were Terra Frisk and Joshua Zehetmir.

Because offenders are generally in their cells during 1st shift, COs regularly use part of the shift to take care of paperwork. On that date, Frisk and Zehetmir were in the process of updating the offender rolodex, which includes a picture and other pertinent information about each offender in the unit.

At approximately 12:35 a.m., Zehetmir was working at the computer in the sergeant's office. Grievant was sitting in a chair by the wall of the office. Frisk entered the office and noticed that Grievant's eyelids were closing and that his head kept nodding forward, then jerking back. She went over and made some comment to him but he did not respond. A few minutes later, Frisk saw Grievant change his position, lean his head on his hand, and appear to go to sleep.

Over the next few minutes, both Frisk and Zehetmir made noises—loudly shutting file cabinet drawers, banging the rolodex and a clipboard on the metal desk—in an effort to awaken Grievant. He did not wake up. They also talked to him, but he did not respond.¹

The chair in which Grievant was sitting was visible through the door of the office. In addition, there is a window into the office from the unit, and the chair is visible through the window. Though most offenders were in bed at the time of the

¹ Neither Frisk nor Zehetmir included the information about their attempts to awaken Grievant in their incident reports.

incident, there is a night crew of inmate custodians who are up and working. One inmate apparently saw Grievant during this time.²

Around 1 a.m., Zehetmir went to tell Sgt. Gray, who was in C3, what was going on. He told Gray that Grievant was “nodding off” and asked Gray to assign Grievant some tasks to keep him active. Zehetmir returned to the office in C5, and saw that Grievant still appeared to be asleep.

At about 1:10 a.m., Gray called over the radio for an informal count of offenders. Grievant’s belt radio was turned to near maximum volume, and he appeared to wake with a start on hearing the radio call. He got up, gathered himself, and left the office without saying anything to either Frisk or Zehetmir.

After the informal count and a subsequent medical emergency were finished, Gray talked to Frisk and Zehetmir. When Frisk told him that Grievant was asleep not just nodding off, he directed them to write incident reports.

Lt. Eric Biviano investigated the incident. He interviewed Frisk, Zehetmir, Gray, and Grievant. Grievant gave him a written statement that said “On May 25th all I can recall is sitting in the sgt’s office staring at the wall until the informal count was called at 0110 am.” He told Biviano that his written statement had everything he remembered and anything else he had to say he would say to the Superintendent.

Miller-Stout held a pre-disciplinary meeting with Grievant in June 2005. At that meeting, he admitted that he was probably asleep, but offered information about his personal circumstances as mitigating facts.

By letter dated September 2, 2005, Miller-Stout notified Grievant of his discharge. She stated:

In determining the appropriate level of discipline, I considered the totality of facts and circumstances regarding the charge against you and your employment with the Department. I reviewed your complete work history including your personnel file and found that this was not the first incident of sleeping or giving the appearance of sleeping.

² Frisk testified that an inmate saw Grievant sleeping and commented about it as the inmate passed by the office. That detail was not included in her incident report.

Specifically, on December 14, 2004, you received a letter of reprimand from me for sleeping or giving the appearance of sleeping. * * * In the letter regarding this incident I state, 'You need to be aware that any future incidents of this nature will lead to further corrective action and/or disciplinary action up to and including dismissal, being taken against you.' I also considered the number of years you have been a state employee. However, sleeping while on duty is an extremely serious offense. It is obvious to me that you did not take the first warning seriously. I believe that under the totality of the facts and circumstances your termination of employment is the appropriate level of discipline.

In deciding to terminate Grievant, Miller-Stout also considered efforts that Greenwalt had made to assist Grievant following the first incident. She also consulted with other DOC superintendents, who agreed that termination was the appropriate penalty.

The Union grieved the discharge. This arbitration is the result of that grievance.

V. CONTENTIONS OF THE PARTIES

A. Employer

The Employer contends that the evidence supports the conclusion that just cause existed for Grievant's termination, and requests that the grievance be dismissed.

Just cause has been defined by the Washington Supreme Court as a "fair and honest cause" that is not "arbitrary, capricious, or illegal" and is based on "facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." Under that definition, the arbitrator must decide whether the facts here are supported by substantial evidence, were reasonably believed by the Employer, and led to a decision that was not arbitrary or capricious.

There is no dispute that Grievant fell asleep while on duty. This is serious misconduct and employees are warned in several ways to avoid it. There is also no dispute that Grievant was aware of the Employer's prohibition of sleeping on duty. Despite that knowledge, Grievant failed to take steps that would have kept him active

and unlikely to doze off and instead put himself in a situation that made it more likely he would fall asleep.

The Employer established by persuasive evidence that Grievant was guilty of the charged misconduct. The burden should then shift to the Union to demonstrate that the penalty imposed was too severe for the offense.

Safety of inmates, employees, and the public is an important consideration for the Employer. Inmates are opportunistic and look for weaknesses in security. The threat is no less significant merely because this incident occurred in the minimum security portion of AHCC.

Grievant knew he could be fired for falling asleep at work, based on the letter of reprimand he had received less than six months earlier. While it is true that he had personal problems in his home life, it is also true that the Employer, through Sgt. Greenwalt, attempted to assist Grievant in dealing with those issues so that his work would not be adversely affected. Grievant did not take advantage of this assistance and ultimately fell asleep for a second time.

Contrary to the Union's claim, it was not possible for the Employer to place Grievant in a day shift position without violating the parties' contract. Likewise, that Grievant did not try to hide the fact he fell asleep does not lessen the safety breach.

In deciding to terminate Grievant, Miller-Stout had to take into account not just the misconduct but also her responsibility for the safety and security of others. It was a decision that was supported by other DOC superintendents.

B. Union

The Union contends that the Employer did not establish that it had just cause to terminate Grievant. The Union requests that the grievance be sustained, and Grievant reinstated and made whole, including interest on any back pay.

The burden of proof in discipline cases is on the Employer. The appropriate evidentiary standard in discharge cases is "clear and convincing evidence." The

Employer did not meet its burden because it did not use progressive discipline and did not give adequate consideration to mitigating factors.

Progressive discipline is an essential part of just cause, and arbitrators have required it in cases of unintentional sleeping on the job. Prior to the incident for which he was discharged, Grievant had not been disciplined for sleeping or anything else. He had received a letter of reprimand, but at the time that was not considered a disciplinary action. Though the reprimand put Grievant on notice that sleeping on the job was serious, he was not told that additional incidents of sleeping on the job would result in his termination. Instead the letter merely indicated that further incidents would result in “corrective and/or disciplinary action.” There is no evidence of intentional misconduct and the reprimand implied the use of progressive discipline, so the Employer should be required to follow that approach.

In deciding whether there was just cause for termination, the fact that Grievant was asleep is not the only thing that must be considered. One important factor is the question of intent. Where the evidence shows that an employee intended to sleep at work, severe discipline or termination is usually upheld. But where the employee falls asleep in plain view, many arbitrators would find a lesser penalty appropriate. Had Grievant intended to sleep on the job, he had the opportunity to find a location where he likely would not have been discovered. He did not do so.

Another factor to consider is the nature of the position. The evidence is that 1st shift is quiet the vast majority of the time and officers have to use a variety of techniques to remain alert. Though this is no excuse, it is a relevant consideration.

A third mitigating factor is Grievant’s marital problems. The Employer was aware of these issues and offered suggestions. Grievant followed some of these suggestions, such as getting counseling and bidding for another shift. This is relevant, not only because these issues were the major reason he fell asleep, but also because the problems have been resolved making it likely Grievant would be successful if reinstated.

The final factor is Grievant's character, He did not deny falling asleep. He acknowledged his mistake and the risk that it could cause. He is prepared to return to work and committed to staying alert if reinstated.

VI. DISCUSSION AND ANALYSIS

As framed by the parties, the issue is whether there was just cause for Grievant's discharge. For the reasons explained below, I find that the Employer had just cause to discharge Grievant.

The parties did not define the term "just cause" in their agreement. Absent a mutually agreed-upon definition, I will give the words their ordinary meaning in the labor relations context. That is, just cause is a measure of whether the employer's reason for discipline was adequate and its procedures were fair. The central elements in determining if just cause for discipline existed are: (1) whether the employer established by persuasive evidence that the grievant in fact committed the charged misconduct; (2) whether the grievant knew or reasonably should have known that such misconduct would result in discipline; and (3) whether, all things considered, the discipline imposed was reasonable. While progressive discipline is favored, each case must be considered on its own merits, and the facts of a particular case may warrant a departure from the typical progressive discipline model.

In this case, the first two just cause elements are not at issue. Grievant did not contest the charge that he fell asleep while on duty. Likewise, there is no dispute that such conduct is clearly prohibited and the prohibition was known to Grievant, pursuant to both DOC policy and the December 2004 letter of reprimand he received for like conduct. The question remaining is whether, under all the circumstances, discharge was a reasonable penalty for the admitted offense.

The Union contends that the Employer must prove the charged misconduct by "clear and convincing evidence." The matter of the requisite evidentiary burden is not truly at issue here, however, for two reasons. First, and most significantly, Grievant's admission that he fell asleep means that it is not necessary to decide whether the

Employer cleared any particular evidentiary hurdle. Second, even was that not the case, the evidence established beyond any reasonable doubt that Grievant was asleep as charged. He was observed at close range by two other COs. They attempted to rouse him by talking to him and making loud noises to no avail. In addition, his reaction to the radio call—starting, jumping up, looking confused—is consistent with a conclusion that he was asleep. Further, he acknowledged that he remembered nothing that occurred in the office during the twenty plus minutes that he was observed sleeping.

The Employer argues that, since it established that Grievant was asleep and that there was a clear rule prohibiting such conduct, the burden should shift to the Union to prove that the penalty imposed was unreasonable. That is incorrect. Unless otherwise specified by the parties, where the contract requires just cause for discipline, the burden is on the employer to establish that it had just cause. One of the essential elements of just cause is whether the level of discipline is within the range of reasonableness. Thus, the burden does not shift, but remains on the Employer to show that the discipline was reasonable under the circumstances.

Arbitrators typically consider three factors in sleeping cases to decide whether the penalty was appropriate. *Discipline and Discharge in Arbitration*, Brand, ed., 262 (BNA Books, 1998).

The first factor is whether the employer has a clear rule against sleeping on the job and has applied that rule consistently. The Employer satisfied that factor here.

The Employer has express rules against sleeping or giving the appearance of sleeping on duty. Those rules are communicated to employees in the employee handbook and in post orders. Grievant received a copy of the handbook, and was required to periodically sign off on the post orders. Even had there not been an express rule, however, Grievant was put on notice that sleeping on the job was prohibited conduct when he received the letter of reprimand in December 2004.

Evidence about application of the rule was not extensive. The Employer established that, for a first offense of sleeping on the job, a letter of reprimand was the discipline imposed. However, at least during Miller-Stout's tenure as superintendent, there has not been occasion to discipline an employee a second time for that offense until the instant case. On the few prior occurrences where an employee was charged with a second instance of sleeping on the job, the employee resigned before Miller-Stout imposed discipline. She testified that had they not resigned, her intention was to discharge them. She also testified that she consulted with other DOC superintendents who concurred that discharge was appropriate for a second offense of sleeping on the job.

The second, and often most critical, factor to consider in analyzing the penalty are the attending circumstances, both mitigating and aggravating. Among the circumstances to consider are the reasons Grievant fell asleep, whether it was intentional or not, his length of service and work record, any prior discipline, and the nature of the job. On balance, this factor is not sufficiently favorable to Grievant to justify overturning the discharge.

This is not a case of an employee falling asleep at work for bad reasons, e.g., failing to get enough sleep because he was out partying. By all accounts, Grievant's tiredness at the time of the incident was mainly because his efforts to reconcile with his wife and keep his family together were interfering with getting enough sleep.

Although I empathize with Grievant's personal problems, I do not find that they constitute a basis for mitigation. This is so for several reasons.

By May 25, Grievant was well aware that the graveyard shift hours were hard for him. He acknowledged that, from the start of his employment at AHCC, he was often tired and tried different strategies to stay alert.

In addition, he had been specifically reprimanded for falling asleep on duty. That reprimand had come just five months earlier and so should have been fresh in his mind, making it all the more important that he find and use a viable strategy for

staying alert. He was also aware that his problems at home were making it even more difficult for him to be rested and ready for work.

Further, Grievant did not do all he could have to address the problem. Though he did bid for day shift positions, he knew that it was unlikely he would be awarded one due to his seniority rank. He did not bid for a swing shift position, which he would have been likely to receive, even though he had worked on that shift at Monroe without the difficulties that he found in working graveyard.

Thus, though his personal situation may have been at the heart of his problem in staying awake, it does not provide a reason to mitigate the discipline.³ There were things within Grievant's control that might well have prevented the incident.

An employee with a long unblemished service record will typically be accorded more benefit of the doubt, especially where the sleeping is unintentional. Grievant was not a long term employee. He started working for the Employer only in 2002. His length of service is not a mitigating circumstance.

It is generally well accepted that all cases of sleeping on the job are not equal. One of the key differentiating factors is the question of intent. In reviewing many of the published decisions on the subject, the majority of arbitrators distinguish between employees who nod off at their work station or other open place and employees who seek a quiet, secluded, usually darkened spot, and lie down to sleep. The latter is viewed as more egregious conduct because the employee has acted with a deliberate intention.

Here, the Union stresses that Grievant was not "nesting." This was not premeditated or deliberate misconduct. He did not seek out a secluded spot where he could have potentially eluded discovery, which he could easily have done given the

³ Regarding Grievant's personal issues, the Union also argues that Grievant should be given the benefit of the doubt because those issues have been resolved. In reaching my decision, I did not consider that information. The question presented is whether there was just cause for Grievant's termination. In answering that question, my focus was on the information available to the Employer at the time.

duties of the R&M position. Instead, he fell asleep in an open area in full view of two other COs. He simply was unable to stay awake.

That his conduct was not intentional or planned is to Grievant's credit. It does not diminish the seriousness of the offense, however. This is mainly so because the May 25 incident was not the first time Grievant had been reported sleeping or appearing to sleep on the job.

The prior instance had occurred less than a year before. Grievant said he understood the seriousness of his actions following his first offense. He was specifically warned of the potential for serious disciplinary consequences should he fall asleep at work a second time. Yet it happened again within only a few months.

More significantly, this was not just a simple matter of Grievant nodding off momentarily. Instead, he fell asleep deeply enough that he was not roused by the noises made by the other two COs. And he stayed asleep long enough that, after efforts to wake him failed, Zehetmir had time to walk to another unit, talk to the sergeant, and walk back. Grievant did not move during all this time and for several additional minutes until the sergeant's radio call. By his own account, Grievant did not recall any-thing that happened between sitting in the office staring at the wall and hearing the radio.

The Union also contends that the nature of the work on 1st shift was a contributing factor that warrants consideration. There is less activity than on the other shifts. That fact, coupled with the work hours, may tend to make employees more susceptible to drowsiness.

While it is true that the workplace is less active, that fact cannot excuse falling asleep. Employees, including Grievant, are aware of the greater potential for being drowsy, and it is incumbent on them to exercise greater vigilance to avoid the potential for dozing off.

Further, on May 25, Grievant was not working a tower or some other relatively sedentary post. Rather, he was in the R&M position. His duties were to be active, to

move around, to show a presence. In short, his job that night offered one of the best antidotes to drowsiness—physical activity. The nature of the work thus does not favor mitigation.

The final factor often considered by arbitrators is the impact of the conduct on the safety of other employees and on the employer's business interests. The Employer operates a correctional facility. It requires a high level of security, whatever the classification of offender housed. Staying alert and awake is critical, not just for the safety of the individual employee, but also for the safety and security of other staff, offenders, and the general public. The seriousness of the misconduct is not lessened by the fact that nothing untoward happened as a result of Grievant falling asleep.

The Union contends that it was not progressive discipline for the Employer to go from a first offense letter of reprimand to a second offense termination. This contention is premised on the fact, at the time the letter of reprimand was issued, a letter of reprimand was not considered "discipline" under the contractually recognized forms of discipline.

Discharge is, of course, the ultimate form of discipline. Absent serious misconduct, the general rule is that discipline ought to be progressive in nature, with an eye to correcting misbehavior or poor performance before discharge becomes necessary.

Whether the letter of reprimand was considered to be disciplinary by the parties at the time it was issued, however, is not really the point. It served the same purpose whether considered disciplinary or not, i.e. to put Grievant on notice that future incidents of sleeping on the job would meet with more serious consequences, including the possibility of discharge, and to give him the opportunity to correct his behavior. He failed to heed that warning.

In the *Georgia-Pacific Corp.* case cited by the Union, the arbitrator chronicled his research into published decisions on the subject of sleeping. Among his conclusions was this: "without exception, the only cases where the arbiter upheld

discharge of an employee found sleeping at his duty station was where the discharged employee had other disciplinary incidents of sleeping on the job and/or an extremely poor work record.” 88 LA 244, 248 (1987). The former, of course, is what occurred here.

This is so even though the reprimand was not considered a form of discipline at the time. As discussed above, regardless of the label attached to it by the parties, it served the same function as an initial step of progressive discipline.

The Union cited numerous other cases in support of its various arguments in favor of reducing the discipline imposed. While those cases each discuss one or more elements that may bear on the appropriate discipline in a sleeping on the job case, none is on all fours with the instant case. Moreover, the cases do not establish any bright line test among arbitrators as to when a discharge for sleeping should be upheld or overturned. What the cited decisions do establish is that each case turns on its own facts, and due consideration must be given to both mitigating and aggravating factors, as well as to any prior disciplinary practice for the offense. I have addressed those matters above.

For all the foregoing reasons, I conclude that the Employer had just cause to discharge Grievant. In reaching this conclusion, I considered all of the evidence, argument, and cases cited by the parties, even if not specifically mentioned herein. I will enter an award denying and dismissing the grievance.

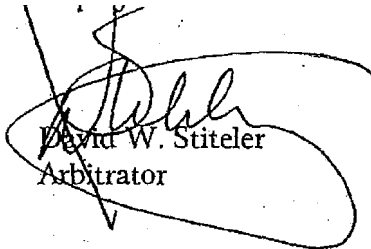
Although I am denying the grievance in this case, my doing so should not be read as signaling a blanket approval of discharge as the appropriate penalty for any second offense of sleeping on the job. As discussed previously, each such case must be analyzed on its own facts. Whether moving from a reprimand to discharge would constitute progressive discipline in another case will depend on the facts of that case, and in particular, upon the mitigating and aggravating circumstances present there.

AWARD

Having considered the whole record in this matter, and for the reasons set forth in the above Opinion, I conclude:

1. The Employer had just cause to discharge Grievant from his position as a CO for falling asleep at work on May 25, 2005.
2. The grievance is denied and dismissed.
3. Pursuant to the contract, the parties shall share equally the fees and expenses of the Arbitrator.

Respectfully submitted this 18th day of July, 2005.



David W. Stiteler
Arbitrator