ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 560

OCB GRIEVANCE NUMBER: 35-04-900830-0042-01-03

GRIEVANT NAME: VANEGAS, SANTIAGO

UNION: OCSEA/AFSCME

DEPARTMENT: YOUTH SERVICES

ARBITRATOR: SMITH, ANNA D.

MANAGEMENT ADVOCATE: BRAVERMAN, BARRY

2ND CHAIR: BROWN, BRUCE

UNION ADVOCATE: FALCIONE, DENNIS A.

ARBITRATION DATE: JANUARY 25, 1991

DECISION DATE: FEBRUARY 25, 1991

DECISION: MODIFIED

CONTRACT SECTIONS
AND/OR ISSUES: REMOVAL FOR PHYSICAL ABUSE OF YOUTH

HOLDING: EMPLOYER VIOLATED ART. 24.01 AND DID NOT HAVE JUST CAUSE FOR DISCHARGE. GRIEVANT DID COMMIT A SERIOUS OFFENSE WHICH FOLLOWED AFTER PROGRESSIVE DISCIPLINE. GRIEVANT TO BE RETURNED TO HIS JOB BUT NO BACK PAY. GRIEVANT ADVISED THAT IF THE EMPLOYER HAD NOT VIOLATED THE CONTRACT AND ITS OWN PROCEDURES, THE REMOVAL WOULD HAVE BEEN SUSTAINED.

ARB COST: $826.68

In the Matter of Arbitration Between THE STATE OF OHIO, DEPARTMENT OF YOUTH SERVICES and OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL-CIO	OPINION and AWARD #560 Anna D. Smith, Arbitrator Case No. 35-04-900830-0042-01-03 Removal of Santiago Vanegas

I. Appearances

For the State of Ohio:

Barry Braverman, Advocate, Ohio Department of Youth Services
Bruce Brown, Second Chair, Office of Collective Bargaining
Crystal Bragg, Superintendent, Indian River School, Witness
Michael R. Frias, Deputy Superintendent, Indian River School, Witness
Susan Frew, Unit Administrator, Indian River School, Witness
Vera Taylor, R.N., Indian River School, Witness
Three youth (B.C., B.S. and J.P.) currently or formerly under the custody of the State of Ohio, Witnesses

For OSCEA/AFSCME Local 11:

Dennis A. Falcione, Staff Representative and Advocate
Robert Robinson, Staff Representative and Second Chair
Santiago Vanegas, Grievant
William S. Taylor, Youth Leader 2, Witness
Frank Thomas, Youth Leader & Chief Steward, Witness
Joseph Harkless, Chaplain, Witness.

II. Hearing

Pursuant to the procedures of the Parties a hearing was held at 10:00 a.m. on January 25, 1991 at the Ohio Department of Youth Services, Indian River School, Massillon, Ohio before Anna D. Smith, Arbitrator. 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, 6:30 p.m. January 25, 1991. 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 hired with DYS on October 22, 1984;
2) On August 14, 1990 he was working as a Youth Leader II on Navajo Dorm on IRS;
3) The Grievant's prior discipline is as follows:

7-90	Written Reprimand
2-90	Verbal Reprimand
11-89	Verbal Reprimand
7-89	Verbal Reprimand
6-89	Written Reprimand
5-89	Written Reprimand
1-89	7-Day Suspension
9-88	Written Reprimand
6-88	5-Day Suspension
1-88	5-Day Suspension
11-87	Written Reprimand
9-87	1-Day Suspension
6-87	Verbal Reprimand
12-86	Verbal Reprimand
12-86	Verbal Reprimand
12-86	2-Day Suspension
9-86	Verbal Reprimand
3-86	1-Day Suspension

4) The Grievant was terminated on August 30, 1990;
5) The matter is properly before the Arbitrator.

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

1) State of Ohio/OCSEA Local 11 AFSCME Contract, 1989-91;
2) Grievance Trail;
3) Discipline Trail including prior discipline;
4) Nurse's Report on Youth W.G. and Santiago Vanegas;
5) DYS Directive B-19, "General Work Rules;"
6) Population Control Sheet for 8-14-90 at IRS Navajo Unit;
7) DYS Directive B-34, "Pre-Disciplinary Hearing for Suspensions and Terminations;"
8) DYS Directive E-7, "Incidents of Physical Force;"
9) IRS Directive 05, "Use of and Incidents of Physical Force on Youth."

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.

§24.04 - 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....

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 care and confinement of felony youth offenders in secure facilities for public safety and offender rehabilitation. 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.

At the time of his removal the Grievant, Santiago Vanegas, was a Youth Leader 2 on the Navajo Dorm of the Indian River School. As such, he had the primary responsibility for the care and control of the youth assigned to the dorm. Mr. Vanegas had been so employed for nearly six years until his removal on August 30, 1990 for physically abusing a youth "thus causing bruises and injuries to the youth" (Joint Exhibit 3). During the course of his employment, the Grievant had been trained several times in the use of physical force, special management of high-risk youth, and other related procedures (Employer Exhibit 8), but he had not received any hands-on

training. He had also been informed of his employer's work rules, DYS Directive B-19 (Joint Exhibit 5 and Employer Exhibit 4). He had been disciplined on eighteen occasions prior to this removal, said discipline ranging from verbal reprimands to a seven-day suspension. The rule infractions varied from improper call-off procedure to fighting with staff (Joint Exhibit 3B).

The Incident

On August 14, 1990, a youth housed on the Navajo dorm (W.G.) was suspended from school and placed on door restriction on his dorm for threatening another youth. W.G.'s disruptive behavior was on-going, for it had been the subject of team discussion on August 9, 1990 (Union Exhibit 9). Shortly before 1 p.m., the youths lined up at the door of the dorm to return to school. Mr. Vanegas saw that youth W.G. had also lined up. He ordered the youth to return to his door. The youth refused. An argument ensued, culminating in a physical struggle between the two. The disturbance was witnessed by several youths on the dorm and by several staff on Navajo and in the connecting Cherokee dorm. The struggle was broken up by two who came from the adjacent dorm, William Taylor (a youth leader) and Chaplain Joseph Harkless. When the youth was subdued, Mr. Taylor and Mr. Vanegas escorted him to his room, prepared him for and placed him in isolation. Taylor and Harkless returned to Cherokee, and Vanegas began the paperwork on the incident--Youth Behavior Incident Report (Employer Exhibit 2) and Physical

Force Report and Investigation (Employer Exhibit 6). At 1:10 p.m., Vanegas was seen by Vera Taylor, R.N. Nurse Taylor saw redness on his neck and a superficial laceration and redness on his arm (Joint Exhibit 4). Nurse Taylor examined the youth at 1:38 p.m. She observed swelling and redness on his forehead, neck and arms. The youth also complained of soreness in his testicle and scrotal area (Joint Exhibit 4), but Nurse Taylor apparently did not directly observe abnormality. Photographs taken of the youth less than an hour later match the observations of Nurse Taylor (Employer Exhibit 3).

Susan Frew, unit administrator, heard that the youth was on Medical and asked him what had happened. He told her about the altercation with the Grievant, so Ms. Frew launched an investigation and moved the youth off his dorm. She did not interview Mr. Vanegas, but did tell him that an investigation was underway. She then notified her superiors, called Security and had pictures taken (Employer Exhibit 3). At a later time she took an additional set of photographs herself, which she turned in to her superior and did not see again. Statements from twelve youths, including the alleged victim, were taken, to which Ms. Frew attached her report (Employer Exhibit 5).

Discipline and Grievance

Vanegas was placed on administrative leave and served with the pre-disciplinary meeting notice on August 16, 1990 (Joint Exhibit 3). Attached to the notice was a list of witnesses and a list of documents provided. This list identified

three staff by name and "various youths" who were not identified. Among the documents listed were photographs of youth W.G., which were not provided to the Grievant but were shown to him at the meeting. The list also contains the following summary of youth statements: "you grabbed youth [G.] by his shoulders, slapped his face several times, grabbed him by the throat, pushed him into furniture and a wall, kneed him in the groin area and pressed your keys into his head/face" (Joint Exhibit 3). The youth statements referred to were not included in the pre-disciplinary packet nor were they provided him nor shown to him at the pre-disciplinary meeting on August 20. Michael Frias was the hearing officer. On cross-examination he admitted to having read the youth statements prior to the meeting and further admitted that they entered into his recommendation. Frias further testified that at no time did he see the second set of photographs taken by Ms. Frew. At the hearing Vanegas presented his version of events and submitted a three-page written statement. This statement describes the incident from his point of view, responds to specific charges from the summary of youth statements, and denies the charge of abuse (Joint Exhibit 3). On August 21, 1990 Frias completed his report to the superintendent, concluding that "just cause for discipline exists" (Joint Exhibit 3).

On August 30 Mr. Vanegas received notification of his removal for failure of good behavior "in violation of Chapter 124.34 of the Ohio Revised Code and DYS Directive B-19, Work

Rule #1, 'abusing or mistreating youth entrusted to the Department's care...'" (Joint Exhibit 3).

A grievance of this removal was filed on August 30. In the grievance Vanegas complains of reliance on a second set of pictures allegedly taken 25 hours after the confrontation. He alleges that the youth had no marks, that any marks were self-inflicted, and that youths submitting statements had probably been coached by a supervisor (Joint Exhibit 2).

Three weeks prior to the third-step hearing, on September 17, the Union requested in writing names and documents relevant to the grievance, including youth statements. This request was denied (Union Exhibit 5). This request was renewed by Chief Steward Thomas during the third-step hearing on October 1, 1990. Thomas testified that Management's response was that the Union would see the statements at arbitration. The Employer denied the alleged contract violations and the grievance (Joint Exhibit 2).

On January 10, in preparation for arbitration, the Union again requested specific documents including the photographs, complete statements of 11 youths, and Frew's investigative report and findings (Employer Exhibit 9). In the main these documents were finally provided on January 17, but as of the date of arbitration the Union still did not have a copy of Frew's report.

VII. Contentions of the Parties

The Employer

The Employer's version of the incident is that Vanegas abused the youth, W.G. Three youth witnesses, none of whom had a particular ax to grind with the Grievant, testified that in the struggle Vanegas kneed W.G. in his genital region. B.C. saw the two push each other and Vanegas hit the youth on the forehead. B.S. saw Vanegas push W.G. against the office window. J.P. saw Vanegas grab W.G. by the shirt. Photographs taken of the youth, the nurse's report and testimony all confirm that the youth received injury. The testimony of the two staff witnesses for the Union proves nothing except that an incident occurred. That Taylor and Harkless never saw Vanegas hit a youth does not prove that he did not abuse this youth on this occasion since they did not see the entire incident.

Even if the youth was disruptive, this does not justify the behavior of the Grievant. His actions were not necessary nor were they appropriate, as was testified by staff and evidenced by written policies.

This action--the use of abusive force--by itself is enough to warrant discharge, for abuse has no place in the Department's facilities. Moreover, the Grievant's cumulative disciplinary record shows that he has no regard for progressive discipline, for he had ample warning and opportunity to correct his behavior. Therefore, even on the theory of progressive, corrective discipline, discharge is warranted.

The Employer contends that there have been no procedural violations of the Contract and the Grievant's due process rights have not been harmed. Notice was provided, pre-disciplinary meeting held, level three hearing held, and now the case is in arbitration.

Past practice has been to provide a summary of youth witness statements until arbitration when the full documents are given. There was no formal request made at the third step hearing for youth statements, but even then the Union knew the number of statements that existed. Pursuant to §25.08 of the Contract, the Union requested documents on January 10, and these were provided by agreement on January 17. In arbitration the Union has all the documents the Employer does.

With respect to the Union claim on the Employer's removal order citation of the Ohio Revised Code, the Employer points out that this Arbitrator and others have found this to be insufficient reason by itself for overturning discipline.

The Employer concludes that it had just cause for terminating Santiago Vanegas and asks that the removal be upheld under §24.01 of the Contract.

In support of its position, the Employer offers three arbitration decisions. In Park Geriatric Village, 81 LA 306, the arbitrator upheld the reasonableness of the employer's protection of its patients from staff abuse. The arbitrator further found that the employer proved abuse and sustained the dismissal as required by the contract, which provided that

removal was the sole penalty for abuse. The arbitrator also made note of the grievant's poor work record, having six disciplines in 3-1/4 years of employment. The Employer in the instant case points out that Vanegas's record is much worse, having 19 violations in less than six years.

In a second case, City of Tampa, 79 LA 1155, the arbitrator held that provocation by immature adolescents (by spitting on grievant) does not justify threatening and belligerent behavior by an adult. Noting a poor work record, the arbitrator upheld the discharge.

In the third case, Central Telephone Co. of Florida, 76 LA 1137, the arbitrator held that the employer's failure to comply with a procedural requirement was no basis for setting aside a removal since there was no evidence that the case would have progressed differently, either substantively or procedurally, had the employer complied. The arbitrator found that the grievant had not been deprived of due process by the employer's lapse.

The Union

The Union's version of events differs in several respects from that of the Employer's. It claims that the Grievant did not abuse or mistreat youth W.G. Rather, when attacked by the youth, Vanegas restrained him to protect himself and the youth. Staff testified and wrote in their statements that they did not see Vanegas strike the youth. They saw a struggle, the youth resisting, and the two interlocked in a motionless position.

Additionally, Chaplain Harkless said he had never known the Grievant to hit or abuse a youth in the four years he had known him. Furthermore, youth leader Taylor testified that he did not notice any marks or signs of discomfort when they were preparing the youth for isolation. The Union also claims that these staff would not leave the youth alone with the Grievant if they felt the youth to be in danger. It points out that these are credible, responsible witnesses who would not lie and contrasts their character with that of the youth witnesses who are problematic boys and convicted felons who can be manipulative and lie to get youth leaders in trouble.

The Union states that the standard for abuse was set by Arbitrator Pincus in the Dunning decision (G87-0001A). In this decision, the Department of Youth Services was exempted from the definition set forth in the Ohio Administrative Code. The definition to apply is that contained in §2903.33(B)(2) O.R.C.:

> "Abuse" means knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

The definition for serious physical harm is contained in §2901.01(E):

> "Serious physical harm to persons" means any of the following:
> (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
> (2) Any physical harm which carries a substantial risk of death;
> (3) Any physical harm which involves some permanent incapacity, whether partial or total, or

> which involves some temporary, substantial incapacity;
> (4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;
> (5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

The Union contends that Management has not met the standard of the Ohio Revised Code, for the Grievant has not knowingly caused physical harm or recklessly caused serious physical harm to the youth. In support of its position that the Grievant be returned to work, the Union cites two arbitration cases. In the Nixon case (G87-1008) Arbitrator Michael held that the grievant acted recklessly when he broke the arm of a youth with a ping-pong table. Grievant was reinstated and his suspension was further reduced by the Employer's procedural violation of the Contract. In ODMRDD v. OCSEA (G87-0366 Kassandra Jefferson, Grievant), Arbitrator Michael held that abuse must be of a serious enough nature to establish just cause for termination.

The Union further contends that there are procedural violations of the Contract that warrant sustaining the grievance. First, the removal order cites 124.34 of the Ohio Revised Code. The Code holds Management to a lesser standard than does the Contract, for it does not contain a due process guarantee. Arbitrator Pincus in the Wiley King decision (G87-2810) returned the grievant to work due in part to the employer's citation of 124.34. Arbitrator Rivera in the T. Turner case (35-16-900502-0032-01-03) ruled that the employer's use of

124.34 is inappropriate. Additionally, the Ohio Supreme Court ruled in Rollins v. City of Cleveland Heights that the Code cannot be used to usurp or circumvent the Contract.

Additionally, the Employer violated §24.04 of the Contract when it did not furnish all witness statements, photographs and investigative reports prior to conducting the predisciplinary meeting. If further violated §25.08 when it failed to provide these documents and the predisciplinary meeting report prior to and during the third step hearing as requested by the Union. These documents were not provided until one week prior to the scheduled arbitration, and the Employer still has not provided Frew's investigative report and findings. In the Woods decision (ODMH v. OCSEA, G86-0431) Arbitrator Klein ruled that management must provide documents used to support discipline at least by the time of the predisciplinary hearing. In Arbitrator Rivera's Turner decision cited above, she ruled that the employer's failure to provide complete witness statements violates the specific mandate of the Contract, and set the termination aside.

Finally, the Union points out that prior discipline of the Grievant was for rule infractions unrelated to the violation alleged here, and resulted in only minor penalties.

For all these reasons, the Union asks that the Grievant be returned to work, awarded all back pay, benefits and seniority, and made whole.

VIII. Discussion and Opinion

Merits of the Case

For the convenience of discussion, the issue will be approached through a series of questions. First, did the Grievant commit abuse within the meaning of §24.01? In the Dunning decision, abuse is defined by §2903.33, Ohio Revised Code, to be knowingly causing physical harm or recklessly causing serious physical harm. I will take these in reverse order. First, did the Grievant recklessly cause serious physical harm? The answer to this must be "No," for the youth did not require hospitalization or prolonged psychiatric treatment; there was no substantial risk of death; and there was no permanent incapacity or disfigurement nor temporary substantial incapacity or disfigurement. While the youth complained of soreness, there is no evidence of substantial suffering or prolonged or intractable pain. Thus, while the Grievant may have acted recklessly, he did not cause serious physical harm.

Did he cause physical harm to the youth? As evidenced by the nurse's testimony and report, supported by the photographs, the youth did receive injury. It is clear that the red marks, etc. were the result of the fracas with the Grievant. That they were self-inflicted is beyond belief. Even the Grievant received mild injury as a result their struggle. Did he knowingly cause the injuries? What happened during the fracas and whether Vanegas was acting in retaliation to injure the youth or in a misguided attempt to restrain him and protect

himself is not at all plain. There were no witnesses to give a good account of the full exchange. Taylor and Harkless apparently missed the beginning of the altercation and their view was totally obscured below by desks and walls and partially obscured above by several thicknesses of glass. None of the three boys gave a very complete account, and each was somewhat different. For example, B.C. stated that Taylor broke up the fight while J.P. testified that Harkless broke it up. The one feature the three agreed on was that the Grievant kneed the youth in his groin. The Union argues that youth conspire to get staff in trouble and their testimony is therefore suspect. Be that as it may, in this case the alleged victim was separated from his peers immediately after the incident and does not seem to have had an opportunity to participate in a conspiracy. Yet both he and the youth witnesses remark on the kneeing. Unfortunately this issue cannot be clarified because youth W.G. did not testify. We only know what Frew said he said, what he complained of to Nurse Taylor and what he wrote in his statement, all of which are hearsay and cannot be credited. We therefore are left with the word of the Grievant against the word of the three youth witnesses, who may in fact have seen an opportunity to gain some leverage over the youth leaders or who may have been mistaken in what they saw and drew certain conclusions. Against the youth witnesses we have the statements of staff and the Grievant that W.G. had no difficulty in walking to his room and exhibited no visible evidence of having received a blow to

his genitals. To be sure, the Grievant's statements are self-serving and youth leaders understandably protect one another, but none of the youth witnesses nor Harkless remarked on any apparent physical disability. Moreover, the nurse did not observe any injury to this region. In short, the evidence does not clearly and convincingly demonstrate that the Grievant knowingly kneed the youth in the genitals. If there were, the Arbitrator would agree that this constitutes abuse within the meaning of §24.01.

Other specific actions the Grievant allegedly took against the youth were to hit him, push him, tussle, grab his shirt, wrestle around, fend off, and get one arm around his head. All of these are characteristic of a fight--one which (in view of the youth's record) could well have started as the Grievant states with the youth retaliating for the Grievant's attempt to move him to his door by taking him by the arm. The Grievant calls the result "self-defense" and/or "restraining" the youth. The Employer calls it "abuse." The photographs are not particularly helpful in resolving the issue since the injuries they show could have resulted from either motivation and, as the nurse testified, "could be from anything." Since no one saw the altercation from its beginning there is no way of knowing more than that they had a struggle. There simply is not clear and convincing evidence that the Grievant knowingly caused injury and therefore abused the youth. The Grievant may have acted recklessly in a misguided attempt to control the

youth, but he not cause serious harm. Certainly the Grievant acted negligently by failing to wear his beeper in such a manner to sound it easily when necessary. This is particularly true since the Grievant knew the youth to be a behavioral problem. The Grievant says that he acted in self-defense. This could well be true since it would have been foolish for the Grievant to provoke a fight in the presence of so many witnesses--staff and youth. However, the Grievant has acted foolishly before, as his extensive disciplinary record testifies, the defense is self-serving, and there is no independent corrobortation. But even if the self-defense claim is true, the Arbitrator believes that he became or was close to becoming out of control because Chaplain Harkless put himself between the Grievant and the youth who was already restrained by Taylor and wrote that Vanegas was upset. I conclude that the situation was not as controlled as the Union would have me believe. Thus, while I am unable to find the Grievant guilty of physical abuse within the meaning of §24.01, I do find him guilty of fighting.

Due Process

Was the removal notice defective in that it cited Chapter 124.34 of the Ohio Revised Code? Citation of the Code constitutes a technical violation of the Contract. However, the Employer makes no claim to the supremacy of the Code over the Contract. Rather, it contends that the Grievant was disciplined for violating a reasonable work rule according the just-cause standards of the Contract. As this Arbitrator has consistently

held, citation of Code on the removal notice is insufficient by itself for overturning the removal.

Did the Employer violate §24.04 of the Contract by failing to supply certain documents when the pre-disciplinary notice was served? The Grievant claims that when he was served the pre-disciplinary notice, nothing was attached to it and that he received none of the documents indicated on the list until the pre-disciplinary hearing. This cannot be true, for the Grievant's written statement given to Frias at the hearing makes reference to information that he only could have obtained from the list of witnesses and documents. Therefore, at least the list was attached to the notice and probably also staff statements. This calls into question the veracity of his statement that he received none of the documents until the hearing. I therefore conclude that what was missing from the pre-disciplinary packet were the youth statements and Frew's report attached to them (Employer Exhibit 5), and the three photographs taken by Security (Employer Exhibit 3). The only other Frew report of which there is any evidence is Employer Exhibit 6--Physical Report and Investigation. This was timely provided. The Union made much of a second set of photographs taken by Ms. Frew. Certainly this second set existed at one time, but there is no evidence the Employer relied on them in the disciplinary process and the Arbitrator is not even sure that they existed after Frew turned them in to her superior. We are therefore left to deal with the original set of photo-

graphs, which the Employer admittedly only showed to the Grievant at the pre-disciplinary meeting, and the complete youth statements, which were denied the Grievant and his Union until January 17. The Arbitrator is cognizant of the need to balance the Employer's responsibility to youth in its custody with the Union's responsibility to represent its members in the disciplinary and grievance process. Nevertheless, the Parties themselves struck such a balance when they negotiated the language of §24.04 of the Contract. This language does not exempt the Department of Youth Services or make photographs and youth statements exceptions to the rule. The Employer therefore had the contractual duty to supply copies of youth witness statements and photographs, since it plainly relied on them to discipline Vanegas, and to do so when it served the pre-disciplinary notice. It follows that the Employer violated §24.04.

The Employer argues that withholding these documents did not prevent the Grievant from getting to arbitration or otherwise prejudice his case. The first of these is true. The Union makes no case for the second, and the Arbitrator can only speculate as to how things might have progressed had the statements and photographs been provided in a timely fashion. Nevertheless, the Contract has been violated and the breach is more serious than that of the removal notice. The Arbitrator will return to this when she fashions a remedy.

Did the Employer violate §25.08 of the Contract when it refused to supply certain documents requested during the grie-

vance procedure? The youth statements and pre-disciplinary conference report were requested on September 13 (Union Exhibit 5). An Employer refusal is documented for September 17. Chief Steward Thomas testified that he renewed his request during the third step hearing. They were finally provided on January 17, after the third step hearing but prior to arbitration. These documents are discoverable under §25.08 for the request was specific, the documents were reasonably available from the Employer, and they were relevant to the grievance. Moreover, the youth statements should have been provided when the pre-disciplinary notice was issued. In Arbitrator Rivera's Darnell Brown case (G87-1299), predisciplinary conference reports are held to be not discoverable prior to the final decision but discoverable prior to arbitration. In this arbitrator's view the predisciplinary conference report is discoverable once the final disciplinary decision has been made and the grievance filed. It was, therefore, improper for Management to refuse the Union request on September 17. As with the complete pre-disciplinary hearing packet, there is no evidence that this violation of §25.08 prejudiced the Grievant's case, particularly since these documents were provided in advance of the arbitration hearing.

The Arbitrator is also disturbed that no interview of the Grievant was conducted by Ms. Frew during her investigation. Ms. Frew questions whether she was assigned that responsibility, but in every other respect she acted as the investigator. It

was she who talked with the nurse, arranged for the photographs and youth statements, and filed the report. Just-cause principles and the Departments's own policy (Joint Exhibit 8, Chapter E-7, "Incidents of Physical Force") call for an interview with employees involved in the incident, including the Grievant. The Grievant's reports and presence at the predisciplinary meeting mitigate this lapse to some extent. But for an employer to be fair and have credibility in its disciplinary actions it must conform not only to the contractual procedures but also to the rules and guidelines it, itself, has established. I therefore find that the Employer violated §24.01 and did not have just cause to discharge the Grievant. However, it is clear that the Grievant committed a serious, actionable offense, and that this followed a substantial history of progressive discipline. Moreover, the Employer's infractions did not so taint the process as to warrant overturning the discipline in its entirety. Accordingly, the Grievant will be returned to his job forthwith, but not receive back pay. He is also advised that were it not for his Employer's violations of the Contract and its own procedure, the removal would have been sustained.

XI. Award

The grievance is sustained in part, denied in part. The Employer did not have just cause to discharge the Grievant. The Grievant will be reinstated forthwith, but afforded no back pay, benefits or seniority. A record of this action will be placed in his personnel file. It is recommended but not required that he receive the Employer's standard training on the use of physical force on youth, verbal strategies in crisis, and special management of high risk youth at the first available opportunity.

Anna D. Smith, Ph.D.
Arbitrator

Shaker Heights, Ohio
February 25, 1991