

Howard D. Silver  
Arbitrator  
Columbus, Ohio

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In the Matter of Arbitration  
Between

The State of Ohio

and

The Ohio Health Care Employees Union  
District 1199, WV/KY/OH  
National Union of Hospital and  
Health Care Employees, SEIU, AFL-CIO

Grievance Number:  
35-09-900116-0001-02-12

Grievant:  
Franklin Curry

*Award # 487*

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APPEARANCES

For The State of Ohio

Rodney Sampson, Advocate  
Office of Collective Bargaining

For The Ohio Health Care Employees Union,  
District 1199, WV/KY/OH  
National Union of Hospital and  
Health Care Employees, SEIU, AFL-CIO

Rick Kepler, Advocate  
District 1199/SEIU, AFL-CIO

ISSUE

Was the Grievant, Franklin Curry, discharged from the Department of Youth Services for just cause? If not, what shall the remedy be?

The hearing in this matter was held on June 19, 1990 and July 27, 1990 within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining, 65 East State Street, 16th Floor, Columbus, Ohio. The parties were afforded a full and fair opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and make arguments supporting their positions. The record in this matter was closed, following the submission of written closing arguments, on August 15, 1990.

#### STATEMENT OF THE CASE

The Grievant, Franklin M. Curry, was removed from his employment as a Social Service Worker 3 with the Ohio Department of Youth Services effective January 10, 1990. At the time of his removal, Grievant was employed within the Akron Region Office as a Youth Counselor and had been employed with the Ohio Department of Youth Services since May 4, 1974. Mr. Curry's job responsibilities entailed supervising a caseload of fifty to sixty minors who were under some form of judicially imposed supervision as a result of criminal misconduct.

The Grievant was responsible for both an institutional caseload and for juveniles on parole. Within his role as a Youth Counselor the Grievant counselled youths assigned to his caseload, referred youths to treatment, and interacted with parents and guardians of the youths assigned to his caseload.

The Grievant's responsibilities for a youth released from an Ohio Department of Youth Services's detention facility included reenrolling the youth in school, assisting in employment aspirations, and securing placement within foster care or group homes when determined appropriate. The Grievant's caseload was primarily comprised of youths from the inner city of Akron, Ohio, an environment of poverty, a community of educational and economic disadvantages, and a high crime area. The Grievant's caseload experienced a fifty percent turnover in youths annually. Because of this turnover, at various times the Grievant was responsible for as many as eighty to ninety youths within his caseload.

The Grievant's educational background includes a bachelor's degree from Kent State University, a master's degree from California State University, a second master's degree from the University of Akron, and work toward a doctoral degree at the University of Akron which the Grievant expects to receive in December, 1990.

The order of removal issued to the Grievant charges the Grievant with negligence in the performance of his duties. The particulars of this alleged negligence appear in four separate charges appearing on the face of the order of removal.

The first charge lodged against the Grievant alleges the Grievant prepared a final placement plan placing a youth in the custody of his mother at an address at which she was temporarily living. This charge alleges that it was later determined that the mother had not lived at this address for approximately three months

and further alleges the Grievant had not been in contact with the mother as required by the Ohio Department of Youth Services's Risk Based Assessment Standards. This charge alleges that as a result the youth, who was scheduled for release from an institution on November 22, 1989, had to be placed in foster care.

The second charge lodged against the Grievant alleges that the Grievant did not visit a youth or his mother since the youth's court hearing on October 10, 1989. This charge alleges that according to the Grievant's daily activity sheets the Grievant indicated he had had face to face contact with the family and the youth on four and three separate occasions.

The third charge lodged against the Grievant alleges that on November 29 and 30, 1989; and December 6, 7, 8, 1989; the Grievant failed to report to work as scheduled and did not notify his supervisor of this absence. This charge provides that as a result the Grievant was considered AWOL for these specified days.

The fourth and final charge lodged against the Grievant alleges that he failed to contact a youth's sister since the youth was admitted to a facility of the Ohio Department of Youth Services on June 20, 1989.

#### TESTIMONY OF WITNESSES

##### Joseph Frederick

Joseph Frederick had served as the Grievant's supervisor since 1986. Mr. Frederick has served as a Caseworker Supervisor within

the ODYS Akron Region Office for twelve years. Previous to service as a supervisor, Mr. Frederick served as a Youth Counselor for ten years.

Mr. Frederick first addressed Charge One within the order of removal issued to the Grievant. This charge refers to a youth, Jerry Sales, son of Dorothy Sales. Mr. Frederick identified Management Exhibit 4 as the final placement plan prepared by Mr. Curry for the placement of Jerry Sales, following release of the youth from a facility of the Ohio Department of Youth Services. This placement plan is dated October 2, 1989 and was approved by Mr. Frederick on October 3, 1989. This placement notes that the youth will be placed with his mother at 349 Beechwood Avenue, Akron, Ohio. The placement plan notes that a bus ticket must be provided to the youth upon his release from the departmental facility.

Mr. Frederick explained that because of misbehavior by Jerry Sales while still detained, his release and placement were delayed seven days. Mr. Frederick explained that Dorothy Sales contacted Mr. Frederick and said she had never been informed by the Grievant of the delay in the placement.

Mr. Frederick stated that he then received a telephone call from the Summit County Children Services Board asking why Jerry Sales was being placed with a mother who was homeless. Mr. Frederick stated that he then contacted Dorothy Sales and attempted to verify her address. He explained that the mother became upset and hung up and then called back informing Mr. Frederick that her

son could be placed with the Summit County Children Services Board. Jerry Sales was subsequently released and placed in a foster home.

Mr. Frederick identified correspondence from Patricia Pfander, a social worker of the Summit County Children Services Board. This letter is dated September 14, 1989 and is directed to Mr. Frederick. The letter reads as follows:

Our agency became involved with the above-named family on October 25, 1989, when Mrs. Dorothy Sales requested placement of her three children due to the family being homeless.

Mrs. Sales continues to be homeless at this time.

Please contact me if further information is needed.

Sincerely,

Patricia Pfander, LSW  
CSB Social Worker

Mr. Frederick explained that he and Frazier Blandon, the Regional Administrator of the Akron Region, visited a homeless shelter and verified that Dorothy Sales was a homeless mother. Mr. Frederick identified Management Exhibit 3, a memorandum from Mr. Frederick to Mr. Blandon about this visit, a memorandum dated December 15, 1989. This memorandum reads as follows:

The Regional Administrator, Frazier Blandon, and I, Joseph Frederick, Casework Supervisor, visited the access shelter on 12-15-89 and verified that Dorothy Dales was in the shelter from 10-25-89 thru 11-3-89.

Mr. Frederick then identified Management Exhibit 5 which is a handwritten letter signed by Frankie Gordon of 349 Beechwood Avenue, Akron, Ohio. This letter is dated December 15, 1989 and reads as follows:

To Whom It May Concern:

Re: Jerry Sales 133339

When I met the Sales family they were living in a car. I brought them into my home and fed them, but I didn't know that they would stay with me. Mr. Curry did visit the home, but he didn't ask who lived here or whose home this was. The Sales family has not lived here for three months. I have a fifteen year old daughter and I would not want someone like Jerry living here.

Frankie Gordon

Mr. Frederick then identified Management Exhibit 6 which is a community deferred placement plan approved by Mr. Frederick and Mr. Bandon. This plan is dated November 28, 1989, was prepared by Joseph Frederick, addresses Jerry Sales, and notes that placement of Jerry Sales must be deferred because of the inability to verify that the mother of Jerry Sales has a permanent residence. The admission date appearing on this plan is 11/22/88, and the minimum date expiration date appearing on this plan is 11/22/89. This plan notes that seven days' institutionalization had been added to the confinement of Jerry Sales by R.V.S.B., the institution to which Jerry Sales had been remanded. This placement plan refers to this deferral as Deferment #1. This plan also notes that Dorothy Sales does not live at 349 Beechwood Avenue.

Mr. Frederick then identified Management's Exhibit 7 which comprises the investigation conducted by the Ohio Department of Youth Services as to Charge One within the order of removal issued to the Grievant. The incident alleged within this investigation reads as follows:

Mr. Curry prepared a final placement plan for Jerry Sales, placing him with his mother, Dorothy Sales at 349 Beechwood Drive, Akron, Ohio, on 11-22-89. Mrs. Sales reportedly has not lived at this address for about three months, spent some time in a homeless shelter and has not been able to verify that she has a home for her son or herself.

This notice of investigation bears the signature of Joseph Frederick and is dated November 28, 1989.

A recommendation appears within this package of investigative materials dated December 15, 1989, signed by Mr. Blandon. Mr. Blandon's recommendation as to this charge reads:

I concur with a three (3) day suspension based on neglect of duty by attempting to place a youth without an established adequate home. The mother cannot verify that she has a home for herself or her son.

Attached to this notice of investigation is a handwritten response by the Grievant dated December 13, 1989. This response reads as follows:

This youth counselor saw the family of Jerry Sales three times within a six week period of Mr. Frederick's conversation with Mrs. Sales. The first contact was during the month of September when the writer visited the mother to explain the details of the treatment agreement and to obtain a signature on said agreement.



This treatment agreement has disappeared from Jerry's folder. This youth counselor will obtain a copy of the agreement from Juvenile Court in order to verify the date on this document.

The day after, Mr. Frederick ordered the writer to return to the home in order to obtain a signature on a DP7. The writer found Mrs. Sales sitting on the front porch of the Beechwood residence and obtained a signature on the DP7.

Subsequently, an early release hearing was held on 10-4-89 at which time all parties were present.

Therefore, the family had three opportunities to inform this youth counselor that they did not live at the Beechwood address.

In summary, the writer saw the father and mother of Jerry Sales at the Beechwood address on two occasions within a six week period prior to his early release hearing on 10-4-89.

During said hearing the family had every opportunity to inform the writer that they had moved or lacked housing. They did not inform the writer and therefore it was assumed that they were living at the Beechwood address.

In addition to face to face contacts, this youth counselor made seven phone contacts with the mother during this time period. When she was not available, the lady who answered the phone never informed this counselor that the Sales family did not live at said address.

Mr. Frederick testified at hearing that had the Grievant done his job as required he would have discovered that Mrs. Sales was homeless at the time the Grievant prepared his placement plan. Mr. Frederick pointed out that when the Grievant was unable to locate Mrs. Sales in order to inform her of the delay in the release of her son, this should have served as a warning to Mr. Curry that Mrs. Sales had a problem in securing a permanent home. Mr.

Frederick testified that it was the duty of the Grievant to have made this determination.

Mr. Frederick then turned his attention to Charge Two within the order of removal issued to the Grievant and identified Management Exhibit 10 as a report of an investigation conducted by the Ohio Department of Youth Services into this charge. Alleged on the face sheet of this investigative packet is the following allegation:

Mr. Curry did not see youth David Hayes since the youth's court hearing on 10-10-89. The mother did report that Mr. Curry went to the home one additional time by mistake. Another youth had left Mr. Curry a message and Mr. Curry thought it was David who had called.

Appearing within this investigative packet is a recommendation from Mr. Bandon dated December 15, 1989, reading as follows:

Curry did not meet standards of one (1) visit within thirty days and subsequent every sixty days to the family. I concur with the one (1) day suspension due to Mr. Curry not having any physical contact with family during six month period.

Also contained within this investigative packet is a memorandum from Joseph Frederick to Mr. Bandon dated December 1, 1989. This memorandum reads as follows:

Subject Hayes, David - D.Y.S. number 132829

The capital Reg. Administrator, Frazier Bandon, and I, Joseph Frederick, Casework Supervisor, met with Louise Hayes, mother of David Hayes, at her home on 12-1-89. She reported that Mr. Curry had not seen her son since the last court hearing 10-10-89. Mr. Curry did stop by the house one other time, but that was by mistake.

Mr. Frederick testified at hearing that he has been contacted over the telephone by the mother of David Hayes and informed that she had had no contact with the Grievant since October 10, 1989. The mother of David Hayes informed Mr. Frederick that she was upset that her son had been placed in a group home. Mr. Frederick testified that he and Mr. Blandon traveled to the home of Mrs. Hayes, talked to her, but Mrs. Hayes refused to give a written statement.

Also included within Management Exhibit 10, the investigative report directed to Charge Two within the order of removal issued to the Grievant, are daily activity sheets prepared by the Grievant. The October 10, 1989 activity sheet reflects a contact with David Hayes, David Hayes's mother, and the court responsible for the disposition of David Hayes. The October 18, 1989 daily activity sheet prepared by the Grievant reflects a contact with David Hayes and his mother on that date. The October 24, 1989 daily activity sheet prepared by Mr. Curry reflects a contact with David Hayes and his mother, as does the October 30, 1989 daily activity sheet prepared by Mr. Curry. The October 31, 1989 and the November 15, 1989 daily activity sheets prepared by Mr. Curry reflect contact with Mrs. Hayes. The daily activity sheets mentioned are included within daily activity sheets prepared by Mr. Curry between October 9, 1989 and November 16, 1989.

A handwritten response prepared by the Grievant on December 13, 1989 also appears within Management Exhibit 10. This response from the Grievant reads as follows:

David Hayes was contacted by phone and in person by his youth counselor at which time the writer talked to the mother and the child. On the notice of investigation the mother reported one visit to the home when he thought David had called him. This was true, and it demonstrates the writer's [illegible].

Mr. Frederick then turned his attention to Charge Three within the order of removal issued to the Grievant and identified Management Exhibit 8 as an investigative packet directed to this charge. The cover sheet of this investigative packet alleges: "On 11/29 to 12/1/89 and 12/5/89 to 12/8/89, Mr. Curry failed to report his absence from work and was absent from work without being excused." Included within the packet identified as Management Exhibit 8 are employee call off notification forms. One notes a call off on November 28, 1989 and the other notes a call from Mrs. Curry, the Grievant's wife, at 11:00 a.m. on December 1, 1989. This form notes the call was taken by Mr. Blandon and within comments on this form it is noted that Mrs. Curry called to inform Mr. Blandon about her husband being admitted to Edwin Shaw Hospital for treatment.

Management Exhibit 8 also contains two letters from Mr. Blandon, each dated December 8, 1989. Both are directed to 432 Roberts Street, Akron, Ohio, with one addressed to Franklin Curry, and the other to Mary Curry. The letter to the Grievant requests that he contact Mr. Blandon as soon as possible and informs Mr. Curry that he has been AWOL since his departure from Edwin Shaw Hospital on December 5, 1989. The letter to Mrs. Curry from Mr.

Blandon, dated December 8, 1989, informs Mrs. Curry that Mr. Blandon was led to believe that Mr. Curry was attending a rehabilitation program at Edwin Shaw Hospital. Mrs. Curry was informed that the Department considered Mr. Curry AWOL from his job since his departure from Edwin Shaw Hospital on December 5, 1989. It requests that Mrs. Curry contact Mr. Blandon at her earliest convenience and notifies her that Mr. Blandon had not received any word from Mr. Curry concerning his job.

Also contained within Management's Exhibit 8 is a letter from a Dr. Andrew DiBartolemeo on the letterhead of Edwin Shaw Hospital, Chemical Dependency Medicine. Dr. DiBartolemeo is identified on this letterhead as the Chairman of Chemical Dependency Medicine at Edwin Shaw Hospital. This letter is dated December 6, 1989 and is directed to Frazier Blandon, Regional Administrator. This letter from Dr. DiBartolemeo reads as follows:

This is to inform you that Franklin Curry is suffering from the disease of alcoholism and suffered a severe relapse early last week (11/27/89). He entered treatment at Edwin Shaw Hospital on Thursday, November 30, 1989. He remained in treatment as an in-patient until December 6. He has a treatment plan underway and should be able to return to work December 13, 1989.

Also within Management Exhibit 8 is a written response from the Grievant. This response reads as follows:

11-27-89 this youth counselor became ill, and called off from work. I also called off from work on 11-28-89. On 11-29-89 this youth counselor did not call off from work as he was too ill to move out of bed. On 11-30-89 I was admitted to Edwin Shaw Hospital where I remained until 12-6-89. At that time Dr. Andrew DiBartolemeo

instructed this youth counselor to rest at home, contact his sponsor, attend AA meetings and to call him to report my progress at least twice each week. This youth counselor was instructed to report to work on 12-13-89. Mr. Blandon is in receipt of the doctor's letter verifying said information.

While at Edwin Shaw Hospital this youth counselor signed release information forms for Mr. Blandon, as he was informed that several phone calls had been made to verify his status as an in-patient.

This youth counselor was of the impression that Mr. Blandon had received all important information regarding the writer's treatment program.

Mr. Frederick testified at hearing that from November 29 through December 1, 1989, the Department had no knowledge of the Grievant's whereabouts. He stated that on November 28, 1989 Mr. Curry had called off to Mr. Frederick and this had been a proper call off. Mr. Frederick stated that he was told by Mr. Curry that he would be in the next day.

At midday on December 1, 1989, a call was made to Mr. Blandon at around 11:00 a.m. He stated that at this time the Department became aware that Mr. Curry had been hospitalized.

Mr. Frederick stated that the call off procedure utilized by the Department requires a call off by 8:30 a.m. to the absentee's supervisor. Mr. Frederick stated that if he had known that Mr. Curry would be off for some time during this period he would have managed Mr. Curry's caseload differently. Mr. Frederick stated that in the event an employee is hospitalized, notification is still required.

Mr. Frederick pointed out that Mr. Curry, Mr. Blandon, and Mr. Frederick had participated in meetings about Mr. Curry's excessive absenteeism. Mr. Frederick said he became aware of the letter from Dr. DiBartolemeo on December 11, 1989. Mr. Frederick stated that Mr. Blandon had called Edwin Shaw Hospital on December 5, 1989 and had been told at that time that Mr. Curry had checked himself out. Mr. Frederick stated that from December 5 through December 8, 1989, the Department had had no notice of Mr. Curry's whereabouts.

Mr. Frederick then turned his attention to the fourth and final charge within the order of removal issued to the Grievant. Mr. Frederick identified Exhibit 9 as an investigative packet addressing this charge. On the cover sheet of this packet appears the following allegation:

Robert Toth lived with his sister, Debbie Masula, at the time of his commitment to DYS. She reported that Mr. Curry has never contacted her, either in person or by telephone since Robert was admitted to DYS on 6-20-89.

Within Management Exhibit 9 are two written statements appearing on the same sheet from Deborah Masula. This sheet bears the date December 11, 1989, and the first statement from Ms. Masula reads: "I never seen or heard from Mr. Curry since Robert been Dept. Youth Services. I usually home, I'm not hard to contact." The second statement from Ms. Masula reads: "Mr. Curry has never contacted his sister Deborah Masula either in person or by telephone since his commitment to Department of Youth Services."

Also appearing within Management Exhibit 9 is a memorandum from Joseph Frederick to Frazier Blandon dated December 15, 1989. This memorandum provides that RBA standards require a visit with the family within thirty days and visits thereafter every sixty days. Also appearing within Management's Exhibit 8 is a thirty day contact summary prepared by Mr. Curry reflecting a contact with Robert Toth on August 28, 1989, within a court setting. Attached to this summary is Mr. Curry's written response which reads as follows:

In the section regarding Robert Toth, this youth counselor stated that the file could not be found on this morning (12-13-89). This youth counselor conferred with Mr. Blandon and Mr. Frederick regarding this lost file and it could not be found. After reading this youth counselor's response (this document) Mr. Frederick found the file on his desk and presented it to the writer for research on his defense. This youth counselor finds it odd that information is missing because the signed treatment agreement is also missing from the file of Jerry Sales.

It should also be noted regarding Robert Toth, that Mr. Patterson had been attempting to meet with Robert's sister during the writer's illness, but once again the [illegible] did not respond.

At the time of Robert's adult court hearing this youth counselor informed Robert about his efforts to meet with the sister. Robert confirmed that she had been looking for work and would be difficult to meet with because of this reason.

Also within Management's Exhibit 9 is a recommendation from Mr. Blandon which reads as follows:



Curry did not meet RBA standards of one (1) visit within thirty days of subsequent every sixty days to the family. I concur with the one (1) day suspension due to Mr. Curry not having any physical contact with family during six month period.

A second written response from the Grievant, dated December 13, 1989 also appears within the record of this matter. This response reads as follows:

On this day, 12-13-89, the file of Robert Toth cannot be found. However, in the summary admission report, this youth counselor outlined his efforts to meet with Debbie Masula on several occasions. When Robert appeared in adult court on adult charges, Ms. Masula did not attend, and she constantly refused to set a meeting with this youth counselor because of her personal schedule. This youth counselor even set a Saturday meeting with Ms. Masula, but when a call was made prior to departure, she had left the home.

Mr. Frederick stated that he met personally with Ms. Masula, who gave him a written statement stating that no contact with Mr. Curry had been made since her brother had been committed to the Department. Mr. Frederick stated that a home contact with the family of a youth committed to the Ohio Department of Youth Services is required thirty days from the commitment date, sixty days from that date, and sixty days following that.

Mr. Frederick testified that Mr. Curry had disagreed with administrators within the region about how his caseload should be handled. Mr. Frederick testified that under Mr. Frederick's supervision, Mr. Curry had been the only counselor to receive disciplinary action.

Mr. Frederick then outlined the disciplinary history of the Grievant. This includes a one day suspension effective January 22, 1987, for neglect of duty, Management Exhibit 12; a three day suspension for neglect of duty, effective May 12, 1987, Management Exhibit 13; a one day suspension for neglect of duty effective June 22, 1988, Management Exhibit 14; a letter of reprimand issued effective March 17, 1988, Union Exhibit 2; and a verbal reprimand issued April 21, 1988, Union Exhibit 1.

Mr. Frederick testified that he was aware that the Grievant, at the time of his removal, was a Union delegate and had also been aware that Grievant had, in the past, brought a class grievance to a conference held in Columbus, Ohio. Mr. Frederick concluded his testimony by identifying Management Exhibit 15, a receipt signed by the Grievant on February 17, 1987 for the rules of the Ohio Department of Youth Services.

#### Frazier Blandon

Frazier Blandon is the Administrator of the Akron Region and has served in this capacity for the past eight years. Mr. Blandon identified Management Exhibit 16 as the position description for a Youth Counselor, identified Management Exhibit 17 as the ODYS general work rules, identified Management Exhibit 18 as the disciplinary policy of the Ohio Department of Youth Services, and identified Management Exhibit 19 as the Department's sick leave rules.

Mr. Bandon then addressed each of the charges within the order of removal issued to Mr. Curry and expressed the opinion that Charge One, the charge associated with Jerry Sales, was the most serious charge. Mr. Bandon testified that the other charges are also serious, but the possibility of placing a youth with a mother who is homeless represents the most egregious misconduct charged against the Grievant. Mr. Bandon explained that it was Mr. Curry's responsibility to have discovered the circumstances of this placement. Mr. Bandon testified that the failure of Mr. Curry to uncover this situation represented neglect of duty.

As to the AWOL charge in Charge Three of the order of removal issued to the Grievant, Mr. Bandon testified that he received a telephone call from Mrs. Curry on December 1, 1989 at 11:00 a.m. Mr. Bandon testified that Mrs. Curry did not identify the hospital to which her husband had been admitted. Mr. Bandon stated that on December 4, 1989, he began to call hospitals in the Akron area to locate Mr. Curry and found Mr. Curry located at Edwin Shaw Hospital.

Mr. Bandon testified that he traveled to Edwin Shaw Hospital on December 5, 1989, but was told upon arrival that Mr. Curry had left the hospital. Mr. Bandon stated that later he found that this information had been incorrect as on that date Mr. Curry had still been located at Edwin Shaw Hospital.

Mr. Bandon testified that he met with Mrs. Curry on December 11, 1989 and was told at that time that Mr. Curry would return to work on December 13, 1989. He stated that upon return to his

office he found a letter from Dr. DiBartolemeo also confirming that Mr. Curry would return to work on December 13, 1989.

Mr. Bandon testified that he had also been aware that Mr. Curry was a delegate of the Union. He explained that it was his understanding that Mr. Curry became a delegate of the Union in the summer of 1989.

Mr. Bandon identified Union Exhibits 5, 6, 7, 8, and 9, all of which refer to incidents involving the Grievant and a youth in the Grievant's caseload named Otis Patterson. These exhibits, offered on behalf of the Grievant by the Union, relate to allegations that Mr. Curry had falsified ODYS reports and had been neglectful of duty in terms of his job responsibilities associated with Otis Patterson. Union Exhibit 8 reflects that Mr. Bandon, on October 19, 1989, based on the allegations in the Patterson matter, recommended that Mr. Curry's employment with the Ohio Department of Youth Services be terminated. Union Exhibit 9 is a report by the Superintendent of Indian River School who was charged with serving as a hearing officer on the proposed termination of Mr. Curry's employment. The predisciplinary hearing conducted by the Superintendent of Indian River School was held on October 20, 1989 and based on the material submitted at the hearing the hearing officer concluded that there was insufficient evidence to warrant discipline for the stated charges.

Mr. Bandon then identified Union Exhibit 10 as a memorandum from ODYS's then Acting Labor Relations Administrator, Deneen D.

Donough. This memorandum is directed to all staff and addresses the treatment of witnesses. The memorandum reads as follows:

When an administrative investigation is being conducted on an incident, no witness, whether employee or youth, is to be intimidated. Intimidation includes, but is not limited to, threatening or coercing a witness to refuse to cooperate with administration in an investigation in such ways as refusing to give a statement. It is also intimidation to threaten or coerce a witness to give a statement for an investigation being done by an employee independent of the administration or to threaten or coerce to give an additional or different statement from what is given to the administration. Anyone found to be intimidating a witness will be terminated even though it is his/her first offense.

Employees conducting an investigation independent of an administrative investigation are not permitted to interview youth, unless directed to do so by the administration. Independent interviewing of a youth by an employee, even when an "advocate", such as the youth's social worker, is present, is not appropriate. A bargaining unit employee or Union steward wishing an exception to this rule shall request the right to question youths at the Step 3 Grievance Hearing. Management will then grant or deny the request at that level and if denied, such denial may be grieved. Failure to obtain permission prior to questioning youths will result in discipline.

Mr. Bandon identified Union Exhibit 16 as a chronology of events beginning on December 1, 1989 and running through December 11, 1989, that he prepared December 18, 1989, addressing Franklin Curry's AWOL status. Within this chronology Mr. Bandon notes that by 8:30 a.m. on December 1, 1989, Mr. Bandon had not received any word from Franklin Curry as to his status. At 11:00 a.m. Mr. Bandon received a telephone call from Mrs. Curry informing him that Mr. Curry was in the hospital and Mr. Bandon recorded within

this notation that no name of the hospital was provided. Mr. Blandon wrote within his memorandum that he was told by Mrs. Curry that Mr. Curry had entered the hospital for the purpose of detoxification. Mr. Blandon, according to this notation, asked Mrs. Curry how long the Department could expect Mr. Curry to be in the hospital and when the Department could expect Mr. Curry's return to work. According to this notation, Mr. Blandon was told by Mrs. Curry that she did not know and would get back with him as soon as possible with an answer.

The notation for December 4, 1989 in Union Exhibit 16, Mr. Blandon's December 18, 1989 chronology of events, notes that beginning at 11:00 a.m. Mr. Blandon began telephoning hospitals in the Akron area for information about Mr. Curry. Upon contact of Edwin Shaw Hospital, Mr. Blandon was told that Mr. Franklin had been admitted November 26, 1989 and no other information was received.

Within this chronology Mr. Blandon wrote that on December 5, 1989 at 9:30 a.m., accompanied by Richard Tobias, a Social Program Specialist, Mr. Blandon drove to Edwin Shaw Hospital to verify Mr. Curry's presence there. Mr. Blandon states within his note that he was allowed to enter the rehabilitation section and was informed by a nurse that Mr. Curry had signed himself out of the hospital. Upon return to the Region's office, Mr. Blandon directed his secretary for the record to put Mr. Curry on absence without leave status since Mr. Curry had not informed the Department of his change of whereabouts when he departed Edwin Shaw Hospital.

The notation for December 11, 1989 by Mr. Bandon on Union Exhibit 16 notes that at 8:00 a.m. on this date he received a telephone call from Mrs. Curry and he later met with her in the hallway of the municipal building of the City of Akron. According to this note Mr. Bandon was informed by Mrs. Curry that Mr. Curry would probably return on December 13, 1989 to his duties within the Region Office. Mr. Bandon stated that he told Mrs. Curry of Mr. Curry's AWOL status, and upon his return to his office received a letter from Dr. Andrew DiBartolemeo informing Mr. Bandon of Mr. Curry's return to work on December 13, 1989, and providing a diagnosis of Mr. Curry's illness. At 11:00 a.m. Mr. Bandon contacted Dr. DiBartolemeo, scheduled an appointment to confer with him about the letter Mr. Bandon had received, and found, during this conversation, that the Department's date of Mr. Curry's departure from the Edwin Shaw Hospital did not coincide with the departure date mentioned in Dr. DiBartolemeo's letter. Dr. DiBartolemeo told Mr. Bandon, according to this exhibit, that Mr. Curry had left the hospital on December 5, 1989 and a day later Dr. DiBartolemeo wrote the letter to Mr. Bandon. Dr. DiBartolemeo also advised Mr. Bandon during their meeting of the seriousness of Mr. Curry's illness, and that upon departure from Edwin Shaw Hospital Mr. Curry was still in a state of denial.

Mr. Bandon testified that a few years ago he had talked to Mr. Curry about alcoholism. He stated that at this meeting Mr. Curry had told him that he, Mr. Curry, did not need help and declined to join an employee assistance program at that time. Mr.

Blandon stated that Mr. Curry's disciplinary history dates to 1986 and that over the past ten years Mr. Curry has been the only employee to receive discipline under the supervision of Mr. Blandon. Mr. Blandon testified that Mr. Curry had not been charged with being AWOL from December 1 through December 5, 1989.

Mr. Blandon identified Union Exhibit 17, a memorandum from Mr. Blandon to Mr. Curry summarizing a conference held on August 24, 1987 by Joseph Frederick, Case Work Supervisor; Robert Maier, Deputy Regional Administrator; Dan Sanor, Union Representative; Franklin Curry, Youth Counselor; and Linda Perry, Recorder. On the second page of Union Exhibit 17 Mr. Blandon recalled a conversation with Mr. Frederick and Mr. Maier wherein Mr. Curry stated, "He thought he might have a drinking problem." Mr. Curry was to go for treatment and Mr. Curry stated that he did, having stayed with the program for four months out of a six month treatment plan.

Mr. Blandon concluded his testimony by recalling he received Dr. DiBartolemeo's December 6, 1989 letter on December 7, 1989.

#### Franklin Curry

Mr. Curry testified that there are occasions when his philosophy on how a particular case within his caseload is to be handled conflicts with Departmental views on how to most effectively handle the case. Mr. Curry testified that he believes he is viewed by the Department as an unorthodox Youth Counselor and admitted that on frequent occasions he had taken issue with



management within the Department on policy issues. Mr. Curry testified that after lengthy experience in dealing with an inner city caseload he has developed methods of caseload management which have proved effective for Mr. Curry.

Mr. Curry disputed all of the prior discipline imposed upon him and stated that these prior disciplinary actions arose from the friction produced by philosophical differences between Mr. Curry and the Department as to case management. Mr. Curry pointed out that he was the only employee in the Akron Region Office to receive so much as a written reprimand and pointed out that in 1989 he was elected by fellow employees, for the first time, as a Union delegate. Mr. Curry pointed out that prior to his removal in January, 1990, the last time he had received disciplinary action was in June, 1988.

Mr. Curry testified at hearing that because of his dissatisfaction with working conditions within the Akron Region Office and generally within the Department, he developed a self proclaimed professional bill of rights, subtitled, "A Grievance." The preamble of this professional bill of rights reads as follows:

When in the course of human events it becomes necessary in order to establish a sane workplace and to establish some basic changes in order to fulfill our commitments to disturbed children; we hold these truths to be self evident:

The remainder of this bill of rights addresses a supervisory chain of command based on educational background, the use of

computers, the advisability of ceasing to use daily activity sheets, promotional opportunities for youth counselors, and ceasing to allow juvenile delinquents and their families to jeopardize the professional credibility of youth counselors. This bill of rights also refers to the Ohio Department of Youth Services's risk assessment system as systematically wrong, statistically flawed, and intellectually illogical.

The professional bill of rights prepared by Mr. Curry is dated October 5, 1989 and bears the signatures of eleven people, most of which are dated October 6, 1989. This professional bill of rights, appearing in the record as Union Exhibit 4, alleges violation of Articles 5 and 3 of the collective bargaining agreement between the parties. Mr. Curry testified that his participation in grieving the professional bill of rights within the Department was one of the reasons for his removal. Mr. Curry identified Union Exhibits 19, 20, and 21 as three additional grievances with which he was associated and which, according to Mr. Curry, also provide the real reasons behind his removal.

Mr. Curry then turned his attention to the four charges lodged against him within the order of removal. As to Charge One, Mr. Curry stated that he saw Jerry Sales and his mother, Dorothy Sales, three to four times during the six to eight week time period in question. Mr. Curry testified that he saw the mother and father of Jerry Sales and the youth's grandparents at court and at a location that each of these people claimed was their residence. Mr. Curry pointed out that he secured documentation from Dorothy

Sales at what appeared to be her residence and also secured documentation from the father of Jerry Sales at what appeared to be the family residence. Mr. Curry pointed out that he contacted family members at this residence and talked to the mother and another woman there, and had no reasonable way of knowing that this was not the residence of the Sales family. Mr. Curry testified that he saw both the mother and father of Jerry Sales, and both had said that this was their residence. Mr. Curry agreed that there were other people in the room when he talked to the Sales but did not feel it was his duty to discover the identity of these other people.

Mr. Curry pointed out that Mrs. Sales desired the release of her son from a detention facility operated by the Department and therefore lied about her home. Mr. Curry pointed out that it is not unusual for parents to concoct stories in an effort to secure the release of their children. Mr. Curry stated that he contacted Mrs. Sales on three to four occasions at the residence in question and did everything required of him in the Jerry Sales case.

As to the second charge lodged against Mr. Curry, the charge involving David Hayes, Mr. Curry testified that he maintained regular contacts with this family. Mr. Curry agreed that this is a youth in trouble and agreed that the mother of David Hayes had said that her son had not been properly served by Mr. Curry. Mr. Curry pointed out, however, that these are difficult youths to deal with and not infrequently parents who have been unable to control

their children blame a youth counselor assigned to assist their child.

As to Charge Three, the charge which charges Mr. Curry with being AWOL, Mr. Curry testified that he had had a drinking problem and suffered a relapse on November 27 and November 28, 1989, and called off on both days. Mr. Curry stated that he became very ill on November 29 and November 30, 1989, and on December 1, 1989 his wife contacted the Region Office and reported his absence and his physical condition. Mr. Curry testified that during this period of time he had been in a very bad state and had been taken to a hospital on November 30, 1989.

Mr. Curry testified that he had been taken to Akron City Hospital on November 30, 1989 and then transferred, the same day, to Edwin Shaw Hospital. Mr. Curry testified that his wife delivered Dr. DiBartolemeo's December 6, 1989 letter to Mr. Blandon.

As to the fourth and final charge within the order of removal, Mr. Curry identified a letter from Keith Patterson, dated June 14, 1990, Union Exhibit 3. This letter reads as follows:

In late November to early December of 1989, I was temporarily assigned to DYS cases previously supervised by Mr. Franklin Curry. This was due to an extended "leave" by Mr. Curry related to actions being taken against him by DYS Management.

During this period of time, I had occasion to work briefly on the above captioned case. My assigned task was to develop a placement plan and treatment agreement on this youth in order to have him released at his minimum expiration date. The instructions given me were to contact a Ms. Deborah Masula (youth's sister) at a

specified phone number in order to set an appointment to go to her home and get her signature on the aforementioned forms. I tried on numerous occasions to contact her, but succeeded only in leaving a series of messages on her answering machine asking her to contact me at the Regional office. Ms. Masula never responded to my messages, and I reported same to my immediate supervisor.

I regret that I was unable to appear at the arbitration in person, but I was only notified of the meeting on June 14, 1990 and am unable to modify my schedule in order to be there.

Respectfully submitted,

Mr. Keith Patterson  
MA CCDC LSW

Mr. Curry testified that he too had trouble contacting Ms. Masula, the sister of the youth, as Ms. Masula kept breaking appointments. Mr. Curry pointed to Management Exhibit 9, which includes within it a summary admission report dated August 28, 1989 which also notes a problem with contacting the sister of Robert Toth, Deborah Masula.

#### Deneen Donaugh

Deneen Donaugh is the Administrator of Labor Relations for the Ohio Department of Youth Services. Ms. Donaugh identified Union Exhibit 10 as the memorandum she prepared and issued on October 10, 1989 to all staff as to the treatment of witnesses. Ms. Donaugh explained that this memorandum was prepared as a result of an incident occurring at the Buckeye Youth Center wherein an employee was threatened and told not to provide a statement in the

course of an investigation at the Buckeye Youth Center. Ms. Donaugh explained the memorandum prohibits intimidating employees within the memorandum's first paragraph, and prohibits the intimidation of youths within the second half of this memorandum. Ms. Donaugh testified that this memorandum was directed to all staff of the Ohio Department of Youth Services, a population of about seventeen hundred.

#### APPLICABLE CONTRACT PROVISIONS

##### Article 5 - Management Rights

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention, and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against

any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

### Article 8 - Discipline

#### Section 8.01 - Standard

Disciplinary action may be imposed upon an employee only for just cause.

#### Section 8.02 - Progressive Discipline

The principles of progressive discipline shall be followed.

These principles usually include:

- A. Verbal reprimand
- B. Written reprimand
- C. Suspension
- D. Demotion or removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

#### Section 8.03 - Pre-Discipline

Prior to the imposition of a suspension of more than three (3) days, demotion or termination, the employee shall be afforded an opportunity to be confronted with the charges against him/her and to offer his/her side of the story. This opportunity shall be offered in accordance with the "Loudermill Decision" or any subsequent decisions that shall impact on pre-discipline due process requirements.

Article 13 - Sick Leave

Section 13.05 - Notification for Use of Sick Leave and  
Notification for Extended Sick Leave.

A. Notification

An employee who is unable to report for work, and who is not on a previously approved day of vacation, sick leave, personal leave or leave of absence, shall give reasonable notice to the supervisor. For those employees in non-relief positions, the notification must be made within one-half (1/2) hour after the time the employee is scheduled to work. For those employees who are in relief positions, the current local practice will remain in effect, unless the cause for the relief prevents such notification.

B. Notification for extended sick leave

In the case of a condition exceeding seven (7) consecutive calendar days, a physician's statement specifying the employee's inability to report for work and the probable date of recovery is required.

Section 13.06 - Sick Leave Uses, Evidence of Use, and Abuse.

A. The appointing authority shall approve sick leave usage by employees for the following reasons;

1. Illness, injury, or pregnancy-related condition of the employee...



## POSITIONS OF PARTIES

### Position of Management

Management points out that between November 22 and December 12, 1989, Management received complaints from relatives and from an employee of the Summit County Children Services Board concerning the placement of three youths under the custody of the Ohio Department of Youth Services. Management investigated these allegations and found them meritorious. Management points out that during the same time period the Grievant was absent without leave for not reporting off work for November 29, 30, December 6, 7, and 8, 1989, as no notification of his absence to his supervisor was made for these dates. Management points out that the Grievant prepared a final placement plan for a youth in the Department's custody for placement with a mother at an address that she had not resided at for approximately three months. Management urges that the Grievant had not been in contact with the mother of this youth as required by the Ohio Department of Youth Services's risk based assessment standards and as a result the youth, who was scheduled for release on November 22, 1989, had to be placed in a foster home.

As to the second charge, Management points out that the Grievant did not visit a youth or his mother since a court hearing on October 10, 1989, although daily activity sheets indicated that he had had face to face contact with the family and youth on seven separate occasions.

As to the charge involving Robert Toth, Management urges that the Grievant failed to contact Robert Toth's sister since the youth was admitted to the Department of Youth Services on June 20, 1989.

Management also urges that the Grievant failed to report his absence from work and was absent from work without leave on November 29, December 1, December 6, December 7, and December 8, 1989.

Management points out that the Grievant violated ODYS Directive B-19, general work rules; ODYS Directive B-38, rules associated with disciplinary action; and ODYS Directive B-7, rules bearing on sick leave.

Management contends that the Union has failed to carry its burden of persuasion in its claim that Mr. Curry was removed because of Union activity participated in by the Grievant. Management points out that Mr. Curry's disciplinary record, except for the removal herein, predates his election to the position of Union delegate.

Management urges that the grievance in this case be denied in its entirety and that Mr. Curry's discharge from employment with the Ohio Department of Youth Services be upheld.

#### Position of the Union

The Union contends that Management has failed to carry its burden of persuasion on all four of the charges lodged against the Grievant. As to Charge One, the Union contends that Management offered no proof on this charge and points out Mr. Curry's

testimony about the numerous times he made contact with the Sales family and the circumstances of those contacts were unrebutted by any evidence presented to the record. The Union points out that it was Administrator Blandon's original recommendation as to Charge One that Mr. Curry receive a three day suspension based on this charge. The Union contends that Mr. Curry has been removed under Charge One because of a judgment call made by Mr. Curry and urges that this charge does not support disciplinary action of any kind.

The Union emphasizes that while Mr. Curry was fooled by Dorothy Sales, she was a mother who wished to have her son released from an institution and would therefore carry out any ruse as to her living arrangements in order to be reunited with her son. The Union points out that in the event it was discovered that Mrs. Sales had no permanent residence, her other children were at risk in terms of removal from Mrs. Sales's custody. The Union argues that Mr. Curry was not neglectful in carrying out his duties as alleged within Charge One and the charge should be denied.

As to the second charge, the Union again points out that Mr. Curry's daily activity sheets and his testimony rebut this charge. The Union points out that while statements were secured for other charges, no written statement by anyone, other than Mr. Frederick and Mr. Blandon, was secured by Management as to Charge Two.

As to the AWOL charge which is found within the third charge of the order of removal, the Union contends that Mr. Blandon's testimony on this issue was confused and evasive. The Union pointed to the discrepancies between Mr. Blandon's testimony and

other exhibits presented as to this time period, and Mr. Blandon's chronology of events which appears as Management Exhibit 8. The Union points out that Dr. DiBartholemeo's letter regarding Mr. Curry's illness was received by Mr. Blandon on December 7 or December 8, 1989, and yet Mr. Blandon, in his testimony and in his written chronology of events prepared on December 18, 1989, notes receipt of the letter on December 11, 1989. The Union also points out that information received by Mr. Blandon as to Mr. Curry's departure from Edwin Shaw Hospital was incorrect, through no fault of Mr. Curry.

The Union also points out that the ODYS sick leave policy, Management Exhibit 19, provides for lack of notification under emergency conditions. The Union urges that the serious nature of Mr. Curry's condition in late November, 1989, his hospitalization for treatment and his disabling illness, alcoholism, combine to bring Mr. Curry's circumstances during the time period in question under the emergency conditions contemplated by the Department's own sick leave policy. These emergency conditions would therefore, according to the Union, negate the disciplinary action imposed for lack of notification to Mr. Curry's supervisor if such a lack of notification occurred.

As to the fourth charge against Mr. Curry, the Union points to not only Mr. Curry's frustration, but that of Mr. Patterson in attempting to contact Robert Toth's sister, Ms. Masula. The Union points out that Mr. Curry's testimony and previous reports indicate his continuing attempts to reach Ms. Masula and the frustration of

these attempts by Ms. Masula. The Union points out that Keith Patterson had no better luck at actually meeting with Deborah Masula and yet received no disciplinary action for his failures on this score.

The Union contends that a comparison of the disciplinary action imposed upon Mr. Curry to his participation as a Union delegate denotes that Mr. Curry's discharge was based not on just cause, but upon Mr. Curry's participation as an active Union participant. The Union admits that the evidence as to this charge is circumstantial, but urges that the lack of weight of the charges lodged against Mr. Curry, tied to Mr. Curry's Union activity, denote an attempt by Management to dismiss a Union troublemaker under the guise of purported neglect of duty.

The Union urges that the grievance be sustained, that the Grievant be reinstated, and the Grievant be made whole in every way.

#### DISCUSSION

The Grievant was removed under four charges listed within an order of removal which took effect January 10, 1990. This order of removal appears within the record of this matter as Management Exhibit 1 and alleges in all four charges neglect of duty on the part of the Grievant.

The removal of Mr. Curry proceeds under Article 8 of the collective bargaining agreement between the parties, an article

which permits disciplinary action only when imposed upon an employee for just cause. This article also provides that principles of progressive discipline shall be followed and the steps of progressive discipline shall begin with a verbal reprimand, move to a written reprimand, then move to suspension, and then to demotion or removal. Article 8 also provides that the application of progressive disciplinary steps is contingent upon the type and occurrence of various disciplinary offenses.

In determining whether the order of removal issued to the Grievant rests upon just cause, the validity of the allegations lodged against the Grievant must be considered, the severity of the charges proven to be valid must be gauged, the application of progressive disciplinary steps must be determined applicable or inapplicable, and if determined applicable a determination must be made as to whether sufficient progressive disciplinary steps have occurred in order to satisfy Section 8.02 of Article 8 of the collective bargaining agreement between the parties. The more egregious the proven misconduct ascribable to the Grievant, the less compelling the requirements for progressive disciplinary steps suggested by Section 8.02 of Article 8 of the contract.

The arbitrator is also of the opinion that the employment history of the Grievant should be considered. At the time of his removal Mr. Curry had provided almost sixteen years of service to the Ohio Department of Youth Services and the length of such service is determined herein to be a legitimate factor in gauging

whether any proven misconduct supports a finding that the removal of the Grievant is based upon just cause.

The first charge lodged against Mr. Curry in his order of removal, effective January 10, 1990, refers to a final placement plan prepared by Mr. Curry for a youth, placing the youth in the custody of his mother at an address at which the mother was temporarily living. This charge alleges that it was later determined that the mother had not lived at the address for approximately three months and further alleges that Mr. Curry had not been in contact as required by the Department of Youth Services's risk-based standards. This charge concludes by stating that as a result, the youth, who was scheduled for leave from the institution on November 22, 1989, had to be placed in a foster home.

The evidence presented on this charge reflects, within Management Exhibit 3, a memorandum from Mr. Frederick to Mr. Blandon, that Mr. Frederick verified that Mrs. Sales, the mother of Jerry Sales, the youth mentioned within Charge One, had lived within a public shelter from October 25, 1989 through November 3, 1989. This charge also produced Management Exhibit 5, which is a statement by Frankie Gordon, dated December 15, 1989, that Mrs. Sales had not lived at 349 Beechwood Avenue for the past three months.

It should also be remembered that Management Exhibit 6, a memorandum by Mr. Frederick dated November 28, 1989, reflects that as of that date Mr. Frederick was unable to verify whether Dorothy

Sales had a permanent residence, and it should also be recalled that Mr. Blandon, who testified that this first charge is the most serious charge contained within the order of removal issued to Mr. Curry, recommended on December 15, 1989 that Mr. Curry receive a suspension of three days based on this charge.

The Grievant pointed out that in September, 1989 he secured the signature of Mrs. Dorothy Sales on a treatment agreement and had secured the signature while Mrs. Sales was physically located at 349 Beechwood Avenue. In a written response to this charge Mr. Curry pointed out that this particular document had disappeared from the case file for Jerry Sales, but stated within his response that he would secure a copy of this document from the juvenile court. This document was not presented at hearing by either party and therefore the arbitrator is unable to determine with certainty whether this claimed document does or does not exist.

Mr. Curry pointed out that the day following the day upon which he secured the signature from Mrs. Sales on the treatment agreement while located at 349 Beechwood Avenue, he went back, under order of Mr. Frederick, and obtained the signature of Mrs. Sales on a DP-7 form. Mr. Curry testified that he secured this signed document from Mrs. Sales while Mrs. Sales was located on the front porch of 349 Beechwood Avenue. Unfortunately, once again, this document was not presented at the hearing in this matter and the arbitrator is unable to determine with certainty whether this document exists or not.



It is also not possible for the arbitrator to determine with certainty what Mr. Curry noted on his daily activity sheets in terms of contacting Mrs. Sales or her son, Jerry Sales, in August or September, 1989, as the daily activity sheets presented at hearing, Management Exhibit 10, date from October 9, 1989 and run through November 16, 1989.

The arbitrator is therefore left with a very brief, signed statement from Frankie Gordon, dated December 15, 1989, which refers to the previous three months, during which, according to this statement, Mrs. Sales did not live at 349 Beechwood Avenue. This three month period dates to September 15, 1989, and therefore does not address whether Mr. Curry did or did not contact Mrs. Sales prior to September 15, 1989. The arbitrator is also unaware as to how precise this three month period was intended to be by Ms. Gordon in her statement. Had this statement intended only two and one-half months, Mr. Curry could have met with Mrs. Sales in mid to late September, 1989, as alleged by Mr. Curry, and the statement of Ms. Gordon would not conflict with the testimony of the Grievant.

It is undisputed that at some point in 1989, Mrs. Sales did reside at 349 Beechwood Avenue with Frankie Gordon. The evidence reflects that it is also undisputed that on one or more occasions Mr. Curry did meet with Mrs. Sales at 349 Beechwood Avenue in his role as a Social Service Worker 3.

The core issue raised by Charge One involves whether Mr. Curry should have determined that Mrs. Sales's physical presence at 349

Beechwood Avenue did not denote that this was her permanent residence. The Employer argues that Mr. Curry should have determined this in the course of his contacts, did not, and therefore Mr. Curry was negligent in carrying out the duties required of his position in making the contacts required on the mother of Jerry Sales. These allegations were made through the testimony of Mr. Frederick and Mr. Blandon at hearing, but within the charge contained within the order of removal issued to Mr. Curry, the charge alleges that because it was later determined that Mrs. Sales had not lived at the address as shown on the final placement plan for approximately three months, "...you had not been in contact with the mother as required in the Department of Youth Services's risk-based standards. As a result, the youth who was scheduled for release from the institution on November 22, 1989, had to be placed in a foster home."

The burden of persuasion as to the first and all other charges within the removal order issued to the Grievant must be borne by the Employer. It is the Employer who has brought these charges in support of the discharge of the Grievant and it is therefore properly the Employer's burden to present evidence sufficiently persuasive to find that the allegations within this first charge are true and are sufficiently egregious to support removal. The arbitrator finds that this burden of proof as to the first charge is not satisfied by the evidence presented in this matter. The arbitrator is not persuaded upon the evidence presented that Mr. Curry did not make the contacts he claims to have made, claims made

during the testimony he provided at the hearing herein. Nothing within the exhibits presented on this charge by Management rebuts the Grievant's claims on this point.

The arbitrator is also not persuaded that Mr. Curry's mistaken notion that Mrs. Sales was permanently residing at 349 Beechwood Avenue represents a neglect of duty sufficient to support removal. Mrs. Sales desired to have her son released from a detention facility within which he was then located, obviously wanted her son to reside with her, and therefore had a reason to mislead Mr. Curry about her living arrangements at that time. Had Mrs. Sales been open with Mr. Curry about her living arrangement it is doubtful that she would have been able to secure the custody of her son upon his release from the facility. It is also the finding of the arbitrator that having found Mrs. Sales within and in front of 349 Beechwood Avenue on more than one occasion, and having contacted her by telephone at this address on other occasions, it was not unreasonable to assume that this was her then permanent residence.

This is not to absolve Mr. Curry of the mistake he obviously made in mistakenly determining that Mrs. Sales had a permanent residence. The failure of Mr. Curry to uncover this important circumstance reflects a failure on the part of the Grievant to perform an important part of his job. However, the failure to carry out some portion of an assigned duty does not always reflect a neglect of duty. In this case, based on the evidence presented, the arbitrator is persuaded that the mistaken conclusions reached by Mr. Curry as to the residential status of Mrs. Sales during the

time period in question do not reflect a neglect of duty and therefore do not warrant disciplinary action.

The second charge lodged against Mr. Curry charges that Mr. Curry did not visit a youth or his mother since a court hearing on October 10, 1989, although Mr. Curry's daily activity sheets indicated he had had face to face contact with the family and the youth on seven separate occasions. It should be noted that Mr. Blandon recommended a one day suspension for the violation of departmental policy represented by Charge Two within the order of removal issued to Mr. Curry.

The evidence presented by the Employer in support of Charge Two is based solely upon the testimony of Mr. Frederick and Mr. Blandon and a memorandum prepared by Mr. Frederick within Management Exhibit 10 claiming that the mother of David Hayes informed Mr. Frederick on December 1, 1989 that Mr. Curry had had no contact with her or her son since October 10, 1989. It should also be noted that Mrs. Hayes was upset that her son had been placed within a group home and refused to sign a written statement as to the charges she had raised with Mr. Frederick.

The daily activity sheets prepared by Mr. Curry, supported by Mr. Curry's testimony at hearing, reflect numerous contacts with Mrs. Hayes or her son on October 10, October 18, October 24, October 30, October 31, and November 15, 1989. Other than the memorandum from Mr. Frederick, and the testimony of Mr. Frederick, the daily activity sheets prepared by Mr. Curry on the dates indicated and the testimony provided by Mr. Curry on this charge

are unrebutted. The arbitrator finds that the Employer has failed to carry its burden of persuasion on Charge Two and the arbitrator remains unpersuaded that the allegations lodged against the Grievant within this second charge support a finding, based on the evidence presented, that the discharge of the Grievant under this second charge is based on just cause.

The third charge lodged against Mr. Curry relates to being away without leave on November 29, 30, December 6, 7, and 8, 1989. This charge alleges a failure to report to work as scheduled and a lack of notification to an appropriate supervisor for these absences.

The documentary evidence presented as to this third charge may be found within Management Exhibit 8 and Union Exhibit 16. Management Exhibit 8 is the investigative packet produced by the Employer in investigating the facts surrounding this third charge. Union Exhibit 16 is a chronology of events prepared by Mr. Blandon on December 18, 1989, dating back to late November and early December, 1989.

There is no dispute that Mr. Curry called off properly November 27 and 28, 1989. There is also no dispute that Mr. Curry made no such call off on November 29 and 30, 1989. It is likewise undisputed that on December 1, 1989, at 11:00 a.m. Mrs. Curry, the Grievant's wife, contacted Mr. Blandon and notified him that her husband was too ill to come to work and she was unable to tell Mr. Blandon when he would be able to report.

The call off by Mrs. Curry is the subject of some dispute because Mr. Bandon claims that during his telephone conversation with Mrs. Curry on December 1, 1989 at 11:00 a.m., Mrs. Curry did not inform Mr. Bandon of the location of Mr. Curry. This contention is rebutted however by the call off notice which appears within Management Exhibit 8, which was prepared by Mr. Bandon on December 1, 1989, which contains on its face the location of Mr. Curry at Edwin Shaw Hospital. This notation is supported by other evidence presented at the hearing herein reflecting that Mr. Curry was in fact an inpatient at the Edwin Shaw Hospital on December 1, 1989. It is therefore determined that effective December 1, 1989 at 11:00 a.m., the Ohio Department of Youth Services was aware, in the person of Mr. Bandon, of Mr. Curry's hospitalization at Edwin Shaw Hospital and the reason for his hospitalization.

Mr. Bandon traveled to Edwin Shaw Hospital on December 5, 1989 and was informed by a medical staff member that Mr. Curry had signed himself out and was no longer residing within the hospital. Upon receiving this information Mr. Bandon went back to his office and at that point notified his secretary to place Mr. Curry on AWOL status. It was subsequently determined that the information received by Mr. Bandon while located at the Edwin Shaw Hospital on December 5, 1989 was incorrect and that, in fact, Mr. Curry was still an inpatient on that day at Edwin Shaw Hospital and was not released from the hospital until the next day, December 6, 1989. The placement of Mr. Curry on AWOL status, on December 5, 1989, therefore, was based on misinformation provided to Mr. Bandon by

a hospital staff member and was not caused by any misinformation directed to Mr. Blandon by Mr. Curry. The arbitrator finds that the placement of Mr. Curry on AWOL status on December 5, 1989, based on the misinformation provided to Mr. Blandon, undercuts the validity of the AWOL status ascribed to Mr. Curry on December 5, 1989.

It should also be noted that Mr. Curry's attending physician during this period of time, Dr. DiBartolemeo prepared a letter dated December 6, 1989 directed to Mr. Blandon, informing Mr. Blandon of Mr. Curry's condition and his expected return to work. Mr. Curry testified that this letter was delivered to Mr. Blandon by his wife and contends that the letter was received by Mr. Blandon on December 7 or 8, 1989. Mr. Blandon testified at hearing that he received the letter on December 11, 1989, and then later testified that he received it on December 7, 1989.

There is some reason to believe that the letter of Dr. Dibartolemeo was received prior to December 11, 1989 by Mr. Blandon, but in any event, by December 11, 1989 at the latest, the Ohio Department of Youth Services was on notice as to the reasons for Mr. Curry's absence during late November and early December, 1989, and was also aware of Mr. Curry's expected return to work. Considering that alcoholism is a disease, and considering as well the provisions of Article 13 of the collective bargaining agreement between the parties, an article addressing sick leave usage, the arbitrator is not persuaded that the circumstances surrounding the third charge reflect just cause in support of the discharge of the

Grievant. In support of this view the arbitrator directs the parties' attention to Section 13.05(B) entitled Notification for Extended Sick Leave. This subsection provides that in the case of a condition exceeding seven consecutive calendar days, a physician's statement specifying the employee's inability to report to work and the probable date of recovery is required. The Grievant did provide this documentation to Mr. Blandon sometime between December 7, 1989 and December 11, 1989. It should also be noted that Section 13.06 of Article 13 of the collective bargaining agreement between the parties provides that the appointing authority shall approve sick leave usage by employees for such reasons as illness.

Mr. Curry managed to provide notice of his absence on November 27 and 28, 1989, absences that were based on his alcoholism. He did not provide such notice on November 29 and 30, 1989 and there is nothing in the record of this matter reflecting the reason for this lack of notification other than Mr. Curry's statement that he was in such bad shape he was unable to call. It is presumed that on December 1, 1989 he was still suffering from the same malady, though he managed to have notice provided to Mr. Blandon through his wife on that date. The arbitrator therefore finds that the lack of notification on November 29 and 30, 1989 represents a violation of the enforceable sick leave policies of the Ohio Department of Youth Services, and subject the Grievant to disciplinary action. Considering the totality of circumstances surrounding this absence, however, the arbitrator further finds



that the lack of notification on these two days followed by notification by Mrs. Curry and correspondence from Mr. Curry's physician, does not support a finding that just cause is present in support of the discharge of the Grievant based on these violations.

The fourth and final charge lodged against Mr. Curry in support of his removal provides that Mr. Curry had failed to contact a sister of a youth within Mr. Curry's caseload since the admission of that youth on June 20, 1989. This charge alleges an absence of contact with the sister from June 20, 1989 through December 12, 1989.

The testimony of the appellant on this charge was to the effect that he was unable to meet with the sister because of the actions of the sister in avoiding such contact. This claim is buttressed by the letter from Keith Patterson, who also attempted to meet with Ms. Masula, the sister of the youth, and was likewise unable to meet with her because of Ms. Masula's inability or refusal to make time for such a contact. The arbitrator is not persuaded by the evidence presented that Mr. Curry's neglect of duty caused a lack of contact with Ms. Masula and therefore finds that Charge Four within the order of removal issued to the Grievant does not make out just cause in support of the discharge of Mr. Curry.

The prior discipline issued to Mr. Curry may be employed in support of imposing more severe disciplinary action upon the proven misconduct alleged within the order of removal issued to Mr. Curry

which is the subject of this arbitral proceeding. The prior disciplinary action may not, however, serve in the stead of proven misconduct which allegedly supports the discharge.


In this matter the arbitrator is persuaded that Mr. Curry is subject to disciplinary action for the lack of call off notification on November 29 and 30, 1989, but also finds that this neglect of duty represents the only allegation lodged against Mr. Curry which supports disciplinary action herein. Based on this finding, and based on the work record of the Grievant, the arbitrator finds that discharge is too severe a disciplinary response based on the misconduct proven by the evidence presented in this case. The arbitrator determines that the violations which have been proven by the Employer and which are ascribable to the Grievant constitute misconduct which supports a finding of just cause for a suspension of two days.

While the arbitrator finds only limited validity underlying the charges giving rise to this grievance, the arbitrator is not persuaded that these charges arose as a result of anti-Union animus on the part of the Employer. While not finding most of the charges meritorious, the arbitrator does not find the charges were based on bad faith.

#### AWARD

1. The Grievant, Franklin Curry, was not discharged from the Department of Youth Services for just cause.

2. The grievance is sustained.
3. The Grievant shall be reinstated to his previous employment with the Ohio Department of Youth Services, effective January 10, 1990, under the terms, wages, and conditions of employment enjoyed by the Grievant immediately prior to January 10, 1990.
4. The Grievant shall be suspended for two days, effective January 10 and 11, 1990.
5. The Grievant shall be made whole in every way, including but not limited to, wages, seniority, benefits, and all other emoluments of employment, with the exception of the effects of the two day suspension ordered by paragraph 4 within this award, effective January 10, 1990.

  
Howard D. Silver  
Arbitrator

September 11, 1990  
Columbus, Ohio