

Thomas F. Levak
Arbitrator/Mediator
P.O. Box 82639
Portland, OR
97282-0639
Tele: 503/777-9600
FAX 503-774-8967
E-mail: levak@europa.com

STATEMENT OF PROFESSIONAL FEES AND SERVICES

DATE: September 8, 1998

IN THE MATTER OF: State of Oregon/AEE of O, Halstead Arbitration
DOJ file no. 731-001-GL0321-97

Invoice No. 2215

Stephen D. Krohn
Assistant Attorney General
State of Oregon
Department of Justice
General Counsel Division
1162 Court St NE
Salem OR 97310-0314

Invoice No. 2216

Association of Engineering
Employees of Oregon
Michael Tedesco
Attorney at Law
15050 SW 150th Ct
Beaverton OR 97007

PROFESSIONAL FEES & EXPENSES:

1.25	hearing and travel
2.25	days consideration & preparation of opinion and award
3.50	days @ \$775.00/day

TOTAL FEE: \$2,712.50

EXPENSES:

Auto	43.75 (125 miles @ .35 mi)
Secretarial	90.00

TOTAL: \$133.75

GRAND TOTAL: \$2,846.25

AMOUNT PAYABLE BY EACH PARTY: \$1,423.13

Please remit within 30 days.

BEFORE THOMAS F. LEVAK, ARBITRATOR

In the Matter of the Grievance
Arbitration Between

THE STATE OF OREGON, DEPARTMENT
OF TRANSPORTATION

The State and DOT

and

ASSOCIATION OF ENGINEERING
EMPLOYEES OF OREGON

The Association

On Behalf of Michael Halstead,
The Grievant

DISCHARGE FOR SLEEPING ON THE
JOB/LEAVING WORK/DISHONESTY

ARBITRATOR'S OPINION
AND AWARD

This matter came for hearing on August 25, 1998, at Salem, Oregon. The State was represented by Stephen Krohn and the Association by Michael Tedesco. Testimony and evidence were received, and following oral closing argument the hearing was declared closed. Based upon the evidence and the arguments of the parties, the Arbitrator decides and awards as follows.

OPINION

I. THE ISSUE.

The July 3, 1997, dismissal letter, issued by DOT Region 2 Manager W. Gary Johnson, asserted that, despite cited progressive discipline, the Grievant repeatedly slept on the job, failed to follow his supervisor's directive to request leave in advance of taking it, and failed to accurately record time he did take. Charge No. 1 charged him with leaving work 90 minutes early without approval from his supervisor and failing to deduct that time on his time card. Charge No. 2 charged the Grievant with calling in sick and indicating on his time card that he worked eight hours. Charge No. 3 charged him with leaving work one hour early, while claiming the time on his time card. Charge No. 4 charged him with leaving work two hours early, while claiming the time. Charge No. 5 charged him with failing to follow his supervisor's instruction to correct his timesheet, by adding overtime

hours to it that he had not worked. Charge No. 6 charged him with sleeping on the job on April 18, 1997, for 20 minutes, and Charge No. 7 charged him with sleeping on the job on May 8, 1997. The Association concedes that the Grievant slept on the job as charged, so the State offered no evidence on the latter two charges. The stipulated issue is:

Did the State violate Article 24 of the parties' 1995-97 collective bargaining agreement (Er. Ex. 1, the "Agreement") when it terminated the Grievant? If so, what is the appropriate remedy?

The parties further stipulated that there are no procedural or substantive arbitrability issues, and that should the Arbitrator find in favor of the Association, he should render a general award and retain jurisdiction for 60 days to resolve any dispute between the parties concerning the amount of back pay or benefits due.

II. THE AGREEMENT.

ARTICLE 24 DISCIPLINE AND DISCHARGE

Section 1. The Employer and the Association agree that the conduct of employees must reflect the best interest of the public. Conduct shall be measured by the employee's performance, safety record and attitude. The employer may discipline an employee for just cause. Disciplinary action shall follow the principles of progressive discipline when appropriate.

Disciplinary Action shall consist of:

Light: A written reprimand which shall be placed in the employee's personnel folder.

Severe: Reduction in pay, demotion or suspension.

Termination: As described in Section 3 of this Article.

Section 3. Termination. An employee may be terminated for just cause. As used in this Article just cause includes misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render service. A written pre-dismissal notice shall be given to a regular status employee against whom a charge is presented. Such notice shall include the known complaints, facts and charges, and a statement that the employee may be dismissed. The employee shall be afforded an opportunity to refute such charges or present mitigating circumstances to the agency or his/her designee at a time and date set forth in the notice ***.

III. THE FACTS.

Background.

The Grievant was employed by DOT since 1983, as an Engineering Specialist 1. He was a member of Crew 2854 in Salem, Oregon. The crew performed surveys for highway construction. Crew members worked both inside and outside the office. His supervisor was Project Manager Ronald Clay and his crew chief was William Dye.

Cited Progressive Discipline and Counselings.

The Grievant was counseled and progressively disciplined, as follows: On July 19, 1995, he received a letter of reprimand from Clay for sleeping on the job; on or about October 24, 1995, he was counseled for sleeping on the job; on November 15, 1995, he was again counseled for sleeping on the job; and on October 18, 1996, he received a salary reduction for sleeping on the job, and was advised that repeating the offense would result in more severe discipline, up to and including discharge. Neither the letter of reprimand nor the salary reduction was grieved.

Clay testified that he talked many times with the Grievant about sleeping on the job, including the occasions on which he was disciplined and counseled, always asked him on those occasions whether there were any medical reasons for doing so, and that the Grievant always responded that there were no medical reasons. He further testified that on those occasions the Grievant, in fact, told him that he had not been sleeping on the job, and also told him on one of those occasions that a neck condition simply made it appear that he had been sleeping. Clay also noted that during the investigation that led to the disciplinary pay reduction, the Grievant admitted that he may have "dozed off," but further stated that he was not taking any medication that would have caused him to do so.

When the disciplinary pay reduction was issued, then-Personnel Officer Tawnie Marie interviewed the Grievant, who denied that he had been sleeping.

The Timesheet Errors.

The persuasive evidence established that because of concerns about the Grievant's and two other employees' time reporting, Clay directed Dye to conduct a personal surveillance of them during February and March, 1997.¹ Dye testified that he personally observed: (1) that on March 14, 1997, the Grievant left work two hours early, telling Dye that he had a doctor's appointment; (2) that on March 24, 1997, he was absent from work; (3) that on March 25, 1997, he left work one hour

¹Interestingly, Clay claimed that he gave no directive to Dye, and that Dye kept track of the Grievant's work hours because of Dye's and others' concerns that the Grievant and other employees had submitted incorrect timesheets.

early,² and (4) that on March 31, 1997, he left work two hours early. Dye reported the results of his surveillance to Clay, who compared the Grievant's actual work hours with his timesheets. Clay then met with the Grievant and told him to correct his timesheets. The Grievant did so, but Clay testified that the corrected timesheets still did not conform to actual hours worked, because the Grievant had added unworked overtime hours. Clay testified further that the Grievant ultimately corrected those hours.

Regarding those instances, the Grievant testified that he and his wife separated on March 2, 1997, and that on that date, "I just walked out." He testified further that during the time in question, "I was depressed and just didn't care about anything at work," and that he did not therefore fill out his timesheets in a timely manner, as he normally had done, but that he instead waited until the end of the month to fill them out; and he claimed that the errors were not intentional. He testified that when the errors were pointed out, he went to his co-workers and asked what work had been done on those days, and that he corrected the timesheets according to what they told him. He specifically noted that one co-worker told him that they both had worked overtime on one of the days. He testified that Smith and Clay discussed the matters with him, and that he believed that at the end of that discussion, and once the timesheets had been properly corrected, the matter had been resolved. The Grievant appeared to testify in a credible and forthright manner, and his testimony was essentially un rebutted.

The only evidence is that between April 4 and June 2, 1997, no disciplinary action was initiated against the Grievant for the timesheet errors.

The Charged Sleeping Incidents and Surrounding Circumstances.

On April 18, 1997, the Grievant fell asleep in a DOT vehicle. On May 1, 1997, he had a dizzy spell on the job and was unable to work for approximately 75 minutes. That dizzy spell led him to schedule a doctor's appointment at the Kaiser Permanente Clinic in South Salem. Clay talked to Personnel Officer Cindy Smith³ about the dizzy spell and the most recent sleeping incident. On May 7, 1997, Smith contacted Kaiser and asked for medical information on the Grievant. For some unknown reason, she failed to first obtain a medical release from the Grievant, so Kaiser refused to release any information to her. Importantly, neither Smith nor any other manager ever took steps to secure such a release. On May 8, the Grievant experienced the second charged sleeping incident. On May 14, 1997, Smith authored a letter for Clay's signature, which he sent to Kaiser Permanente, which related the dizzy spell, as well as the occasions when the Grievant had fallen asleep, and asked if there was a medical condition which might have caused those problems. On May 22, 1997, the Grievant saw a physician's assistant, John Fitch, at Kaiser at which he complained about sleepiness and lethargy at work. Fitch's chart notes indicate that he informed the Grievant that "if he sits in a

²Dye noted that the entire crew had ended work about an hour early, but that the other crew members remained at work.

³Smith was subsequently terminated for an off-the-job drug related offense.

warm office for short while, will go to sleep. Employer is concerned.” Fitch referred the Grievant to pulmonologist Robert Unitan, a specialist in sleep disorders. On June 16, 1997, the Grievant was evaluated by Unitan for possible sleep apnea.⁴ Unitan’s chart notes indicate that he told the Grievant that, “He has fallen asleep at work using the computer, and this is a concern for his boss.” Unitan testified that because of the concerns of DOT, he scheduled him for an urgent — that is, a “fast tracked” — sleep study to be held on June 29, 1997. The study was conducted on that date, with a written report scheduled to be issued in mid-July, 1997.

The Grievant testified that he found out that he had sleep apnea for the first time at the time of the June 29, 1997 sleep study. He further testified that prior to that time he believed, from discussions with Fitch, that his difficulties possibly related to his diabetes. He also testified that, for the most part, he was not aware that he had been sleeping on the job, and that he always believed that he had merely “nodded off” for a moment and immediately awakened. He noted that, therefore, he felt he had been honest with Clay when he told him that he had not been sleeping. He conceded that except for one incident, when he was stretching his neck, he had in fact been asleep.

The Pre-dismissal Meeting.

The notice of suspension with pay and commencement of pre-dismissal proceedings was issued on June 18, 1997. Johnson conducted the July 1, 1997 pre-dismissal meeting; Personnel Analyst Victoria Masengale,⁵ Association Assistant Director Jess Dressler and Clay attended it. The Grievant and Dressler advised Masengale and Clay that the Grievant had been tested at Kaiser for sleep apnea, but that the results of the tests would not be available for a week to ten days; and Dressler asked that no further action be taken by the State until the study results were received. Masengale responded that she would take the request into consideration. Dressler testified that with regard to the timesheet charges, the Grievant commented to Clay that he believed that those charges had been “taken care of and that his attendance was not longer a problem,” and that Clay responded, “That’s correct.” There was no evidence to the contrary.

Subsequent Events.

On July 3, 1997, the Grievant was terminated. On July 9, 1997, Unitan advised in a letter “to

⁴ Unitan testified that sleep apnea, causes awakenings known as “apneas” as frequently as 20 to over 80 an hour, which in turn causes pathological sleepiness during day time hours. And he explained that because the disorder is related to heavy weight, which often is gained gradually, a sufferer may not be aware of the disorder or that it is causing the individual to fall asleep.

⁵ Masengale has since been terminated by the State.

whom it may concern” that the sleep study was on “fast track” for a report.⁶ On July 22, 1997, the report issued; Unitan found “severe sleep apnea.”⁷ Unitan testified that the Grievant was experiencing 80 apneas an hour. He further testified that he would have expected such a sufferer to fall asleep as many as several times a day, except during periods of greater concentration or vigilance, such as while driving or operating heavy machinery. The Grievant was prescribed nighttime oxygen treatment with the use of a face mask and nasal spacer. Unitan testified that, utilizing that treatment, he was able to completely eliminate the Grievant’s apnea.

On August 15, 1997, the State Employment Division issued an Administrative Decision in which it was noted that the Grievant “had been diagnosed as having severe obstructive sleep apnea resulting in significant sleep fragmentation and oxygen desaturation.”⁸

On February 4, 1998, Unitan issued a “to whom it may concern” letter which stated that the Grievant had suffered from “severe obstructive sleep apnea,” that he had been treated and that so long as he remained compliant with the treatment, sleep apnea should be effectively eliminated, and there should be no impairment of work performance.”⁹

IV. STATE CONTENTIONS.

First, arbitral authority concerning the falsification of time records and sleep apnea support the State’s case. At the least, arbitral authority supports the position that if the Arbitrator should reinstate the Grievant, it should be without back pay.

Second, the Grievant’s medical condition should not control the State’s ability to manage the workforce and issue discipline appropriate to the circumstances. Within the context that the theft of time and sleeping on the job occurred, the sleep apnea should not be a defense.

Third, the theft of time is a major offense, particularly where an employee self regulates his or her timesheets. Moreover, the Arbitrator should remember that the infractions occurred during

⁶There was no evidence that the State received a copy of the letter.

⁷That report was provided by the Association to the State on or about January 28, 1998, shortly before the first scheduled arbitration hearing of this matter, a hearing date that was canceled.

⁸DOT received a copy of that Decision on August 18, 1997.

⁹That report was provided by the Association to the State shortly before the instant arbitration hearing.

a period of time that the Grievant was not aware that he was under surveillance, and were a continuation of conduct about which his co-employees had complained. Thus, it should not be determined by the Arbitrator that the incidents were isolated to a period of time. In addition, it must be remembered that even when the Grievant was given the opportunity to correct his timesheets, he failed to do so.

Fourth, the use of sick leave, standing alone, is not serious, but is indicative of a negative personality trait. However, leaving work a significant time before the end of one's shift, without permission, and without telling anyone, is serious, and was an infraction repeated several times.

Fifth, regarding the sleep apnea defense, the State was not told until the last hour — during the pre-dismissal meeting itself — that the defense was being raised. The State would assert that it is unreasonable to expect an employer to hold off, at such a late date, from making a final decision. The fact is that the State has been talking to the Grievant about his conduct, and disciplining him, since 1995. The Agreement recognizes the right of the State to hold employees to a standard that meets public expectations. The Agreement also recognizes three degrees of discipline. The Grievant is an employee who understood steps he could have taken in a medical situation; and he did not take steps to resolve his current problem in a timely manner. The Grievant needs to learn from this situation that he must fulfill his responsibilities; and the State should not be penalized for his failure to do so. At the very least, if the Arbitrator chooses to reinstate the Grievant, he should do so under a last chance agreement without back pay.

V. UNION CONTENTIONS.

First, the circumstances of the pre-dismissal meeting cannot be ignored: the Union made a timely and reasonable request for a delay in any decision by the State, based upon the results of a sleep apnea test result, projected at seven to ten days. The State ignored that request, even though the test was itself conducted prior to the meeting, and instead cranked out a termination letter in two days. And once that occurred, it did not make any difference what information the Union provided the State.

Second, medical evidence established that there was no reason to expect that the Grievant would have realized that he suffered from sleep apnea until it was diagnosed and he was told that the condition existed.

Third, the timesheet charges are no more than a red herring. The Grievant was notified by his supervisor that the errors had been corrected and that the matter had come to a close. It is clear that once the decision had been made to terminate the Grievant, the timesheet charges were simply tacked onto the sleeping charges in an attempt to bolster the State's case. In any event, it is clear that the Grievant was going through a tough time in his life, and simply was not paying proper attention to his timesheets. Even assuming *arguendo* that the errors were intentional, no more than a reprimand

was appropriate for a first offense.

In sum, what we have is a good, long term employee with a disability that was and is subject to treatment, and we have an employee who was terminated before he could obtain that treatment. That means there was a lack of just cause. Therefore, that employee should be reinstated with full back pay and benefits.

VI. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the State failed to establish by clear and convincing evidence¹⁰ that the Grievant was terminated for just cause. Accordingly, the grievance is sustained. The following is the Arbitrator's rationale.

Whether an employee has been discharged for just cause commonly involves an analysis of whether three basic components of that term have been satisfied: 1) Was the employee afforded fundamental due process rights implicit in the just cause clause, or contained specifically in the labor agreement, e.g., did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted? 2) Was the charged offense(s) proved? And 3), was the penalty imposed reasonably related to the seriousness of the offense(s), the employee's disciplinary record and any mitigating or extenuating circumstances?¹¹

Turning to the first due process component, the Arbitrator first finds that the State did not comply with either the letter or the spirit of the Article 24.3 requirement that at the pre-dismissal hearing, an "employee shall be afforded an opportunity to refute such charges or present mitigating circumstances to the agency or his/her designee." As the Arbitrator reads and interprets that provision, such an opportunity must be meaningful. In the face of the stated facts — namely, that the Grievant had a long history of falling asleep at work; that the State inexplicably failed to follow through and obtain a medical release when it knew the Grievant was seeking medical treatment for his problem; and that the State was advised that at the pre-dismissal hearing that a sleep apnea test had already been conducted, with results due in only seven to ten days — it is clear that the deciding official was contractually required to wait for the receipt of the test results before making a decision. By failing to do so, he deprived the Grievant from the opportunity to present a full and complete defense. Indeed, as the Union argued, the State's "rush to judgment" was unconscionable. The failure of the State to honor an explicit due process requirement is grounds alone for setting aside the

¹⁰The State urged the Arbitrator to apply a preponderance of the evidence standard.

¹¹See, generally, Volz & Goggin, Elkouri & Elkouri, How Arbitration Works, Ch. 15, "Discharge & Discipline," BNA, 5th Ed.; Bornstein & Gosline, Gen. Eds., Labor & Employment Law Arbitration, Ch. 19, Zack, "Just Cause and Progressive Discipline," Matthew Bender; Koven & Smith, Just Cause: The Seven Tests, Coloracre.

discharge.

The Arbitrator also finds a second due process violation. It is well established that management must proceed in a timely manner to issue discipline for a purported offense. It cannot wait an unreasonable period of time to do so, nor may it belatedly "pile" stale charges upon a more recent offense, or resurrect issues resolved without discipline, in an attempt to bolster its overall case. In the instant case, the persuasive evidence established that the State did just that. It first led the Grievant to believe that the timesheet errors had been disposed of without discipline, then after approximately two months had passed, belatedly resurrected those errors and piled them on top of the sleeping charges.

Moving then to the second just cause component, that of proof of the charged offenses, the Arbitrator finds, first, that the State failed to prove the commission of the timesheet related charges, and second, that the Grievant did not willfully or knowingly sleep on the job.

The Arbitrator has already determined that the timesheet issues were improperly resurrected and brought. But even assuming *arguendo* that the charges had been properly brought, the Arbitrator would have to find them to be without merit. The State had the burden of proving that the Grievant knowingly falsified those records. The Arbitrator found the Grievant to be a credible and forthright witness, and accepts his testimony that because of the stress and depression created by his marital situation, he unintentionally made the errors. Given the facts that he was depressed over his marital situation and was then functioning in a state of chronic sleepiness, it is most understandable that he had difficulty ever remembering the actual hours worked on any day.

This brings us to the sleeping charges. The Arbitrator has already determined that the State failed to give due consideration to the Grievant's medical condition. However, even assuming *arguendo* that the State had received and rejected all medical evidence before making its decision, the Arbitrator would find in favor of the Union. The Union does not dispute the fact that the Grievant slept on the job; however, clear and convincing evidence established that he did not do so willfully and intentionally. In fact, the only evidence — his doctors' chart notes — indicate the Grievant's own concern with his problem. The rule applicable must be that unintentional sleeping on the job, caused by a medical condition, does not give rise to just cause discipline, at least where the condition is made known to management in a reasonable time, and where the condition is fully treatable. In the instant case, the only evidence is that the Grievant's condition was and is fully treatable and that he is able to return to his former position without any problems.

The Grievant's medical condition might also be referenced here as a mitigating circumstance. Indeed, it constitutes sufficient mitigation to merit the Grievant's reinstatement with full back pay and benefits.

For all the above reasons, the grievance must be sustained.

AWARD

The Grievant's discharge was in violation of Agreement Article 24. The grievance is sustained. The State shall immediately reinstate the Grievant to his former position with full back pay and benefits, less any outside earnings, and without loss of seniority. The Arbitrator retains jurisdiction of this case for 60 days to resolve any conflict between the parties concerning the amount of back pay or benefits due.

Dated this 8th day of September, 1998,

A handwritten signature in black ink, appearing to read 'T. Levak', with a stylized flourish at the end.

Thomas F. Levak, Arbitrator,
Portland, Oregon.