#160

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF YOUTH SERVICES

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO

PAUL NIXON, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-87-1008, Paul Nixon

This is a proceeding pursuant to Article 25, Sections 25.03 and 25.04, Arbitration Procedures and Arbitration Panel, of the Contract between the State of Ohio, Department of Youth Services, (hereinafter "Employer") and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, (hereinafter "Union").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. The hearing was held at the Office of Collective Bargaining, on January 11, 1988. The parties have waived the thirty (30) day time period for issuance of this Opinion and Award. They further agreed to allow the Arbitrator to tape record the proceedings but declined to grant permission for publication of this Opinion and Award. This matter has been submitted to the Arbitrator on the testimony and exhibits and authorities offered at the hearing of this matter. The parties stipulated that the grievance is properly before the Arbitrator for decision.

APPEARANCES:

For the Employer:

John E. Patterson
Labor Relations Administrator
Department of Youth Services

For the Union:

Shirley Taylor, Staff Representative
Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties stipulated that the issue before the Arbitrator is:

> Did the Department of Youth Services terminate Mr. Paul Nixon for just cause?
>
> If not, what shall the remedy be?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 2901.22(C), Ohio Revised Code.

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conductis likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

Section 2901.22(D), Ohio Revised Code.

> A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

Section 2903.33(B)(2), Ohio Revised Code.

> "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

4117.08(C), Ohio Revised Code.

> Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and

responsibility of each public employer to:

* * *

(2) Direct, supervise, evaluate, or hire employees:

* * *

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees:

* * *

(8) Effectively manage the work force. . .

CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employee reserves, retains and possesses, soley and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(C) numbers 1-9.

* * *

ARTICLE 24 - DISCIPLINE

§24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action

shall include:

A. Verbal reprimand (with appropriate notation in employee's file)

B. Written reprimand;

C. Suspension;

D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action.. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a

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

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situation which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement.

ARTICLE 25 - GRIEVANCE PROCEDURE

§25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

B. Grievances may be processed by the Union on behalf of a grievant or on behalf of a group of grievants or itself setting forth the name(s) or group(s) of the grievant(s). Either party may have the grievant (or one grievant representing group grievants) present at any step of the grievance procedure and the grievant is entitled to union representation at every step of the grievance procedure. Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

Those employees in their initial probationary period as of the effective date of this Agreement shall retain their current rights of review by the State Personnel Board of Review for the duration of their initial probationary period.

C. The word "day" as used in this article means calendar day and days shall be counted by excluding the first and including the last day. When the last day falls on a Saturday, Sunday or holiday, the last day shall be the next day which is not a Saturday, Sunday or holiday.

D. The mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

E. Grievances shall be presented on forms mutually agreed upon by the Employer and the Union and furnished by the Employer to the Union in sufficient quantity for distribution to all stewards. Forms shall also be available from the Employer.

F. It is the goal of the parties to resolve grievances at the earliest possible time and the lowest level of the grievance procedure.

G. Verbal reprimands shall be grievable through Step Two. If a verbal reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal reprimand.

§ 25.08 - Relevant Witnesses and Information

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

FACTUAL BACKGROUND

Paul Nixon, the Grievant, was employed as a Youth Leader 2 at the Buckeye Youth Center, Columbus, Ohio, for approximately nine years until his removal, effective March 6, 1987. He was discharged for "failure of good behavior", specifically physical abuse of a youth assigned to his care. (Joint Exhibit 3-1). The removal order refers to five prior disciplinary actions which were imposed against Grievant between November, 1982, and March, 1986. Those disciplines include two three-day suspensions for neglect of duty, as well as the most recent prior disciplinary action, a fifteen-day suspension, also for neglect of duty.

The immediate basis for Grievant's removal is an incident which occurred on January 16, 1987. Grievant was working the first shift (7:30 a.m. - 3:30 p.m.). He testified that he was

responsible for 34 youths on that day although the documentary evidence (Union Exhibit 2) establishes that 30 boys assigned to Group 56 were in his charge.

At approximately 12:30 p.m., Mr. Nixon ordered the youths to line up for lunch. A disagreement then took place between Grievant and one of the boys, Robert Washington, then fifteen years of age. It is undisputed that Grievant became involved in a physical confrontation with Washington which culminated in a compound fracture of Washington's right wrist. This serious injury occurred as a result of a ping-pong table "shoving match" between Mr. Nixon and Washington. Grievant admits to weighing approximately 290 pounds while Robert Washington weighed approximately 108 pounds at that time.

Robert Washington testified, and various witness statements (Employer Exhibits E-3, E-5, E-6, E-7) allege, that Mr. Nixon also slapped Washington about the head several times. None of the other youths who gave statements were called to testify by either party to this proceeding. Washington then accompanied the group to lunch. The testimony is conflicting as to when Washington first requested permission to go to the clinic. Washington testified that he first made the request of Mr. Nixon on the return trip to the living area. The Grievant stated that Washington complained about his hand about halfway through the lunch break and requested permission to go to the clinic. Grievant testified that for security reasons he waited until the group returned from lunch to send Washington to the clinic.

Following examination by the facility's nursing supervisor,

Deborah French, at approximately 1:40 p.m. (Employer's Exhibit A), Robert Washington was taken to Children's Hospital where his right wrist and forearm were x-rayed, the compound fractures were diagnosed and the cast was placed on Robert's right wrist. (The medical reports indicate that the cast was ultimately removed on March 4, 1987, almost seven weeks following the injury).

The supervisor filed an Incident Report (Joint Exhibit 3-4) on January 22, 1987, some six days following the incident. She also completed an Injury Report on January 29, 1987, some thirteen days after the injury occurred. On January 22, 1987, the supervisor met with the Grievant and a Union Representative, Marcella Dennis, to review the Incident Report. Section II of that report indicates that Mr. Nixon disagreed with the description of the incident written by the supervisor but he declined to give his own written statement at that time.

The testimony clearly establishes that written statements were taken from the other youth witnesses that afternoon prior to the end of the first shift. Both Mr. Nixon and the supervisor, Bobbie Gentry, testified that the witnesses were together in a group when they wrote out their statements, although Ms. Gentry also claimed that she interviewed the youths separately. Mr. Nixon stated that he completed a Group Incident Report that day and gave it to Ms. Gentry. Ms. Gentry admitted that the Grievant may have done so although that document is not in evidence and Ms. Gentry did not know its whereabouts. Ms. Gentry's written statement (Union Exhibit 5) is also dated February 4, 1987, some 19 days after the incident occurred. Upon questioning by

the Arbitrator as to the reason for her delays in completing the various reports referred to hereinabove, Ms. Gentry stated that she was unaware at the time of any procedural deadlines for those reports.

Seven days following the interview of Mr. Nixon by Ms. Gentry, Mr. Nixon and Ms. Dennis met with John Carter, Group Life Director at Buckeye Youth Center, who was Grievant's department head. The testimony established that Mr. Carter made no recommendation as to appropriate discipline at that time. At some time between that date and February 6, 1987, Mr. Carter placed a written recommendation for Grievant's dismissal on the Incident Report. (Joint Exhibit 3-6). On February 6, 1987, Granville Potter, Jr., Superintendent of Buckeye Youth Center, made a written recommendation for the dismissal of Mr. Nixon. (Joint Exhibit 3-6).

Following a pre-disciplinary conference on February 12, 1987, a Removal Order (Joint Exhibit 3-1) was issued on March 4, 1987, well within the 45 day contractual deadline for the imposition of discipline.

A timely grievance (Joint Exhibit 2-1) was filed on March 12, 1987. In salient part the grievance seeks reinstatement of Mr. Nixon to his Youth Leader position with back pay and restoration of all benefits.

POSITION OF THE EMPLOYER

Paul Nixon was terminated for physically abusing Robert Washington, a youth in the custody of the Employer. The evidence

establishes that the broken wrist received by Washington was not the result of an accident, as alleged by Mr. Nixon, but as the result of abuse.

Contrary to the assertions of the Union, the Employer has not violated the procedural disciplinary guidelines agreed to in the Contract. The Grievant was terminated for just cause as the result of a disciplinary proceeding in accordance with the Contract between the parties. The grievance must be dismissed.

POSITION OF THE UNION

Grievant and Robert Washington engaged in a confrontation of ping-pong table pushing when Mr. Nixon ordered the youths in Group 56 to line up for lunch. Washington suddenly stopped pushing on the table and Grievant's momentum pushed the table into Washington, accidentally fracturing his wrist.

The Employer issued a removal order dismissing Mr. Nixon for "failure of good behavior", namely physical abuse of a youth assigned to the custody of the Employer. The removal of the Grievant was not for just cause. The Employer bears the burden of establishing just cause for removal by clear and convincing evidence. Violation of numerous procedural provisions of the Contract between the parties by the Employer taints the disciplinary process and requires reinstatement of the Grievant.

The Employer has failed to prove that Grievant's behavior constitutes "abuse" as defined by statute. Therefore, in fashioning an appropriate remedy the Arbitrator is not limited by the constraints of §24.01 of the Contract but may consider

mitigating factors, such as the length of employment of Grievant.

Grievant must be reinstated with all back pay, benefits and seniority restored and expungement of this disciplinary action from his personnel records. In the alternative, the Arbitrator should modify the termination order to an order of suspension.

PROCEDURAL ISSUES

I. Did the Employer violate § 25.08 of the Contract by failing to provide access to documents or witnesses reasonably available from the Employer and relevant to the grievance?

II. Did the Employer violate §24.04 of the Contract by refusing access to documents or witnesses thereby limiting the Union's ability to comment, refute or rebut the Employer's charges?

III. Did the Employer violate §24.06 of the contract by improperly considering disciplinary actions which should have been expunged from Grievant's personnel records?

IV. Did the Employer violate §§24.01 and 24.02 of the Contract by failing to follow the investigatory timelines set forth in Employer Policy Statement B-34 (Joint Exhibit 8)?

PROCEDURAL DECISIONS

I and II. The Arbitrator finds that the Employer did not violate §§24.04 or 25.08 of the Contract.

With respect to documents requested by the Union, the testimony of Ms. Dennis establishes that all of the documents requested by her in Union Exhibit 4 were in fact provided to the Union at the predisciplinary hearing with the exception of the medical reports on Robert Washington.

§24.04 specifically provides that the Employer may wait until the predisciplinary meeting to provide a list of witnesses and

documents in support of the Employer's charges. There is no evidence that the requested medical reports were specifically relied upon by the Employer at the time of the pre-disciplinary hearing. The facts that those reports (Employer's Exhibit A) were incomplete at that time suggests that they were not specifically relied upon since there was no dispute that Robert Washington had in fact sustained a broken wrist.

With regard to the application of §25.08 of the Contract, the only additional discoverable documentation requested by the Union was the complete medical report (which was provided at the Step 3 hearing) and the pre-disciplinary report and recommendation of (Joint Exhibit 3-2) Evelyn Farmer, Deputy Superintendent, who served as hearing officer. As held by Arbitrator Rivera in G-87-1299 (Grievant Darnell Brown), neither just cause nor the Contract requires production of the pre-disciplinary document prior to arbitration. Since both of the aforementioned documents have been provided in the grievance process, the Employer has comported with §25.08 regarding production of documentation.

The Union contends that just cause requires that the Employer in effect provide the Grievant with a quasi-judicial due process type adjudication hearing at the time of the pre-disciplinary meeting. This is reflected in the memorandum from Ms. Dennis to the hearing officer which requests the production of witnesses for purposes of questioning. The purpose of the pre-disciplinary hearing is to place the Grievant on notice of the precise nature of the charges against him so that he can respond appropriately. The pre-disciplinary process does not require the employer to

furnish an adjudication hearing to an employee. Therefore, §24.04 has not been violated by the Employer in this regard.

On the other hand, §25.08 specifically provides that not only documents but witnesses reasonably available from the Employer be made available for the arbitration. However, there is no evidence that the presence of any particular witness in the control of the Employer was denied the Union for this arbitration. Nor was this Arbitrator requested to issue a subpoena for any such witness. Absent such evidence there is no basis for concluding that §25.08 has been violated in this regard by the Employer.

III. The Arbitrator finds that the Employer did not violate §24.06 of the Contract by improperly considering outdated disciplinary actions.

There is no substance whatever to this procedural objection. The evidence establishes that the five prior disciplinary actions considered by the Employer in determining this matter fall well within the guidelines of §24.06. The Union argues that those prior disciplines should not be considered since they were all pre-contractual and not based upon a just cause standard. In support of that position, the Union cites Arbitrator Rivera's language in G-87-0351 (Gerald Gregory) wherein it was noted that "(s)ome merit lies in the Union's argument that the prior discipline was pre-contractual and decided under a lesser standard."

This Arbitrator does not read Arbitrator Rivera's observation as a holding that pre-contractual discipline is irrelevant. To

the contrary, the parties have expressly provided in §24.06 that pre-contractual and post-contractual disciplines are to be treated equally insofar as inclusion in personnel records. As Arbitrator Rivera suggests, however, it may be appropriate in certain circumstances for an Arbitrator to assign somewhat less weight to some pre-contractual disciplines due to the lesser disciplinary standard applied at that time.

IV. The Arbitrator finds that the Employer did violate its own investigatory guidelines as set forth in Policy Statement B-34 and that this violation constitutes a breach of §§24.01 and 24.02 of the Contract. The evidence is insufficient for the Arbitrator to determine whether or not Directive E-7 has been violated by the Employer.

The Employer denies that it is guilty of any violations of the time deadlines set forth in Policy Statement B-34. (Joint Exhibit 8). The evidence does not support that position. While exact time lines for disciplinary reports are not included in the Contract, the parties have agreed that "(d)isciplinary action shall be initiated as soon as reasonably possible...". (Contract, §24.02). That same contractual section requires this Arbitrator to consider timeliness of the Employer's decision to begin the disciplinary process. Presumably, Policy Statement B-34 sets forth deadlines self-imposed by the Employer and constitutes the Employer's statement of a fair investigatory process. Employees are therefore entitled to rely on those timelines (Compare G-87-1299, Darnell Brown, Arbitrator Rivera).

The Employer's written policy required the supervisor to complete Section 1 of the Incident Report within 24 hours of

becoming aware of the incident. A copy of the Incident Report is to then be provided to the employer for completion of Section II. Grievant's supervisor, Bobbie Gentry, knew of the incident on the afternoon of January 16, 1987. She did not complete Section I, thereby initiating disciplinary action, until January 22, 1987. The Employer argues that this delay was due to the Supervisor's wish to complete that Section in the presence of the Grievant and further argues that the Grievant then completed Section II on the second working day that also included his supervisor. There are two defects in this argument. First of all, the policy statement does not contemplate completion of Section I in the presence of the employee. The purpose of Section I is to immediately initiate disciplinary action while an incident is fresh for investigation and while witnesses' and participants' memories are most clear. Secondly, the Employer relies on Union Exhibit 6 for the proposition that January 22, 1987, was the second working day in which both the Grievant and Ms. Gentry were present following the incident. Unfortunately, Union Exhibit 6 is <u>not</u> Grievant's attendance record for 1987, as represented by the parties. This is evident when one compares the actual calendar for 1987 with he days and dates indicated on Union Exhibit 6. Additionally, Union Exhibit 6 indicates that Mr. Nixon was on the Employer's payroll at least through the end of March, 1987, contrary to the facts. (Examination of a 1986 calendar suggests that Union Exhibit 6 is, in reality, a reflection of Grievant's time record for the first quarter of 1986).

Further, Section VI was not completed. This is no doubt due

to the fact that the "Deputy Administrator" was the designated hearing officer for the pre-disciplinary meeting. Therefore, Section VII should have been completed by the Administrator within two working days of January 29, 1987, when Mr. Carter noted his completion and forwarding of Section V. Section VII was not completed until February 6, 1987. (The Arbitrator has assigned no weight in this case to the fact that apparently Ms. Farmer, the Institution's Deputy Superintendent, was called upon to review a recommendation by her superior, Superintendent Potter. However, the Arbitrator would respectfully suggest that an appearance of possible undue pressure on Ms. Farmer arises from that situation).

Absent proof of extenuating circumstances presented by the Employer to explain its apparent failure to meet its self-imposed deadlines, this Arbitrator is compelled to find that it has not met those guidelines and is thereby in violation of §§24.01 and 24.02 of the Contract. This Arbitrator will consider this procedural violation by the Employer in fashioning an appropriate remedy.

OPINION

By Contract, the Employer has the burden of proof to establish just cause for termination of the Grievant (Section 24.01). The Employer has imposed the ultimate penalty on Mr. Nixon - the "economic capital punishment" of termination. The authorities agree that the severity of this penalty places the burden on the Employer to demonstrate by at least a preponderance

of the evidence that Grievant was guilty of abuse of Robert Washington as well as proof that such behavior constitutes just cause sufficient to support discharge (See e.g., Elkouri, How Arbitration Works, 3d ed., pages 661-662).

The substantive issue in this matter turns on a determination of the definition of "abuse" to be applied to the Department of Youth Services. This Arbitrator has carefully reviewed the Opinion and Award in G87-0001(A), Juliette Dunning, Arbitrator Pincus. The parties to the Contract herein had mutually agreed that the Dunning contract arbitration award was to have statewide application to all departments in determining the applicable definition of the term "abuse". Dr. Pincus concluded that departments not participating in that arbitration, including the Department of Youth Services, were not bound by the specific definitions of "abuse" set forth in Chapters 5122 and 5123 of the Ohio Administrative Code, which relate respectively to the Department of Mental Health and the Department of Mental Retardation and Developmental Disabilities.

The Employer has effectively adopted for purposes of this case the definition of abuse set forth in §2903.33, Ohio Revised Code:

> "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

The Employer argues that the evidence establishes that Grievant's actions were either deliberate or performed with such recklessness as to constitute abuse. The Arbitrator has not been

cited to, nor does the Ohio Administrative Code appear to include any other defiition of abuse which arguably could apply to this case. Therefore, adopting the rationale of Dr. Pincus in the Dunning arbitration, this Arbitrator finds that Section 4117.10(A), Ohio Revised Code, operates to incorporate the abuse definition set forth in Section 2903.33(B)(2) to the Department of Youth Services for purposes of this case. For the reasons which follow this Arbitrator concludes that Grievant's actions, while arguably negligent, were not deliberate nor do they consitute the recklessness requisite to meet the statutory and contractual definition of abuse.

Based upon the evidence and testimony of record it is found that Grievant did not knowingly, intentionally or deliberately injure Robert Washington. The disciplinary history of Grievant does not indicate any predisposition on his part toward client abuse. Robert Washington himself testified that he had never seen Grievant attack another youth even when he had been subjected to name-calling. He further testified that he likes the Grievant and got along well with him, an unlikely attitude toward brutality. Further, no witness even hinted in testimony that this nine-year employee was abusive toward youths at any time in his past employment. Finally, no steps were taken by the Employer to either reassign the Grievant or place him on administrative leave pending disposition of the abuse charge. The Contract specifically contemplates such precautionary personnel actions in suspected physical abuse cases. (§24.05).

Nor is there adequate evidence in this record upon which to

conclude that Grievant acted "recklessly" within the statutory criminal context of §2903.33, Ohio Revised Code:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

§2901.22(C), Ohio Revised Code. The Arbitrator is convinced by the testimony of Mr. Nixon and the evidence in toto that the Grievant did not recognize that he was likely to injure Robert Wshington and choose to ignore that risk. However, the Grievant, because of his momentary lapse from due care, failed to recognize the substantial risk to a 108 pound youth occasioned by a man of his size pushing a heavy table toward him. This substantial lapse consitutes negligence and requires that the Grievant be disciplined. That negligence does not constitute just cause for termination; however, the discipline meted out should recognize the serious injury visited upon a youth as a result of Grievant's negligence.

Without considering the Employer's disregard for its own investigation deadlines, the Arbitrator would merely reinstate the Grievant as of the date of this Opinion. No back pay would be awarded due to the seriousness of the injury to the involved youth. But the Arbitrator is disturbed by the Employer's failure to recognize the importance of its own rules with regard to the prompt investigation of incidents forming the basis for disciplinary actions. Prompt reporting and investigation is

particularly important where, as here, an incident could serve as the basis for criminal charges against an employee.

AWARD

The grievance is denied in part and sustained in part. The termination of Grievant is to be modified to a suspension without pay of 180 days. Back pay and benefits are to be calculated and the Grievant reinstated as of the 181st day following the effective date of the order of removal.

Thomas P. Michael, Arbitrator

Rendered this Fourth day
of March, 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 4th day of March, 1988, upon:

John E. Patterson
Labor Relations Administrator
Department of Youth Services
51 N. High Street
Columbus, Ohio 43215

Shirley Taylor, Staff Representative
Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11
995 Goodale Boulevard
Columbus, Ohio 43212.

Thomas P. Michael