IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF YOUTH SERVICES

AND

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

EUGENE LOCKER, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Case No. 35-13-880222-0146, Eugene Locker

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 Novmber 2, 1988. The parties agreed to allow the Arbitrator to tape record the hearing and to publish 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:

Deneen D. Donaugh
Ohio Department of
Youth Services

For the Union:

John T. Porter
Assistant General Counsel
OCSEA/AFSCME Local 11

ISSUE

The issue before the Arbitrator, as stipulated by the parties, is as follows:

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

PERTINENT AUTHORITIES AND CONTRACTUAL PROVISIONS

Section 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 Employer reserves, retains and possesses, solely 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 43 - DURATION

§43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

* * *

§ 43.03 - Work Rules

After the effective date of this Agreement, agency

work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceediong arising under this Agreement.

FACTUAL BACKGROUND

The Grievant, Eugene Locker, commenced employment as a Youth Leader 2 for the Ohio Department of Youth Services ("DYS") on October 9, 1984, an was so employed until the effective date of his termination on February 12, 1988. He was assigned to the Buckeye/TCY ("Training Center for Youth") Complex of DYS located in Columbus, Ohio.

The order of removal (Joint Exhibit 2-5) alleged that the Grievant was guilty of "Failure of Good Behavior" in the following particulars:

> On or about December 20, 1987 you left your assigned work area without prior permission from your supervisor, and you failed to comply with the oral instructions of your supervisor to return to your assigned work area. Further you physically and verbally abused another employee. In addition you physically abused your supervisor. This type of activity constitutes 'Failure of Good Behavior' and is in violation of Section 124.34 of the Ohio Revised Code.

The incident referred to in the removal order involved an altercation between Mr. Locker and his common-law wife, fellow employee and co-worker Dorothy Howell, on December 20, 1987. Ms. Howell was working her regular shift during the early afternoon

on Group H of the TCY facility while Mr. Locker was working overtime on Group J, which adjoins Group H. Ms. Howell and Mr. Locker were experiencing marital difficulties and were living apart at the time of this incident.

At approximately 1:20 p.m., Ms. Howell was in the TCY Duty Office conversing with Sallie A. McDaniel, a TCY supervisor who was the shift duty officer. It is uncontradicted that the Grievant went to the duty office, confronted Ms. Howell and began arguing with her. When Ms. Howell ran from the duty office the Grievant gave chase. In so doing he pushed past Ms. McDaniel, who was attempting to block his progress. Ms. McDaniel sustained a minor injury to her back and arms which was treated at the institution's clinic (Management Exhibit F). Ms. McDaniel also testified that she later sought medical treatment from her doctor, who prescribed medication for her.

The Grievant caught and collared Ms. Howell in the office of Eli Barnes, the TCY Group Life Coordinator, who eventually managed to separate the warring couple, calm the Grievant, and escort him back to the duty office. An investigation by the Highway Patrol quickly ensued and Mr. Locker was sent home thereafter.

A predisciplinary conference was conducted on December 31, 1987. Following that conference the Hearing Officer, Cynthia Edwards, recommended that the Grievant be assessed a suspension of unspecified duration (Joint Exhibit 2-2). Instead, on February 11, 1988, the subject removal order was issued by DYS Director Geno Natalucci-Persichetti.

POSITION OF THE EMPLOYER

The Employer had just cause for the removal of the Grievant, Eugene Locker, from his position as a Youth Leader 2. Mr. Locker has violated three departmental work rules by (1) absenting himself from his work area without permission; (2) using threatening language toward another employee; and (3) fighting with a co-worker (Management Exhibit D, §§IV. A. 9, 11, 13). The Grievant has admitted that he wrongfully fought with Ms. Howell in the workplace. There is no real evidence of provocation sufficient to explain his actions. Additionally, he unjustifiably injured a supervisor in the course of the quarrel with Ms. Howell.

The Grievant has presented no evidence to counter the charge of unauthorized absence from his work area, a violation for which he previously received a verbal warning discipline in June, 1987. (Management Exhibit H). No evidence has been presented that supervisory personnel at TCY have failed to discipline other staff for similar violations.

The Training Center for Youth, by all accounts, presents a stressful environment in which to work under ordinary circumstances. Employees should not be subjected to the additional unnecessary stress created by the threat of fighting with their fellow employees. The grievance should be denied in its entirety.

POSITION OF THE UNION

The Employer has failed to demonstrate just cause for the removal of Eugene Locker from his position as a Youth Service Leader 2. The Contract (§24.02) requires the Employer to apply the principles of progressive discipline to this event and to administer discipline commensurate with the offense.

Mr. Locker has a good employment record as evidenced by his performance evaluations (Joint Exhibits 4,5). He admittedly acted inappropriately in having physical contact with other employees; however, removal is too severe a penalty forhis offense. The Grievant was in the midst of a troubled personal relationship with his common-law wife, who provoked him into physical retaliation for her personal involvement with a TCY client. She in fact resigned when facing charges of aiding that youth to escape from custody and is, therefore, no longer employed by DYS.

Further, the staff of TCY hasnever been placed on adequate notice of the appropriate penalty for physical contact. As admitted by the Employer, there was no disciplinary grid in effect at the time of Mr. Locker's offense. The good work record of the Grievant and his provocation by Ms. Howell mulitate against a finding of just caue for the removal of Mr. Locker requests instead that the removal of Mr. Locker be reduced to a 30 day suspension and that he be awarded back pay and full restoration of benefits.

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. Locker - 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 the charges against him 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 Grievant himself has readily admitted that he wrongfully had physical contact with Ms. Howell and Sallie McDaniel in the workplace and has agreed that he should have restrained himself when Ms. McDaniel attempted to block his progress. Therefore, the Employer has proven its claim of a violation of DYS General Work Rule IV. A. 11. (Management Exhibit D). The charge of verbal abuse against another employee has also been proven to the satisfaction of this Arbitrator (DYS General Work Rule I. A. 13.) although that violation is subsumed by the violation of the rule prohibiting fighting and does not justify imposition of an additional penalty.

The contested charge of absence from his work area without permission (DYS General Work Rule IV. A. 9.) must also be determined in favor of the Employer. This neutral finds the testimony of Ms. McDaniel to be credible and conclusive on this

issue.

In sum, the Employer has indeed met the first prong of its burden in this proceeding by satisfactorily proving violation of the DYS work rules as alleged in the order of removal. The difficulty comes in assessing whether or not, in the circumstances of this case, those violations constitute just cause for summary termination of the Grievant. Upon careful consideration of the entire record this Arbitrator is unable to support the Employer in its imposition of the economic death penalty of termination.

First of all, if DYS had placed in effect a disciplinary grid providing that fighting in the workplace was grounds for immediate removal on a first offense, this neutral would inquire no further. Since no such work rule is applicable to this incident the Arbitrator must examine the Contract for guidance as to the appropriate penalty. The Contract imposes a duty on the Employer to "follow the principles of progressive discipline" (§24.02) and that such discipline "be reasonable and commensurate with the offense and shall not be used solely for punishment." (§24.05).

Both the testimonial evidence and documentary evidence establish that the Grievant was a dependable, capable employee with no history of violence who interacted politely and courteously with both his fellow employees and the youths in his charge (Joint Exhibits 4, 5). (This Arbitrator has assigned no weight to the undocumented hearsay testimony to the effect that same unnamed youth or youths complained of physical abuse by the

Grievant. If the Employer considered such charges worthy of investigation and disciplinary action, they should have been the subject of another disciplinary proceeding.) Therefore it must be concluded that the December 20, 1987, incident was an isolated aberration from the usual workplace demeanor of Mr. Locker.

The Union has satisfactorily demonstrated that the source of that aberration was the emotional stress experienced by the Grievant due to his marital difficulties. The Employer must bear some responsibility for placing this troubled couple together in a work environment which was likely to bear the explosive results which in fact occurred. It is clear from the testimony that the TCY supervisory personnel were well aware of the domestic difficulties of the combatants prior to December 20, 1987, but nonetheless assigned them to work adjacent to one another.

Of critical importance to the Arbitrator is the fact that no resident was the subject of any physical harm. However, the injury to Ms. McDaniel, albeit minor, requires a significant increase in the severity of the discipline against Mr. Locker. The Grievant can be very thankful that neither Ms. McDaniel nor any other innocent bystander was seriously injured as a result of his actions.

Other arbitrators have recognized that a discharge penalty for fighting is inappropriate where there are mitigating circumstancs such as provocation. See, e.g., Apex International Alloys, Inc., 82 LA 747 (Arbitrator Wright); Toledo Edison Co., 84 LA 1289 (Arbitrator Duda); and ITT Higbie Mfg. Co., 85 LA 859, (Arbitrator Shanker).

As indicated by Arbitrator Duda in the Toledo Edison Co. case, 84 LA 1289, at 1295,

> ...(T)he imposition of discipline must not be arbitrary, unreasonable, discriminatory. In other words, the penalty imposed by the Company should be allowed to stand unless it is patently unfair. For example, an excessive penalty, out of proportion to the offense, should be modified. All the significant circumstances related to the misconduct should be considered to insure the perspective necessary for a just evaluation.

Obviously, the Employer has legitimate reasons for insisting that its employees do not make improper physical contact with other employees in the workplace. Especially in light of the contact with a supervisor, the Grievant's misconduct deserves serious discipline. However, based upon an evaluation of the mitigating factors set forth hereinabove and the fact that there is no evidence that the "work well has been poisoned" against the Grievant, the Arbitrator finds that discharge of the Grievant, Eugene Locker, is unreasonable, not commensurate with the offense and, therefore, not for just cause. The extended suspension thus far visited upon the Grievant as a result of the grievance process is a more appropriate penalty.

AWARD

The grievance is sustained in part and the order of removal is modified to a suspension. Grievant is to be reinstated commencing with the workweek commencing immediately following the seventh day from receipt of this Award by the Employer, subject to the terms of the Contract. No back pay is awarded.

Thomas P. Michael, Arbitrator

Rendered this Thirtieth day
of December, 1988, at Columbus,
Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 1988, the original Opinion and Award was hand delivered to Eugene Brundige, Director, Ohio Department of Administrative Services, Office of Collective Bargaining, 65 East State Street, Columbus, Ohio 43215; with copies of the foregoing Opinion and Award being hand delivered to John Porter, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael