

In the Matter of Arbitration Between)
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WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
(Union),)
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and)
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)
WASHINGTON DEPARTMENT OF)
SOCIAL AND HEALTH SERVICES,)
(Department).)
)
_____)

OPINION AND AWARD

AAA Case No. 75 390 121 09
TomaHawk Pearson Grievance

BEFORE: David W. Stiteler, Arbitrator

APPEARANCES: *For the Union:*
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OPINION

I. INTRODUCTION

In August 2008, the Department disciplined Grievant TomaHawk Pearson by reducing his salary for three months. The discipline notice listed three charges: sleeping on the job; security and safety violations; and use of cell phone and text messaging. The Union filed a grievance alleging that the Department did not have just cause for the discipline. The parties were unable to resolve the dispute, and the Union advanced it to arbitration. David W. Stiteler was appointed Arbitrator through the procedures of the American Arbitration Association.

At a hearing before the Arbitrator on September 1, 2009, the parties had the full opportunity to examine and cross-examine witnesses, present documentary evidence, and argue their positions. They agreed that the dispute was properly before the Arbitrator for resolution. They also agreed that the Arbitrator could retain jurisdiction following the decision to resolve disputes about a remedy, if one was awarded.

After the presentation of evidence, the parties agreed to submit written post-hearing arguments. The Arbitrator closed the hearing record on receipt of their briefs.

II. ISSUE

The parties agreed that the issue is:

Did the Department have just cause for the discipline imposed on Grievant, and if not, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

Article 27
Discipline

27.1 The Employer will not discipline any permanent employee without just cause.

27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.

IV. FACTS

Background. The Department operates Secure Community Transition Facilities. The one at which the incidents that led to this grievance took place is in King County. It is located near downtown Seattle, and is a 24 hour a day, seven day a week facility.

Up to six civilly-committed sexually violent predators reside at the facility. These individuals are designated as level three offenders. That designation means they are considered the highest risk to re-offend.

Though not a correctional institution, the facility is a secure environment. There is a control room. The employee working in the control room monitors the interior and exterior of the facility through multiple security cameras. The control room employee also can remotely open entrances to the facility, including the gate into the secure parking area.

There are three shifts at the facility: day, swing, and graveyard. Each shift is supervised by a residential rehabilitation counselor (RRC) 4. Day and swing shift each have four RRC 2s; graveyard has three RRC 2s. The RRC 2s monitor and work with residents in the facility; they also escort residents to jobs or other locations outside the facility.

Employees go through new employee orientation after hire. They must complete the training before being assigned escort duty. During training, employees are told that no one is allowed into the facility without the manager's approval. The training also stresses the importance of remaining alert and vigilant for security and safety. However, consequences of violating these policies are not discussed.

The manager of the facility at all relevant times was Tabitha Yockey. She reported to Allen Ziegler, then-administrator of the Less Restrictive Alternative/Secure Community Transition facilities. Ziegler reported to then-Superintendent Henry Richards, who headed the Department's Special Commitment Center.

Grievant's Employment History. Grievant was hired in January 2006 as an RRC 2. He was assigned to graveyard shift at the King County facility after he went through orientation.

Grievant had two performance evaluations during his first year on the job. They were conducted by RRC 4 Craig Lawe and RRC 3 Anthony Golder. Both rated his performance as satisfactory.

At some point in late 2006, Grievant was placed on paid administrative leave and assigned to home. The date and reasons for this action are not completely clear in the record.¹

Grievant was away from the facility for at least seven months. When he returned to work in July 2007, he returned to graveyard shift. Golder was acting shift supervisor.

Not long after Grievant returned to work, his co-workers began telling Yockey about issues with Grievant, including his attitude, sleeping on the job, and cell phone use. She relayed those concerns to Ziegler, who told her to monitor the situation. Yockey also discussed the issues with Golder; he said that he was not aware of any issues.

By September, Yockey was still getting reports of concerns about Grievant from other employees. She talked to Grievant about the issues and asked if he needed support. He denied the allegations and claimed that other employees were harassing him because he had been gone so long on administrative leave, which created an overtime burden for them. She sent all employees a policy reminder sheet on discrimination and harassment.

Yockey continued to get reports from facility employees about Grievant. She told them to start putting their concerns in writing.

Near the end of September, RRC 4 Eric Starkey reported some concerns about Grievant to Yockey. He said that Grievant needed to go through new employee orientation again because there had been changes in procedures

¹ There are indications that it concerned allegations about Grievant's conduct toward other employees and sleeping on the job. Ziegler investigated the allegations. There is no evidence that any formal discipline was imposed on Grievant following the investigation.

while Grievant was on administrative leave, and Grievant was resisting on-the-job training efforts. He told her it was difficult to work with Grievant because Grievant did not believe that he needed any more training and did not accept that there had been changes in practices and policies in his absence.

In early October 2007, RRC 4 Ana Mosquera became the graveyard shift supervisor.

On October 5, day shift supervisor RRC 4 Tsinik Adams arrived at the facility a little before her shift started at 7 a.m. She saw an unfamiliar car enter the secure parking lot. She found out that Grievant told RRC 2 Roman Balisi to open the gate to allow the car to enter. In the car were Grievant's fiancé and sister; his sister apparently was going to drive his vehicle and he was going to leave with his fiancé. When Grievant entered the facility, Adams asked him if he had brought someone into the parking lot. He said he had. Adams told him that no one was allowed into the secured area without Yockey's approval. Grievant said he thought it was okay if he escorted them. Adams told him that was incorrect and directed him to have the car and its occupants leave immediately; he complied.

Afterward, Adams counseled Balisi about opening the gate without knowing who was in the car. Balisi told her that Grievant had directed him to open the gate and that he did not know there was anyone else in the car. Adams advised him to be more careful.

A few days later, Mosquera sent Yockey a memorandum reporting that she had talked to Grievant twice about falling asleep at work. She said that on one occasion witnessed by Balisi and RRC 2 Carl Hedlund, Grievant was snoring before Mosquera woke him up. She also stated that Hedlund and Balisi told her that this conduct had been going on for some time. Mosquera told Hedlund and Balisi to put their concerns about Grievant in writing.

A day or so after those incidents, Mosquera saw Grievant sending text messages from his personal cell phone while he was working in the control room. When she later talked to Grievant about the importance of staying alert and not being distracted by his phone, he told her that he was having some

personal difficulties, that other employees were treating him differently, and that he felt humiliated by having to go through new employee orientation again. She reported the incident and the conversation to Yockey.

On October 11, Yockey sent all employees a memorandum reminding them that personal cell phones were to be turned off during work hours. Employees were required to sign and date the memorandum to acknowledge receipt. Grievant signed on October 12.

On October 13, Hedlund wrote a statement about Grievant sending and receiving text messages and sleeping on the job.

New employee orientation was held during the week of October 15. During the training, Adams saw Grievant sending and receiving text messages on his personal cell phone during a class. The next day, she was present when instructor Crystal Dixon admonished Grievant for sending text messages during a class. She also saw Grievant appear to doze off during a class; Dixon also noticed and commented about it. Adams sent a report to Yockey about these incidents on October 20.

Mosquera was present at the training and also sent Yockey a report about the incidents in Dixon's class. The same day, she reported to Yockey another incident of seeing Grievant fall asleep.

On October 23, Mosquera gave the RRCs on graveyard shift, including Grievant, a letter of expectation. Among other issues, she stressed the policy on not using personal cell phones during work time. She said that she would have weekly individual meetings with them.

The next day, Mosquera reported to Yockey that Grievant was having a hard time staying awake during his shift. She said she had sent him to do a security check so he could get some fresh air, but noticed later that he appeared to be struggling to stay awake.

Hedlund wrote a report about Grievant around October 26. He identified several specific dates that he saw Grievant fall asleep, and several specific dates that he saw Grievant using his personal cell phone during work hours.

On October 28, Mosquera reported to Yockey that Hedlund told her that Grievant had been using his cell phone during work hours on a day Mosquera was not at work. On October 30, she reported to Yockey that Grievant had misplaced his facility keys and apparently had left them in the residents' kitchen.

Hedlund wrote a third report around October 30. He said that Grievant had spent over 45 minutes sending and receiving text messages on October 29. He also reported the incident about Grievant misplacing his keys.

The Investigation. Sometime in late October, Richards appointed Ziegler to investigate the concerns being raised about Grievant. Ziegler interviewed Yockey, Adams, Starkey, Mosquera, Golder, Hedlund, Balisi, and Grievant. The interviews began on October 30; all but Golder's and Grievant's were done by November 7; those two interviews were completed by the end of December.

When Ziegler interviewed Adams, she confirmed her report about Grievant allowing unauthorized individuals into the parking area. She also confirmed her observations about Grievant's actions—cell phone use and nodding off—during new employee orientation.

Balisi told Ziegler that Grievant regularly received calls on his personal cell phone during work hours, and sometimes would go outside for up to 30 minutes to take calls. Balisi also reported seeing Grievant appear to be asleep—sitting at the computer with his eyes closed and not doing any work. He told Ziegler that he was present on the occasion when Mosquera woke Grievant up after they heard him snoring.

In Hedlund's interview with Ziegler, he confirmed what he had written in his reports about Grievant's sleeping, cell phone use, and misplaced keys.

Mosquera told Ziegler that she had seen Grievant use his personal cell phone on duty at other times after Yockey's October directive. She also told Ziegler about having to counsel Grievant on several occasions about falling asleep. She told Ziegler about Grievant leaving a janitor unsupervised while he was looking for his keys, and about having to remind Grievant on more than one occasion about leaving his Department cell phone lying around.

On November 6, Mosquera reported to Yockey that on two occasions during a shift, Grievant had left his Department cell phone lying around. According to policy, employees are to have their Department phone with them at all times during work hours.

That same date, Yockey sent a memorandum to all employees prohibiting them from bringing personal cell phones into the facility. Ziegler directed her to send the notice because he found during his investigation that employees were not following her earlier directive.

Also on the same date, Grievant was reassigned to home duty. The reassignment was prompted by the information Ziegler had gathered to that point in his investigation.

When Ziegler interviewed Golder, Golder told him that while he was acting shift supervisor other employees had not mentioned concerns about Grievant to him. However, he also told Ziegler that he had to correct Grievant more than once about nodding off at work. He told Ziegler that Grievant used his personal cell phone excessively, sending and receiving text messages inside the facility and taking and making voice calls outside lasting for as much as 20 minutes.

In late November, Yockey sent Ziegler a report outlining the various concerns about Grievant's conduct. She did not give a copy of the report to Grievant. She did not issue Grievant an oral reprimand or any other discipline related to her concerns. Any formal discipline needs Richards' approval.

Ziegler interviewed Grievant in December. Grievant denied sleeping on the job, though he acknowledged that Mosquera had talked to him about not sleeping on the job several times. Grievant admitted using his personal cell phone during work hours. Grievant acknowledged that he has walked off without his facility keys or Department cell phone, but denied that Mosquera or anyone else reminded him to carry the phone and keys at all times.

Grievant expressed concerns about the investigation. He told Ziegler that Mosquera and other new employees had been given information about him and had preconceived ideas about his behavior before they got to know him. He felt

that his relationship with his supervisors and co-workers was damaged beyond repair, that most co-workers would not talk to him, and that they were writing statements about him every day. He also requested the results of the investigation related to his prior administrative leave.

Ziegler concluded that the charges against Grievant were substantiated. He reached that conclusion based on the observations and statements of Grievant's supervisors and co-workers. Specifically, he found that: (1) Grievant continued to use his personal cell phone for text messaging during work hours after Yockey's October directive prohibiting on-duty use of personal cell phones; (2) Grievant appeared to be asleep on duty on several occasions and once was awakened by Mosquera when he had been snoring;² and (3) Grievant committed a security violation by allowing an unauthorized vehicle to enter the secured parking area.

The Discipline. Richards notified Grievant by letter dated June 9, 2008, that he intended to discipline Grievant for sleeping on the job, security and safety violations, and use of cell phone and text messaging. He scheduled a pre-disciplinary meeting for June 23 to give Grievant the opportunity to respond to the charges.

At that meeting, Grievant again denied that he slept on the job or during the training. He admitted allowing unauthorized individuals into the secure parking area, but denied it was a security breach because another employee had opened the gate and because he was always with the individuals. He admitted leaving his Department cell phone in the control area, but denied that it was a security breach because the control area is secure. He denied sending or receiving text messages during training. He also denied the other allegations.

Richards reviewed the investigation report and the rebuttal information provided by Grievant. He considered Grievant's claim that other employees

² A consistent description from Mosquera and Grievant's co-workers is that Grievant would sit in a chair in the control area with his back to the rest of the room, slouch down, lean his head back into the chair top cushion, and not move for extended periods of time. On occasions when his face could be seen, his eyes would be closed. When there was a loud noise or disturbance, he would startle, as if being awakened abruptly.

were out to get him, that others engaged in similar conduct and were not disciplined, and that other employees were misinterpreting his behavior. Richards decided that the information compiled by Ziegler established that Grievant had engaged in misconduct, and that the information Grievant provided did not refute that information.

In deciding on the level of discipline, Richards consulted Ziegler and the Department's HR staff. He thought the issues were serious enough to warrant discharge, but decided on a pay reduction because there had been no progressive discipline or written notice to that point. For Richards, the allegations of sleeping on the job were the most critical.

By letter dated August 12, 2008, Richards notified Grievant that the Department was going to discipline him by reducing his salary for three months, beginning in September. Richards listed three grounds for the disciplinary action: sleeping on the job; security and safety violations; use of cell phone and text messaging.

Richards' letter set out six instances on which other employees said they observed Grievant asleep while at work. The letter also identified specific security violations—allowing unauthorized individuals and failure to secure his cell phone and keys. Finally, the letter listed three occasions on which Grievant was seen using his personal cell phone during work hours.

Richards concluded that the information supported the charges. He stated:

I have carefully considered all of the evidence regarding the incidents above, the additional information you provided on June 25, 2008, and your work history. Your complete disregard of clearly stated agency policy and expectations and your repeated and unacceptable actions as outlined above are unacceptable and will not be tolerated. Additionally, your actions run contrary to the judgment and responsibility you are to exercise as an RRC 2 at SCC. I have come to the conclusion that a reduction in salary is appropriate.

He also advised Grievant that failure to follow supervisory directives and Department policies could result in further disciplinary action.

The Union filed a grievance on August 14. The grievance alleged a violation of Section 27.1 for disciplining Grievant without just cause.

V. CONTENTIONS OF THE PARTIES

A. DEPARTMENT

The grievance should be denied and dismissed. The evidence established that Grievant engaged in the conduct—especially sleeping on the job—for which he was disciplined.

Sleeping on the job is a serious offense, one that is compounded when it occurs in a secure work environment where such conduct may endanger the residents, other staff, and the public. No rule or policy is necessary to inform employees that sleeping on the job may lead to discipline. The importance of staying alert and vigilant was stressed in new employee orientation, a training that Grievant twice participated in. In addition, he had been placed on administrative leave previously while allegations of sleeping on the job were investigated.

Other than his denials, Grievant produced no evidence to refute the allegations against him. The Department's investigation produced ample evidence that Grievant had been observed either asleep or with his eyes closed and not paying attention to his duties. This evidence, which arguably supported termination, required a strong disciplinary response.

Though the discipline included other issues, such as inappropriate cell phone use and security violations, it is the Department's position that the misconduct of sleeping on the job is sufficient to warrant the level of discipline imposed. The Department opted for the lesser sanction than discharge to give Grievant the chance to change his behavior.

B. UNION

The Department did not have just cause to reduce Grievant's salary, and violated the parties' agreement when it did so. The Arbitrator should uphold the grievance and order the Department to provide Grievant with make-whole relief.

The Department must prove the charges by a preponderance of the evidence. Just cause requires proof of the misconduct, due process, and a proportionate penalty.

The Department's evidence was tainted by the preconceptions of Grievant's co-workers and the investigator. Grievant's co-workers were out to make a case against him, and discussed Grievant among themselves during the investigation, a violation of Section 27.3. The investigator was not impartial because he was in Grievant's line of supervision and had previously investigated Grievant.

Grievant was not on notice that his actions could result in serious discipline. In fact, his direct supervisors gave him good evaluations. The Department's policies were not clear and consequences for violations were not discussed in training. The cell phone policy caused confusion and changed several times. Mosquera did not comply with her own stated expectation to meet with employees every week. Yockey brought her children into the facility with no consequences, yet Grievant was disciplined.

Richards said that he would have issued the same discipline even if some of the charges had not been substantiated. That shows a lack of understanding of the just cause proportionality requirement. In addition, there was a lengthy unexplained delay after the investigation before the discipline was imposed, which made it difficult for Grievant to adequately respond to the charges.

The Department did not first use less serious discipline, such as a reprimand, to try to correct Grievant's conduct. Lesser discipline would likely have worked, especially considering that Grievant has been on home assignment for over half the time he has been employed.

In any event, the punishment was too severe given such facts as the confusion about the cell phone policy. Also, Grievant was already effectively punished by being assigned to home duty for about seven months with no explanation.

VI. DISCUSSION

The issue is whether the Department had just cause to discipline Grievant by reducing his salary for three months. The Department argues that Grievant was guilty of inappropriate conduct, including sleeping on the job, that justified the discipline. The Union argues that there was no just cause because of flaws in the investigation, a lack of adequate notice, and disproportionate discipline. For the reasons explained below, I conclude that there was just cause for the discipline.

The term “just cause” is not defined in the parties’ contract. Arbitrators use various definitions in determining just cause. However defined, just cause is essentially a measure of whether the discipline was reasonable under all the circumstances. The critical factors in that determination are whether the employer proved the charged misconduct, whether the employee received the requisite due process, and whether the penalty was a proportionate response to the proven misconduct.

A. Proof of Misconduct

The evidence established that Grievant was guilty of the misconduct alleged. There is no dispute that Grievant brought unauthorized individuals into the facility’s secure parking area. There is also credible evidence that he was not always in compliance with the requirement to have his Department cell phone and keys with him at all times when on duty.

Grievant was seen by co-workers and supervisors using his phone during work time to send and receive text messages. He also made and received calls at times other than when he was on break. He was seen by trainers and supervisors using his phone during new employee orientation.

Most seriously, supervisors and co-workers on several occasions saw Grievant sleeping or dozing or, at a minimum, sitting with his eyes closed and not alert to his duties. He also was seen by a supervisor and a trainer falling asleep or dozing off during new employee orientation.

The Union points out that Yockey brought her children into the facility once and there is no evidence she was disciplined for it. According to the

Union, that could have misled Grievant into believing that what he did was acceptable as long as he escorted them. Though this fact does not mitigate Grievant's policy violation, it does affect the weight to be given to this charge.

The Union contends that the cell phone policy was not clear. There is evidence of some confusion among employees. However, on October 11, Yockey issued a directive that personal cell phones were to be turned off during work hours. After that date, there should have been no basis for confusion about using a personal cell phone during work hours. Yet after acknowledging receipt of that directive, Grievant was seen in the facility and in the new employee orientation using his cell phone during working hours to send and receive text messages.

The Union points out that the policy was clarified in November to prohibit bringing personal cell phones into the facility, which demonstrates that confusion still existed. By then, however, Grievant had failed to comply with Yockey's earlier directive that expressly directed employees to turn their personal phones off during work hours.

Grievant denies that he slept on the job. He claims that his co-workers and supervisors were influenced by rumors that he had been put on administrative leave previously because the Department was investigating complaints that he was sleeping on the job.

Charges of sleeping on the job often raise difficult questions of proof. The accused individual usually denies the charge. The charge is typically based on the observations or perceptions of the individual's co-workers or supervisors.

Here, the evidence persuades me that Grievant was sleeping or dozing during work hours. The reported observations of his behavior are consistent with the behavior of someone sleeping or nodding off. On at least one occasion, he was heard to be snoring and was awakened by Mosquera. On several occasions, he was seen sitting in chair with his head tilted back, eyes closed and inattentive for long periods. His reaction to noise in these instances was to be startled.

In addition, there is no basis to conclude that his co-workers were biased in their perceptions and were trying to build a case against him. Hedlund was hired during the time Grievant was on administrative leave, and so had no prior history with him. Not long after Grievant returned from leave, Hedlund noticed behavior that indicated Grievant was sleeping and he brought it to Yockey's attention. Mosquera observed similar behavior within a few days of starting as the shift supervisor; she too had no prior history with Grievant.

On this record, there is no evidence that any of Grievant's co-workers or supervisors had any incentive to raise complaints or concerns about him. It was only after their concerns were relayed to Yockey and Ziegler that they were directed to document their observations.

B. Due Process

Among the important elements of industrial due process is notice of potential consequences. The Union contends that there were no specific rules in place regarding the issues for which Grievant was disciplined.

When a supervisor issues a directive, the employer has the right to expect that employees will obey. Depending on the circumstances, failure to follow the order may be considered insubordinate behavior and subject the offending employee to discipline, regardless of whether specific consequences were spelled out.

The less serious charges against Grievant concern conduct that was the subject either of policy or directives. Employees are told in orientation that no one is allowed in the facility without the manager's approval. They are also told that they are required to keep their Department cell phone and keys with them at all times. Employees are not told that failure to comply with these policies will result in discipline. These are important security practices, however, and the facility is a secure environment. It is not unreasonable to discipline employees for failing to follow required security precautions.

Grievant and other employees were given a directive on October 11—personal cell phones were to be turned off during working hours. The directive was not ambiguous. Grievant should have known after that date that he could

not have his personal cell phone on during work time. He violated that directive on more than one occasion. He knew or should have known that refusing to obey a directive from the facility manager would lead to discipline.

Not all types of behavior must be specifically prohibited by policy or directive in order to warrant discipline. Some conduct—thrift from the employer or fighting on the job—is such that anyone should know that it will lead to serious discipline, even if there is no policy against it.³

Sleeping on the job is one of those offenses that any employee should know is wrong and will lead to discipline.⁴ No specific policy is needed to inform employees that such behavior is prohibited. The Department hires employees to work, not to sleep. An employee who is sleeping or otherwise not alert is not doing the job they were hired to do. Moreover, in the context of the facility, sleeping on the job creates a security risk for other employees, the facility's residents, and the public.

That said, the absence of a specific policy or rule prohibiting sleeping on the job is a factor in considering the appropriateness of the penalty imposed.⁵

The Union also contends that due process was violated because Ziegler was not an impartial investigator. Ziegler's role was to gather information concerning the allegations that had been made against Grievant. He did not have a role in the decision to discipline Grievant or the level of discipline to be imposed.

It might have been preferable for the Department to use someone unconnected to the facility and unfamiliar with Grievant to conduct the investigation. But the fact that Ziegler was in Grievant's chain of command does not necessarily mean he was partial. Ziegler was several steps removed from Grievant's level. There is no evidence that he conducted the investigation in a biased or slanted way. Likewise, the fact that he had investigated Grievant before does not establish that he was biased in this investigation.

³ *Common Law of the Workplace*, St. Antoine, ed., 166 (BNA 1998).

⁴ *Discipline and Discharge in Arbitration*, Brand, ed., 261 (BNA 1998).

⁵ *Discipline and Discharge in Arbitration*, 261-271.

The Union argues that there was a violation of Section 27.3 because Grievant's co-workers talked among themselves about the issues before being interviewed by Ziegler. That section requires the Department to make a reasonable effort to protect an employee's privacy when discipline is being imposed. It is not applicable here. At the time the interviews were being conducted, no decision had been made that Grievant would be disciplined. In any event, the evidence is that the information they provided during the investigation was consistent with the oral and written reports they had made before the investigation.

The Union also cites the lengthy delay between the investigation and the discipline as a violation of just cause. It is unfortunate that it took the Department nearly eight months after the investigation was finished to determine the discipline. No satisfactory explanation for the delay was provided.

Nonetheless, in this case, the delay did not amount to a just cause violation. Grievant was confronted with the allegations against him during his interview with Ziegler in December. He had the opportunity then to respond to those allegations. He was notified again of the charges about two weeks before he met with Richards in June and had time to prepare further responses. At that meeting, he offered no significant additional information to rebut the charges. There is no evidence that he was disadvantaged by the delay.

C. Appropriate Penalty

The concept of just cause generally embodies progressive discipline even absent a contract provision. The parties' agreement, while not specifically mentioning progressive discipline, does set forth a progressively more serious list of disciplinary actions.

The purpose of discipline generally should be corrective. Thus, progressive discipline typically requires an employer to use minor discipline such as reprimands before resorting to more serious discipline. The facts of each case, however, determine the appropriate level of discipline.

The Department imposed a salary reduction—economic discipline—for Grievant’s first proven misconduct. In the contractual list of disciplinary actions, salary reduction is the lowest form of economic discipline and toward the lower end of the disciplinary matrix.

Grievant was not disciplined for a single act of misconduct but for several different acts over the course of a few weeks. I do not find the security violations and cell phone charges to be so serious, either separately or together, that they would justify economic discipline under the circumstances presented. The charge of sleeping on the job is another matter.

The facility is a secure environment. It houses sexually violent offenders. For the safety and security of the public, the staff, and other residents, employees must remain alert and attentive at all times. Sleeping or dozing or even sitting with one’s eyes closed for extended periods is not consistent with the obligation to be vigilant.

As noted above, the Department has no specific rule prohibiting sleeping on the job. Where such rules exist, set out a clear notice of consequences for violation, and are consistently enforced, discharge may be warranted. Absent a rule and notice of penalty, that level of discipline would be inappropriate in these circumstances. However, even without a rule, Grievant's training should have been enough to put him on notice that he could not nod off without consequences.

As a mitigating factor, the evidence does not support a conclusion that Grievant was acting intentionally. For example, he was not found asleep away from his assigned duty station. As Mosquera described it, Grievant just seemed to have a hard time staying awake.

Considering the nature of the charge, the circumstances both favorable (lack of intent) and unfavorable (secure facility), I find that a three month salary reduction is not disproportionate to this offense, even standing alone.

The Union argues that a salary reduction was not consistent with progressive discipline for a first offense. As already discussed, though progressive discipline is an element of just cause, there is no requirement that

an employer move through each potential level of discipline in all cases. The facts of each particular case dictate the appropriate level of discipline, and as in this case, some misconduct warrants more serious discipline for a first offense.

The Union argues that the Department showed that it did not understand its obligations under just cause by stating that Grievant would have received the same penalty even if some charges had not been proven. First, the point is moot since the charges were all proven. More importantly, the misconduct of sleeping on the job by itself justifies the discipline imposed.

The Union also argues that the penalty was too harsh given the confusion about policies such as the cell phone policy. As discussed above, whatever confusion there may have been about personal cell phone use before October 11, there should have been none after that; yet Grievant continued to use his phone during work time. Confusion about other policies or the lack of specified consequences is largely immaterial here because the linchpin charge of sleeping supports the penalty.

According to the Union, Grievant has already been effectively punished by being assigned to home duty for an extended period. Nothing in this record would support a conclusion that the home duty assignment could be considered disciplinary. Grievant continued to hold his job and receive his regular pay and benefits.

There are no mitigating circumstances that support a reduction in the penalty. Grievant is not a long-term employee. In his relatively short career, he has been the subject of two investigations, one of which substantiated charges of serious misconduct. While his evaluations indicate that he was doing an acceptable job, the overall evidence established conclusively that some of his behavior was unacceptable.

D. Summary

I conclude that the Department had just cause to discipline Grievant by reducing his salary for three months. The evidence establishes that Grievant was guilty of the conduct for which the discipline was imposed. The lack of

notice of specific consequences is immaterial here given the nature of the charges. The discipline imposed, though not progressive, was not unduly harsh and was appropriate for the offenses.


In reaching this conclusion, I considered all of the evidence and argument submitted by the parties, even if it was not specifically discussed above. I will issue an award denying and dismissing the grievance.

AWARD

Having considered the whole record in this matter, and for the reasons explained in the Opinion, I issue the following Award.

1. The Department had just cause to discipline Grievant by reducing his salary for three months.
2. The grievance is denied and dismissed.

Respectfully issued this 8th day of December, 2009.



David W. Stiteler
Arbitrator