

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

JAMES B. SHEPPARD,

Appellant,

v.

Case No. 08-REM-08-0481

DEPARTMENT OF YOUTH SERVICES, CENTRAL OFFICE,

Appellee

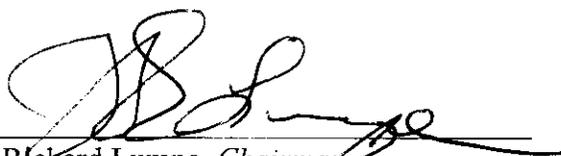
ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Findings of the Administrative Law Judge but must modify the Recommendation of the Administrative Law Judge, for the reasons set forth, herein. It is undisputed that Appellant made contact with the youth in question in this case. Further, the Board wishes to emphasize that such conduct is never acceptable behavior unless under the most extreme and threatening circumstances. Thus, Appellant should consider himself on notice that unsanctioned and inappropriate physical contact is not acceptable behavior and that a future such occurrence is likely to result in a high level of disciplinary response from Appellee. Accordingly, Appellant should do all that he can to strictly comply with Appellee's rules and policies regarding any such contact with youth offenders. Yet, in this particular case, the Board cannot find that a provoked, involuntary reaction, which resulted in no injury to the youth in question, constitutes a removable offense; particularly in the absence of any evidence presented regarding prior discipline. Thus, the Board hereby modifies Appellant's removal to a 30-day unpaid suspension.

Wherefore, it is hereby **ORDERED** that Appellant's removal be **MODIFIED** to a 30-day unpaid suspension, pursuant to R.C. 124.03 and R.C. 124.34.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye


J. Richard Lumpe, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, October 8, 2009.

Michelle Hunsay
Clerk

NOTE: Please see the reverse side of this Order **or** the attachment to this Order for information regarding your appeal rights.

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

James B. Sheppard,

Case No. 08-REM-08-0481

Appellant

v.

August 31, 2009

Department of Youth Services,
Central Office,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his August 19, 2008, removal from employment with Appellee. A record hearing was held in the instant matter on March 19, 2009. Appellant was present at record hearing and was represented by James J. Leo, attorney at law. Appellee was present at record hearing through its designee, Bureau Chief of Facility Operations Amy Ast, and was represented by Timothy A. Lecklider and Megan H. Boiarsky, Assistant Attorneys General. Jurisdiction of the Board was established pursuant to R.C. 124.03(A) and 124.34.

The R.C. 124.34 Order of Removal provided to Appellant listed as grounds for his removal:

Failure of good behavior: on April 12, 2008 and at approximately 5:40pm you did use unwarranted/inappropriate force on Youth 214120 when you inappropriately initiated physical contact with said youth. Your actions are in violation of Policy 103.17, and Rule 4.12 Inappropriate or unwarranted use of force. Furthermore, you violated Policy 5.1, specifically policy 301.05.05, the response to resistance policy.

STATEMENT OF THE CASE

Appellant James Sheppard testified that he had been employed by Appellee for more than ten years at the time of his removal in August 2008. He indicated that he began his employment in 1995 as a Juvenile Corrections Officer at the Cuyahoga Hills Juvenile Corrections Facility. Appellant stated that he held the position of Operations Assistant Manager at the time of his removal, and had been in that position since 2003. He confirmed that as an Operations Assistant Manager he was responsible for preventing incidents that threatened the security and safety of youth at the facility, ensuring that programs were being run, supervising major movement within the facility and making shift schedules. Appellant noted that he received good performance reviews during his tenure and had never been disciplined prior to his removal for excessive use of force.

Appellant acknowledged that he was familiar with Appellee's policies and procedures and had received a copy of those policies and procedures. He confirmed that he participated in annual training on unarmed self-defense techniques. Appellant indicated that he also was trained in critical incident management and response to resistance, and was certified in critical incident management (Appellee's Exhibit P).

Appellant testified that Appellee's policies provide that verbal response is the preferred method of responding to youth resistance, and that physical response should only be used in specific circumstances. He confirmed that he recalled the incident in the facility's cafeteria that took place on April 12, 2008, and which led to his removal from employment. Appellant recalled that he was standing at the head of the serving line when the youth from Alpha Unit were entering the cafeteria for dinner and, while most of them were acting appropriately, several youth in the group were being disruptive. He testified that one youth got out of line and attempted to cut in front of everyone else to go through the serving line. Appellant stated that he instructed the youth to return to his place in line, but the youth refused and went to the front of the line to get a tray; he noted that he told the youth again to either return to his place in line or he would be sent upstairs. Appellant indicated that the youth again refused and tried to take another boy's tray. He explained that when he turned his head toward the second boy to stop the first youth from taking his tray, the first youth moved to Appellant's left and out of his line of sight.

Appellant testified that while he was turned away from the youth, the youth raised his hand and struck him, with his hand coming down across his face and

striking him in the upper lip. He indicated that he responded by turning around to face the youth with his arm swinging, because he thought there was going to be a continued assault and he had nowhere to which he could retreat. Appellant observed that he could not move to his right because the serving line was behind him and there were other youth in the area. He confirmed that his hand contacted the youth's face but testified that by the time he had completely turned he saw that the youth had backed up, so he backed up, too. Appellant stated that Juvenile Corrections Officer (JCO) Webster got between him and the youth and they held the youth's wrists until JCO Rieves arrived and the youth was taken upstairs to seclusion.

Appellant recalled that he did not know the youth was trying to "finger fuck" him until he read the boy's written statement. He confirmed that he reported in his written statement and during his investigatory interview that he struck the youth in the face with his right hand. Appellant acknowledged that none of Appellee's policies expressly permit a staff member to strike a youth, but noted that Appellee's policies do permit use of corresponding force when a youth has gained superiority over the staff member or the staff member fears further injury.

Appellant testified that he received a copy of the R.C. 124.34 Order of Removal contained in Appellee's Exhibit C on August 19, 2008, which was the effective date of his termination.

Ms. Amy Ast testified that she is presently employed by Appellee as Bureau Chief of Facility Operations and indicated that she has held that position since July 2008. The witness stated that as part of her job responsibilities, she reviews Use of Force reports, and reviews disciplinary packets to make recommendations for discipline to Appellee's Director. She confirmed that all disciplinary packets come to her. Ms. Ast noted that she has been a Use of Force instructor for a number of years, as well as an instructor trainer, and has been very involved with curriculum development and policy writing regarding the topic.

The witness noted that Appellee entered into a negotiated settlement in May 2008, resulting from a federal court's fact-finding report which determined that there was an unusually high level of violence with regard to the youth housed in Appellee's institutions. Ms. Ast observed that the court found that Appellee was not effectively reviewing Use of Force incidents or holding staff accountable for excessive uses of force. She indicated that she has been designated by Appellee to work with the expert assigned by the federal court to address the issue of Use of

Force within the institutions. The witness acknowledged that no policy changes or changes to the training curriculum had been implemented prior to the occurrence of the event which led to Appellant's removal.

Ms. Ast testified that in reviewing a Use of Force incident, it is necessary to determine whether the use of force was necessary or excessive. She indicated that staff are trained to use the least amount of force necessary to deal with a situation, and that their response must be proportionate to the level of resistance exhibited by the youth (Appellee's Exhibit N). The witness stated that when youth are physically resistant, staff should use the least restrictive methods to get the youth to comply, with placing their hands on the youth as a last resort. Ms. Ast observed that sometimes it is necessary to move through the response continuum very quickly, while on some occasions staff could take twenty to thirty minutes to move through all the steps.

The witness explained that Appellee's training curriculum teaches several different physical control and escort techniques, including a transport arm control, finger flex, outside wrist turn, C-grip escort, and a side wrist lock. She noted that when a youth is displaying combative resistance, meaning that the youth is assaulting a staff member, any of those techniques could be applied under Appellee's policies. Ms. Ast observed that in selecting a response technique, staff would have to consider a number of factors, such as the relative physical size and strength of both the youth and the staff member, the staff member's level of training, imminent risk of harm, and physical surroundings.

Ms. Ast testified that a strike or slap to a youth's face is not a technique that is either taught or approved by Appellee. She agreed that if a youth had superiority over a staff member and there was an imminent risk of harm, the staff member could use any means necessary to gain control of the situation, but after gaining control, an emergency defense would no longer be appropriate. The witness indicated that even if a youth struck or slapped a staff member, the staff member should still respond with the least restrictive response.

Ms. Ast indicated that she recommended Appellant's removal based upon the contents of the disciplinary packet she reviewed. She noted that the most compelling piece of information she recalled from the packet was that Appellant had struck the youth and stated that she found it somewhat unusual that he admitted his use of force, as most staff members would have denied it. The witness confirmed that she considered Appellant's experience and training in making her

recommendation for removal and testified that she believed, based on the documentation, that an emergency response was not appropriate under the circumstances.

Ms. Ast testified that every incident involving excessive use of force is contextual in nature, in that a reviewer has to understand what was going on at the time. She agreed that it would be important to know where the parties were located in relation to each other, noting that the situation could be different if the staff member was hit from behind instead of facing the youth when he was struck. The witness stated that she would want to review all of the available documentation regarding the incident, including any written descriptions of the incident and any videos, if available. Ms. Ast confirmed that she reviewed all of the information that was presented to her regarding the incident, but did not interview Appellant and could not recall whether or not she had viewed a video prior to recommending Appellant's removal. She indicated that she believed Appellant was either standing beside the youth or in front of him at the time the youth struck him but did not know whether or not the youth was in Appellant's direct line of sight. Ms. Ast observed that even if the youth was not in Appellant's direct line of sight, a face slap or punch would not have been warranted, given her understanding of the situation.

Ms. Ast recalled that the documentation stated that the youth "finger fucked" Appellant. She explained that the term referred to pointing one's fingers at someone's face, with a tap to the forehead and noted that the youth may or may not have made contact with Appellant.

Mr. Rico Webster testified that he is presently employed by Appellee at the Cuyahoga Hills Juvenile Corrections Facility as a Juvenile Corrections Officer (JCO). He indicated that he has worked at Cuyahoga Hills for approximately two and one-half years.

Mr. Webster confirmed that on April 12, 2008, he observed an incident in the cafeteria when he and JCO Rieves were bringing youth down to dinner. He explained that one youth in particular was being very disrespectful and testified that although both he and JCO Rieves verbally instructed the youth to get in line, he refused to comply with their direction. The witness recalled that Appellant told the youth to leave the cafeteria, but the boy continued to try to get a tray and cut into the serving line.

Mr. Webster indicated that Appellant was standing with his back to the serving line and he was standing to Appellant's right, approximately two or three feet away. He noted that there were about fifteen to twenty youth standing around him and Appellant when the incident occurred. The witness stated that the youth was walking in front of him and Appellant when he saw the youth put his hand up against Appellant's forehead in a sign of disrespect. Mr. Webster recalled that Appellant swung at the youth's face and grazed him.

The witness testified that he considered Appellant's actions to be self-defense. Mr. Webster noted that any kind of hands-on behavior from a youth is not acceptable and considered assault. He recalled that Appellant did not have any further contact with the youth; when the youth attempted to charge Appellant, Appellant stepped back and he and JCO Rieves grabbed the youth.

Mr. Renard Rieves testified that he is presently employed by Appellee at the Cuyahoga Hills Juvenile Corrections Facility as a Juvenile Corrections Officer (JCO). He indicated that he has worked at Cuyahoga Hills for approximately two and one-half years.

The witness recalled that on April 12, 2008, he and JCO Webster were bringing a group of youth from their Unit to the cafeteria for dinner. Mr. Rieves indicated that the youth were disorderly and loud and would not line up. He stated that he was standing approximately twenty-five feet away from Appellant when he saw Appellant and the youth in question exchange words. The witness testified that he then saw the youth point at Appellant's eye area and observed Appellant react as if he had been poked in the eye. Mr. Rieves stated that he saw Appellant reflexively swing his arm out and around and graze the youth's cheek. He observed that Appellant's action appeared to be a self-defense move and was not something that would have caused injury to the youth.

Mr. Rieves noted that although the youth attempted to swing back at Appellant, Appellant did not make contact with him a second time. He indicated that once the incident happened, he and JCO Webster grabbed the youth and held him against the wall. The witness observed that the boy was yelling and screaming and that after he calmed down a little bit, they took him upstairs to seclusion.

FINDINGS OF FACT

Appellant James Sheppard was employed by Appellee for approximately thirteen years, and held the position of Operations Assistant Manager at the time of his removal in 2008. As an Operations Assistant Manager, Appellant was responsible for preventing incidents that threatened the security and safety of youth at the facility, ensuring that programs were being run, supervising major movement within the facility and making shift schedules. Appellant had no previous disciplinary history prior to his removal.

On April 12, 2008, Appellant, JCO Rieves and JCO Webster were in the cafeteria while the youth from Alpha Unit were lining up for dinner. Some of the youth were loud and disruptive; one youth got out of line and attempted to cut in front of everyone else to go through the serving line. Appellant instructed the youth to return to his place in line, but the youth refused and went to the front of the line to get a tray. Appellant again instructed the youth to either return to his place in line or he would be sent upstairs. The youth again refused and tried to take another boy's tray. When Appellant turned his head toward the second boy, the first youth moved to Appellant's left.

While Appellant was turned away from the youth, the youth raised his hand and made physical contact with Appellant, with his hand coming down across Appellant's face to Appellant's lip. Appellant reflexively swung his arm out and around as he turned back toward the youth, and grazed the youth's cheek with his hand. At the time of the incident, Appellant was standing with his back to the serving line, with fifteen to twenty youth standing around him.

Appellant had no further contact with the youth. When the youth attempted to charge Appellant, Appellant stepped back and JCO Webster and JCO Rieves restrained the youth until they were able to escort him upstairs to seclusion.

Appellant reported in his written statement and during his investigatory interview that he struck the youth's face with his hand.

Appellant was familiar with Appellee's policies and procedures and had received a copy of those policies and procedures. He participated in annual training on unarmed self-defense techniques, had been trained in critical incident management and response to resistance, and was certified in critical incident management.

Appellee's policies provide that verbal response is the preferred method of responding to youth resistance, with physical response being used only in specific circumstances. Appellee's staff are trained to use the least amount of force necessary to deal with a situation, and their response must be proportionate to the level of resistance exhibited by the youth.

If a youth becomes physically resistant, staff should use the least restrictive methods to get the youth to comply, placing their hands on the youth only as a last resort. However, where a youth gains superiority over a staff member and there is an imminent risk of harm, it is appropriate for a staff member to use any means necessary to gain control of the situation. After gaining control an emergency defense would not longer be warranted.

When a youth displays combative resistance, i.e. assaults a staff member, any of the physical control and escort techniques included in Appellee's training curriculum may be applied, including a transport arm control, finger flex, outside wrist turn, C-grip escort, or a side wrist lock. A strike or slap to the face is not a technique that is either taught or approved by Appellee. In selecting a response technique, staff should consider a number of factors, such as the relative physical size and strength of both the youth and the staff member, the staff member's level of training, imminent risk of harm, and physical surroundings.

CONCLUSIONS OF LAW

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order.

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board

will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant was notified of and had the opportunity to participate in a pre-disciplinary hearing. Appellant had notice of the charges against him and an opportunity to respond to those charges. Accordingly, I find that Appellant's due process rights were observed. I further find that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based upon a failure of good behavior, resulting from his alleged unwarranted/inappropriate use of force on April 12, 2008. Specifically, Appellee alleged that Appellant's admitted physical contact with Youth 214120 violated Appellee's policies 5.1, 103.17, and 301.05.05, and Rule 4.12.

Testimony and evidence admitted at record hearing established that Appellee had established standards of conduct which prohibited an excessive, inappropriate, and/or unwarranted use of force against youth in Appellee's custody. Appellant was familiar with Appellee's policies and procedures and had received a copy of those policies and procedures; he had received training on the applicable policies and procedures.

Evidence contained in the record indicates that the youth involved in the situation which led to Appellant's discipline displayed ongoing and escalating resistance, which quickly rose to the level of combative resistance, as defined by Appellee's policy 301.05.05, when he made physical contact with Appellant. Evidence and testimony in this matter further established that Appellant engaged in several attempts during the incident to verbally redirect and calm the youth. As noted by Ms. Ast, although staff are trained to follow the response continuum when

dealing with a situation, it is sometimes necessary to move through the continuum very quickly.

The words "strike" and "punch" were used in some of the written reports and interviews regarding the incident, however, such language does not appear to accurately correspond to the amount of force actually used by Appellant. The individuals who personally witnessed the incident -- Appellant, JCO Rieves and JCO Webster -- all testified at record hearing that Appellant grazed the youth's face as he swung his arm out in a defensive move and then stepped away from the youth. Appellee's policies allow for the use of self-defense techniques when a youth displays combative resistance. The injury assessment form submitted into evidence by Appellee, which was completed shortly after the incident, contains no mention of any redness or other injury to the youth's face and does not reference any complaint made by the youth at that time. Accordingly, I find the witnesses' testimony to be credible with regard to the amount of force employed by Appellant. The evidence presented was insufficient to support a conclusion that Appellant engaged in excessive, inappropriate, or unwarranted use of force against a youth in Appellee's custody. As such, I find that Appellant's conduct did not rise to the level of "failure of good behavior," as referenced in R.C. 124.34 and in the Order of Removal issued to Appellant.

Because Appellant's conduct did not constitute a violation of Appellee's standards of conduct or failure of good behavior, his removal from employment was not an appropriate disciplinary response. Therefore, I respectfully **RECOMMEND** that Appellant's removal be **DISAFFIRMED**, and that Appellant be reinstated to the Operations Assistant Manager position he held with Appellee prior to his removal.



Jeannette E. Gunn
Administrative Law Judge

JEG: