

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

SHIRLEY A. CROSBY,

Appellant,

v.

Case No. 11-RED-06-0215

DEPARTMENT OF REHABILITATION AND CORRECTION,
OHIO REFORMATORY FOR WOMEN,

Appellee

ORDER

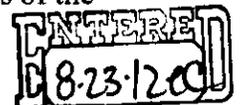
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

The Full Board has carefully examined the entirety of the record, including the Report and Recommendation of the Administrative Law Judge, Appellee's objections to the Report and Recommendation, Appellant's response to Appellee's objections, and Appellee's reply to Appellant's response. Further, on August 8, 2012, the Board held an Oral Argument which was presented on the record before the Board. Present at the Oral Argument was Appellant, who was represented by Stephen T. Wolfe, Attorney at Law. Appellee was present through its designee, Amy C. Parmi, Human Resources Counsel, and was represented by Joseph N. Rosenthal and Amanda L. Sheeser, Assistant Attorneys General. At the Oral Argument, respective counsel provided the Board with analysis and interpretation of the pertinent facts and law and each side answered a number of questions from the Board members present concerning same.

After duly considering the entirety of the record, including the components of the record developed at Oral Argument, the Board hereby adopts the Findings of the Administrative Law Judge, adopts the Recommendation of the Administrative Law Judge for a 10-day suspension, and modifies the Recommendation of the Administrative Law Judge to include the Appellant's reduction from Captain to Lieutenant, for the reasons that follow.

The pertinent R.C. 124.34 Order of Reduction in this case indicates that Appellant was disciplinarily reduced from Captain to Corrections Officer. The record reflects that Appellant had performed in a supervisory capacity for a number of years, both as a Lieutenant and, more recently, as a Captain.

However, on the night in question (New Year's Eve), the record reflects that there is some reason to question Appellant's judgment concerning her supervisory duties. This is because Appellant: did not fully complete rounds that evening; indirectly permitted the presence of perhaps three party items in the prison housing unit, although not in the inmate population; and, indirectly, allowed disorderly circumstances to delay obtaining an accurate housing unit population count for five to six minutes, due to inmates from this same unit becoming rowdy and boisterous. Yet, the record also reflects that the circumstances of the



evening (e.g. two medical emergencies, possible short staffing, fewer seasoned Corrections Officers on the pertinent shift, *et cetera*) should perhaps act as mitigating circumstances on this particular occasion.

The record additionally reflects that, on another occasion, Appellant has a concern about the non-reporting of an incident from a previous shift that placed a reporting responsibility on Appellant's shift. Appellant checked with the Captain on whose shift the initial problem had occurred. That Captain suggested that Appellant contact and discuss the situation directly with one particular Corrections Officer (not from Appellant's shift) who was involved in the situation. Appellant had a previous personal relationship with this particular Corrections Officer and the relationship may not have ended amicably. Further, there was evidence that this Corrections Officer had filed a number of grievances, not only on Appellant but also on other non-bargaining unit personnel. Appellant questioned this Corrections Officer and chose to do in the presence of a union representative.

Appellee considers this discussion and questioning to constitute a possible pre-disciplinary interview, a situation made more intimidating because of Appellant's prior relationship with the Corrections Officer and because of the formal presence of a union representative. Conversely, Appellant sees this as following up with permission on an incident that directly affected her shift. Further, Appellant argues that the presence of the union representative was to protect the Corrections Officer's rights and to lend legitimacy to the discussion involving a union member who was allegedly known to file many grievances, including on Appellant.

While the Board can neither condone the unregulated atmosphere that occurred in the housing unit on New Year's Eve nor the failure to complete rounds that evening, the Board must also take cognizance of the mitigating factors noted above, including the presence of two medical emergencies that evening. Additionally, the Board sees merit in Appellee's argument that Appellant should not have, herself, questioned of the Corrections Officer with whom she had a prior relationship. Yet, the presence of a union representative here could also been seen as lending a more objective air to that discussion. Nonetheless, a better practice would have been for Appellant to have turned this matter over to another supervisory or investigative employee who had not engaged in a personal relationship with this Corrections Officer.

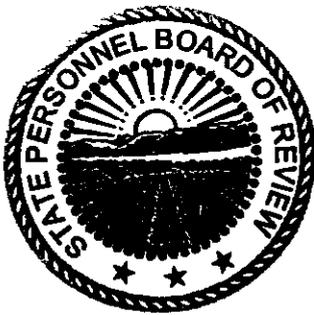
Taken together, the proven allegations of this case appear to demonstrate that Appellant may not currently be at a level of achievement where she can handle the supervisory duties of a Captain.

However, we must also recognize Appellant's years of supervisory experience that would appear to allow her to handle the lesser supervisory duties of a Lieutenant, even when those duties would call for Appellant to be temporarily in charge of a shift. Further, we recognize that Appellant's actions, in interviewing a bargaining unit employee with whom she had a prior personal relationship and in the presence of a union representative, do not represent a best practice and could be misconstrued as intimidating and inequitable. Yet, those same actions could, at least potentially, be interpreted as the actions of a shift supervisor who wishes to resolve a problem affecting her shift and who has the forethought

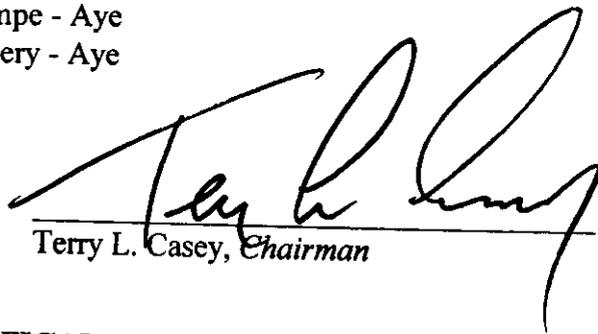
to have a union representative present to protect the rights of the Corrections Officer and to lend an air of legitimacy to the discussion.

Accordingly, based on the totality of the record, we hereby modify Appellee's reduction and, accordingly, reduce Appellant from a Captain to a Lieutenant and provide Appellant with a 10-day suspension for the reasons stated, herein, and based on the Findings of the assigned Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's **REDUCTION** from Captain to Corrections Officer be **MODIFIED** to a **REDUCTION** to Lieutenant **WITH A 10-DAY SUSPENSION**, pursuant to R.C. 124.03 and R.C. 124.34.



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, August 23, 2012.


Erin E. Conn
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**

Shirley A. Crosby,

Case No. 11-RED-06-0215

Appellant

v.

April 23, 2012

Department of Rehabilitation & Correction,
Ohio Reformatory for Women,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on to be heard on October 17, 2011, pursuant to Appellant's timely appeal of her disciplinary reduction. Appellant was present at record hearing and was represented by Stephen T. Wolfe, attorney at law. Appellee was present at record hearing through its designee, Warden Ginine Trim, and was represented by Assistant Attorney General Lee Ann Rabe. The parties stipulated to the jurisdiction of the Board to hear this matter.

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

Rule violations: #8 – Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment; #50 – Any violation of ORC 124.34 ...

STATEMENT OF THE CASE

Appellant testified that she is presently employed by Appellee as a Corrections Officer at the Ohio Reformatory for Women (ORW). She confirmed that she held the rank of Captain prior to her reduction in position and identified Appellee's Exhibit 1 as a copy of the R.C. 124.34 Order effectuating her demotion, effective May 22, 2011. Appellant noted that she has held a supervisory position since 1997.

Appellant indicated that as a Captain, she worked as a shift commander and was responsible for making sure that the staff she supervised completed their assigned tasks, maintaining the security of institution, and making sure that the institution was run in an orderly and efficient fashion. She acknowledged that the shift commander has decision-making authority for the institution in the absence of the warden and deputy warden and agreed that personal integrity and judgment are important:

Appellant confirmed that she worked third shift on December 31, 2010, and brought party hats and small noisemakers to ORW. She noted that it was common to see holiday decorations in the institution and stated that she brought the items into the shift office with her as a morale booster; Appellant observed that in the past she has seen an employee wearing a Santa hat in the Control Center during the holidays. She agreed that Appellee has a uniform or dress code policy, but stated that it is not strictly enforced and observed that employees wear ball caps, shoes and other items while on duty in the institution that are not strictly compliant with the policy. Appellant testified that some of the yard officers on duty that night took holiday items on rounds with them, but stated that she did not know if they wore them or used the noisemakers in view of the inmates.

Appellant explained that the institution is usually in lockdown on third shift and officers make rounds to the buildings to check on the security of the inmates and the facility. She recalled that on this particular evening, there were two medical emergencies that required her attention and the attention of the Lieutenant working with her, Ken White. Appellant stated that she responded to a suicide attempt and assisted Officers in returning the inmate to her wheelchair; she then accompanied the inmate to the hospital to deal with the security issues related to transporting the inmate out of the institution. She estimated that the incident took twenty-five to thirty minutes to handle. Appellant noted that Lieutenant White responded to the other medical emergency and handled security issues there.

She confirmed that neither she nor Lieutenant White were able to make full rounds that evening. Appellant recalled that when she and Lieutenant White did the midnight count, they asked each unit as they reported if there were any issues or problems in their area. She stated that the only issues reported were the two medical emergencies in Hale and Kennedy, and that Corrections Officers McGill and Imbody, who were assigned to the Rogers dorm, reported no problems. Appellant noted that because there were not enough personnel on shift that evening

to cover the medical emergencies and make full rounds, she and Lieutenant White prioritized and made partial rounds of their "hot spot" areas. She testified that she chose to deal first with the potentially life-threatening medical incidents.

Appellant recalled that she spoke with Corrections Officer Angela Embaugh on February 1, 2011, regarding an incident that had affected Appellant's shift several days prior to the interview. She explained that although she was assigned to second shift that day, she was at the institution during first shift to conduct an unrelated Use of Force hearing. Appellant stated that she took the opportunity to speak with Officer Embaugh about statements that had been made by an employee on Appellant's shift; that employee alleged that Officer Embaugh had failed to brief her about an inmate who needed to be placed on suicide watch. Appellant confirmed that although her conversation with Officer Embaugh was not a formal Q & A investigatory interview, she asked a union representative to sit in on the meeting with them to preserve Officer Embaugh's rights. She estimated that they spoke for approximately ten minutes; Appellant noted that she did not feel that the incident from which the statements arose was severe enough to warrant filing an incident report and observed that issues of similar severity are typically dealt with informally by supervisors at ORW.

Appellant confirmed that she had a social relationship with Officer Embaugh outside the institution and that Officer Embaugh had stayed at Appellant's home in the past, as have other co-workers.

Lori King testified that she has been employed at ORW for approximately three years as a Corrections Officer. She confirmed that she was the yard officer working on the evening of December 31, 2010, and explained that she was responsible for checking the security of buildings at the institution and picking up count slips that night. The witness stated that she visited the shift commander's office several times that evening for different reasons and noted that there were party favors and snack food in the office that night.

Officer King recalled that she didn't think it was inappropriate to have those things in the office and she felt it boosted morale. The witness indicated that she wore a hat and a lei out of the shift office and took a noisemaker with her to the housing units when she went to pick up count slips. She confirmed that she later received discipline for wearing the party hat out of the office, but the discipline was rescinded as a result of the grievance process. Officer King observed that the

inmates were awake and somewhat noisy in all of the dorms that evening. She testified that the inmates are normally in their bunks and quiet, but the other officers assured her that it was common for them to celebrate a little on New Year's Eve and she did not think the inmates' behavior was a problem that should have been reported.

The witness confirmed that Appellant was her immediate supervisor and that she believed that Appellant conducted herself professionally around her, other employees and the inmates. She testified that during the time she has been employed by ORW she has been called in to talk to her supervisor about things she has done wrong; Officer King noted that it is fairly common to have such undocumented discussions without the presence of a union representative, in a setting that is less formal than a Q&A session.

Warden Ginine Trim testified that she has been employed by Appellee for approximately fourteen and one half years and has held the position of Warden at ORW since August 2009. She confirmed that she made the decision to reduce Appellant in rank and stated that her decision was based on incidents that occurred on December 31, 2010, and February 1, 2011.

Warden Trim observed that she was concerned about Appellant bringing in party hats and favors on December 31, 2010. She explained that ORW is a controlled environment and it is important that inmates do not perceive staff to be less vigilant or standards to be relaxed because it is a holiday. The witness testified that such a situation could create a security problem. She noted that she was especially concerned because Appellant was the ranking officer on shift that evening. Warden Trim acknowledged that holiday decorations have been brought into the facility in the past, but are confined to offices where inmates are not present; she stated that she felt it was a poor decision by Appellant to allow officers to take hats out of the shift office. The witness conceded, however, that Corrections Officers are permitted to wear other non-regulation hats, as well as non-regulation shoes, while on duty, in violation of Appellee's uniform policies.

Warden Trim recalled that she heard inmates talking about how chaotic the Rogers/Shirley building was on New Years Eve; she reviewed the building videotapes to investigate the matter and was concerned by the number of offenders (about thirty or forty) who were out of their bunks and their proximity to the Correction Officers in the bay area. She noted that the environment did not appear

to be controlled. The witness testified that an incident report regarding the situation (Appellee's Exhibit 6) was filed on January 5, 2011, by the unit manager. Warden Trim observed that Appellant should have anticipated that inmate behavior could have been a problem due to the holiday and made the dormitories a priority that evening.

Warden Trim indicated that the shift commander is responsible for doing rounds of the facility, with operational needs dictating which locations needed to be toured. She observed that on third shift, housing units would be a priority for rounds because all inmates should be confined in the housing units. The witness explained that when there is a medical emergency, the shift commander should respond to assess the situation and ascertain whether the area is secured, or if additional personnel are needed. She noted that support staff should follow up on the matter and report to the shift commander if anything else is needed.

Warden Trim testified that the second incident upon which her decision to demote Appellant was based also came to her attention through the incident report process. She recalled that in February 2011 Appellant interviewed Corrections Officer Embaugh in an informal session regarding an incident that took place in the infirmary on second shift; the witness explained that Officer Embaugh was working first shift at that time and Appellant was working second shift. The Warden noted that it was not common for a supervisor to have a union representative present for a meeting that was not a formal "Q & A" or part of the disciplinary process and stated that she believed it was unnecessary for Appellant to have a union representative present when she spoke with Officer Embaugh.

Warden Trim stated that she did not recall how she determined that Officer Embaugh believed she was being intimidated by Appellant's questioning, but noted that she had spoken with Officer Embaugh on several prior occasions about Officer Embaugh's concern that she would be retaliated against because of an alleged relationship between Appellant and Officer Embaugh. The witness confirmed that Corrections Officer Embaugh has been employed at ORW for approximately four years and has filed grievances against supervisors, including Appellant, in the past. She observed that officers frequently file grievances against management employees, but that she does not believe it is necessary to treat an employee who has a history of filing grievances differently than an employee who does not.

Warden Trim recalled that she frequently talks informally to shift commanders about making good decisions and how to be a good leader. She noted that she has talked with Appellant in general about her relationships with Corrections Officers. The witness testified that she believed Appellant had not made good decisions as a supervisor, although she believed Appellant had good intentions. Warden Trim noted that Appellant had received prior discipline as a result of her exercise of poor judgment in carrying out an assignment.

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 May 22, 2011, based upon alleged violations of Appellee's Work Rules #8 and 50. Appellant's reduction in rank was based in part upon an incident which took place on December 31, 2010, and in part upon an incident which took place on February 1, 2011.

On December 31, 2010, Appellant was shift commander for third shift at ORW. Appellant brought party hats and small noisemakers to ORW and had them in the shift commander's office during her shift. At least one of the yard officers on duty that night took party items from the office on their rounds.

Neither Appellant nor the shift lieutenant made full rounds on the evening of December 31, 2010, due to medical emergencies requiring their attention. No units reported problems on shift other than the two medical emergencies. On January 5, a Unit Manager filed an incident report stating that there had been an inappropriate New Years Eve party in Rogers dorm on the evening of December 31, 2010.

Appellant briefly interviewed Corrections Officer Angela Embaugh on February 1, 2011, to follow up on an incident that had affected Appellant's shift several days prior. Although the conversation was not a formal Q & A investigatory interview, a union representative was present. Appellant did not document the discussion by completing an incident report.

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 her, 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 her 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 alleged violations of Appellee's Work Rules 8 and 50 stemming from the incidents of December 31, 2010, and February 1, 2011. Appellant confirmed that she had received a copy of Appellee's standards of employee conduct (Appellee's Exhibit 4). In addition to

containing an enumerated listing of Appellee's work rules, the standards state, generally, that employees are required to abide by departmental rules and policies, conduct themselves professionally, and shall not use the power of their position for personal gain or advantage. No other policies and/or procedures which Appellant's conduct was alleged to have violated were presented.

Appellant acknowledged that she was charged with carrying out the duties set forth in her position description and that she was responsible for conducting inspection rounds on the evening of December 31, 2011. She testified that she did not conduct her full rounds, accordingly, I find that Appellant failed to carry out her work assignment in violation of Work Rule 8.

Appellant also confirmed that she brought holiday items into the institution with her on December 31, 2010, and had them with her in the Shift Commander's office. Warden Trim acknowledged that holiday decorations have been brought into employee areas of the facility in the past. No evidence of any specific policy or procedure prohibiting Appellant's actions was presented at record hearing, accordingly, I find that Appellee has failed to demonstrate that Appellant violated its work rules by bringing party items into the institution.

Warden Trim testified that she felt it was a poor decision by Appellant to allow officers to take party items such as hats and leis out of the shift office. She conceded, however, that Corrections Officers are permitted to wear non-regulation hats and other non-regulation uniform items while on duty, as well as non-regulation shoes, in contravention of Appellee's uniform policies. No evidence of any other specific policy or procedures prohibiting Appellant's actions was presented at record hearing. Consequently, I find that Appellee has failed to sufficiently demonstrate that Appellant violated its work rules by allowing the officers to take party items such as hats and/or leis out of the office.

Finally, Appellee alleged that Appellant violated its work rules by improperly questioning a Corrections Officer on a different shift about an incident that had not been assigned to Appellant for Q & A purposes. Appellant testified that she spoke informally to Officer Embaugh about an incident that had occurred on Appellant's shift, and that their meeting was not a formal Q & A session. She noted that because she was aware of Officer Embaugh's history of filing grievances against supervisors, she asked a union representative to sit in on their conversation. Appellant noted that she ultimately determined that it was not necessary to

complete an incident report regarding the matter about which she spoke to Officer Embaugh and did not document their conversation.

As noted in Appellant's position description, Appellant has the authority to evaluate employee incidents for possible discipline and she testified that she was following up on such an incident with an employee on her shift when she spoke with Officer Embaugh. Officer King testified that it was fairly common to have informal undocumented discussions with a supervisor. No policies or procedures were admitted to establish that Appellant acted outside her supervisory authority in speaking with Officer Embaugh, or that it was improper for her to have a union representative present during their discussion; no policy or procedure was produced to indicate that Appellant acted improperly by not documenting the conversation. While Warden Trim stated that she had spoken with Appellant generally about making good decisions and relationships with Corrections Officers, she did not indicate that they had ever specifically discussed Officer Embaugh's concerns about retaliation stemming from her prior relationship with Appellant or that Appellant had been instructed not to interact with Officer Embaugh.

Both Appellant and Warden Trim stated that they were aware that Officer Embaugh had filed grievances against supervisors in the past. Considering the totality of the circumstances, I find that it was not unreasonable for Appellant either to speak with Officer Embaugh or to have a third person present during their conversation. While Warden Trim testified that she believed Appellant should have handled the matter in another manner, her differing opinion does not necessarily mean that Appellant used "poor judgment," as contemplated by Appellee's Work Rule 8. Appellant has some discretion in how she carries out her job duties. Absent any evidence demonstrating that Appellant acted in contravention of a policy or procedure, or that her conduct was unreasonable, the evidence presented does not support a finding that Appellant's conduct violated Appellee's work rules.

I find that Appellee has met its burden of proof to show that Appellant violated its work rules by failing to conduct her full rounds on the evening of December 31, 2010. Appellee failed to demonstrate that Appellant violated its work rules by bringing party items into the institution that same evening, or by allowing Corrections Officers to take party items out of the office. Finally, Appellee failed to meet its burden of proof to show that Appellant violated its work rules by improperly questioning a Corrections Officer about an incident that had not been assigned to Appellant for Q & A purposes.

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 years, with evidence presented at record hearing of prior discipline (a 40-hour working suspension issued in September 2009 for violations of work rules 8, 12 and 49 – now renumbered as 50, and a 40-hour working suspension issued in May 2010 for violations of work rules 7 and 50). Appellant offered as mitigating circumstances for her failure to make rounds the need to deal with medical emergencies occurring on her shift. She also noted that no Corrections Officers reported problems in their areas, although they were specifically asked for such information during court.

Upon consideration of the testimony presented and evidence admitted, along with Appellant's prior disciplinary history and the mitigating circumstances presented by Appellant, I find that reduction in pay and position from the rank of Correctional Captain to Correction Officer was not an appropriate disciplinary response to the single rule violation proved by Appellee in the instant matter. Therefore, I respectfully **RECOMMEND** that Appellant's reduction be **MODIFIED** to a ten day suspension.


Jeannette E. Gunn
Administrative Law Judge