ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 543

OCB GRIEVANCE NUMBER: 35-02-900502-0170-01-03

GRIEVANT NAME: PEAL, MARY

UNION: OCSEA/AFSCME

DEPARTMENT: YOUTH SERVICES

ARBITRATOR: SMITH, ANNA D.

MANAGEMENT ADVOCATE: BRAVERMAN, BARRY

2ND CHAIR: PRICE, MERIL 10/26/90
MILLER, SALLY P. 12/17/90

UNION ADVOCATE: STEELE, ROBERT

ARBITRATION DATE: OCTOBER 26 AND DECEMBER 17, 1990

DECISION DATE: JANUARY 21, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: REMOVAL FOR ALLEGED SEXUAL ACTIVITY WITH INMATE YOUTH

HOLDING: LACK OF CREDIBILITY OF WITNESSES AND PROCEDURAL PROBLEMS BY DYS. GRIEVANT IS TO BE REINSTATED TO HER FORMER POSITION & MADE WHOLE FOR ALL PAY & BENEFITS LOST INCLUDING HOLIDAY PAY. BACKPAY REDUCED BY INTERIM EARNINGS.

ARB COST: $1,452.64

In the Matter of Arbitration Between	
THE STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES	OPINION and AWARD
and	Anna D. Smith, Arbitrator Case No. 35-02-900502-0170-01-03
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	Removal of Mary Peal

I. Appearances

For the State of Ohio:

Barry Braverman, Advocate, Ohio Department of Youth Services
Meril Price, Second Chair on October 26, 1990, Office of Collective Bargaining
Sally Miller, Second Chair on December 17, 1990, Office of Collective Bargaining
Rufus L. Thomas, Superintendent, Buckeye Youth Center, Witness
Anna Mills, Witness
Three youth (J.C., A.M., and F.M.) currently or formerly under the custody of the State of Ohio, Witnesses
Jim Goshay, Steward, Witness

For OSCEA/AFSCME Local 11:

Robert W. Steele, Staff Representative and Advocate
Ronald Stevenson, Staff Representative and Second Chair on October 26, 1990.
John Fisher, Second Chair on December 17, 1990.
Mary Peal, Grievant
Tim Ayers, Social Worker 4, Witness
Dannie Fairley, Chapter President and Chief Steward, Witness.

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 11:00 a.m. on October 26, 1990 at the offices of the State of Ohio Office of Collective Bargaining, 65 East State

Street, Columbus, Ohio before Anna D. Smith, Arbitrator. Prior to the start of this hearing the Union moved for a postponement, stating that it had not received documents requested from the Employer until that morning. Said motion to postpone until a later date was denied in view of the assembled witnesses. However, the hearing was postponed for two hours and a continuance granted at the conclusion of the Employer's case to permit the Union adequate time to prepare. Said hearing was continued at 9:15 a.m. on December 17, 1990 at the offices of the Ohio Civil Service Employees Association, 1680 Watermark Drive, Columbus, Ohio. The Parties were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. No post-hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument, December 17, 1990. The opinion and award is based solely on the record as described herein.

III. Issue

The Parties stipulated that the issue before the Arbitrator is:

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

IV. Stipulations

The Parties stipulated to the following facts:

1) The Grievant was a Youth Leader 2 at Buckeye Youth Center;
2) The Grievant started as a Youth Leader 2 on January 4, 1988;

3) The Grievant was working on Group 52 in the institution;
4) A youth, F.M., was housed in the Buckeye Youth Center at Group 52 and was under the care of the Grievant;
5) The Grievant has prior discipline:
   4/5/89 - Written Reprimand
   3/6/90 - Ten (10) Day Suspension;
6) The Grievant was removed for violations #21 DYS Directive B-19 and Ohio Revised Code Section 124.34;
7) The Grievant was terminated on April 30, 1990;
8) The case is properly before the Arbitrator.

In addition, the following documents were received as joint exhibits:

1A) State of Ohio/OCSEA Local 11 Contract, 1986-89;
1B) State of Ohio/OCSEA Local 11 Contract, 1989-91;
2) Grievance Trail;
3) Discipline Trail including Notice of Investigation package and Pre-Disciplinary Package, the latter of which includes priod disciplines in the file at the time;
4) DYS Directive B-19, "General Work Rules."

V. Relevant Contract Clauses

Article 24 Discipline

§24.01 - Standard

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

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline....

Disciplinary action shall be 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 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....

§24.05 - Imposition of Discipline

...If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter.

Article 25 Grievance Procedure

§25.08 - Relevant Witnesses and Information

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

VI. Background

The Ohio Department of Youth Services is charged with the confinement of high-risk, violent, serious juvenile offenders in secure facilities for public safety and offender rehabilitiation. During the youths' confinement, the Department is their legal custodian and responsible for their welfare. As such, the Department provides basic necessities such as housing and clothing, medical and psychological treatment, and education and vocational training. The Buckeye Youth Center is one of the Department's facilities. With a staff of 200, it houses 387-400 youth felony offenders.

At the time the alleged incidents took place, the Grievant, Mary Peal, was working as a second shift Youth Leader 2

on Group 52 of the institution. In this capacity she had direct charge of the youths entrusted to her care. Group 52, it should be noted, usually housed the more troublesome youths. Ms. Peal had less than a year of service at Buckeye, having been employed on January 4, 1988. She had received pre-service training on the work rules under which she was removed (Employer Exhibit 3). At the time of her removal on April 30, 1990, she had two prior disciplines on her record: a written reprimand for making an escape possible and a 10-day suspension for physical force against youth (Joint Exhibit 3).

In the fall of 1988, management (Robert Pritchett and John Carter) met with the Grievant and Dannie Fairley to discuss certain allegations against her. Supt. Thomas testified that he did not know about these allegations at the time, but when he learned about the meeting during the processing of this grievance, the supervisors represented them to be rumors of favoritism towards one F.M., a youth entrusted to the care of the Grievant. Fairley and Peal testified that F.M. had told Fairley that he had kissed Peal, and that Fairley reported it. At the time no further action was taken as the youths had nothing to say at the meeting and no one corroborated the story. According to Supt. Thomas, the charge was considered to be "vague rumors--not enough substance to go further than talk with Peal about what had been said" about her. Peal and Fairley said she was counselled on how to handle herself with male youths to protect herself from these kinds of charges.

Superintendent Thomas was unaware of possible sexual activity between the youth and the Grievant until late February or early March 1990, when Bill Mullens of the Department's central office contacted him and told him that an informant had levied charges against several people at Buckeye, including Ms. Peal. The Highway Patrol proceeded with its investigation and Mr. Thomas with his. Statements from two of the youth involved, F.M. and T.T., were taken by Supt. Thomas at T.I.C.O. on March 9, 1990. Staff took statements from two other youths, A.M. and J.C., who were then at Indian River School.

Thomas further testified that the activity with which the Grievant is charged compromises her ability to function on the job. The actions are particularly inappropriate because of the developmental level of the male youths. Reinstatement, he said, would give license to youth to make overtures to staff and subject staff to extortion attempts and blackmail.

The Charges

Three of the youths from whom statements were obtained testified at the arbitration hearing. J.C. testified that while he was at Buckeye, F.M. told him that Peal had done "stuff for him," including "jackin' off." Nobody believed F.M. Then one youth told J.C. to look in the staff office. J.C. saw F.M. sitting with a paper held in front of his lower torso. Peal's hand was behind the paper. F.M. also told him Peal and he had masturbated each other in the commissary, but J.C. did not see these encounters. On cross-examination this witness

restated that F.M. had told him these things. He also said that he had not actually seen the "jackin' off and fingering."

A.M., F.M.'s roommate at Buckeye, testified that F.M. had told him about sexual favors provided by the Grievant, and that he had seen F.M. and Peal together in the office. F.M.'s pants were down, he held a paper in front of himself, and Peal's hand was behind the paper. A.M. looked from the side and could see Peal's hand moving. On cross, he also said that F.M.'s penis was out. No other Youth Leader was around at the time. A.M. further testified that he, too, had been the recipient of sexual favors from the Grievant and had been supplied with cigarettes and marijuana. Later Peal had written him up, made him look bad to the staff and punched him. Then he was shipped to T.I.C.O.

At the arbitration hearing, the Grievant's chief accuser, F.M., initially denied sexual activity between himself and the Grievant. He stated that he did not want the Grievant to lose her job. After a brief recess he agreed to testify. The Union objected to his testimony on the grounds that the Employer advocates had spoken to the witness during the recess. The Arbitrator over-ruled, but the witness again refused to testify. After a lengthier recess, during which the Arbitrator talked with the witness off the record in the presence of Mr. Steele and Mr. Thomas, he again agreed to testify. Now he admitted that the Grievant had touched him when they stayed back from dinner, that she had masturbated him to ejaculation 10-15

times, and that she had given him cigarettes but no joints, and allowed him the favor of phone calls. He further named several people who knew about it, including Dannie Fairley. On cross-examination he confirmed Mr. Fairley's prior knowledge and the 1988 meeting where the rumor of his relationship with Ms. Peal was discussed. He said he signalled the others not to say anything.

F.M.'s mother also testified. She stated that Ms. Peal had befriended her, given her baby gifts with two marijuana joints tied to them and that on another occasion the two women had smoked a joint together in the parking lot of the institution. Peal, Ms. Mills said, had supplied the drug. She further testified that her son told her Peal had kissed him and rubbed his penis, and had allowed him to touch her breast in the visiting room. Her son did not want her to take Peal's gifts, but she did anyway. She did not report these contacts and favors when they occurred--maybe in 1987--because they were illicit. Only when contacted by Sgt. Lloyd and asked about Peal did she say anything. She admitted she had not seen Peal touch her son sexually, but stated that her son does not lie to her.

For her part, the Grievant denied the charges and said that she had had problems with the three youths. A.M. and J.C. were defiant and verbally abusive. She had had to write up all three. She further testified that this issue had been taken to court and dismissed on a bond forfeiture, an outcome she agreed

to on her lawyer's advice. On cross-examination she denied that she and F.M.'s mother had become friends, but admitted that she had given her baby gifts.

Tim Ayers, Social Worker 4 at the institution, worked on the group to which the three youth and the Grievant were assigned. He testified about his knowledge of the three youths. A.M., he said, had continuous problems with the Youth Leaders, including Peal, and was assigned to the Severe Behavior Handicapped class. He was a sex offender and a very deceptive chronic liar.

Ayers could not recall why J.C. was transferred to Group 52, but did recall that he was a sex offender and thought the other social worker on the group had had him in her sex offender group. He characterized J.C. as a dangerous person who had inserted a gun in a female youth's vagina.

The youth F.M. was directly charged to Mr. Ayers. Ayers testified to F.M.'s inappropriate behavior with females, such as holding his sex organs in front of them, his belief that adult women liked him, and his shallow relationship with his mother. F.M., he said, dominated his mother. The Release Summary Report prepared by Connie Jaycox for Mr. Ayers states in part,

> Even then [F.] has a gift at manipulating people and has been at least partially successful at times at convincing certain adults that what some staff labeled as negative behavior was in truth a misrepresentation of what he actually did or at the very least a misrepresentation of what he intended to do.
>
> ....

> [F.] has had a number of problems with female staff in which he has been challenging and/or verbally sexually provocative/inappropriate.
>
> ....
>
> [F.] has been involved in several serious problems with peers. He has been written up for numerous horseplay and several "sex play" incidents.
>
> Union Exhibit 3, page 6.

In sum, Ayers agreed that the three youths were very incorrigible, three he would never forget. Given that they were problem youths, however, he also stated that they could tell the truth.

Dannie Fairley, Youth Leader at the Department of Youth Services for thirteen years and Chapter President, also testified about the youths, who had been on his group. His testimony substantially corroborated that of Ayers regarding the behavior of the youths in the institution and their truth-telling capability. Finally, he said that the three were all from Columbus.

After each Party rested its case and the Employer had given its oral summation the Union attempted to introduce additional evidence. Finding that this evidence further addressed the credibility of one of the witnesses and was available for submission prior to closing statements, the Arbitrator sustained the Employer's objection.

The Discipline Process

The circumstances under which Peal was disciplined and her grievance processed form the basis for several Union objections and, the Union claims, grounds for reversal of the remov-

al. They therefore need to be reviewed before the contentions of the Parties are set forth.

The day that the Grievant was served with the Notice of Investigation and Pre-Disciplinary Hearing Notice, March 22, she was on sick leave. Supt. Thomas was aware that she had or would come in for her check, so he sent word that she was to come to his office. No union steward was present at Buckeye, so one from the adjoining Training Center for Youth was sent for. This was Jim Goshay. Supt. Thomas explained the nature of the issue and served the Notice of Investigation, Pre-disciplinary Hearing Notice, notice placing Ms. Peal on administrative leave, and gave Ms. Peal her paycheck. Ms. Peal commented that she hoped her foot would not prevent her from attending the hearing (her foot had been giving her trouble and she was on crutches). Thomas testified that he discussed the two youth statements dated March 9 (those of F.M. and T.T.) with Peal and the steward. He could not remember if he read the statements in their entirety, but he did go over them in response to Peal's and Goshay's questions. He did not give them to Peal or Goshay. The statements of the other youths, J.C. and A.M. (marked as received on April 6, 1990) were not available at the time.

Goshay and Peal spoke privately. She denied the incidents and said she would consult another steward whom she knew, Dannie Fairley. She said she would call one of them. Goshay did not hear back from her. At the time Goshay was upset that

Peal was on sick leave when given the notice. He had never before been called on to represent an employee on sick leave. He further testified that sometimes management provides youth statements when serving the notice, sometimes not until the pre-disciplinary hearing.

Ms. Peal testified that she spoke to Fairley about the matter on March 22, asking that the pre-disciplinary hearing be rescheduled. Everyone knew she could not be there, she said. Fairley told her to wait to hear from him because the hearing would be rescheduled.

Fairley testified that he spoke to Supt. Thomas and arranged to have the hearing rescheduled. Supt. Thomas, on the other hand, testified that Fairley did request a postponement, but on the day of the hearing. He claimed he denied the request. The reason he gave in arbitration was that neither he nor the hearing officer had had any direct contact with her and the time of the hearing was the first they had heard the request. Given the importance of the matter he allowed the hearing to proceed. His opinion was that although she was on crutches when he had seen her on March 22, he felt she was able to attend the hearing on March 26 because she had been able to come in for her paycheck on March 22.

The hearing did go forward as scheduled on March 26, with neither Peal nor a union representative in attendance. Based on the statements obtained from the four youths, the hearing officer recommended discipline. Supt. Thomas reviewed

the hearing officer's summary and concurred. On April 30 Ms. Peal was removed for engaging "in sexual activities with a youth entrusted into the care of the Department and [she] supplied him with tabacco [SIC] products...." in violation of General Work Rules Chapter B-19 and §124.30 O.R.C. (Joint Exhibit 2). The rules cited on the Notice of Investigation were 6 and 12:

> 6. Possessing and/or consuming drugs including alcohol on the Department property or during working hours; reporting to work under the influence of drugs, including alcohol; giving or making available to youth drugs, including alcohol. If an employee is taking medication for a health related condition this must be communicated to the employee's supervisor at the beginning of the shift, along with any information regarding known side effects which may affect the employee's work performance.
>
> 21. Displaying immoral or indecent conduct on or off Department premises.
>
> Joint Exhibit 4

Fairley testified that Peal called him to say she had been terminated, a fact she said she discovered when she called in to say she was able to return to work. The Union, however, was not officially informed of the removal. Fairley called Supt. Thomas who told him the pre-disciplinary meeting had been held in absentia. Thomas, Fairley alleged, did not remember who the hearing officer was or remember the prior conversation with Fairley about postponement.

The Grievance

Fairley did not receive any paperwork about the pre-disciplinary hearing, so he filed a grievance on May 3, 1990,

based on conversations with Peal. He charged the Employer with violating the following sections of the Contract: Preamble, §1.01 Exclusive Representation, §2.01 Non-Discrimination, §2.02 Agreement Rights, §2.03 Affirmative Action, §3.01 Union Rights - Access, §3.02 Union Rights - Stewards, §24.01 Discipline - Standard, §24.02 Progressive Discipline, §24.03 Supervisory Intimidation, §24.04 Pre-Discipline, §24.05 Imposition of Discipline, and §24.06 Prior Disciplinary Action (Joint Exhibit 2). He included a 4-1/2 page statement of facts and requested the following documents and witnesses:

Documents:

1. Copy of second pre-disciplinary hearing notice sent to Union & Peale [SIC]
2. Copy of Hearing Officer's Report
3. Copy of Termination (Removal notice [SIC]
4. Copy of Robert Pritchetts [SIC] investigation report (the 1st report) September 1988
5. Copy of DYS "Just Cause Form"
6. Copy of Highway Patrols [SIC] Investigation report
7. Copy of Prosecutor's Report
8. Copy of (10) day suspension order
9. EEOC Officers [SIC] report
10. Copy Mary Peal 10 day suspension.

Witnesses:

John Carter
Robert Pritchett
Rufus Thomas
Connie Jaycox
Tim Ayers
Dannie Fairley
Harry Doty
Mike Guess
Ms. Lemmon
Youths: F.M., A.M., T.T., T.H., J.C. [the latter not being the same J.C. who testified at the arbitration hearing]
DYS EEOC Officer.

Joint Exhibit 2

Fairley represented Ms. Peal at the third step meeting, June 8, 1990. She, however, was not there. Fairley testified that Management could not explain why she had not been notified. He, himself, had learned of the meeting indirectly through Ron Stevenson. He said Management could not explain why the Grievant had not been informed. Mr. Fairley got some of the things he had requested, but a number of documents were still missing, e.g., witness statements, the removal order, and files on the youths. The meeting proceeded without the Grievant. The outcome was Management's denial of the grievance, but without addressing all issues raised in the written grievance. The matter was subsequently appealed to arbitration.

In preparing for arbitration, Robert Steele of OCSEA on October 11 and 15 sought certain documents and facts:

1. Specific date and time when incident occurred.
2. Statement from [F.M.'s] mother.
3. All highway patrol reports and documents relevant to this case, dating back to September 1988. When did patrol investigation end?
4. All institutional reports and documents relative to this case, dating back to September 1988.
5. All background information on the four youths who wrote statements, i.e., charges, ages, etc.
6. Where are youths presently, and if released where are they residing?
7. Any and all other written statements pertaining to this case.
8. All discipline records for others who were disciplined for same or similar violation(s).
9. Specific discipline records of Jackie LaLonis and Carnie Anthony including N.O.I., prediscipline reports and third step hearings.

Union Exhibit 1, October 11

1. All incident reports written on youths [A.M., J.C. and F.M.] during the time period of 1/88 to present date.

2. All paper work pertaining to the three youths as to when they were put on backhall and isolation.
3. All paperwork as to why [F.M.] was sent from group 54 to group 52.

Union Exhibit 1, October 15

Most of these items were supplied or responded to on the morning of the arbitration hearing. The Employer took the position that others did not exist or were missing, specifically

1. Specific date of time of incident: only month and year known;
2. Anna Mills' statement: none;
3. Date highway patrol investigation ended: Employer does not know if ended. File supplied;
4. Discipline file dating back to September 1988: no record of investigation in 1988; balance supplied;
5. All else: there is no more;
6. Discipline record for similar offenses: only similar case (Stockling) was settled October 12, 1990.
7. Paperwork on why F.M. transferred: search did not discover. Probably lost in transfer of records.

The Union further stated that while files on the youth witnesses were brought to the first day of the arbitration hearing, copies were not provided on the J.C. and A.M. files until the next working day and the missing material on F.M. was provided two working days before the second day of hearing.

VII. Positions of the Parties

Employer's Position on the Merits

The Employer argues that it has convincing evidence that the Grievant violated a reasonable work rule and that the penalty imposed is commensurate with the offense and the Grievant's background.

Evidence. Testimony of three youth witnesses shows that the Grievant engaged in sexual activities with youth while on

duty and allowed other youths to watch. She provided them with special favors, cigarettes and marijuana. When the situation got out of control, she wrote incident reports on the youths. Although these witnesses are troubled youths, they are nonetheless credible in their testimony. They do not live near each other and have not seen each other for an extended period of time. Their stories have remained the same throughout.

In addition, there is the testimony of the mother of one of the youths, which supports her son's story. She also testified that she saw the Grievant smoking a joint in the parking lot of the institution and was herself given marijuana by the Grievant.

Reasonable Rule. Superintendent Thomas's testimony shows that this behavior, as well as interfering with the Grievant's ability to perform her job, jeopardizes other staff and the youths entrusted to their care.

Penalty. His testimony further establishes the harm that would result from returning the Grievant to the workplace. Removal, the Employer claims, is thus commensurate with the violation. Moreover, the Grievant's prior discipline history and relatively short tenure further supports that the removal is justified.

Employer's Position on the Union's Due Process Arguments

Timeliness (§24.02). The Employer claims its action was timely. It acted within a reasonable period of time upon notice from the Highway Patrol which was conducting its own

investigation. If the Union's argument were to prevail, the Employer would be required to take disciplinary action on every rumor without first determining the foundation of the claim.

Pre-Discipline Without Notice (§24.04). The Union's claim is not true. The Grievant was served with Notice of Investigation and Notice of Pre-Disciplinary Hearing in the presence of a Union steward. The Union's argument is also absurd, for it would permit the Union and Grievant to purposefully absent themselves from the pre-disciplinary hearing to contrive a fatal flaw.

No Notice of Discipline (§24.05). Even if the Union's claim that it did not receive the removal notice is true, no harm was done. According to the Employer, the purpose of this requirement is to allow the Union to file a grievance if the employee overlooks contractual rights. In this case a grievance was timely filed on May 3. Hence, no harm was done. The Employer also claims that the Darnell Brown case (G-87-1299) cited by the Union is with respect to a different issue and thus does not apply here.

Step 3 Response. The Employer argues that it has not been the practice of the Parties to discuss every issue and Contract article mentioned in the grievance at the Step 3 meeting. Never before has there been an issue of the substance of a Step 3 response. The Employer also states that at the Step 3 meeting the Union did not request or discuss documents, nor did it claim disparate or discriminatory treatment. The

pre-discipline hearing, administrative leave and evidence were discussed. The Employer's position is that the Step 3 meeting was properly held and it responded properly to all issues raised.

Employer's Position on Other Issues

Disparate Treatment. The Employer refers the Arbitator to Arbitrator Rivera's Jennings decision (23-06-891113-0121-01-03) and contends that the cases referred to by the Union (LaLonis and Anthony) do not qualify under the first of the tests set forth by Arbitrator Rivera.

Citation of O.R.C. The Employer refers the Arbitrator to her own previous decision (Stevens 35-03-890810-46-01-03) in which she held that citation of §124.34 O.R.C. on the removal notice does not in itself constitute grounds for overturning the removal.

In conclusion, the Employer asserts that it had just cause to remove the Grievant and asks that the grievance be denied in its entirety.

Position of the Union

Timeliness. The Union raises as the threshold issue the matter of timeliness. It contends that the Employer first became aware of the allegations against the Grievant in September 1988, not during the Highway Patrol investigation as claimed by the Employer. A meeting was held in September 1988 between members of Management, the Union and the Grievant about the allegations. This meeting was perceived as an investigatory

interview. Moreover, the Union did not receive notice of the pre-disciplinary meeting nor a pre-disciplinary packet. Asserting that these constitute violations of §24.02, 24.04 and 24.05 of the Contract and pointing out that §24.02 requires an arbitrator to consider the timeliness of the Employer's decision to begin the disciplinary process, the Union requests a ruling on these procedural violations before going to the merits of the case. As a remedy to the procedural violations it seeks reinstatement with all back pay, overtime and benefits, and that the Grievant be made whole.

Relevant Documents. The Union raises the additional due process issue of discovery, claiming a violation of §25.08. By the Employer's withholding of files on the youths, the Union was hampered in its defense of the Grievant because it could not adequately cross-examine these witnesses. In support of its position it cites Arbitrator Rivera in the Darnell Brown (G-87-1299) and T. Turner (35-16-900502-0032-01-03) cases.

Merits. The Union attacks the Employer's claimed weight of evidence along several lines. First, it challenges the credibility of the youth witnesses. These youth, it contends, were problematic when they were in the custody of the Department and after release. They were either convicted of sex crimes or moved within the institution because of sexual gestures or other inappropriate conduct. The testimony of two Union witnesses supports the position that the youths lied and set up the Grievant. The youth ran together at Buckeye Youth Center

and had the opportunity to do so after release. They therefore had the opportunity to fabricate the charges. The Union would have introduced additional evidence in the form of an incident report on one youth, but was prevented from doing so by the Employer's objection which was sustained by the Arbitrator.

The Union contends that the youth's mother is not a responsible person or credible witness or she would not have waited over a year to say anything. Surely, it says, she had nothing to fear from the Grievant.

The Union also asserts that in agreeing to a bond forfeiture, the Grievant did not admit her guilt in this matter.

In conclusion, the Union contends that the Employer has not proved its case. It has merely subjected the Grievant to double jeopardy and procedurally erred throughout. It asks that the Grievant be reinstated, granted all lost wages, benefits and overtime, and made whole.

VIII. Opinion

Timeliness

The threshold issue is whether the existence of the September 1988 meeting blocks consideration of the merits of the case. The Union holds the view that the Employer waited too long after this meeting to take disciplinary action and that this constitutes a violation of §24.02 and a fatal flaw. The Arbitrator agrees with the Employer that it did not capriciously or arbitrarily delay its disciplinary action, thereby subjecting the Grievant to the hardship of a threatened penalty

for 18 months and preventing the Union from collecting evidence with which to defend its member. Rather, it dropped the matter for lack of evidence in 1988, and took it up again when new evidence came to light from an entirely different source. Significantly, the Employer had no control over its notification by the Inspector General's office and it acted promptly upon being notified. However, both the Employer's and Grievant's cases are harmed by the eighteen month delay because of decay in the quality of evidence. Thus, no one remembers exactly when the alleged incidents occurred. This makes it impossible for the Union to refute the charges by, for example, placing either the youth or the Grievant elsewhere. In the absence of overwhelming evidence that the Grievant is guilty, this would be enough to overturn the removal. I shall return to this below.

The Union also advances a theory of double jeopardy: the case was tried once in 1988 and again in 1990. This argument is misplaced, for it falsely assumes a full hearing in 1988.

Lack of Notice

Another issue raised by the Union is the allegation that it did not receive a pre-disciplinary notice in violation of §24.04. It is clear that the Union was notified in writing of the March 26, 1990 meeting because its steward, Jim Goshay, signed both the Notice of Investigation and Pre-Disciplinary Meeting Notice. The Union did not suggest that Mr. Goshay was

unauthorized to be the recipient of the notification as provided in §24.04, so it must be assumed that, as a Union officer, he qualified. Moreover, it is clear from the testimony of the Chapter President, Superintendent and Grievant that the Union was aware of the meeting, or it would not have sought a postponement. The failure of the Employer to mail a separate written copy of these notices at the time they were served cannot be said to have prejudiced the Grievant. Her absence and that of her representative's from the pre-disciplinary meeting were not the result of lack of notification.

List of Witnesses and Documents

What is more troublesome is the withholding of the so-called "pre-disciplinary packet" of list of witnesses and documents, and subsequent withholding of other relevant information. The Department made its customary argument that it never provides youth statements until arbitration to protect the youths from threats or acts of retaliation. This argument is misplaced in the instant case, for none of the four youths were incarcerated at Buckeye when the notice was served. The argument is similarly without merit as an answer to the Union's charge that the youths' statements were not provided at the pre-disciplinary or Step 3 meetings. Moreover, it is clear from the grievance that the Union knew the identity of three of the four youths by May 3 (Joint Exhibit 2). What can have been the point of withholding their statements once their identity was known? It is equally clear that the Employer considered

the statements in imposing discipline, notwithstanding Thomas's claim that he disregarded J.C.'s and A.M.'s statements, for all four are discussed in the pre-disciplinary hearing officer's report (Joint Exhibit 3). The Employer, therefore, had the contractual duty to supply them to the Union and its justification for withholding them--protection of youth--is without merit.

Relevant Documents

The Union requested specific documents bearing on the case on May 3, 1990 on the grievance form. Some were provided at the third step meeting. Specific documents and information were also requested October 11, 1990, two weeks prior to arbitration. More documents were requested on October 15. Of those that existed, the removal notice, youths' files and the Highway Patrol file were not supplied until the morning of the arbitration. (However, notes on the latter had been provided the preceding week.) Both the removal notice and Highway Patrol report had been requested as early as May 3. It was on the basis of the last minute delivery of these files that a continuance was granted to the Union. The seven-week period between hearing days allowed the Union ample time to prepare. The Union nevertheless claimed not having the files prior to the Employer's case hampered its cross-examination of the Employer's witnesses, specifically the youths. They did not, however, seek to recall any of these witnesses on the second day of hearing, and so the Arbitrator doubts more would have been

forthcoming had the Union gotten the files when they were first requested. All the same, the Employer agreed in §25.08 to supply relevant and reasonably available documents. The Union's request was specific, the documents relevant and reasonably available. The Employer did not respond until the morning of the hearing and gave no reason it could not do so earlier. While much, if not all, of the harm was undone by the continuance, the timing was unfair since it made the Union's preparation more difficult. It also constituted a violation of §25.08.

Other Issues

There are some additional features of this case that were globally referred to in the Union's oral summation as Employer procedural errors:

1. Pre-disciplinary hearing and Step 3 meeting. The Union alleges and the Employer denies that the Parties agreed to postpone the pre-disciplinary hearing because of the Grievant's health. The Employer agrees that the Union requested the postponement, but denied it because the Superintendent doubted the Grievant's inability to attend and it was a last-minute request. The Grievant testified that she thought she spoke to Fairley about it on the day of the hearing because she had not been notified (as he had told her she would be) about its being rescheduled. The pre-disciplinary hearing notice, which was signed by the Grievant and a steward plainly states,

> This is your formal notice of the meeting. If there are no changes, you will receive no further letters. You are directed to attend the meeting unless you wish to waive your right to this

> meeting by informing the Superintendent in writing, stating that you accept the proposed discipline.
>
> Joint Exhibit 3

It is plain that the testimony of the Superintendent and that of the Chapter President are in direct conflict. Neither Party has supporting evidence. The Grievant did not waive her right to a hearing nor request a postponement in writing. Neither did she or the Union receive written notice of postponement. The Arbitrator is somewhat more inclined to believe the Employer's version of events because the Grievant's testimony suggests that Fairley may not have made the request until the day of the hearing when the Grivant's phone call reminded him. The Arbitrator also understands the Employer's doubt of the Grievant's inability to attend and reluctance to postpone: if she could come in for her check, why not when her job was at stake? The Union did not offer evidence at arbitration or, apparently, when making its request, that the situation was materially changed for the Grievant. Given the importance of the matter, however, a wiser and kinder course for the Employer may have been to postpone on a physician's verification of altered condition. The justice of any alleged refusal aside, having received "no further letters," i.e., written notice of postponement, the proper course of action for the Union was to attend the meeting, document the request and the reason for it, and its refusal. To hold the Employer accountable for the absence of the Grievant and her representative when they had been properly notified is to open the door for the abuses suggested

by the Employer. In short, the record inadequately supports the proposition that the Employer granted a postponement and then betrayed the Grievant by holding the hearing as originally scheduled.

The Grievant was also absent from the Step 3 hearing. Here there is no claim that a postponement was requested, only the statement that Management could not explain why she had not been informed. It is impossible from the record to determine whether the Grievant simply did not show up or was, in fact, not informed by either the Union or Employer. Moreover, there is no evidence whether either Party sought to locate her or to postpone because of her absence. It is only clear that she was not there and that the Parties proceeded without her. Responsibility for her absence cannot be ascertained from the record. Nevertheless, there is cause for deep concern: an employee is discharged for immoral conduct and not until arbitration is she present at any hearing to which she is contractually entitled. I shall return to this concern below.

2. Notice of Discipline (§24.05). The Chapter President testified that as late as the Step 3 hearing he had not received the removal notice, despite §24.05's requirement and his specific request on the grievance (Joint Exhibit 2). The removal order indicates it was certified mailed on May 3, but there is no record to indicate the Chapter President or his designee was an addressee (Joint Exhibit 3). The Employer neither admits nor denies the alleged omission. The Arbitrator

concludes the Employer violated §24.05 by failing to provide a copy of the removal notice. The Employer argues, and the Arbitrator agrees, that this did not prevent the Union from timely filing of the grievance. Nevertheless, this is yet another instance of a technical violation of the contract to which the Arbitrator must return.

3. Citation of O.R.C. on Removal Notice. The Employer makes no claim to the supremacy of the Code over the Contract. It contends that the Grievant was disciplined for violating a reasonable work rule according to the just-cause standards of the Contract. As this Arbitrator has previous held, citation of O.R.C. on the removal notice is insufficient by itself for overturning the removal.

4. Disparate Treatment. The Chapter President described in his testimony the foundation for his claim when he filed the grievance. No proof of this charge was provided in arbitation, however. The Union claim is rejected.

5. Step 3 Response. Similarly, the Union did not establish to the Arbitrator's satisfaction that the Step 3 response was inadequate.

In summary, the Employer violated §24.04 by failing to supply a pre-disciplinary packet including witness statements used against the Grievant, it violated §25.08 by failing to supply relevant and reasonable documents in a timely fashion, and it violated §24.05 by failing to supply a copy of the removal notice as called for in that section. Additionally,

although it was not established that the absence of the Grievant from all pre-arbitration meetings was the fault of the Employer, the Employer's failure to give more than cursory consideration to a postponement and, given her prior absence, the Employer's ready willingness to proceed with the Step 3 meeting give the appearance of unfairness. Finally, eighteen months elapsing from the alleged incidents to serving of papers, although not caused by the Employer, compromised the ability of the Union to defend its member. Taken as a whole, a pattern of disregard for the Grievant's due process rights and the integrity of the Contract is apparent. While much of the damage to the Grievant's defense was overcome, the effect of the 18 month delay was irreversible and prejudicial to the Grievant.

Merits

The case against the Grievant is not overwhelming. It consists of the testimony of four witnesses, three of whom are youth felony offenders who were problem youths at the institution and who, according to Union witnesses, had a history of unacceptable, even dangerous, sexual behavior, but who nevertheless could tell the truth. The Arbitrator found A.M.'s testimony to be of little value. While he may have been telling the truth in part, his story of his activities with the Grievant had the character of boastful fabrication, was not convincing and tainted the rest of his testimony. I am more convinced that he heard the story of Peal and F.M. from F.M. or another youth than that he saw the alleged behavior himself.

I found Anna Mills' testimony to be unhelpful regardless of its credibility. She did not see any sexual contact or tobacco change hands. She did receive gifts (which the Grievant admits), including, she says, marijuana. She also claims to have smoked a joint with the Grievant in the parking lot of the institution. Although the Notice of Investigation cites giving drugs to a youth's mother on Department property, the removal order cites giving tobacco to youth. From the history of the case, it appears that the Department dropped the drug charge during the discipline process and renewed it during the grievance process, something the Arbitrator cannot condone. The testimony of this witness, therefore, must be disregarded.

This brings the case down to two witnesses whose credibility is difficult to assess. I am more inclined to believe them than not because their stories have common elements, were given independently of each other, and they seem to have had little opportunity or reason to conspire against the Grievant after being released from Buckeye. However, these witnesses essentially offered an unrebuttable proposition: the Grievant did it sometime in September 1988. Given the lack of specificity, how could the Grievant defend except to swear she did not do it? In the mind of this Arbitrator, this evidence is insufficient to sustain charges of moral turpitude, particularly in the face of the due process problems discussed above.

XI. Award

The grievance is sustained. The Employer did not have just cause to discharge the Grievant. She is to be reinstated to her former position as Youth Leader 2 forthwith and made whole for all pay and benefits lost as a result of the Employer's violation of the Contract, including holiday pay but excluding overtime. Back pay is to be reduced by such interim earnings as the Grievant may have had and she is to supply the Employer with such evidence of earnings as it may require. All reference to this incident is to be expunged from the Grievant's record.

Anna D. Smith

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
January 21, 1991