

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Grievance 35-16-900502-
0032-01-03

Union

Grievant (Turner, T.)

and

Hearing Date: October 25, 1990

Ohio Department of Youth
Services

Opinion Date: December 4, 1990

Employer.

For the Union: Sally Miller, Rodney Sampson

For the Employer: Tim Miller

Present at the hearing in addition to the Advocates named above and the Grievant were the following persons: Bradley E. Rahr, DYS Labor Relations Officer (witness), Chris Simon, DYS Unit Manager (witness), Granville "Bud" Potter, DYS Superintendent (witness), Falyce Yuill, DYS Social Worker (witness), Brian Mooneyham (B.M.), youth (witness), John Mailhot (J.M.), youth (witness), Phillip Harrison (P.H.), youth (witness), Eric Knipe (E.K.), youth (witness), Jason Baker (J.B.), youth (witness), Edith Bargar (Observer), Frank Borcem (Observer), James Turner, DYS (witness), Ricardo Volley, DYS (Steward) (witness), William White, DYS Recreational Activity Worker (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the

sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Joint Exhibits

- Joint Exhibit #1 Contract
- Joint Exhibit #2 Grievance Trail
- Joint Exhibit #3 Discipline Trail
- Joint Exhibit #4 DYS General Work Rules
- Joint Exhibit #5 Performance Evaluations of Grievant for
1987, 1988, 1989
- Joint Exhibit #6 Statement of Teacher Toni Hamilton

Employer Exhibits

- Employer Exhibit #1 Opening Statement
- Employer Exhibit #2 Statement of Youth D.J. 3/22/90
- Employer Exhibit #3 Statement of Social Worker Yuill
3/22/90

Employer Exhibits #2 and #3 were offered; the Arbitrator ruled both Exhibits to be irrelevant

Union Exhibits

- Union Exhibit #1 Opening Statement
- Union Exhibit #2 Revised Directives E-7, Incidents of
Physical Force and E-25, Use of
Physical Force (5/2/89)

Excerpts of Union Exhibit #2

III. IMPLEMENTATION

A. Definitions

Physical Force - The minimum acceptable restraining action necessary in order to prevent personal injury to youth, or employees, or destruction of property.

B. Policy

It is recognized that employees working with delinquent youth must, on occasion, use physical force. Physical force is to be restricted to wholly justifiable instances which include: self protection; protection of the youth or other persons; prevention of property damage; and prevention of escape. The physical power, strength, device, or technique employed to restrain or control a youth is to be the minimum necessary.

1. If preliminary or verbal attempts and/or intervention of additional personnel prove ineffective, then physical force may be used as a control, protective, or safety measure. This physical force is a temporary measure to be used only until control of the necessitating circumstances has been gained and to prevent escalation of those circumstances.
2. After intermediate steps have been used to discourage the unacceptable behavior of a youth, it may be necessary to accelerate the restraining or protective physical force in order to maintain or

extend control. At such time, isolation and/or physical restraints may be used.

- a. External controlling agents, such as restraint devices are to be used only in extreme control situations. (See DYS E-18, Physical Restraints).
 - b. Approved isolation methods may be utilized when the youth cannot be controlled by alternative methods. (See DYS E-19, Isolation).
3. Before leaving duty, an employee who has used physical force shall submit to his/her supervisor or designated supervisor, a Physical Force Report (Attached SECTION I). If the report is not submitted prior to leaving duty or without specific authorized waiver by the supervisor, the employee is subject to disciplinary action.

IV. PROCEDURE

- A. Following all physical force situations, the employee(s) directly involved shall immediately notify his/her supervisor.
- B. The supervisor shall:
 1. Immediately notify the medical staff to ensure that youth and staff receive medical attention.
 2. Notify the Managing Officer or designee.
 3. Conduct an investigation as required by the Managing Officer or designee in situations where injury has been determined by medical staff or where misfeasance is suspected.
 4. In situations where Chapter A-34, Significant Incidents apply, Institutional staff may be required to request the State Highway Patrol to conduct an independent investigation.
- C. The investigations conducted by the Supervisor as required by the Managing Officer or

designee shall begin immediately and shall include but not necessarily be limited to:

1. Consultation with medical staff to determine seriousness of injury. If injuries require treatment outside the facility, the Institutional Designee shall notify the Deputy Director, Correctional Services by telephone to discuss the situation and the actions being taken or the Central Office Duty Officer during designated hours.
2. The employee(s) involved in the use of force shall be interviewed as quickly as possible to ascertain the employee's report of all circumstances, before, during, and after the occurrence of the incident.
3. The youth involved in the incident shall be interviewed to ascertain the youth's report of the above circumstances. The investigating officer shall prepare a written report of the results of the interview which will be read to the youth for purposes of accuracy and completeness. The youth shall then be asked to sign the statement. Should the youth desire to write a statement, he/she shall be given the opportunity to do so. The youth's statement shall be signed and dated by the youth. If the youth refuses to sign the statement, it should be noted and signed by a witness.
4. In physical force incidents resulting in injury or suspected misfeasance, or where the account of the incident by the youth and employee involved are significantly different, each witness shall be interviewed or required to make a signed and dated written statement.

Interviews shall be conducted separately and in private. The investigator shall submit a written report (Attached SECTION II), of the results of these interviews. If there is a reason to question the truthfulness of a statement, the investigator shall state why.

5. In physical force incidents resulting in injury:

- a. Details of the injury shall be obtained from the attending medical staff and/or hospital record.
 - b. Any physical object relating to the cause of the injury shall be described in the report, recovered, and kept for safe keeping.
 - c. Brief physical descriptions (age, height, weight, etc.) of the employee and the youth involved should be included in the report.
 - d. Other pertinent data such as date and court of commitment, name of committing judge, nature of delinquency, name and address of parents or guardians, etc., shall be secured by reviewing the youth's folder.
- D. The investigator shall prepare a report (Attached SECTION II, IV), incorporating the results of the above investigation for the review and recommendation of the Managing Officer; he/she must keep the Managing Officer fully advised of pertinent developments as the investigation is conducted.
- E. Within five (5) working days of the date of any physical force incident resulting in injury or from misfeasance, the Managing Officer shall forward a copy of the report to the Deputy Director of Correctional Services. The Managing Officer shall include a report (Attached SECTION V), incorporating comments on the incident, any administrative action taken to date, and recommendations regarding further administrative action. Also included shall be copies of any letters sent to parents, judges, and others regarding the incident.

Relevant Contract Sections

§ 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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, 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 ask questions, 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 (in part)

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

Stipulated Facts

1. The Grievant was a Youth Leader 2 hired on February 10, 1980.
2. The youth, B.M., was charged to Group L on 3/20/90 and under the care of the Grievant.
3. The Grievant was charged with a violation of O.R.C. 124.34 - failure of good behavior and of Directive B-19, rule #1 - abuse and/or mistreatment of youth.
4. The Grievant had no active prior discipline in his personnel file at the time of the incident.

Issue

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

the remedy be?

Facts

The Department of Youth Services is the State department charged with the responsibility of caring for youth felony offenders sentenced to its facilities by the courts. When a youth is committed to DYS, the DYS becomes the legal custodian of the youth. As such, the Department's duty is to house, clothe, feed and educate the youth. Additionally, the Department is charged with the safety of the youth; therefore, the Department does not tolerate abuse and/or mistreatment of such youth.

The Training Center for Youth (TCY) is a DYS facility where youth with emotional problems or other mental health concerns in addition to having committed felonies are usually sent so that they can be involved in programs designed to address their mental health needs.

The Grievant, was employed as a Youth Leader at the Training Center for Youth (TCY). In this position, the Grievant was responsible for the safety and security of the youths charged to him on Group Lincoln (L) during his shift (from 7:00 a.m. to 3:00 p.m.). Group L was the orientation group at this institution where intake youths were placed.

At the time of the incident, the Grievant was a 10 year employee with no active prior discipline in his personnel file. His evaluations from '87, '88, and 89 (the last was for the period

2/10/88 to 2/10/89) evaluated him as a very good employee. In fact on the 1988-1989 evaluation, the rater said that "dealing with demanding situations" was the Grievant's "strong point."

The alleged incident involved Youth B.M. This youth was placed in Group L (the orientation group) because he was diagnosed as suicidal and needed close attention. Group L has two staff and a smaller group (15 youths). Because of B.M.'s special situation, a log was kept of his daily behavior (Joint Exhibit #3).

On Friday, 3/16/90, the log read "M was placed on Group L for suicide precaution. Youth was quiet during his stay on 7-3 shift." Signed STARKS

The log on 3/17/90 read "M on building restriction. Breakfast was brought back. M to med line at about 8:00 a.m. Mr. Starks off group 9-3." Signed STARKS

The log on 3/18/90 read "M had visits today; when youth returned to group he was upset. He kept telling youths on group to hit him because he didn't care. He also said "kill me, if you think you can." Signed WHATLEY

The log on 3/19/90 read "Ms. Yuill came to group to see M. He said he did not want [to] see or talk to that bitch and she can go to hell. He said he wants to go home and he feels like dying." Signed WHATLEY.

The log on 3/20/90 read "M on building restriction. Meals brought back. Lunch Time - Lunch brought back. After M was informed he would be going to Millcreek, youth became [?] openly [?] [?] and aggressive." Signed STARKS

The incident which gives rise to this grievant occurred on March 20, 1990. On that day, approximately 14 youths were in Group L including B.M. The Youth Leaders were the Grievant and Mr. Starks. Mr. Starks testified that Youth B.M. was on building restriction and that his lunch was brought back to him, probably around 11:45 a.m. Shortly thereafter, the psychiatrist Dr. Goge came on the unit and told youth B.M. that he was being moved to Millcreek (a psychiatric unit). What happened subsequently is at issue.

After Dr. Goge, the next employee on the Unit was William White, an Activity Therapist, who is a 23 year DYS employee who had been a TCY for 13 years. Mr. White testified that around 1:00-1:05 as he was coming close to the Unit, he heard hollering and cursing. When he entered the Unit, Grievant was on the couch, one youth (B.M.) was lying on the floor in the corner near the couch, and Youth Leader Starks was playing cards with other youth. Mr. White sat down and joined the card game. Then, the youth lying in the corner got up suddenly and was on his way by when the Grievant "grabbed the youth by his jump suit and pulled him down to the ground." Shortly thereafter, Youth Leader Turner came in and asked "what was wrong?" The youth in question started cursing and hollering again. Turner left. Shortly thereafter, Ms. Yuill, Social Worker, came in and took the youth off the unit. William White said the only thing he heard from the youth was cursing at the Grievant and Starks. Sometime later, Ms. Yuill returned the youth to the Unit. Mr. Turner testified that he had previously

worked with the youth B.M. when the youth was in his orientation group. He described him as "emotionally disturbed." Turner said on the day in question he was in the "satellite" office close to Unit L and heard profanity. When he walked into the Unit, Mr. Starks was at the table, and the Grievant was to the right talking to B.M. B.M. was cursing. Turner left and ran into Ms. Yuill. He suggested that she go see the youth because she was his case worker. Turner said B.M. was "out of control a lot", and it was more appropriate that Ms. Yuill talk to him. Ms. Yuill testified that when she walked on the Unit, she heard B.M. yelling and screaming. The youth B.M. said that he had been hit and that he was being denied his medicine. She took the youth off the Unit. She said that these events happened between 1:00 and 1:30 p.m. She testified that she took the youth first to Mr. Mossburger to write up a statement. She said she might have taken him to the clinic for his medicine. Then she took him or someone took him to Mr. Simon. Then Ms. Yuill returned the youth to the group "L" with Grievant and Mr. Starks. Mr. Simon, the Unit Manager, said he saw the youth between 3:00 and 3:20. The youth said he had been abused. Mr. Simon took pictures of facial bruises which he could see but that he could not see any burn marks on B.M.'s neck. Mr. Simon testified that youth are manipulative and delight in getting Youth Leaders in trouble.

A teacher, Miss Hamilton, came on the unit at approximately 2:30 p.m. to speak to B.M. because she had just heard he was being moved to a psychiatric facility. She said in her written

statement (stipulated to by both parties) that she found the youth B.M. lying on the sofa with the Grievant comforting him. B.M. seemed in a "daze." She said she asked him about his lumps on his head. According to Ms. Hamilton, B.M. told her he had fallen and hurt himself and that he fell all the time. She asked him if anyone had been hitting him and B.M. said "No, I did it myself, I want out of here, I am depressed, I hate it here." She talked with B.M. some more. During the conversation, B.M. told her he "liked" the Grievant and that the Grievant was "trying to help him."

At 8:50 p.m. that same evening, B.M. was seen by a nurse who found "faint ecchymosis to lateral right eye" and a faint red line on back of neck [ecchymosis = a nonelevated, rounded, irregular, blue or purplish patch]. The nurse also wrote that the youth said he was assaulted by staff at around 12:30 p.m. He said he was struck in the face, on his head, and had his neck burned against a hot pipe. He claimed that he was struck in the head with a plastic chair.

The above related information describes memories and testimonies up to 12:45 and after 1:15-1:30 by staff. The incidents which give rise to this grievance happened in the time period between 12:45 and 1:15 p.m. The youth B.M. testified at the hearing. He said he was 16 years of age and was now at Riverview. He was taking anti-seizure meds three times a day. He had been institutionalized on the charge of Receiving Stolen Property. He said on the day in question both Youth Leader Starks

and Grievant were taunting and teasing him about his mother and about "being crazy." He claimed he was not allowed to have his proper medication. He said that Youth Leader Starks had thrown a chair at him and hit him about the head and held his neck to a radiator pipe. He said the Grievant had thrown him to the ground. He said he was "going out to tell her" (Ms. Yuill) when the Grievant grabbed him. He could not remember the time sequences involved and did not remember when he visited the nurse except that Ms. Yuill was with him. He said he had been screaming and cursing. He agreed that he had written and signed Exhibit A-1 (within Joint Exhibit #3) which substantially mirrored his testimony. J.M., another youth, testified. He described B.M. as "going off" and Youth Leader Starks as trying to restrain B.M. He said Starks threw a chair at B.M. J.M. said that when B.M. tried to "run-off" the unit, Grievant grabbed him and flipped him (B.M.) over the couch. J.M. said he presumed that B.M. "went off" because of lack of medicine. He said B.M. was trying to leave the Unit and that Grievant did not intentionally hurt him rather that when Grievant grabbed the jump suit, B.M. fell back over the couch. The youth volunteered that the Grievant was "innocent" having "only hit B.M. on the leg with a magazine" and that the "real bad thing was what Youth Leader Starks did to B.M." J.M. is 16 and was institutionalized because he threatened to hit a principal and because he escaped from a Group Home.

Youth P.H. also testified. He is 18 and serving at TICO for aggravated murder. He said B.M. was constantly whining for his

medicine and Starks did not allow it so B.M. lay on the floor, screaming and cursing. Starks knelt on B.M.'s face and burned B.M.'s neck with the heater and hit him. Then Starks let B.M. up -- B.M. started crying and yelling. Later B.M. tried to run out of the Unit, and Grievant "grabbed him and put him on the floor." P.H. maintained that the Grievant was uninvolved in the confrontation until B.M. tried to leave.

Youth J.B., 16, from Buckeye Boys Ranch also testified. He was institutionalized for grand theft auto. As J.B. described the scene, B.M. got mouthy, and Starks threw a chair at him, hit him, and held his neck against the heater. According to J.B., the Grievant just sat there during Starks' actions. Then when B.M. was trying to get away, the Grievant stopped him. The Grievant grabbed the youth and pushed him back on the couch; B.M. rolled on to the floor.

Youth E.K., age 15, who was institutionalized for felonious assault, also testified. He said when B.M. came out of the corner, the Grievant grabbed him and hit him on the butt with a magazine. He said the Grievant was seated on the couch, when B.M. said he was leaving and tried to leave, the Grievant grabbed B.M. who fell over the couch and slammed on the floor.

Aside from these youths who testified, Youths H, J, S, C, L and D wrote out statements which were included in Joint Exhibit #3. According to H, Grievant prevented B.M. from leaving the Unit the first time by sitting him on the floor. Then when B.M. tried to walk out the 3rd or 4th time, the Grievant grabbed him (B.M.)

as he walked by and "throw (sic) him down and told him not to get up again." B.J. wrote that while Starks was restraining B.M., Grievant hit him (B.M.) a few times in the leg. Then later when B.M. got up and tried to walk by, the Grievant "slammed him back." R.S. did not mention any acts by the Grievant or even his presence. C said that B.M. was bad mouthing both Youth Leaders and then when Starks tried to restrain him, B.M. fought him off. Starks restrained B.M. by putting B.M. against the wall. According to C, Starks never hit B.M. or kicked him. Subsequently, when B.M. told the Grievant to "fuck off" and tried to leave the group, the Grievant grabbed him and told him to sit down and shut up.

Youth L wrote that Starks threw a chair at B.M., dropped it on him, held B.M.'s head on the heater, and then sat on him. When Starks got off B.M., the Grievant sat on the couch beside him and was talking to him. When B.M. tried to leave the corner, the Grievant grabbed him, flipped him over a chair, and put him back in the corner.

Youth P.D. wrote that after B.M. was cursing, Starks put his knee on B.M.'s neck. Then, P.D. wrote, "that other staff came over and started hitting B.M. with a book, tried to hit B.M. in the genital region, and kept throwing him (B.M.) on the floor.

DYS Unit Manager Christopher Simon completed a Notice of Investigation of these alleged incidents on 3/21/90. The description read as follows:

It has been alleged that on 3/20/90 you struck a youth with a magazine and slammed the youth over furniture to

the floor. As a result of your actions you are in violation of DYS Directives, Chapter B-19, Section IV-A, Work Rule #1 which states "Abusing or mistreating youth entrusted to the Department's care; Failing to immediately report the use of physical force on a youth as prescribed by local Directive or rules.

On 3/21/90, the Grievant wrote in response "I have no knowledge of the incident." This report was received by personnel on 3/22/90 and forwarded to a second level supervisor on 3/23/90 and up to the Managing Officer on 3/26/90 who approved a Pre-Disciplinary Meeting. On 3/24/90, the Grievant was notified of a Pre-Disciplinary meeting for 3/27/90. On 3/24/90, the Steward acknowledged receiving a copy of Pre-Disciplinary meeting letter and "summary" of youth statements about the Grievant. On 3/24/90, the Grievant was placed on administrative leave. David Meyers held the Pre-Disciplinary meeting on 3/27/90 and rendered his Report on 4/3/90. He recommended discipline; he found a use of physical force. On April 20, 1990, the Grievant was removed effective 4/21/90. The Notice of Removal charged,

I have reviewed the Notice of Investigation dated March 20, 1990, which states that on March 20, 1990, you physically abused a youth by striking him with a magazine and slamming him over furniture to the floor. Your actions constitutes failure of good behavior in violation of and the Department of Youth Services Directive, General Work Rules, Chapter B-19 and Section 124.34 of the Ohio Revised Code.

A Step 3 hearing was held. At that hearing, the Union objected that "ORC 124.34" was not a proper charge. The Step 3

decision (in part) read

In this matter, the grievant retaliated with actions toward the youth. When the youth did not get his medicine he reacted toward the grievant and the physical confrontation developed. The Grievant did not follow prescribed procedures and thus handled the situation improperly. Moreover, abuse of a youth is a serious offense and removal is commensurate on the first offense.

At the Arbitration hearing, both Youth Leader Starks and the Grievant testified. Starks testified that B.M., the youth in question, was considered suicidal. After lunch, B.M. asked for his medication, but he was not on "noon meds." The youth got upset, began cursing at the Youth Leaders, banged on windows, kicked the register, started taunting the other youths and the staff. In short, he went out of control. Starks related that the taunts were aggravating the other youths who were about to take action. Starks stopped them and sought to restrain B.M. B.M. backed up against the wall, slid down the wall, spitting and kicking. Starks said he grabbed B.M.'s leg and finally wrestled him to the floor and held him down. Starks asked B.M., "are you under control?" about 5 times. When he finally answered yes, Starks got up. B.M. remained lying in the corner but quiet. Starks went to the table and began to play cards with other youth. White came in and joined them. Suddenly, B.M. started off again, cursing and screaming. The Grievant was sitting on the couch close to where B.M. was lying. B.M. tried to leave the Unit. The Grievant reached up and grabbed him and pulled him back. B.M.

fell to the floor and stayed in the corner. Social Worker Yuill came in and took B.M. out. Later, she brought him back.

The Grievant testified that B.M. was lying against the wall. Meanwhile, he (the Grievant) had to go back and forth down a hall to see about another youth. B.M. started screaming and cursing. Starks went over to talk to him after telling the other youths to sit down and shut up. Starks held B.M. down until he was calm. The Grievant said he saw no reason to intervene; his job, he felt, was to make sure the other youths behaved while Starks restrained B.M. Once B.M. was calm, Starks went to play cards. White came in and joined Starks and other youth. Grievant said "I went and sat on the couch near B.M. and tried to talk to him. He told me to fuck off and laid there screaming and cursing." Then B.M. said "I'm getting out of here" and leapt up and started for the door. The Grievant said I reached up and grabbed him and pulled him back against the wall. The Grievant denied hitting B.M. at any time. He said a magazine was in the same hand he originally used to grab B.M.

The Grievant said when he first saw the investigation report, he had no idea which youth they were talking about. He said he made no report because B.M. was not hurt, and "we have to do things like this all day long."

On rebuttal, Mr. Rahr, the DYS Labor Relations Officer, was asked by the Union if the full statements of the youth were used to support discipline. He said "yes." He said only summaries were provided to the Union until the case was going to

arbitration.

Mr. Potter, DYS Superintendent, and Mr. Rahr both testified that if a physical confrontation occurred between staff and youth, that occasion should first be reported orally to a Supervisor and then reported in writing either in a medical report or an incident report or both. (For full procedure, see Union Exhibit #2.)

Employer Position

The Grievant was properly terminated for violating the agency work rule which prohibits the abuse or mistreatment of youth. The Grievant sat by idly while another Youth Leader abused a youth, already depressed and suicidal. As Grievant watched Youth Leader Starks taunted the youth, hit the youth in his face, threw a chair at him, and held his neck against a hot pipe. The Grievant then participated in this abuse by striking the youth several times with a magazine. In addition, the Grievant grabbed the youth by his clothes as he attempted to escape and slammed him to the floor, causing him to fall over the couch. The Union states that the Grievant was merely trying to restrain the youth from leaving the Unit. However, slamming the youth to the floor is not appropriate restraint. Moreover, the Grievant actively participated in the abuse by hitting the youth with the magazine. Even if the Grievant did not actively participate in the abuse, he failed to report an incident which left the youth injured.

The citation of ORC 124.34 did not supersede the contractual

standard of just cause. The Grievant was terminated for just cause.

Union Position

The Grievant is a 10 year employee, with good work evaluations, who at the time of this incident had no active discipline in his personnel file. A suicidal and emotionally disturbed youth was placed in his group. When told he was going to a psychiatric unit, the youth went out of control. The youth was restrained by Youth Leader Starks. The Grievant did not interfere but appropriately kept the other youths from getting involved. Subsequently, when the distraught youth attempted to leave the unit, Grievant grabbed him by his jump suit and pulled him to the floor to restrain him. The Grievant denies hitting the youth, denies "slamming" him to the floor, or flipping him over the couch. The "grabbing" incident was seen by another long term employee William White. Moreover, less than an hour later Teacher Toni Hamilton found the Grievant consoling the youth. The youth told the Teacher that he had injured himself and that he "liked" the Grievant. The medical report was not made until 7 hours after the alleged incident.

Moreover, this discipline has taken place within the context of procedural errors by the Employer which seriously prejudiced the Union's ability to defend the Grievant.

1. The Employer refused to provide the full witnesses'

statements until the arbitration and similarly withheld copies of photographs of the abuse.

2. The Grievant was discharged under ORC 124.34, a lesser standard than the contractual standard of just cause.

The Issues Restated

1. Was the discharge of Grievant improper because the standard use was a violation of ORC 124.34 as well as a violation of the DYS work rules thus indicating a lesser standard than just cause.

2. Was the Union's defense of the Grievant materially harmed by the Employer's refusal to provide full witness statements until shortly before the arbitration and its neglect to provide a photographic copy of the photographs of the alleged injuries?

3. Did the Grievant violate Work Rule 1 which states:

"Abusing or mistreating youth entrusted to the Department's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rules."

4. Did just cause exist to discharge the Grievant?

Issue 1

In case No. G87-2810, which involved DYS, Arbitrator David

Pincus specifically found that the use of § 124.34 of the Ohio Revised Code was an improper citation under the contract. Pincus said

The Employer failed to introduce any evidence or testimony equating this standard with the standards specified in either Article 31 or Article 24. Reliance on this section, moreover, conflicts with a recent Ohio Supreme Court decision which found that the Code cannot be used to supplement and indirectly usurp provisions negotiated by the parties.

This conclusion of Arbitrator Pincus is drawn from an exceptionally well-reasoned, detailed, and thorough discussion of this issue in G87-0001(A), the Dunning opinion.

This Arbitrator is at a loss to understand why the Department of Youth Services cannot adjust its language after all these years to the contract to which the Employer is party and clearly bound. The Arbitrator must, in fairness, return to this error at the time of the award.

Issue 2

Article § 24.04 states as follows: "When the pre-Diciplinary notice is sent, 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." This contract section is clear and unmistakable. Before the Pre-Disciplinary Hearing, the Employer provided only a "summary" of witness statements. Mr. Rahr testified that the full

statements were used to "support discipline." The Employer was bound to provide full and complete witness statements before the Pre-Disciplinary Hearings. The Employer, in this case, presented no legal or contractual basis for withholding those statements beyond a nebulous referral to the "protection" of the youths. This rationale fails to overcome the clear words of the contract. Moreover, the photos taken fall within the same rule, and authentic copies should have been provided. Again, the Arbitrator will return to this error in the final award.

Issue 3

Did the Grievant sit by and watch Youth Leader Starks "abuse" the youth B.M.? We know that at approximately 1:30 p.m. Ms. Yuill saw some facial bruises on the youth, that at 2:30 p.m. Ms. Hamilton saw lumps on his head, and at sometime in the afternoon, Mr. Simon saw and photographed facial bruises. However, no medical person examined the youth until 8:50 p.m. At that time, he still had some facial bruises and a faint red line on his neck. When did those bruises occur? At 2:30 p.m., the youth told Ms. Hamilton that he fell the night before and hurt himself. No evidence was introduced which described the youth's physical condition prior to the alleged incident.

To determine if abuse occurred on Group "L" between 12:45 and 1:30 p.m., we must rely on the written statements of incarcerated teenagers and the possibly self-serving report of the Youth

Leaders. The Arbitrator agrees with the State that incarceration does not automatically cause the incarcerated person to be labeled a liar. Yet all witnesses agreed, Employer and Union alike, that youth committed to DYS facilities are manipulative and enjoy getting the staff "in trouble." Moreover, the youth witnesses are virtually illiterate and often inarticulate. Last but not least, they could legitimately fear staff reprisals. On the other hand, the employees in this case who testified are by and large long time employees with good records. What did they actually see and hear? Ms. Yuill heard cursing and screaming; she heard B.M.'s description of what happened and saw his bruises. She acted appropriately by taking the youth to higher authorities. Yet, she also returned the youth to the group. Mr. Turner heard yelling and cursing and but saw the youth in the corner cursing away. Mr. White saw the youth in the corner, saw him attempt to leave, and saw Grievant grab him and pull him to the floor. Thus, to determine what the Grievant saw and did, we, of necessity, have only the Grievant's testimony, Sparks' testimony and the testimony of the boys.

The Arbitrator concludes that these events are the most probable scenario: After lunch, Youth B.M. "went off" (to use youth J.M.'s words) that is, he started screaming and cursing and perhaps acting violently toward inanimate objects. What caused him to go off was probably his terror of the coming psychiatric hospitalization or perhaps his medication worries. Youth Leader Starks responded and apparently lost his temper. He threw a chair

at B.M. and eventually physically held him on the floor. Whether he actually hit B.M. remains for another Arbitrator to decide. What was the Grievant doing? By his own statement, he did not interfere and maintained control over the other youths. Why did he not report this incident? The Grievant said it only lasted a short time and was a common occurrence rather than "an unusual incident." After the confrontation with Starks, the youth was apparently calm and in the corner, then he started screaming and cursing and headed for the door. Almost all the witnesses among the youths as well as Mr. White agree that B.M. started to leave. Again, all the witnesses agree that the Grievant stopped him by grabbing his clothes and bringing him down to the floor. The witnesses disagreed on the severity of the force with which the Grievant grabbed and stopped the youth. The Grievant is a goodsized strong-looking person; B.M. is a skinny, small boy. The Grievant says that he stopped the youth without moving from the couch and that it was the youth's own momentum, inhibited by the Grievant's grab, that caused the hardness of his fall. Most of the witnesses agree that the Grievant never left the couch while stopping the youth. The Arbitrator concludes that the fall was a hard one.

The questions now become whether a) the Grievant witnessed abuse by Starks that he should have reported and b) whether grabbing the youth in the manner he did and causing him to fall hard to the floor constituted a violation of Work Rule 1.

The Arbitrator refers the reader to Union Exhibit #2 Revised

Directives E-7 (Incidents of Physical Force) and E-25 Use of Physical Force, issued 5/2/89. This document defines Physical Force as the "minimum acceptable restraining action necessary in order to prevent personal injury to youth or to employees." The Directive requires that any physical force, minimum or not, be reported. Clearly, the Grievant applied physical force to the youth. Moreover, that force was more than minimal. The Grievant negligently failed to judge what a "grab" by a man of his weight and size might cause to a scrawny youth of 16. The Grievant thus violated Rule 1 when he failed to report his use of physical force. No evidence exists that the Grievant deliberately or wantonly or recklessly mistreated or abused the youth himself. However, his use of force was clearly inappropriate and not the minimum when he sought to prevent the youth from leaving the Unit. More serious in the Arbitrator's mind was the Grievant's failure to report Mr. Starks' conduct. By no stretch of the imagination, could Mr. Starks' use of physical force be called minimal or appropriate. Throwing a chair at a youth is an attempt to cause physical harm, serious physical harm. The Arbitrator, however, cannot conclude from the evidence that the Grievant's improper restraint nor his failure to report Mr. Starks' caused any physical harm to the youth in question. No evidence of the youth's condition prior to the incident was presented. A medical report was not secured until 7 hours after the incident (contrary to DYS policy). A plausible explanation of the injuries was presented: self injuries the evening before. The Arbitrator

finds no just cause for termination for abuse.

The Grievant clearly violated Rule 1 by failing to report his own use of physical force and failing to report Starks' abusive actions. Moreover, he compounded his behavior by his disingenuous answer on the investigative report.

Termination for these offenses does not follow the Contract's progressive discipline criteria and is not commensurate to the act. However, in the Arbitrator's judgment, these offenses are serious. These two men had entrusted to their care a weak, emotionally disturbed, suicidal 16 year old youth. No doubt he presented great difficulties and was a thoroughly unpleasant youth. However, taking care of difficult and unpleasant youth is the Grievant's job. The Grievant acted negligently in his apprehension of the youth and acted dishonestly in not reporting Mr. Starks'.

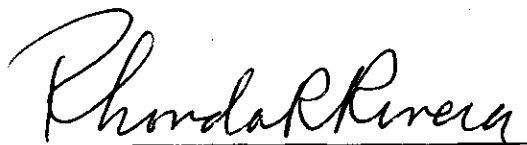
Unfortunately, management's conduct of this Grievance is not without blemish. The use of 124.34 is inappropriate and clouds management's just cause decisions under the Contract. The Arbitrator urges DYS to change its conduct in this respect. However, in this case, the Arbitrator is bound to conclude that the harm of using 124.34 was de minimis. The failure to provide witness statements and a second set of photographs is a much more serious matter. The Grievant was terminated -- what is called the "capital punishment" of employment. The Union has the duty to defend the Grievant. Altered or unavailable evidence can be severely prejudicial to the Union's effort.

Because of the serious nature of Grievant's conduct, the Arbitrator would have reinstated him with no back pay as of the date of this award. However, failure to provide complete statements violates the specific mandate of the Contract. Moreover, the Grievant is a ten year employee with no prior inclination to abuse and who had no active discipline at the time of the incident.

Award

The Grievance is denied in part and granted in part. The termination of the Grievant is set aside and a suspension of 180 days without pay is imposed. Back pay and benefits are to be reinstated as of the 181st day following his removal.

December 4, 1990
Date


Rhonda R. Rivera
Arbitrator