ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD #: 551

DCB GRIEVANCE NUMBER: 35-03-901016-0078-06-10

GRIEVANT NAME: RAUCH, ROBERT

UNION:

SCOPE, DEA/NEA

DEPARTMENT:

YOUTH SERVICES

ARBITRATOR:

PERRY, SAM

MANAGEMENT ADVOCATE:

BUTLER, VAL

2ND CHAIR:

DONAUGH, DENEEN

UNION ADVOCATE:

STEVENS, HENRY

ARBITRATION DATE:

JANUARY 16, 1991

DECISION DATE: FEBRUARY 7, 1991

DECISION:

DENIED

CONTRACT SECTIONS

AND/OR ISSUES:

WAS 10 DAY SUSPENSION IMPOSED FOR STRIKING A YOUTH

DONE SO FOR JUST CAUSE?

HOLDING:

ARBITRATOR FOUND THAT JUST CAUSE EXISTED, AND THAT ABUSE HAD

OCCURRED, WHICH PRECLUDED HIM FROM IMPOSING HIS JUDGEMENT AND

ALTERING THE PENALTY IMPOSED BY THE EMPLOYER.

ARB COST: \$1266.5B

STATE OF OHIO, OFFICE OF COLLECTIVE BARGAINING

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA

In the Matter of Arbitration

Between

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING

-and
STATE COUNCIL OF PROFESSIONAL EDUCATORS
OHIO EDUCATION ASSOCIATION (OEA) AND
NATIONAL EDUCATION ASSOCIATION (NEA)

OPINION AND DECISION

Grievance No.:
35-03-901016-0078-06-10

Robert J. Rauch,
Grievant

SAMUEL S. PERRY, IMPARTIAL ARBITRATOR

The Impartial Arbitrator, Samuel S. Perry, was appointed by the Parties to hear and decide this matter.

The oral hearing was held on Wednesday, January 16, 1991, in a Conference Room at Offices of Ohio Education Association, 5026 Pine Creek Drive, Westerville, Ohio 43081.

The following appearances were made for each of the Parties:

FOR THE STATE

Valerie Butler
Harry Edwards
Deneen D. Donaugh
William Best
Jeff Johnson

FOR THE ASSOCIATION NAME

Henry L. Stevens Michael Catheline Robert J. Rauch

POSITION

Contract Compliance Officer
Deputy Superintendent, CHBS
Labor Relations Coordinator, DYS
Witness
Witness

POSITION

OEA/NEA Representative SCOPE Grievant The Parties agreed the matter was properly before the Arbitrator for a decision on the merits. The Parties requested a separation of witnesses and that persons to be called to testify in this matter be sworn en masse.

The State requested three (3) copies and the Association requested two (2) copies of this Opinion and Decision.

At the conclusion of the oral hearing, the Parties waived filing a post-hearing brief. The oral proceedings in this matter were concluded on Wednesday, January 16, 1991.

The Arbitrator declared the hearing closed as of January 16, 1991, and shall render his Opinion and Decision pursuant to Article 6, Section 6.07 of the Agreement between the State of Ohio and State Council of Professional Educators, Ohio Education Association (OEA) and National Education Association (NEA).

THE GRIEVANCE

The Grievance and related documents (Joint Exhibit #2 and Employer Exhibits #1, #4 and #5) were offered and admitted into evidence and state as follows:

SEE NEXT EIGHTEEN (18) PAGES

Joint Exhibit #2 (ten pages)
Employer Exhibit #1 (five pages)
Employer Exhibit #4 (one page)
Employer Exhibit #5 (two pages)

Ointer-office communication

		date: _9/27/90
to:	Crystal Bragg, Superintendent	
from:	Robert L. Jackson, Deputy Superintendent - Ind	
subject _	Pre-disciplinary Meeting - Robert Rauch, Teach	er

A pre-disciplinary meeting was held on September 25, 1990 with Robert Rauch, Teacher regarding an alleged incident that occurred on July 19th. The original pre-disciplinary meeting was scheduled on August 27th, however due to a death in Mr. Rauch's family, the meeting was scheduled for September 18th. Due to the illness of the hearing officer, it was re-scheduled for September 25th. Present at the meeting were Robert Rauch, Teacher, Michael Catheline, SCOPE representative, James Montaquila, Principal and Robert Jackson, Hearing Officer.

There were no procedural errors noted in the investigatory package. At the meeting, Mr. Rauch reviewed his statement already included in the package. He had nothing further to add to the record. Mr. Rauch stated that he had no reason as to why he slapped the youth. It was just a "gut" reaction to the youth's comments. He further stated, that knowing what he knows today, he would have completed the youth's Physical Force Form. Mr. Montaquila testified that this type of action is totally out of character for Mr. Rauch. He further stated that while it was a wrongful act, the youth was not hurt and he hoped it does not lead to a suspension or termination.

A review of the written documentation and testimony presented at the meeting, as well as Mr. Rauch's own admission, the incident occurred as alleged. There is just cause for disciplinary action.

If you have any further questions, please do not hesitate to contact me.

Robert L. Jackson Hearing Officer

RLJ:im



DEPARTMENT OF YOUTH SERVICES

INTRA-DEPARTMENTAL REFERENCE

January 3, 1991

TO:

Robert Rauch, Grievant

(CHBS)

450 Turney Rd., Apt. 301

Bedford, OH 44146

FROM:

Barry Braverman

Labor Relations Officer

SUBJECT: Step 3 Response

35-03(10-16-90)78-06-10

Statement of Procedure

On November 27, 1990 a Step 3 Meeting was held at Cuyahoga Hills Boys School. At the meeting for the union were: Robert Rauch (Grievant), Henry Stevens (Staff Representative) and Michael Catheline (Steward). Management was represented by: James Montaquila (Principal) and Barry Braverman (Labor Relations Officer).

The parties agreed we were properly constituted and there were no procedural objections. The union stated the remedy sought was that stated on the grievance.

Union Contention

The union argues that the Grievant was unjustly suspended for ten (10) days by the employer. The union argues that even though the Grievant slapped the youth in the library, the ten (10) day suspension is not commensurate. The Grievant has no prior discipline of this nature and his behavior was not premeditated. This action violates Article 13.

Management Contention

The employer contends that it acted properly and has not violated Article 13. The employer became knowledgeable of The evidence supports just the incident and investigated. cause to discipline the Grievant.

Cont'd - 2

Finding

After reviewing the merits of the instant case, the actions of the employer are supported. It is undisputed that the Grievant slapped the youth on his left cheek in the library. While the youth's behavior may have bothered the Grievant, the fact remain that the Grievant acted in an inappropriate manner. He has been hired to provide service and protection to the youth(s) under the custody of Department Youth Services. Although the union claims that the Grievant's actions were not premeditated, nonetheless the physical contact took place. Just cause does exist and the discipline (10 days) is commensurate for behavior of this nature in the Management is vested under Article 5 (Mgt. workplace. Rights) and 13 to discipline its employees. Finding no contractual violation, this grievance must be denied in its entirety.

BB:vs

cc: Marilee Chinnici-Zuercher Sally Miller Michael Kline Henry Stevens Michael Catheline File

OHIO EDUCATION ASSOCIATION &

An affiliate of the National Education Association FRANKLIN COUNTY METRO UNISERV OFFICE 5026 Pine Creek Drive, Westerville, Ohio 43081 Phone (614) 895-1041 or 1-800-221-2530 (in Ohio) Marilyn Cross, President Michael Billirakis, Vice President Rod Hineman, Secretary-Treasurer Bill Sundermeyer, Executive Director



December 20, 1990

Mr. Don Wilson, Deputy Director Office of Collective Bargaining 65 East State Street - 16th Floor Columbus, OH 43266-0585

35-03-10-16-90-078-06-10 RΞ:

Dear Mr. Wilson:

Pursuant to Article 5, Section 5.05 (D), Grievance Procedure, of the 1989-92 Agreement between SCOPE/OEA and the State of Ohio, this letter will request a review of a grievance by the Director of the Office of Collective Bargaining (Step 4).

Your immediate attention to this matter is greatly appreciated. I have enclosed a copy of the grievance.

Sincerely,

Henr√y L. Stevens

Labor Relations Consultant

Henry & Stevens

HLS/asw

Enc.

Ellen Smith cc:

Deneen Donaugh

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DEPARTMENT OF YOUTH SERVICES

51 N. HIGH STREET COLUMBUS, OHIO 43215 Richard F. Celeste Governor

Geno Natalucci-Persichetti Director

TO:

Robert Rauch, Teacher 2 (Librarian)

Crystal E. Bragg, Superintendent

SUBJECT: Disciplinary Action - Suspension

On July 19, 1990, you mistreated a youth entrusted to the Department's care and you failed to submit the reports that are required when physical force is used on a youth.

Your actions constitute failure of good behavior, neglect of duty, and/or insubordination in violation of Section 124.34 of the Ohio Revised Code and the Department of Youth Services Directive B-19, Section IV, para. A-1.

You are hereby suspended from your position for ten working days effective: 10-16-90

You are to return to work on: 10-30-90

You are to turn in your institutional keys and any contact you have with the institution during the term of this suspension shall be through the Personnel Office.

A copy of this letter of suspension shall be placed in your Personnel File.

Geno Matalucci-Persichet

CEB/vqs

Personnel File

My signature indicates receipt of and not necessarily agreement with.

erving the Youth of Ohio



DEPARTMENT OF YOUTH SERVICES

51 N. HIGH STREET COLUMBUS, OHIO 43215 Richard F. Celeste Governor

Geno Natalucci-Persichetti
Director

November 13, 1990

Robert Rauch; 450 Turney Rd., Apt. 301 Bedford, OH 44146

RE: Step 3 Hearing - 35-03(10-16-90)78-06-10

Dear Mr. Rauch:

A Step 3 Hearing will be conducted on the above-referenced matter(s) on 11/27/90, at 1:30 p.m., in the office of Crystal Bragg, superintendent/regional administrator.

If you cannot attend on this date, or if you would like to reschedule this time, please give me 24 hours notice of your intention to request a change of hearing time. Failure to appear at the hearing without notice forfeits your right to a hearing.

Yours truly,

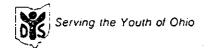
Deneen D. Donaugh

Labor Relations Administrator

DDD: vgs

cc:

Crystal Bragg Henry Stevens





INTEROFFICE COMMUNICATION

TO: Robert Rauch, Teacher

DATE: 10-12-90

FROM: Crystal E. Bragg, Superintendent

SUBJ: Disposition Conference

I have scheduled a disposition conference on your incident of 7-19-90. This conference will be held in my office on Monday, 10-15-90, at 4:25~p.m.

Please plan to attend.

CEB:dac

cc: H. Edwards

J. Montaquila

M. Shell

File



DEPARTMENT OF YOUTH SERVICES

CUYAHOGA HILLS BOYS SCHOOL 4321 GREEN ROAD WARRENSVILLE TWP., OHIO 44128 216-464-8200

Richard F. Celeste Governor

Geno Natalucci-Persichetti
Director

September 24, 1990

TO:

Robert Rauch, Librarian

FROM: Crystal E. Bragg, Superintendent

SUBJECT: Pre-disciplinary Meeting

The pre-disciplinary meeting originally scheduled was not held due to unforseen circumstances.

It has been re-scheduled for tomorrow Tuesday, September 25, 1990 at 3:15 P.M. in Mr. Jackson's office.

Failure to attend this meeting will result in a waiver of your right to a pre-disciplinary meeting.

CEB:im

cc: R. Jackson

J. Montaquila

SCOPE







DEPARTMENT OF YOUTH SERVICES

CUYAHOGA HILLS BOYS SCHOOL 4321 GREEN ROAD WARRENSVILLE TWP., OHIO 44128 216-464-8200

Richard F. Celeste Governor

Geno Natalucci-Persichetti
Director

CATON Goldson NO SHOW

September 17, 1990

TO:

Robert Rauch, Librarian

FROM: Crystal E. Bragg, Superintendent

SUBJECT: Pre-disciplinary Meeting

The pre-disciplinary meeting has been re-scheduled for 4:00 P.M. September 18, 1990 in Mr. Jackson's Office.

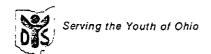
Failure to attend this meeting as scheduled, will result in a waiver of your right to a pre-disciplinary meeting.

CEB:im

cc: R. Jackson

J. Montaquila

SCOPE





STATE OF OHIO

DEPARTMENT OF YOUTH SERVICES

TITLE: DYS GENERAL WORK RULES



I. NATURE AND PURPOSE

The purpose of this Directive is to establish written work rules for all employees of the Department of Youth Services.

II. RESPONSIBILITY

- A. Authority The authority for the initiation of this Directive is granted to the Director of the Department of Youth Services in the Ohio Revised Code.
- B. Responsibility The responsibility for the specific implementation of this Directive rests with each Deputy Director, Managing Officer, and every employee of the Department of Youth Services.

III. IMPLEMENTATION

- A. Definitions none
- B. Policy
 - 1. The Department of Youth Services shall establish uniform, written work rules regarding subjects which have general applicability for all employees regardless of their location or affiliation. The unauthorized activities contained herein shall not be considered as all inclusive, but are intended to be representative examples of activities which warrant immediate corrective action. This Directive shall supercede local directives; concerning matters contained herein. It is expected that each Managing Officer shall maintain local rules regarding matters not covered by this Directive. Violation of this Directive and other Department of Youth Services directives as well as those directives developed by each Managing Officer shall tonstitute cause for corrective action, up to and including removal depending on the gravity of the situation.

- 2. The work rules set forth in this Directive shall apply equally to all employees of the Department of Youth Services whether or not they are affiliated with an employee or professional organization, and regardless of their position.
- 3. It is the desire of the Director of the Department of Youth Services to protect the rights of all Department-al employees, while at the same time not unduly restricting generally accepted rights of any individual employee. Where possible, employees should be placed on notice, in writing and in advance of any alleged violation of conduct expected of them by their employer and by their fellow workers.

IV PROCEDURE

- A. Employees participating in the following activities shall be considered to be in violation of the Department of Youth Services work rules:
 - 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.
 - Possessing or removing from State premises the property of youth, fellow employees, or the State of Ohio without authorization.
 - 3. Sabotaging, abusing, misusing, defacing or deliberately destroying the property of youth or employees, or of the Department's equipment.
 - 4. Possessing a weapon, or reasonable facsimile thereof, on Department property, in a State vehicle or during working hours while on a field assignment, unless previously authorized by the Director.
 - 5. Falsifying or failing to accurately complete or attempting to alter or falsify timekeeping records in any manner or falsifying other records such as: travel vouchers, daily activity sheets, monthly work sheets, request for leave forms, employment applications, insurance claim forms, without regard to time or discovery.
 - 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.

- 7. Sleeping during working hours.
- 8. Participating in, or encouraging others to participate in an illegal strike, slow down, sick out, or another form of work interruption, concerted or otherwise.
- Being away from assigned work area without prior permission and/or authorization from the supervisor.
 Being inattentive to duties and/or interfering with work of others.
 - 10. Reporting late for work; failing to report absence from work in a timely fashion as required by Departmental or facility rules or directive; and being absent from work without being excused.
 - 11. Fighting, provoking a fight, or scuffling. Engaging in horseplay or practical joking which could or does cause injury to youth, another employee, and/or Department property.
 - 12. Refusing or failing to comply with written or oral instructions of supervisor, and/or failing to comply with Departmental or local directives.
 - Using malicious, abusive or threatening language to youth and/or other Department employees.
 - 14. Aiding in the escape of a youth, making an escape possible by neglect of duty or in any way aiding a youth under Department custody subsequent to an escape.
 - 15. Accepting gifts, gratuities, or other special favors from youth or the parents, guardians, relatives, foster parents, etc. of youth entrusted to the Department's care:
 - 16. Failing to give a receipt to a parent, guardian, relative, foster parent, etc., for money or articles received on behalf of the youth or for failure to properly deliver or account for such property in accordance with Departmental or facility rules.
 - 17. Corresponding with, or accepting correspondence from youth confined in the Department's custody without authorization of the appropriate deputy or Director. Contacting or visiting youth, except for official work purposes, who are still in custody of the Department without prior authorization from the Director or appropriate deputy director, even when such youths are not living in a Department institution at the time.

- 18. Making false or malicious statements, oral or written, concerning the Department, its employees, or its programs. Sharing confidential information regarding youth in the Department's custody with the public or with those Department employees having no need or authorization to know such information.
- 19. Entering without authorization Department premises at any time.
- 20. Gambling on Department premises.
- Displaying immoral or indecent conduct on or off Department premises.
- 22. Defacing or abusing State property, the property of youth; or other employees.
- 23. Distributing literature (written or printed) which is in violation of the Department of Administrative Services rules governing such conduct.
- 24. Soliciting or collecting contributions for any purpose whatever during working time without the prior authorization of the Managing Officer.
- 25. Violating safety rules and practices; failing to properly report any on-the-job accident or injury.
- 26. Failing to report an accident within 24 hours of its occurrence, which occurs while driving a State vehicle. Reckless operation of a State vehicle. Using a State vehicle without proper authorization. Unlawfully operating a State vehicle including operating a State vehicle under the influence of alcohol or drugs. Failing to report to supervisor within 24 hours the receipt of a ticket while responsible for a State vehicle.
- 27. Creating or contributing to poor housekeeping or unsanitary conditions; disrupting proper decorum in areas where public is received or is present.
- 28. Deliberately giving false or inaccurate information, verbally or written, to a supervisor.
- 29. Engaging in personal work on State time, or using State equipment for personal projects without the express prior consent of the Managing Officer.
- 30. Failing to maintain such personal grooming and appearance as would meet with acceptable standards in the community of people with whom the employee must relate in his/her position.

Chapter B-19 July 1985 ACA Number 9074 Page Five

V. <u>Counsel</u>

Questions which arise should go through channels to the Department's Legal Counsel or a designated representative who will clarify such questions.

JI THOMAS MULLEN, DIRECTOR DEPARTMENT OF YOUTH SERVICES



DEPARTMENT OF YOUTH SERVICES

CUYAHOGA HILLS BOYS SCHOOL 4321 GREEN ROAD WARRENSVILLE TWP., OHIO 44128 216-464-8200

Richard F. Celeste Governor

Geno Natalucci-Persichetti
Director

August 21, 1990

TO:

Robert Rauch, Librarian

FROM: CBIO

Crystal E. Bragg, Superintendent

SUBJECT:

Pre-disciplinary Meeting

It is alleged that on July 19, 1990, you mistreated a youth by slapping him in the face. Your action constitutes failure of good behavior/neglect of duty and/or insubordination in violation of section 124.34 of the Ohio Revised Code and DYS Directive B-19, paragraph IVA, rule 1, "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" and DYS Directive E-7, paragraph IIIB, rule 2, "Submit a written report setting forth the circumstances which made the use of physical force necessary before leaving duty."

The possible form of discipline being considered for this type of infraction is suspension up to and including removal.

A pre-disciplinary meeting will be held in Mr. Jackson's office Monday, August 27, 1990 at 3:30 P.M. to determine whether there is just cause for discipline.

Mr. Robert L. Jackson has been selected to serve as the designee of the Appointing Authority to conduct such meeting.

You may not call witnesses; however, you will be given the opportunity to present documentation, ask questions, comment, refute, or rebut the allegations against you.

This letter is your formal notice of the meeting. You are expected to attend the meeting as scheduled. Failure to attend this meeting as scheduled will result in a waiver of your rights to a pre-disciplinary meeting.







You may not call witnesses; however, you will be given the opportunity to present documentation, ask questions, comment, refute, or rebut the allegations against you.

This letter is your formal notice of the meeting. You are expected to attend the meeting as scheduled. Failure to attend this meeting as scheduled will result in a waiver of your rights to a pre-disciplinary meeting.

You have the right to have a union representative present at this meeting. If you choose to waive this right, such waiver must be in writing.

Attached for your information is a list of witnesses and documents known at this time that will be used to support the possible disciplinary action.

Acknowledgment of Receipt

cc:

R. Jackson J. Montaguila

SCOPE





DEPARTMENT OF YOUTH SERVICES

CUYAHOGA HILLS BOYS SCHOOL 4321 GREEN ROAD WARRENSVILLE TWP., OHIO 44128 216-464-8200

Richard F. Celeste Governor

Geno Natalucci-Persichetti Director

March 15, 1990

TO: Robert Rauch, Teacher

FROM: Crystal E. Bragg, Superintendent

SUBJ: Letter of Reprimand

The investigation which commenced with the incident report of 2-7-90, has established that you failed to retrieve a pair of scissors that you issued to a youth. This constitutes Neglect of Duty by reason of being inattentive to duties and failing to comply with CHBS/DYS Directive B-19.

This sort of behavior will not be tolerated at Cuyahoga Hills Boys School. Any repetition of this or similar behavior may result in more serious disciplinary action.

A copy of this letter of reprimand will be placed in your personnel file.

Robert Rauch

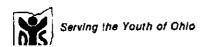
(Signature indicates receipt and not necessarily agreement.) Crystal E. Bragg

Superintendent

CEB: dac

cc: Personnel







THE ISSUE

: •

The issue as framed by the Employer and Association states:

"Was the 10 day suspension imposed against the Grievant for just cause, and, if not, what shall the remedy be?"

PERTINENT PROVISIONS OF THE AGREEMENT (Joint Exhibit #1):

ARTICLE 1 - BARGAINING UNIT

ARTICLE 3 - MANAGEMENT RIGHTS

ARTICLE 6 - ARBITRATION

ARTICLE 13 - PROGRESSIVE DISCIPLINE

ARTICLE 39 - DURATION

FACTS AND BACKGROUND:

The Parties to this Arbitration are the State of Ohio, Office of Collective Bargaining (hereinafter referred to as "Employer") and the State Council of Professional Educators, Ohio Education Association (OEA) and National Education Association (NEA) (hereinafter referred to as "Association"). The Grievant in this matter is Robert J. Rauch, a member of the bargaining unit. The Grievant has been employed at the Cuyahoga Hills Boys School since October 11, 1986 and is classified as a teacher and also is the school librarian.

The primary mission of Cuyahoga Hills Boys School is the security of the youth and rehabilitation of the youth who are incarcerated there. All youth incarcerated at Cuyahoga Hills Boys School are adjudicated delinquents and are felons who have been convicted of crimes ranging from breaking and entering to murder, Felony 1-4. (Edwards) The ages of the youth at the school range from 14-21, with a mean age of 16 1/2 currently.

(Edwards) Normally, once a youth has been adjudicated a delinquent, the Department of Youth Services has custody of them and can keep them until age 21. (Edwards)

, ,

The event leading to this arbitration occurred when the Grievant struck a youth entrusted to the care of the Cuyahoga Hills Boys School in the library on July 19, 1990. (stipulated) Prior to that occurrence, the Grievant was charged with neglect of duty and received a written reprimand from the Employer on March 15, 1990, stating (Employer Exhibit #4):

The investigation which commenced with the incident report of 2-7-90, has established that you failed to retrieve a pair of scissors that you issued to a youth. This constitutes Neglect of Duty by reason of being inattentive to duties and failing to comply with CHBS/DYS Directive B-19.

* * *

On July 19, 1990, the Grievant was performing his duties as librarian, which are passing out newspapers and magazines, answering questions, and locating books and materials for the youth at the school, when one of the youth who was in the library began "pestering" the Grievant by repeatedly asking the Grievant to copy a page out of a magazine which was not available at that time. (Rauch) On the spur of the moment, the Grievant struck the youth in the face with has hand. (Rauch) The youth had not touched the Grievant nor did he provoke the Grievant in any way. (Rauch) The Grievant then asked the youth to step out into the hall because there were fifteen (15) other

youth in the library and the Grievant did not want to cause a scene. (Rauch) The youth kicked the waste basket on the way out and the two talked outside in the hallway. (Rauch) The Grievant and youth exchanged apologies and then went back into the library. The period ended and the youth and others left the library and nothing more was said of the incident. (Rauch) accordance with CHBS Directive #E-7, dated October, 1985, a Report of Physical Force and Injury Form (Employer Exhibit #3) is required for all employees to fill out and submit to their supervisor within twenty-four (24) hours after force has been used on a youth. (Edwards; Rauch) The youth must also see a member of the medical staff, such as the nurse, to ascertain whether the youth has been injured. (Edwards; Rauch) Grievant did not fill out the Report of Physical Force and Injury form, nor was the youth sent to the nurse to be checked for injuries after the Grievant struck him. (Edwards; Rauch) Just prior to this incident, the Grievant had reviewed all of the Employer's Directives on June 22, 1990, and was familiar with the Directive requiring the reporting of use of physical force, as well as the Employer's Directive B-19, DYS General Work rules, which were available for his review upon request at any reasonable time. (Employer Exhibit #9) The Grievant also participated in the Employer's forty (40) hour Pre-Service Training course on 10/24-11/4/88 which included verbal strategy and crises intervention. (Edwards; Employer Exhibit #2)

It was not until the youth reported the incident to his social worker who, in turn, reported the incident to her supervisor that the Employer became aware of the incident the matter was investigated. (Edwards) The procedure at the Cuyahoga Hills Boys School for investigating an allegation starts out as a fact gathering process. (Edwards) The employee's immediate supervisor gathers facts to support or disprove allegation and that information is then passed on through the chain of command to the superintendent to make an assessment of the situation. (Edwards) In this case, the Grievant's immediate supervisor spoke to the Grievant and took statements from at least two (2) witnesses as well as from the Grievant. (Rauch; Employer Exhibits #6-#8) Based upon the information gathered, a letter dated August 21, 1990, was sent from Crystal E. Bragg, Superintendent, to Robert Rauch, Librarian, informing him of a pre-disciplinary meeting to be held on Monday, August 27, 1990. (Employer Exhibit #5) The letter, in part, states (Employer Exhibit #5):

, .

It is alleged that on July 19, 1990, you mistreated a youth by slapping him in the face. Your action constitutes failure of good behavior/neglect of duty and/or insubordination in violation of section 124.34 of the Ohio Revised Code and DYS Directive B-19, paragraph IVA, rule 1, "Abusing or mistreating youth entrusted to the Deparetment's care; failing to immediately report the use of physical force on a youth as prescribed by local directive or rules" and DYS Directive E-7, paragraph IIIB, rule 2, "Submit a written report setting forth the circumstances which made the use of physical force necessary before leaving duty."

The possible form of discipline being considered for this type of infraction is suspension up to and including removal.

1

* * *

The pre-disciplinary meeting was rescheduled for September 18, 1990 and again rescheduled for September 25, 1990. (Joint Exhibit #2) The pre-disciplinary meeting was held on September 25, 1990 and by inter-office communication dated September 27, 1990, Robert L. Jackson, Hearing Officer, notified Crystal Bragg, Superintendent, there was just cause for disciplinary action concerning the incident involving the Grievant. (Joint Exhibit #2) The Grievant was notified by an undated letter from Crystal E. Bragg, Superintendent, that he was to be suspended for ten (10) working days effective 10-16-90 and return to work on 10-30-90. The letter stated the basis for the suspension as follows (Joint Exhibit #2):

On July 19, 1990, you mistreated a youth entrusted to the Department's care and you failed to submit the reports that are required when physical force is used on a youth.

Your actions constitute failure of good behavior, neglect of duty, and/or insubordination in violation of Section 124.34 of the Ohio Revised Code and the Department of Youth Services Directive B-19, Section IV, para. A-1.

On October 18, 1990, the Association filed a grievance on behalf of the Grievant, charging violations of the Agreement between SCOPE/OEA and the State of Ohio of Articles 13.01, 13.04 and any other pertinent article or state law. The grievance

asked that the grievant be made whole. (Joint Exhibit #2) A Step 3 hearing was scheduled to be conducted on November 27, 1990. (Joint Exhibit #2) On December 20, 1990, by letter to Don Wilson, Deputy Director, Office of Collective Bargaining, the Association requested a review of the grievance by the Director of the Office of Collective Bargining (Step 4). (Joint Exhibit #2) On January 3, 1991, the findings of the review of the grievance from the Step 3 Meeting held on November 27, 1990 were issued to the Grievant from Barry Braveman, Labor Relations Officer. The findings of Mr. Braveman state (Joint Exhibit #2):

* * *

After reviewing the merits of the instant case, the actions of the employer are supported. It is undisputed that the Grievant slapped the youth on his left cheek in the library. While the youth's behavior may have bothered the Grievant, the fact remain [sic] that the Grievant acted in an inappropriate manner. He has been hired to provide service and protection to the yout(s) under the custody of Department Youth Services. Although the union claims that the Grievant's actions were not premeditated, nonetheless the physical contact took place. Just cause does exist and the discipline (10 days) is commensurate for behavior of this nature in the workplace. Management is vested under Article 5 (Mgt. Rights) and 13 to discipline its employees. Finding no contractual violation, this grievance must be denied in its entirety.

In accordance with the Agreement between the Parties, Article 6, ARBITRATION, this Arbitrator was selected to hear and decide the matter.

EMPLOYER POSITION

The Department of Youth Services views physical abuse or mistreatment of a youth entrusted to its care as a serious offense. The Department has been consistent in its treatment of those employees who violate the Department's directives regarding the use of physical force. After reviewing the merits of a case, if physical force was inappropriate, and there were no mitigating circumstances, the Department suspends or removes the employee, depending on the facts of each case. A determination is made as to the commensurate discipline for the infraction, in accordance with Section 13.04 of the Agreement, which requires the Employer to impose a penalty commensurate with the offense.

The Employer, after reviewing the facts and circumstances surrounding this case, found that the use of force against the youth in this case was inappropriate. Further, the Employer found no mitigating circumstances which would call for a lesser penalty. The penalty imposed was commensurate with the offense, therefore, the grievance should be denied.

ASSOCIATION POSITION

The Association states that ARTICLE 13, PROGRESSIVE DISCIPLINE, Section 13.04, is clear and unambiguous. The intent of the parties at negotiations was for disciplinary action to be progressive in nature and include both verbal and written

reprimand. Had Management chosen to suspend the grievant, there were lesser forms of suspension other than 10 days without pay. The Association argues that Management's action toward this grievant is clearly punitive only with no intent to correct inappropriate behavior.

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The Association cites the Agreement between theh Parties and also the Ohio Revised Code in order to argue that the ten (10) day suspension was not for just cause.

ARTICLE I, BARGAINING UNIT, Section 1.04 - Legal References, states in pertinent part:

* * *

Pursuant to Ohio Revised Code 4117.10(A), where this Agreement makes no specification about a matter, the Employer and employee are subject to all applicable state laws pertaining to the wages, hours, terms and conditions of employment for public employees.

Section 3319.41, Use of Force and Infliction of Corporal Punishment on Pupils, Ohio Revised Code, states in pertinent part:

* * *

A person employed or engaged as a teacher, principal or administrator in a school, whether public or private,, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority.

Chapter 24, Care and Protection of Pupils, Offenses Against Minors, Section 24.02, Teacher and Parental Duties and Authority in Loco Parentis, Ohio Revised Code states in pertinent part:

* * *

Under RC 2744.03(A)(6), an employee is immune from acts and omissions in the scope of his employment unless he acts maliciously, recklessly, or in bad faith.

The Association states that Management has not proven that Mr. Rauch acted maliciously, recklessly or in bad faith. Further, the Association contends that Management is attempting to amend and modify the Negotiation Agreement.

The Association asks the Arbitrator to sustain the grievance and make the Grievant whole.

DISCUSSION AND OPINION

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The facts in this case are uncontroverted. The Grievant admitted that he struck or slapped a youth who was "pestering" him for a copy of a page out of a magazine which was not available at the time. The Grievant also admitted that he did not complete and submit a Report of Physical Force and Injury which was required by the Employer in CHBS Directive #E-7. (Employer Exhibit #3)

Chapter B-19, dated July, 1985, ACA Number 9074, State of Ohio, Department of Youth Services, <u>DYS General Work Rules</u> specifically states (Employer Exhibit #1):

III. IMPLEMENTATION

:

- A. Definitions none
- B. Policy
 - 1. The Department of Youth Services shall establish uniform, written work rules regarding subjects which have general applicability for all employees regardless of their location or affiliation. unauthorized activities contained herein shall not be considered as all inclusive, but are intended to be representative examples of activities which warrant immediate corrective action. This Directive shall supercede local directives concerning matters contained herein. It is expected that each Managinig Officer shall maintain local rules regarding matters not covered by this Directive. Violation of this Directive and other Department of Youth Services directives as well as those directives developed by each Managing Officer shall constitute cause for corrective action, up to and including removal depending on the gravity of the situation. [emphasis added]

* * *

IV. PROCEDURE

- A. Employees participating in the following activities shall be considered to be in violation of the Department of Youth Services work rules:
 - 1. 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.

* * *

9. Being away from assigned work area without prior permission and/or authorization from the supervisor. Being inattentive to duties and/or interfering with work of others.

* * *

ARTICLE 13 - PROGRESSIVE DISCIPLINE, of the Agreement between the Parties, outlines the procedures of progressive discipline to be used:

13.04 - Progressive Discipline

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The Employer will follow the principles of progressive discipline. Disciplinary action shall include:

- 1. Verbal reprimand (with appropriate notation in the employee's official personnel file);
- 2. Written reprimand;
- Suspension without pay;
- 4. Demotion or discharge.

Disciplinary action shall be commensurate with the offense.

Harry Edwards, Deputy Superintendent, Cuyahoga Hills Boys School, testified that violations of the Work Rules contained in Chapter B-19 (Employer Exhibit #1) are cumulative and that the Grievant, therefore, violated the Work Rules for a second time, under IV.A.1. Previous to this last violation, the Grievant also violated IV.A.9. of the Work Rules, for which he received a written reprimand on March 15, 1990. (Employer Exhibit #4) In this respect, therefore, the Arbitrator finds the Employer did not violate ARTICLE 13, PROGRESSIVE DISCIPLINE, Section 13.04 - Progressive Discipline, when it suspended the Grievant for a second violation of the Work Rules.

The Arbitrator has been asked to determine whether the ten (10) day suspension imposed against the Grievant was for just cause. The American Arbitration Association has established a set of guidelines or criteria that are to be applied to the facts of any one case involving the discipline of an employee. This criteria is set forth in the form of seven (7) questions. A "no" answer to one or more of the seven (7) questions normally signifies that just and proper cause did not exist and that the employer's disciplinary decisions contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse The test questions set up by the of managerial discretion. American Arbitration Association for learning whether the employer had just and proper cause for discipling an employee are listed below.

1. Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

NOTE A. Forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and penalties for violation thereof.

NOTE B. There must have been actual oral or written communication of the rules and penalties to the employee.

NOTE C. A finding of lack of such communication does not in all cases require a "no" answer to Queestion Number One. Certain offenses, such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees, are so serious that any employee in the industrial society may properly be expected to already know that such conduct is offensive and heavily punishable.

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NOTE D. Absent any contractual prohibition or restriction, the agency has the right unilaterally to promulgate reasonable rules and issue reasonable orders; and same need not have been negotiated with the union.

2. Was the agency's rule or managerial order reaonably related to the orderly, efficient, and safe operation of the business?

Note: If an employee believes that the rule or order is unreasonable, s/he must nevertheless obey it (in which case s/he may file a grievance thereafter) unless s/he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his or her personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his or her disobedience.

3. Did the agency, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note A. The agency's investigation must normally be made before its disciplinary decision. If the agency fails to do so, its failure may not normally be excused on the ground that the employee will get his or her day in court through the grievance procedure after the exaction of discipline. By that time, it is generally conceded that there has been too much hardening of positions.

Note B. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases, normally the proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, s/he will be restored to his or her job full pay for time lost.

4. <u>Was the agency's investigation conducted fairly</u> and objectively?

Note: At said investigation, the management official may be both "prosecutor" and "judge" but s/he may not also be a witness against the employee.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note: It is not required that the evidence be preponderant, conclusive, or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy or slight.

6. <u>Has the agency applied its rules, orders and penalties evenhandedly and without discrimination</u> to all employees?

 $\underline{\text{Note A}}$. A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note B. If the agency has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the agency may avoid a finding of discrimination by telling all employees in advance of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the agency in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his or her service with the agency?

Note A. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same offenses a number of times in the past. (There is no rule as to what number of previous offenses constitute a "good," "fair," or "bad" record. Reasonable judgment thereon must be used.)

Note B. An employee's record of previous offenses may never be used to discover whether s/he was guilty of the immediate or most recent offense. The only proper use of his or her record is to help determine the severity of discipline once s/he has properly been found guilty of the immediate offense.

Note C. Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the agency may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

No evidence was presented by the Employer which reflected that other employees have been suspended for a second violation of the Work Rules. Likewise, the Association did not present any evidence which may have reflected that the Grievant had been disciminated against or in some other manner, was treated differently than other employees under similar circumstances. Lacking any evidence of the contrary, this Arbitrator must, therefore, accept the testimony of Mr. Edwards who stated that the Grievant was treated in the same manner as other employees had been treated under the same circumstances. The answer to all of the above questions, therefore, must be "yes".

Elkouri and Elkouri, <u>How Arbitration Works</u> (Fourth Edition) discusses the view that the determination of the penalty for misconduct is a function of management and that an arbitrator should hesitate to substitute his judgment and discretion for that of Management. In this regard, Elkouri and Elkouri quote Arbitrator Whitley P. McCoy at page 665:

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Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper If management acts in good faith upon a fair penalty. investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make orginally, is not justification for changing it. The minds of equally A consideration which would reasonable men differ. weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case The result would be as intolerable to to arbitration. employees as to management. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved -- in other words, where there has been abuse of discretion.

The Employer has stated that it considers abuse or physical mistreatment of a youth as a serious offense which requires the Department to take strict measures to ensure that the employee understand that such behavior will not and cannot be tolerated. The Employer has established that a ten (10) day suspension is required for mistreatment of a youth by an employee. Arbitrator cannot, then, substitute his judgment for that of the Employer and change the number of days the Employer determined is appropriate for such an offense. It is the opinion of this Arbitrator, therefore, that the Employer had just cause to suspend the Grievant for ten (10) days when he struck a youth who was "pestering" him in the library at Cuyahoga Hills Boys School. The grievance must be denied.

Samuel S. Perry, Impartial Arbitrator

STATE OF OHIO, OFFICE OF COLLECTIVE BARGAINING
-and-

STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA

In the Matter of Arbitration)
Between) OPINION AND DECISION
STATE OF OHIO OFFICE OF COLLECTIVE BARGAINING	,)) Grievance No.:) 35-03-901016-0078-06-10
-and-)) Robert J. Rauch,
STATE COUNCIL OF PROFESSIONAL EDUCATORS OHIO EDUCATION ASSOCIATION (OEA) AND NATIONAL EDUCATION ASSOCIATION (NEA)) Grievant))

DECISION OF ARBITRATOR

The Undersigned Arbitrator, having been duly appointed in accordance with the Agreement entered into by the between the Parties and effective June 21, 1989 through June 30, 1992, and having duly heard the allegations and proofs of the Parties, awards as follows:

The Grievance filed by Robert J. Rauch is <u>DENIED</u> for reasons set forth in the Discussion and Opinion.

Opinion rendered, Decision signed, Issued and Dated at Beachwood, Cuyahoga Coundy, Ohio this $\frac{74}{2}$ day of $\frac{1991}{2}$.

Samuel S. Perry, Impartial Aribtrator

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