

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

RAYMOND RACHEL,

Appellant.

v.

Case No. 10-RED-04-0097

DEPARTMENT OF REHABILITATION & CORRECTION,
LORAIN CORRECTIONAL INSTITUTION,

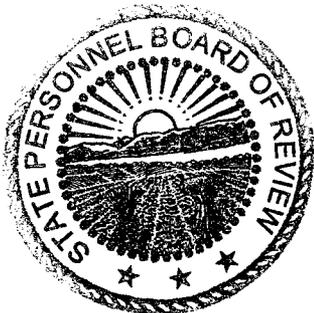
Appellee

ORDER

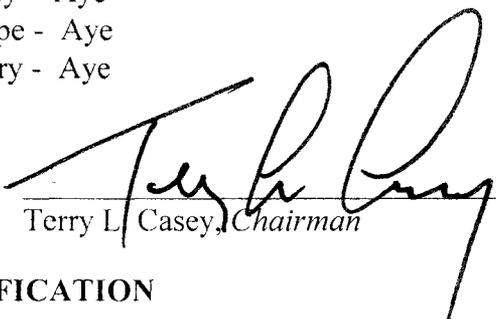
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's reduction be **MODIFIED** to a fifteen-day suspension.



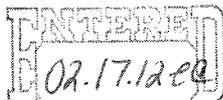
Casey - Aye
Lumpe - Aye
Tillery - Aye

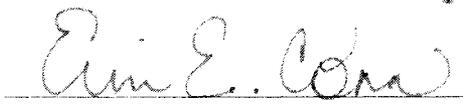

Terry L. Casey, *Chairman*

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, February 17, 2012.




Erin E. Conroy
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**

Raymond Rachel,

Case No. 10-RED-04-0097

Appellant

v.

November 29, 2011

Department of Rehabilitation & Correction,
Lorain Correctional Institution,

Jeannette E. Gunn
Administrative Law Judge

Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on to be heard on April 12, 2011, pursuant to Appellant's timely appeal of his disciplinary reduction. Appellant was present at record hearing and was represented by Robert C. White and James R. White, attorneys at law. Appellee was present at record hearing through its designee, Warden Marc Houk, and was represented by Assistant Attorney General Komlavi Atsou. Jurisdiction of the Board to hear this matter was established pursuant to R.C. 124.34.

The R.C. 124.34 Order of Reduction issued to Appellant stated as grounds for his reduction:

Violation of the Standards of Employee Conduct rule(s) #7 – Failure to follow post orders, administrative regulations, policies or written or verbal directives; #40 – Use of excessive force toward any individual under the supervision of the Department or a member of the general public; and #50 – Any violation of ORC 124.34 – and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violations of such sections or the rules of the Director of Administrative Services or the commission or any failure to good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office....

STATEMENT OF THE CASE

Appellant testified that he has been employed by Appellee since 1987. He noted that he began his employment as a Correctional Officer and progressed through the ranks to Captain in 2008. Appellant recalled that he held the rank of Lieutenant for approximately thirteen years prior to being promoted to Captain. He indicated that he was demoted from the rank of Captain, effective April 11, 2010, based upon alleged violations of Appellee's Work Rules 7, 40, and 50. Appellant confirmed that he received a written reprimand in 2009 for a violation of Work Rule 49, which has since been renumbered as Work Rule 50.

Appellant confirmed that one of the incidents which formed the basis for his reduction in rank took place on September 30, 2009. He recalled that he was called to the Segregation Unit three times that evening to address problems involving Inmate Eden and noted that the first two times he was able to resolve the situation using verbal communication. Appellant indicated that when he returned to Segregation the third time, Inmate Eden was violently kicking his cell door and the cuff port in the door was open. He stated that he instructed Inmate Eden to stop kicking the door and cuff up, and when Inmate Eden refused and cursed at him, Appellant administered a burst of OC through the cuff port into the cell.

Appellant recalled that after he deployed the OC, Inmate Eden hid in the cell's shower area and failed to respond to Appellant's orders to come out; the inmate was not visible from the door. He noted that he had a responsibility to check on the inmate's condition and ordered Officer Candlish to open the cell. Appellant acknowledged that he entered the cell alone even though he knew Inmate Eden presented a threat, and noted that if the inmate were hurt, waiting to assemble a cell extraction team would have resulted in a significant delay in rendering aid. He observed that he believed he was in no danger because Officer Candlish was present and he was carrying OC.

Appellant testified that when he entered the cell he was able to see that Inmate Eden was down on the floor of the shower with something wrapped around his head, but was not otherwise in distress. He indicated that because the inmate still presented a threat, he deployed OC a second time before leaving the cell. Appellant stated that Inmate Eden subsequently obeyed the order to cuff up and was removed from his cell and taken to medical for decontamination.

Appellant explained that he used OC in order to minimize the risk to Inmate Eden and to himself, noting that using OC is considered to be a lesser use of force than placing your hands on a non-compliant inmate. He testified that Inmate Eden's behavior presented an imminent danger and stated that he believed the amount of force he used was appropriate for the situation. Appellant noted that when a Correctional Officer gives an inmate a direct order that is ignored, there is a good chance that other inmates will start to mimic his behavior and cause more disruption in the unit.

Appellant observed that the inmate had been kicking the door and door frame for a period of time, which could have compromised the integrity of the door or the lock. He noted that doors have been kicked open in the past and supervisors are responsible for making sure that the cells are secure. Appellant testified that he instructed Lt. Washington to check the door's integrity after Inmate Eden had been removed from the area, and that he reported that the door was secure. He acknowledged that he did not follow the steps for a planned use of force response prior to spraying the OC into Inmate Eden's cell and did not videotape the incident or assemble a cell extraction team.

Appellant testified that prior to the incident, Major Foley had told the officers to enforce the rules and have a regimen for inmates to follow so that they knew how to conduct themselves. He observed that LorCI is a reception facility and inmates coming into the system do not know how to act properly. Appellant stated that Major Foley had instructed officers to personally remedy situations arising on the units instead of calling the shift supervisor.

Appellant indicated that the second incident upon which his reduction in rank was based took place on November 12, 2009. He recalled that he was called to Segregation to respond to a disruption on the range involving numerous inmates kicking their cell doors. Appellant stated that he determined that two inmates, both named Boone (Inmate Boone 144 and Inmate Boone 146), were the ringleaders of the disruption.

Appellant testified that because the situation appeared to be a significant incident he instructed Lieutenant Washington to get a video camera and record what was going on. He stated that he also called for all available yard officers to respond to the unit, as Major Foley had encouraged them to use additional officers in situations where a large number of inmates were involved in a disruption.

He recalled that Inmate Boone 146 initially refused to stop kicking his door, but did so after Appellant deployed OC into his cell and verbally instructed him again to stop doing so. The witness noted that both Inmate Boone 146 and Inmate Boone 144, who was in a different cell, refused to cuff up. Appellant stated that he deployed OC into the cell of Inmate Boone 146 a second time in order to gain compliance with his instructions for the inmate to cuff up. He indicated that Inmate Boone 146 subsequently complied and was handcuffed. Appellant noted that some of the inmates were still kicking their cell doors, but that the behavior had begun to taper off and it appeared that the situation was beginning to calm down.

Appellant testified that after Inmate Boone 146 cuffed up, he went to Inmate Boone 144's cell; Inmate Boone 144 had stopped kicking his door but was still refusing to cuff up, so Appellant deployed OC into his cell. He noted that it is his practice to deploy OC as needed, wait briefly, and then re-instruct the inmate.

Appellant stated that while he was at Inmate Boone 144's cell, two other staff members were walking Inmate Boone 146 down the range to be decontaminated. He recalled that Inmate Boone 146 began to yell out "make them kill you" to the other inmates and was encouraging them to continue their disruptive behavior. Appellant testified that he went down the range to Inmate Boone 146 and instructed him three separate times to be quiet and face the wall; the third time, after Inmate Boone 146 swore at him and made other comments, Appellant sprayed him with OC. He confirmed that when questioned by the Use of Force committee during the administrative investigation he told them that he deployed the third blast of OC because he "still had OC and wanted offenders to know it was still effective." Appellant noted that he did not instruct the officers to take Inmate Boone 146 to the other side of the range because he did not want to take a disruptive inmate over to the side that was not disruptive.

Appellant indicated that after he returned to Inmate Boone 144's cell, the inmate cuffed up and came out of the cell. He recalled that Inmate Boone 144 was also taken to the medical area for examination and decontamination and his cell was decontaminated. Appellant noted that he was called to respond to a fight in another part of the facility at that point and left the Segregation Unit; he noted that when he returned to check on the decontamination process it was his understanding that things had returned to normal in Segregation.

Appellant stated that he believed he complied with the Use of Force policy in responding to the inmates' behavior. He noted that a cell extraction was not

performed, as both Inmate Boone 146 and Inmate Boone 144 came out of their cells on their own. Appellant testified that he considered the overall situation in Segregation to present an imminent threat and that he believed it needed to be dealt with in an expedient manner. He observed that he did not implement a planned Use of Force because it would have taken approximately twenty minutes to assemble a team and prepare a plan, and he believed that the immediate threat to security from inmates kicking their doors was real and substantial. Appellant confirmed that there was no negotiator present during the incident and that he did not contact medical personnel prior to spraying OC into the inmates' cells.

Appellant confirmed that he has received training in use of force, including planned and reactive uses of force. He indicated that reactive force is spontaneous and appropriate only when there is an imminent danger; where there is no imminent danger, planned use of force should be utilized. He explained that when implementing a planned use of force, the first step is to communicate verbally with the inmate. Appellant noted that when verbal communication does not defuse a situation, the next step is typically to call a negotiator and to warn the inmate that you intend to use planned force if the targeted behavior does not cease. He acknowledged that Appellee's policies require that a video record be made of any planned use of force incident.

Appellant stated that a cell extraction is different than a planned use of force. He noted that he has never attended training on cell extraction, although it is held annually for employees who are specifically designated as being on the cell extraction team. Appellant testified that he believed that assembling a cell extraction team was not appropriate in either the incident involving Inmate Eden or the incident involving Inmate Boone 144 and Inmate Boone 146. He noted that a cell extraction is violent in nature and represents a much greater use of force than deploying OC.

Appellant confirmed that he has been trained in the use of OC and understands that OC is considered a use of force. He explained that use of OC is slightly greater than the lowest level of force, which is officer presence, and less than physical force. Appellant observed that officer presence and interpersonal communication skills were utilized prior to deploying OC in both the September 2009 incident and the November 2009 incident.

Appellant agreed that use of excessive force, which he understands to mean more force than is necessary to control a situation, is never appropriate. He noted

that it is important to look at all of the circumstances in a given situation and opined that the appropriate level of force may differ depending on the environment in which the situation occurs. Appellant noted that Appellee's administrative regulations reference how an officer knows and perceives circumstances at the time they are considered.

He stated that past practice in the institution had been to first stop the imminent threat and cell extractions were not an established method for dealing with inmates who were kicking cell doors. Appellant testified that every kick takes a toll on the cell door and lock. He noted that in both the September 2009 and the November 2009 incidents he did not feel that he had time to stop and plan a reactive use of force.

Appellant indicated that the institution's previous major, Major Redwood, had directed officers to stop inmates from kicking cell doors as quickly as possible. He noted that he was personally made aware, through family members also employed by Appellee, that cell doors had been kicked open by inmates at other institutions. Appellant stated that Major Foley had instructed officers to follow policy and he believed that the directive previously put in place by Major Redwood was not inconsistent with Appellee's policies.

He recalled that after the Boone incident, use of force and cell extractions were major topics of discussion; Appellant did not recall any specific discussions regarding the policies prior to that time. He noted that Major Foley made OC readily available to the officers, although he did not take that to mean that he was permitted to liberally use OC without following Appellee's policies.

Marc Houk testified that he is presently employed by Appellee as Warden of the Lorain Correctional Institution (LorCI). He indicated that in his capacity as Warden he is responsible for managing the overall operations of facility; as part of that responsibility, he reviews use of force incidents and conducts disciplinary proceedings. The witness noted that he has known Appellant through the course of their mutual employment with Appellee for approximately twenty years.

Warden Houk stated that he believed Appellant should have followed the planned use of force and cell extraction policy in dealing with Inmate Eden. He noted that Inmate Eden stopped kicking his cell door after OC was deployed the first time, and stated that it was inappropriate and dangerous for Appellant to enter the cell to spray the inmate a second time without an extraction team present. The

witness acknowledged that a cell extraction team would represent a greater use of force than OC.

Warden Houk recalled that in the November 12, 2009 incident upon which Appellant's reduction in rank was based, Appellant also used OC on Inmate Boone 144 and Inmate Boone 146. He noted that Appellant should have followed the cell extraction policy in this instance as well, since the inmates were secured in cells with closed doors and did not present an imminent threat. The witness opined that Appellant's third use of OC on Inmate Boone 146 constituted excessive force. He noted that the inmate was handcuffed and under the control of two Corrections Officers, and could have been escorted to another area to eliminate his ability to disrupt the other inmates. Warden Houk agreed that in some instances a verbally abusive inmate can form an adequate basis for use of force.

The witness noted that while it is important to respond in a timely manner to situations within the institution, officers must also follow Appellee's policies and procedures in doing so. He agreed that the incident reports and statements made by corrections staff contained numerous mentions of concern for the integrity of the cell doors and locks. Warden Houk recalled that he had heard a rumor years prior to the incident about a door being kicked open by an inmate at ManCI but did not know whether or not the rumor was true and noted that he has never personally seen a cell door be kicked open.

The witness confirmed that the Use of Force Committee report arising from the incident involving Inmate Eden also contained findings exhibiting their concern for the integrity of the cell door and locks. He acknowledged that the Use of Force Committee recommended that the force used by Appellant was justified, and that he should receive additional training to ensure a clear understanding of policies.

Warden Houk testified that he knew staff operated under a directive from Major Redwood to prevent inmates from kicking cell doors. He noted that he did not believe that Major Redwood's directive was compliant with Appellee's policies and had discussed with Major Foley and Lieutenant Turner how to address the practice, although no corrections had been yet made at the time of the incidents upon which Appellant's discipline was based.

The witness confirmed that Captain Desi Cheers was also involved in a similar Use of Force incident involving Inmate Eden in October 2009. He recalled

that Inmate Eden was in a safe cell on constant watch at that time; the inmate was repeatedly kicking his cell door and the food port and failed to respond to orders to stop. Warden Houk noted that Captain Cheers entered the cell without the presence of a cell extraction team and used physical force to control the inmate. He observed that whether that force was greater than Appellant's use of OC would depend on the amount of resistance exhibited by Inmate Eden.

The witness confirmed that Captain Cheers was not disciplined as a result of the incident. He stated that he did not consider the force utilized by Captain Cheers to constitute "punishment" of the inmate. Warden Houk observed that Captain Cheers indicated that he saw "play" in the door's cuff port which necessitated his entering the cell; he noted that the safe cell occupied by Inmate Eden at that time had a different type of door than the cell he occupied on September 30, 2009. The witness indicated that on September 30, 2009, Inmate Eden's cell was a standard segregation cell with a standard all-metal door, approximately 2.5" thick and containing a cuff port.

Keith Foley testified that he is presently employed by Appellee at LorCI and holds the rank of Major. He stated that he supervises Lieutenants and Captains, assists with post orders and policies and has overall responsibility for security issues at the institution. The witness recalled that he has been employed by Appellee since 1996 and moved to LorCI in 2009, replacing Major Redwood at the facility.

Major Foley stated that when he came to LorCI he met with the officers he supervised to introduce himself and discuss his expectations of them. He recalled that he stressed the need to follow policy. The witness testified that he did not recall if he ever specifically referenced Major Redwood's directive or lock integrity in his discussions with the officers. He noted that no supervisor ever indicated to him that he did not understand Appellee's use of force or cell extraction policies.

Major Foley agreed that it is appropriate for officers to use force when there is destruction of property involved, but that officers cannot use OC on inmates if they are just kicking their cell door. He noted that in both the Eden incident and the incident involving the Boones, the inmates stopped kicking their doors and were simply refusing to cuff up. The witness observed that because the kicking had stopped there was no remaining imminent threat and Appellant would have sufficient time to implement a planned use of force.

The witness stated that, based upon his investigation of the incident involving Inmate Eden and his review of the incident reports, he believed that Appellant's actions violated Appellee's cell extraction policy. He noted that his review indicated that there was no imminent danger, and observed that Appellant should have followed policy to assemble a cell extraction team to remove Inmate Eden from his cell. Major Foley testified that there is typically a significant delay between an inmate refusing to cuff up and the assembling of a cell extraction team and observed that he always stressed that officers should be familiar with the other members of their team so they could assemble quickly.

Major Foley testified that became aware after the incident involving Inmate Eden of a directive that had supposedly been issued by Major Redwood to take immediate action, including the use of OC, when cell doors were being kicked. He noted that the corrections staff should have followed his directives, and not those issued by prior supervisors. He observed that he does not consider the integrity of doors and locks in the institution to be an issue.

David Less testified that he is employed by Appellee as the Health Care Administrator at LorCI. He indicated that he is responsible for managing the medical aspects of inmate care and related policies and procedures of the institution. The witness confirmed that he is familiar with OC and explained that OC is a chemical agent derived from the pepper plant. He stated that the spray is used as an irritant or inflammatory agent to put a person under control and works by burning the eyes and nasal mucosa.

Mr. Less noted that it is typical for a supervisor to contact medical before using OC in a planned use of force and Appellee's policies require prior contact and a medical person's presence for its use in cell extractions. He estimated that it takes medical staff approximately five to ten minutes to respond to such a request.

Charles Washington testified that he is employed by Appellee as a Corrections Lieutenant and has held that rank since 2003. He stated that he is a CPR instructor, a Use of Force instructor, and recently completed an OC course. The witness observed that he is very familiar with Appellee's Cell Extraction policy. He indicated that he has been part of the Special Response Team for approximately eighteen years and has participated in cell extractions.

The witness observed that, as a Use of Force instructor, he deals with hands-on training and reviews policies as part of his instruction. He acknowledged that,

while staff is required to follow policies, in most instances the choice of whether to use planned force to respond to a situation or to react in a more immediate manner is a decision that must be made in a split-second. He stated that in his opinion there is no right or wrong answer, as the choice of response depends on the perception of the individual involved in the situation.

Lt. Washington confirmed that he was present toward the end of the incident involving Inmate Eden, which took place on or about September 30, 2009. He stated that he was not present when Appellant deployed OC, but was there to assist him in removing Inmate Eden from the cell. The witness noted that when Inmate Eden hid in his shower and failed to respond Appellant had a duty to consider whether or not the inmate had caused injury to himself; he didn't know and could not see the inmate, and needed to react quickly. He stated that Appellant was required to make a quick decision as to whether he should enter the cell or wait for back up and conduct a cell extraction. Lt. Washington indicated that it was appropriate for Appellant to deploy OC while in the cell because he still needed to control the inmate's actions.

The witness testified that the deployment of OC represents the least amount of force a Corrections Officer can use to control an inmate's actions. Lt. Washington stated that using OC represents less force than putting your hands on someone and is not life-threatening, so it is safer for everyone involved. He agreed that when corrections staff determines it is possible, medical staff should be contacted before deploying OC.

Lt. Washington indicated that he was also present on November 12, 2009, when the incident involving Inmate Boone 144 and Inmate Boone 146 took place, and noted that he videotaped the incident. He recalled that when he came on the range, the situation was chaotic, with loud yelling and kicking going on, and that more inmates than just Inmates Boone 144 and Boone 146 were involved. The witness testified that he believed that the situation was dangerous and needed to be controlled immediately before it escalated any further.

Lt. Washington stated that Major Redwood, who was employed at LorCI prior to Major Foley's appointment, had instructed staff that they needed to stop inmates from kicking cell doors to prevent damage to the integrity of the cell doors and locks. He noted that Major Redwood had further instructed them to deploy OC if necessary to bring inmates under control, and testified that he believed the Major's instructions to be consistent with the use of force policy.

Lt. Washington recalled that when he arrived on the scene, Appellant was giving Inmate Boone 146 a direct order to come out of his cell. He noted that Inmate Boone 146 was dressed in his "battle garb," indicating that he was not going to follow any directives, and refused several orders from Appellant. The witness confirmed that at some point Appellant deployed OC while Inmate Boone 146 was still in his cell; the inmate then cuffed up and was removed from the cell. He stated that while this was happening, the kicking and yelling was continuing all along the range.

The witness indicated that he went toward Inmate Boone 144's cell, while Inmate Boone 146 and the corrections officers escorting him walked toward the other end of the hallway. He testified that he was not close enough to Inmate Boone 146 to say what happened between Appellant and the inmate, but noted that simply because the inmate was cuffed it did not mean that he did not present a threat. Lt. Washington observed that if the inmate was being disruptive and encouraging others to be disruptive, it would have been consistent with the Use of Force policy for Appellant to deploy OC.

The witness stated that he believed that Appellant's use of OC in the incidents involving Inmates Eden, Boone 144 and Boone 146 was appropriate. He testified that neither Warden Houk nor Major Foley ever told him that using OC was simply an excuse to avoid using a cell extraction team.

William Rachel testified that he was employed by Appellee for approximately thirty years, from 1973 until his retirement. He confirmed that Appellant is his nephew. The witness stated that he was personally aware of instances occurring at the Mansfield Correctional Institution (ManCI) where inmates damaged cell doors by kicking them; one of the doors came off its hinges.

Mr. Rachel noted that although he did not work at LorCI and was not an engineer, he had been in the Segregation Unit at LorCI on at least one occasion and the doors appeared to be the same as those used at ManCI.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Appellant was reduced in rank from Correctional Captain to Correction Officer, effective April 11, 2010, based upon alleged violations of Appellee's Work Rules #7, 40 and 50; he has been employed by Appellee since 1987. Appellant's reduction in rank was based in part upon an incident which took place on September 30, 2009, and in part upon an incident which took place in November 2009.

On September 30, 2009, Appellant was called to the Segregation Unit to address a problem involving Inmate Eden, who was violently kicking his cell door. Appellant directed Inmate Eden to stop kicking his cell door and cuff up. When he refused, Appellant administered a burst of OC through the cuff port into the cell. Inmate Eden stopped kicking the door and hid in the shower area of his cell, where Appellant was not able to see him, and failed to further respond to Appellant. When Inmate Eden hid in his shower and failed to respond, Appellant had a duty to consider whether or not the inmate had caused injury to himself.

Appellant ordered Officer Candlish to open the cell and entered the cell alone. Upon entering, Appellant was able to see that Inmate Eden was on the floor of the shower with something wrapped around his head, but was not otherwise in distress. Appellant deployed OC a second time before exiting the cell. Inmate Eden subsequently cuffed up and was removed from his cell and taken to medical for decontamination.

OC is a non-life-threatening chemical agent derived from the pepper plant. The spray is used as an irritant or inflammatory agent to place an individual under control and works by burning the eyes and nasal mucosa. The use of OC represents a significantly lesser use of force than a cell extraction and is a lesser use of force than physical force.

On November 12, 2009, Appellant was called to Segregation to respond to a disruption on the range involving numerous inmates kicking their cell doors. Appellant instructed Lieutenant Washington to get a video camera and record the incident; he also called for all available yard officers to respond to the unit.

After determining that Inmate Boone 144 and Inmate Boone 146 were the ringleaders of the disruption, Appellant ordered Inmate Boone 146 to stop kicking his cell door. Inmate Boone 146 refused and Appellant deployed OC into his cell to gain compliance. Both Inmate Boone 146 and Inmate Boone 144 refused to cuff

up; after OC was deployed into their respective cells, both inmates were handcuffed, removed from their cells and taken to medical to be decontaminated.

As Inmate Boone 146 was being removed from the area he began to yell, encouraging the other inmates to continue their disruptive behavior. Appellant instructed Inmate Boone 146 three times to stop yelling and, when he refused, administered OC a third time. Throughout the incident, other inmates on the range continued to kick their doors and engage in disruptive behavior.

Pursuant to a directive from the institution's former major, Major Redwood, past practice of correctional staff in the institution had been to act as swiftly as possible to stop inmates from kicking their cell doors and locks. The institution's major at the time of the incidents, Major Foley, had instructed officers to follow policy; he did not specifically override the directive issued by Major Redwood, although he and Warden Houk were aware of the directive and had discussed their desire to change the practice.

In October 2009, Captain Desi Cheers entered Inmate Eden's cell without the presence of a cell extraction team and used physical force to control the inmate. Captain Cheers received no discipline as a result of the incident.

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 pre-disciplinary 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 reducing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's reduction was based upon his failure to follow Appellee's cell extraction policy (policy #310-SEC-29) during the September 30, 2009, incident involving Inmate Eden; and his failure to utilize a negotiator, failure to use a planned use of force, failure to follow Appellee's cell extraction policy, and use of excessive force during the November 12, 2009, incident involving Inmate Boone 144 and Inmate Boone 146.

In the instant matter, Appellee clearly demonstrated that it had an established standard of conduct in the form of policies pertaining to the use of force and to cell extractions. Appellant confirmed that he was familiar with Appellee's policies.

What is less clear, however, is how Appellee's policies applied to the facts and circumstances surrounding the two incidents for which Appellant was disciplined. Both the use of force policy and the cell extraction policy require a responding officer to subjectively assess the situation and circumstances presented and both policies provide that the least possible amount of force should be utilized. In addition, Appellant presented credible testimony to establish that a directive was in place from the institution's former major, Major Redwood, that correctional staff should stop inmates from kicking cell doors to prevent damage to the integrity of the cell doors and locks, deploying OC if necessary to bring inmates under control. Appellee confirmed that it was aware of the directive and the existing institutional

practices arising from the directive, but had not communicated to staff prior to the incidents that formed the basis of Appellant's discipline that such practices were non-compliant with policy.

With regard to the September 30, 2009, incident involving Inmate Eden, Appellant is alleged to have violated Appellee's cell extraction policy. Testimony is clear that Appellant did not follow the procedures for effectuating a cell extraction as outlined in Policy 310-SEC-29. The policy, however, provides that the Shift Commander (in this case, Appellant) has the discretion to determine whether or not a cell extraction is necessary. Testimony established that Inmate Eden was repeatedly kicking his cell door, potentially causing damage to the door, the cuff port and/or the lock. Rather than control the situation with a cell extraction, Appellant elected to stop the inmate's actions by using a lesser amount of force – first, verbal instruction, and then a blast of OC. His actions were in conformance with past practice that had arisen from Major Redwood's earlier directive.

Once the OC had been deployed, Inmate Eden's actions created a secondary situation, where it became incumbent upon Appellant to check on the inmate's physical condition; he evaluated the situation and the potential risk and responded quickly by entering the cell to ensure the inmate's safety. Although it may not have been necessary for Appellant to deploy OC a second time, upon seeing that the inmate was not in medical distress, Appellant was not charged with an excessive use of force in this situation. Having deployed the OC, it was necessary for Inmate Eden to be removed from his cell to be checked by medical staff and decontaminated; testimony established that Inmate Eden complied with staff in exiting his cell.

Accordingly, upon a review of the circumstances surrounding the September 30, 2009, incident involving Inmate Eden, and a review of the pertinent policies, I find that Appellant's conduct did not violate Appellee's cell extraction policy, as no cell extraction was initiated and use of a cell extraction to control a situation is discretionary.

With regard to the November 12, 2009, incident involving Inmate Boone 144 and Inmate Boone 146, Appellant was charged with failing to utilize a negotiator to get the inmates to comply with his orders to cuff up, failure to determine that a planned use of force was necessary, failure to follow cell extraction procedures, failure to use the least amount of force, and use of excessive force. Appellee's policies regarding the use of force and using planned force also rely to some extent

on the personal judgment of staff. Policy 63-UOF-01 notes that, while a planned use of force is a preferred tactic for dealing with non-compliant offenders, staff must evaluate the circumstances to determine if the necessary delay will jeopardize the safety and security of the institution or any person. Appellant testified that there were numerous inmates kicking their cell doors in the Segregation Unit on the evening of November 12, 2009. Again following past practices and instructions, he determined that a delay would jeopardize the safety and security of the institution and took immediate action utilizing a minimal amount of force to gain compliance with his order to stop kicking the doors.

As in the incident involving Inmate Eden, once OC had been deployed into their cells, it became necessary to remove the inmates for medical evaluation and decontamination. In this instance, both initially refused to cuff up; Appellant testified that the two inmates were the ringleaders of the situation occurring on the range and that controlling their behavior was essential to gaining control of the situation as a whole. Appellant had a variety of options to consider in dealing with the situation and circumstances presented, including utilizing a negotiator, implementing a planned use of force or assembling a cell extraction team. Testimony established that although Inmates Boone 144 and Boone 146 had stopped kicking their cell doors, numerous other inmates on the range were still yelling and kicking their doors. Rather than dealing with each individual offender in the Unit who was engaging in disruptive behavior, Appellant elected to remove the two inmates who he had determined were inciting the others to be disorderly. Although the immediate threat to the safety and security of the institution arising from Inmates Boone 144 and Boone 146's kicking of their cell doors had abated, the threat from other inmates kicking their doors continued.

Accordingly, upon a review of the circumstances surrounding the November 12, 2009, incident involving Inmates Boone 144 and Boone 146, and a review of the pertinent policies, I find that Appellant's initial use of OC to control the behavior of Inmates Boone 144 and 146 and his secondary use of OC to persuade them to cuff up did not constitute an excessive use of force. I further find that his decision not to utilize a negotiator, implement a planned use of force or assemble a cell extraction team did not violate Appellee's policies.

With regard to Appellant's third use of OC, to control Inmate Boone 146 as he was being removed from the area, I find that Appellant's conduct was sufficient to constitute an excessive use of force. Appellee's policies define "excessive force" as an application of force which exceeds that which reasonably appears to be

necessary under all of the circumstances. Testimony at record hearing established that Inmate Boone 146 was leaving the area with two correctional officers when he began yelling and Appellant administered a third blast of OC. There was no indication that the inmate was resisting the officers and it would have been reasonable for the officers to escort him off the range to another area. Had Inmate Boone 146 then shown resistance, the use of OC may have been merited, but in considering the totality of the circumstances, I find that its use was excessive.

This Board's consideration may now turn to the appropriateness of the discipline imposed upon Appellant. As previously noted, Appellant has been employed by the Department for approximately twenty-three years, with evidence presented at record hearing of a written reprimand for failure to maintain professionalism issued on October 13, 2009. Upon consideration of the testimony presented and evidence admitted, I find that reduction in pay and position from the rank of Correctional Captain to Correction Officer was not an appropriate disciplinary response in the instant matter. Appellee failed to meet its burden of proof with regard to the charges of failing to follow Appellee's cell extraction policy (policy #310-SEC-29) during the September 30, 2009, incident involving Inmate Eden and the November 12, 2009, incident involving Inmates Boone 144 and 146; his failure to utilize a negotiator during the November 12, 2009, incident; and his failure to use a planned use of force during the November 12, 2009, incident. Appellee met its burden of proof with regard to the charge of use of excessive force during the November 12, 2009.

Based upon the above analysis, I respectfully **RECOMMEND** that Appellant's reduction be **MODIFIED** to a fifteen-day suspension.


Jeannette E. Gunn
Administrative Law Judge

JEG: