

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

James M. Hawkins,

Appellant,

v.

Case No. 2012-RED-09-0201

Department of Rehabilitation and Correction,
Grafton Correction Institution,

Appellee,

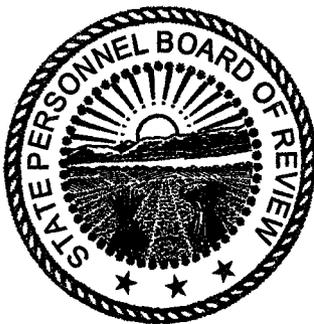
LIFTING OF STAY AND ISSUANCE OF FINAL ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal. On December 23, 2013, Appellee filed a motion for reconsideration of this matter. On December 30, 2013, this Board issued a Stay Order in this matter to provide Appellant with an opportunity to respond to Appellee's motion for reconsideration. Appellant did not file a response to Appellee's motion for reconsideration.

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, as well as an extensive further review of Appellee's motion for reconsideration, the Board finds there is no good reason to set aside its final Order of December 13, 2013 and, accordingly, that Order STANDS AS ISSUED.

Wherefore, it is hereby **ORDERED** that Appellant's discipline be **MODIFIED** to reflect a temporary reduction in rank from Captain to Lieutenant, and that Appellant be reinstated to the rank of Captain as of December 13, 2013, the date of issuance of this Board's original final Order in this matter, pursuant to R.C. 124.03 and R.C. 124.34.

Casey - Aye
Lumpe - Aye
Tillery - Aye



Terry L. Casey, *Chairman*

4-16-14

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, April 16, 2014.



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 M. Hawkins,

Case No. 2012-RED-09-0201

Appellant

v.

October 11, 2013

Department of Rehabilitation & Correction,
Grafton Correctional Institution

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 September 5, 2012, reduction. A record hearing was held in the instant matter on May 22 and 23, 2013. Appellant was present at both days of record hearing and was represented by Carl Rose, attorney at law. Appellee was present at both days of record hearing through its designee, Deputy Warden for Special Services Brandeshawn Harris and was represented by Robert E. Fekete and Julie Smith, Assistant Attorneys General. The parties stipulated to the jurisdiction of the Board to hear the case.

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

7. Failure to follow post orders, administrative regulations, policies, or written or verbal directives. 27. Failure of a supervisor to properly supervise or enforce work rules or failure to properly process employee payroll forms. 50. Any violation of ORC 124.34 – and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the Commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. On 11/16/2011 James Hawkins was assigned as the 3rd shift Captain at Grafton Correctional. During his shift, inappropriate force was used on inmate McGlaughlin four times. The inmate was placed in five-way restraints and restraint mitts were

placed on the inmate in violation of policy. Staff did not document their involvement with the four uses of force nor did they complete the necessary paperwork to document the series of uses of force. James Hawkins failed to ensure policies and procedures were adhered to and make sure all documentation and reports were properly completed.

STATEMENT OF THE CASE

Appellant testified that he has been employed at the Grafton Correctional Institution ("GCI" or "Grafton") for approximately twenty-four years and currently holds the rank of Lieutenant. He stated that he held the rank of Captain from 1996 until his reduction in 2012, and in November 2011 he was assigned to the post of Shift Commander on third shift. Appellant indicated that he and the shift lieutenants supervised staff and oversaw the operation of the facility on third shift; he noted that there were twenty-four posts on third shift at that time. He confirmed that he was responsible for enforcing Appellee's policies and procedures, and acknowledged that he had received and been trained on those policies and procedures.

Appellant explained that, generally speaking, a "use of force" is a measure taken by staff to make an inmate comply with the rules of the institution. He noted that there are different levels of tactics staff can use to ensure compliance, ranging from verbal direction to deadly force. Appellant recalled that uses of force did not occur very often on third shift in 2011; he observed that November 16, 2011, may have been the first time he had been Shift Commander when a Use of Force occurred, as well as the first time during his tenure that staff were required to strap down an inmate.

Appellant testified that on November 16, 2011, Officer Zadowski called him shortly after count to report that Inmate McGlaughlin was masturbating in front of a female Corrections Officer (Officer Michelle Brillon). He stated that he instructed the reporting Officer to cuff the inmate and write a conduct report; Appellant called over the radio to request that an available Yard Officer bring the inmate to the Shift Captain's office. He noted that Officer Michelle Brillon's husband, also a Corrections Officer working third shift, was one of several Yard Officers who escorted the inmate to his office.

Appellant recalled that he prepared the necessary paperwork to send Inmate McGlaughlin to segregation for his violation of the inmate code of conduct; he noted that when an inmate is sent to segregation, Appellee's policies require a suicide questionnaire to be completed in order to determine whether or not the inmate intended to harm himself. Appellant indicated that he asked Inmate McGlaughlin the two questions contained in the questionnaire approximately fifteen times, but he refused to answer. He testified that when an inmate is unresponsive, staff have been instructed to answer the questions affirmatively and place the inmate on constant watch.

Appellant confirmed that he ordered Lieutenant Wright to take Inmate McGlaughlin to segregation, which is located in the Special Management Unit (SMU), get him stripped out and place him on constant watch. He stated that there are two "safe cells" in the SMU which are used for inmates on constant watch or who are demonstrating erratic behavior, and explained that the safe cells have a cuff port and a window in the door, and a shower with windows at the top and bottom so staff can see an occupant's head and feet.

Appellant recalled that he received a call from Lieutenant Wright shortly after he had directed him to escort the inmate to the SMU, reporting that the inmate had refused to disrobe and had put his hands in his pants so they were not visible. Appellant noted that he understood that the inmate had also purposely banged his head against the strip cage and that Lieutenant Wright had used force to remove Inmate McGlaughlin from the cell to gain compliance with instructions and to prevent him from further hitting his head. He observed that Lieutenant Wright made a judgment call to act immediately rather than delay action to allow for a planned use of force and he would probably not have done anything differently if he had been present.

Appellant stated that when Lieutenant Wright and Lieutenant Heath returned to the Shift Captain's office they reported that the inmate had been placed in a safe cell and that Officer Lopez had been assigned to the constant watch. He indicated that Lieutenant Wright and Lieutenant Heath began putting together all of the documentation and reports needed for the use of force packet, and confirmed that it was his responsibility as Shift Captain to review the packet for completeness before it was submitted.

Appellant stated that Officer Roberts called him later during the shift to report that Inmate McGlaughlin was hiding in the shower area inside the safe cell with his foot over the shower window so Officer Lopez couldn't see what he was doing. He noted that he is aware of inmates who have hidden in the shower area and cut themselves and the inmate was required to remain visible while on constant watch. Appellant recalled that he told Officer Roberts to instruct Officer Lopez to give the inmate directives to stop, but Inmate McGlaughlin continued to hide in the shower area. He testified that he went to the SMU to talk to Inmate McGlaughlin, who was still hiding, and gave the inmate multiple directives to come to the door and talk to him. Appellant indicated that Inmate McGlaughlin refused to comply and grunted and cursed at him; he noted that he finally told Inmate McGlaughlin that he was going to leave if he did not cooperate, and would return with an extraction team. Appellant stated that he took a few steps away from the cell and Inmate McGlaughlin came to the door; he told him that he was on constant watch and couldn't hide, explained why he was there and told him that he would have to restrain him if necessary to keep an eye on him. Appellant recalled that after Inmate McGlaughlin assured him that he would remain visible, he left the area and returned to the Shift Captain's office.

Appellant indicated that he was called approximately forty-five minutes later and told that Inmate McGlaughlin was hiding in the shower again; he testified that he called Lieutenant Heath and Lieutenant Wright, briefed them on what had happened when he spoke to the inmate and instructed them to get the inmate to comply with his directive to stop hiding. Appellant noted that he authorized a cell extraction team and the use of restraints if necessary.

Appellant confirmed that he told Lieutenant Heath to act as site supervisor for the incident, with Lieutenant Wright advising him as needed. He observed that he did not accompany them to the SMU because it is a standard safety practice at Grafton that all shift supervisors cannot be in one area at the same time and, typically, the shift lieutenants respond to situations such as the one involving Inmate McGlaughlin. Appellant acknowledged that he could have gone in place of Lieutenant Wright, but would not have gone in place of Lieutenant Heath since he was still working at a temporary level at that time and it would have been inadvisable to leave Lieutenant Heath solely in charge of the facility.

He testified that earlier in the evening he had advised Nurse Cindy Laux, the mental health nurse working that shift, about Inmate McGlaughlin's behavior and

indicated that she came over to SMU and talked to the inmate while he was in the safe cell. Appellant stated that there was no crisis or hostage negotiator and no psychiatrist assigned to third shift. He recalled that although Inmate McGlaughlin was not violent, he was verbally and physically uncooperative throughout the evening. Appellant noted that he resisted the initial escort to SMU and moved slowly, refused to strip as instructed, banged his head on the cell, cursed and mumbled, refused to remain visible while in the safe cell, would not come to the cell door when ordered to do so, and otherwise behaved in an erratic fashion. He observed that the inmate had disciplinary issues and was manipulative, misbehaving until the video camera was turned on and then behaving compliantly.

Appellant noted that he was contacted by one of the lieutenants and informed that Inmate McGlaughlin was continuing to struggle and scoot down in the bed after he had been removed from the safe cell and arm and leg restraints were applied; he confirmed that he authorized the addition of a chest strap to prevent the behavior. Appellant observed that he was not able to personally observe the inmate's behavior at that time and relied on the lieutenants' report of the situation.

Appellant recalled that he sent Lieutenant Wright and Lieutenant Heath back to SMU two more times that evening to refasten Inmate McGlaughlin's restraints after he freed his hands. He stated that the final time, which was approximately forty-five minutes before the end of third shift, Lieutenant Wright called and asked if they could put transport mitts on the inmate to keep him from getting his hands out of the restraints. Appellant testified that he authorized the use of the transport mitts and the inmate was compliant for the remainder of the shift.

Appellant confirmed that he initialed the restraint report completed later that evening by Lieutenant Heath and agreed that the form indicates on its face that restraints must not be applied for more than two hours without a physician's approval. He acknowledged that although Appellee's 2007 restraint policy allows restraints to be applied for three hours, both the 2010 and 2012 policies limit the use of restraints without a physician's approval to two hours. Appellant further acknowledged that Appellee's policies state that transport mitts may not be used without pre-approval from the Director of Mental Health Services and agreed that he did not secure that pre-approval prior to authorizing the use of transport mitts on Inmate McGlaughlin. He confirmed that he had received training in 2009 on the use of restraints. Appellant indicated that he referenced the policies kept on a clipboard in the Shift Captain's office, which had apparently not been updated.

Appellant stated that the restraint report indicated that Inmate McGlaughlin was first restrained at 3:36 a.m. He observed that his shift ended at 5:30 a.m.; he testified that he notified the captain and lieutenant coming on for first shift that Inmate McGlaughlin was on constant watch and showed them the reports of the incident. Appellant explained that shifts overlap by thirty minutes, with supervisors coming on duty before correction officers. He speculated that the first shift officers were also not aware of the two hour time limit for restraints, as there would have been an opportunity for them to remove the inmate's restraints either just within the two hour time limit or shortly thereafter.

Appellant testified that at the time of the incident he believed that the events of the evening constituted a single use of force but now understands that they should have been recorded as multiple uses of force, with each occurrence documented separately. He observed that the incident may have been the first time during his tenure that staff were required to strap down an inmate.

Appellant stated that the internal investigation of the incident was not carried out in a timely manner and employee interviews were not conducted while the incident was fresh in their memory. He observed that the incident occurred in November 2011 but the predisciplinary hearing was not held until July 2012. Appellant testified that neither he nor Lieutenant Wright were interviewed by the Use of Force committee and, to his knowledge, Nurse Laux was never contacted to determine whether or not she had gone to the SMU to talk to Inmate McGlaughlin. He further observed that Inmate McGlaughlin refused to make a statement about the incident after coming off constant watch and did not make a statement when later offered an opportunity to do so by the Use of Force Committee.

Appellant acknowledged that he had received prior discipline, specifically an 8-hour suspension and a 16-hour suspension, both imposed in 2010. He indicated that the 8-hour suspension was based on his failure to sign out, misplacing his OC spray and failure to properly document that infraction. Appellant stated that the 16-hour suspension was based on his failure to maintain proper documentation related to the contraband vault.

Appellant confirmed that he received notice of and participated in a pre-disciplinary conference. He acknowledged that he also received a copy of the R.C.

124.34 Order of Reduction, which effectuated his demotion in rank from Captain to Lieutenant.

Michael Wright testified that he has been employed by Appellee at the Grafton Correctional Facility (Grafton) for approximately twenty-three and one half years, and has held the rank of Lieutenant for the past twelve years. He confirmed that he was working third shift on the evening of November 16, 2011, and Appellant was the Shift Captain that night.

Lieutenant Wright recalled that he was sitting in the common area outside the Shift Captain's office (the "bubble") shortly after midnight on November 16, 2011, when Inmate McGlaughlin was brought to the Shift Captain's office. The witness recalled that Inmate McGlaughlin was brought to the Captain's Office because he had violated the inmate code of conduct by exposing himself to a female Corrections Officer; he stated that Appellant talked to the inmate, explaining why he was there and trying to get him to answer the questions on the suicide questionnaire (5404), but the inmate refused to answer. Lieutenant Wright explained that because Appellant could not determine whether or not the inmate intended to harm himself, he directed the officers in the area to take the inmate to the Special Management Unit (SMU) and begin the process of placing him in isolation.

The witness confirmed that he and Officer Gribble escorted Inmate McGlaughlin to the SMU. Lieutenant Wright observed that the inmate was handcuffed and did not physically resist the escort. He stated that he and Officer Gribble continued to try to get the inmate to answer the questions on the 5404 but he only mumbled and cursed and was generally uncooperative. Lieutenant Wright recalled that he and Officer Gribble placed Inmate McGlaughlin in a strip cage when they got to the SMU and noted that inmates must be strip searched before they are placed in isolation. The witness indicated that when Inmate McGlaughlin's cuffs were removed he put his hands inside his pants and refused to remove them so that they were visible.

Lieutenant Wright testified that he called Appellant to notify him of Inmate McGlaughlin's actions and, as he was turning back from the desk, he observed the inmate strike his head against the wall of the strip cage. He noted that in order to ensure that Inmate McGlaughlin did not continue to harm himself, he entered the strip cage and pulled Inmate McGlaughlin out. The witness indicated that he called Appellant a second time to report that the inmate had struck his head and his

resulting use of force; while he was talking to Appellant, the other officers present removed the inmate's clothing and gave him a blue hospital-type gown and a blanket.

Lieutenant Wright stated that Inmate McGlaughlin was placed in an observation cell and his restraints were removed. He noted that Officer Lopez was assigned constant watch duty and indicated that he returned to the bubble to complete and submit his Use of Force report.

The witness stated that Appellant sent him back to the SMU with Lieutenant Heath later that evening after they were notified that Inmate McGlaughlin was hiding from Officer Lopez in the shower area of the safe cell. He recalled that Lieutenant Heath was the site supervisor on their second trip to the SMU because the witness had already been involved in a Use of Force with Inmate McGlaughlin earlier that evening. Lieutenant Wright stated that their purpose in going back to SMU was to get Inmate McGlaughlin to remain visible in the cell so that Officer Lopez could be sure that he was not harming himself; he noted that although several officers talked to him, the inmate refused to stay in sight. The witness stated that Appellant had directed them to assemble a cell extraction team and implement a Planned Use of Force to remove Inmate McGlaughlin from the observation cell if necessary and restrain him to ensure that he stayed in sight of the constant watch officer.

Lieutenant Wright testified that Inmate McGlaughlin was removed from the observation cell and moved to a different isolation cell in the SMU, where he was restrained with ankle and wrist restraints. He observed that because the inmate continued to move around after the ankle and wrist restraints were applied, a strap was also placed across his chest. The witness recalled that the inmate and the officers involved in the cell extraction team were checked by medical staff and decontaminated, and he returned again to the common area outside the Shift Captain's office.

Lieutenant Wright testified that Appellant sent him back to the SMU a third time that evening after he was notified that Inmate McGlaughlin had freed himself from his restraints. He recalled that Lieutenant Heath served as site supervisor again and that the responding officers tightened Inmate McGlaughlin's restraints, had the restraints checked by medical staff to make sure they were not too tight and left the area. The witness stated that when the inmate freed himself a second time, he and the other officers were called to the SMU again. Lieutenant Wright observed

that because Inmate McGlaughlin was still trying to get out of the restraints he suggested to Appellant they use transport mitts to keep him from freeing his hands a third time; he noted that the transport mitts are soft leather mitts with adjustable straps at the wrists. The witness stated that Appellant approved the use of the transport mitts and he was not aware that any other approval was needed to use them.

Lieutenant Wright recalled that there were no more calls regarding Inmate McGlaughlin that night. The witness testified that, to his knowledge, neither Inmate McGlaughlin nor any of the officers who interacted with him that evening were injured. He further testified that he did not believe any excess or inappropriate force was used on Inmate McGlaughlin. Lieutenant Wright stated that his shift ended at 5:30 a.m. and he was not present when the inmate's restraints were removed, but noted that he advised his first shift relief what had happened on third shift. He confirmed that when he reviewed Appellee's policy on restraints he saw that they could only be applied for three hours.

Lieutenant Troy Heath testified that he is presently employed by Appellee at the Grafton Correctional Facility and has worked for Appellee for approximately fourteen years. He stated that Appellant is currently his direct supervisor on second shift. The witness confirmed that he was working on third shift on November 16, 2011, and stated that he held the rank of Lieutenant at a temporary work level at that time.

Lieutenant Heath recalled that Appellant called him to the Shift Captain's office that evening and instructed him to go to the SMU to assist in dealing with Inmate McGlaughlin. He stated that he was told by Appellant that the inmate was misbehaving and that it was necessary to put him in a safe cell on constant watch because he had refused to answer the questions on the suicide questionnaire.

The witness confirmed that Inmate McGlaughlin was uncooperative, but not violent, and stated that the inmate was put in a hospital gown by the assisting officers, escorted to a safe cell and placed on constant watch. Lieutenant Heath indicated that he returned to the Shift Captain's office after the escort was completed.

The witness recalled that Appellant went to the SMU later that evening when he was advised that Inmate McGlaughlin was hiding in the safe cell and could not

be observed by the officer assigned to constant watch duty. He testified that although Appellant had instructed the inmate to comply with orders to remain visible he failed to do so and Appellant instructed the officers on shift, including him, to assemble an extraction team and restrain the inmate to prevent him from harming himself. Lieutenant Heath observed that there are places in all of the safe cells, including those in the Medical area, where an inmate can hide if he is determined to do so.

Lieutenant Heath stated that he acted as site supervisor for the cell extraction. He noted that he had not been involved in a cell extraction before and Lieutenant Wright advised him on how to proceed. The witness recalled that he gave Inmate McGlaughlin a directive to remain visible, but when Inmate McGlaughlin refused to comply, Lieutenant Wright told him to deploy OC (pepper spray); the extraction team then entered the cell, cuffed Inmate McGlaughlin and brought him out of the cell. The witness stated that the inmate was decontaminated by medical staff and placed in a different cell, with five-way restraints applied.

Lieutenant Heath confirmed that he left the area after Inmate McGlaughlin had been initially restrained, but returned to the SMU two more times that evening when Inmate McGlaughlin freed himself from the restraints. He noted that they finally ended up putting transport mitts on the inmate's hands to keep him from getting his arms out of the restraints. The witness testified that staff used the minimum amount of force possible at each step of the incident.

Lieutenant Heath stated that his shift ended at 5:30 a.m and he was not present when Inmate McGlaughlin was released from his restraints. The witness stated that he looked at the policy on restraints in the medical handbook and saw that they were not to be applied for more than three hours. He observed that some time after he read the policy the medical handbook was removed and he has been made aware that the policy is now two hours. The witness also noted that he became aware after the incident that the use of transport mitts has to be authorized by mental health staff.

Bennie Kelly testified that he has served as Warden at Grafton since July 2012 and has been employed by Appellee for approximately twenty-eight years. He explained that Grafton is a minimum to medium-security facility and that Uses of Force at Grafton are infrequent; the witness estimated that there are typically only five or six instances per year.

Warden Kelly stated that when he became Warden at Grafton he was made aware of the November 2011 incident involving Inmate McGlaughlin. He noted that the investigation had been completed but the disciplinary process was still ongoing.

The witness confirmed that he was not at Grafton at the time the incident occurred and was not there at the time the investigation took place; he agreed that typically the incident would have been referred to a Use of Force committee before it was assigned to an investigator. Warden Kelly acknowledged that the incident was not dealt with in a timely manner as per Appellee's policies and stated that the matter should have been concluded by December 2011 or January 2012.

The witness recalled that when he reviewed the matter in July 2012 he looked at the investigator's report, along with Appellant's work record and the rest of the information contained in the pre-disciplinary packet. Warden Kelly testified that he also reviewed the cell extraction recording prior to making a determination as to what level of discipline was most appropriate.

The witness indicated that he chose to demote Appellant rather than terminate his employment primarily due to Appellant's years of service. He noted that Appellant had previously been disciplined for failure to follow policy and explained that, as Shift Captain, Appellant had a responsibility to maintain control of the facility in his absence and to ensure that staff follow Appellee's policies and procedures. Warden Kelly testified that he considered Appellant's role in the incident and the severity of the incident in determining what discipline was most appropriate.

Warden Kelly stated that Appellant was charged with a violation of Rule 27, failure to properly supervise or enforce work rules, related to inaccuracies in submitting Use of Force documentation, improperly carrying out a planned use of force (cell extraction), applying restraints for more than the permissible time period, improper use of restraints; and with a violation of Rule 50, specifically incompetency. Warden Kelly testified that Appellant should have been more involved with the process and should have been aware of the current policies.

Warden Kelly agreed that much of the video he reviewed was recorded after the inmate was under forced compliance; he stated that in his judgment the force used was excessive. He stated that the shift captain is responsible for making sure that the videotape and other documentation for uses of force are complete. The witness observed that, based upon his review, he believed that there were a

number of opportunities throughout the evening when Appellant could have intervened in the situation but did not do so. Warden Kelley confirmed that he was aware that Appellant had personally visited the inmate.

Brandeshawn Harris testified that she has been employed by Appellee for approximately seventeen and one-half years. She indicated that she currently holds the position of Deputy Warden of Special Services at Trumbull Correctional Institution and previously held the position of Correctional Warden Assistant 2. Ms. Harris confirmed that she handled the administrative investigation of the November 16, 2011, incident and recalled that then-Warden Clipper requested that an individual from outside Grafton be assigned to the investigation.

The witness recalled that she reviewed the Use of Force committee's report and findings, the Quality Assurance review and the video recording of the incident prior to scheduling employee interviews. She confirmed that she completed an investigative report and submitted it to Warden Clipper. Ms. Harris stated that, as a result of the information gathered during her investigation, she concluded that Appellant had failed to properly supervise and testified that, in her opinion, multiple uses of force would not have been necessary if Appellant had intervened during the process.

Ms. Harris testified that she considered each incident to constitute a separate use of force that should have been properly video recorded and documented; she stated that at least four distinct uses of force took place on November 16, 2011. She noted that she observed multiple errors in the video recordings she reviewed, including improper escort techniques, improper procedures utilized during the cell extraction, unnecessary deployment of OC, failure to properly use restraints, failure to contact mental health personnel before applying restraints and failure to record the entire incident. The witness observed that the witness statements she collected were inconsistent and Appellant failed to have witnesses write statements at the time of the incident to be included in the Use of Force packets.

Ms. Harris testified that when she reviewed the video recordings she observed an inmate who was physically compliant and not resisting officers. She stated that she determined that the inmate's restraints were used as punishment and were left on for longer than the two-hour time limit allowed for by Appellee's policies.

Lloyd Brownlee testified that he is currently employed by Appellee at Grafton Correctional Facility. He indicated that he holds the rank of Captain and has been employed by Appellee since 1990. Captain Brownlee confirmed that he was not Appellant's supervisor at the time of the incident upon which resulted in Appellant's reduction in position and was not present at the facility when the incident took place.

Captain Brownlee stated that he discussed the incident with Lieutenant Heath and viewed the DVD but had no official involvement with the investigation of the matter or with the resulting disciplinary process. He testified that from his understanding of events, he believed that Appellant followed protocol in handling the incident.

Brett Langston testified that he is presently employed by Appellee as a medical nurse at Grafton Correctional Facility. He indicated that he has been employed by Appellee for approximately fourteen years. The witness confirmed that he was working on third shift on November 16, 2011, and was present when security restraints were placed on Inmate McGlaughlin.

Mr. Langston noted that he had only participated in the application of security restraints one or two times prior to that incident and recalled that he reviewed the security restraint policy immediately before the incident to be sure he was familiar with his role and followed procedures properly. The witness testified that the policy he reviewed that evening indicated that the restraints could be left on for no more than three hours; he stated that he viewed the policy on the computer and printed it out so that all of the individuals participating in the situation could read it. Mr. Langston recalled that he had to search Appellee's intranet to find the policy. He indicated that the policy was dated 2001, but could not recall the specific policy number.

The witness confirmed that he decontaminated Inmate McGlaughlin after he was sprayed with OC and before he was placed in restraints. He stated that he checked the restraints to be sure they were applied properly and took the inmate's vital signs. Mr. Langston testified that Appellee's policy required staff to call a psychiatrist as part of the security restraint process but stated that there were no psychiatrists available on third shift at Grafton that evening. He recalled that they called Cindy Laux, a mental health nurse who was working that evening, and she came over to the SMU and talked to the inmate.

Todd Gill testified that he has been employed by DRC for fourteen years and has worked at Grafton for the last thirteen years. He confirmed that he was working third shift on November 16, 2011, and recalled that he and Mr. Langston reviewed the security restraint policy that evening. The witness stated that the policy he reviewed was in the medical policy book, which is a three-ring binder kept in their work area for reference and maintained by the Health Care Administrator. Mr. Gill indicated that he did not recall the policy number or effective date of the restraint policy that he reviewed, but stated that it indicated a prisoner could be kept in restraints for three hours. He observed that the policy has changed since the time he reviewed it and now allows restraints for only two hours.

FINDINGS OF FACT

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

Appellant has been employed by Appellee at Grafton for approximately twenty-four years and currently holds the rank of Lieutenant. He held the rank of Captain from 1996 until his reduction in 2012, and in November 2011 was assigned to the post of Shift Commander on third shift. Appellant was responsible for facility security, facility operations and staff supervision on third shift. He was responsible for enforcing Appellee's policies and procedures, and had been trained on those policies and procedures. Appellant received training on the use of restraints in 2010 and use of force in 2011.

On November 16, 2011, Appellant was assigned to the post of Shift Commander on third shift; Michael Wright and Troy Heath were the shift lieutenants that evening, with Lieutenant Heath serving in a temporary work level. Appellant was notified around midnight that Inmate McGlaughlin had violated the inmate code of conduct. He requested that the inmate be transported by an available yard officer to the Shift Captain's office and several officers subsequently responded.

As a consequence of his behavior, Appellant directed that the inmate be sent to segregation and prepared the required paperwork. Because the inmate was unresponsive and refused to answer the mandatory questions on the suicide questionnaire, Appellant recorded an affirmative response to the questions and placed the inmate on constant watch.

Lieutenant Wright and Officer Gribble escorted Inmate McGlaughlin to segregation, with several other officers joining them in the SMU. Inmate McGlaughlin continued to be uncooperative during the escort and after being placed in the SMU strip cage, he refused to disrobe, putting his hands in his pants so they were not visible. The inmate purposely struck his head against the cell and Lieutenant Wright removed him from the strip cage in order to prevent the inmate harming himself and to gain compliance with the instruction to disrobe. Lieutenant Wright contacted Appellant after removing the inmate to notify him of his actions.

Although there was no crisis or hostage negotiator assigned to third shift, Appellant advised Mental Health Nurse Cindy Laux about Inmate McGlaughlin's behavior; she talked to the inmate while he was in the SMU safe cell. Later that evening Appellant was notified that Inmate McGlaughlin was hiding in the shower area inside the safe cell and could not be observed, as required for constant watch. Appellant went to the SMU and gave the inmate multiple directives to come out of the shower area but Inmate McGlaughlin refused to comply. As Appellant was leaving, the inmate came to the door and Appellant told him that he had to remain visible, explaining that if he did not do so Appellant would return with a cell extraction team and the inmate would be restrained to make sure he stayed in sight. The inmate agreed to remain visible and Appellant returned to the Shift Captain's office.

Shortly thereafter, Appellant was notified that Inmate McGlaughlin was hiding in the shower again; Appellant instructed the shift lieutenants to gain the inmate's compliance, using a cell extraction team and restraints if necessary. The responding officers first attempted to gain compliance through verbal directives, but were unsuccessful. A cell extraction team removed the inmate from the safe cell.

Following the cell extraction, the inmate and the participating officers were decontaminated by medical staff and the inmate was placed in a second safe cell. After applying arm and leg restraints, the shift lieutenants advised Appellant that Inmate McGlaughlin was continuing to struggle and scoot down in the bed. Appellant authorized the addition of a chest strap to Appellant's restraints to prevent this behavior. The inmate was initially placed in restraints at approximately 3:30 a.m., with security instructions to remain in restraints for three hours.

Appellant dispatched the shift lieutenants to the SMU two more times that evening after Inmate McGlaughlin freed his hands from the restraints. The final time the lieutenants applied the inmate's restraints was approximately forty-five minutes before the end of third shift. Appellant authorized the additional use of transport mitts at that time to prevent the inmate's further escape from the arm restraints, but did not obtain prior authorization from any medical or mental health staff to use the transport mitts.

Appellee's 2007 restraint policy allows restraints to be applied for three hours without a physician's approval; both the 2010 and 2012 policies limit the use of restraints to two hours. Appellee's policies require pre-approval from the Director of Mental Health Services prior to the utilization of transport mitts.

The officers involved in Inmate McGlaughlin's initial escort to the Shift Captain's office and placement in segregation completed incident reports detailing the Use of Force, which were included in the Use of Force packet submitted by Appellant. Some of the officers involved in the cell extraction and restraint of the inmate completed incident reports regarding that Use of Force. Not all of the officers present completed or submitted statements and no incident reports were completed to memorialize the additional two times officers were called to reapply the inmate's restraints after he freed his hands.

Appellant notified the Captain and Lieutenant coming on for first shift that Inmate McGlaughlin was on constant watch and showed them the incident reports. Inmate McGlaughlin was released from restraints by first shift officers at approximately 6:37 a.m.

Appellant confirmed that he received notice of and participated in a pre-disciplinary conference. He acknowledged that he also received a copy of the R.C. 124.34 Order of Reduction, which effectuated his demotion in rank from Captain to Lieutenant, effective September 5, 2012.

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 reduction was based upon Appellant's alleged failure to follow policies and procedures, failure to properly supervise or enforce work rules and incompetency; all of these alleged violations occurred as part of use of force incidents which took place on November 16, 2011. Testimony and evidence established that Appellant had received and was familiar with Appellee's Standards of Employee Conduct. It was further established that Appellant had received training on the use of restraints in 2010, and Use of Force training as recently as 2011, including information on properly reporting a Use of Force.

Appellee alleged at record hearing that Appellant acted improperly by not excluding Officer Manuel Brillon from the officers responding to incidents involving Inmate McGlaughlin on the evening of November 16, 2011; the inmate's initial conduct violation involved Officer Brillon's wife. Appellee presented no evidence to establish that it had a specific policy, procedure, or work rule requiring Appellant to do so, therefore, I find that his failure to exclude Officer Brillon did not constitute a policy or procedure violation, a failure to enforce work rules or a failure to supervise upon which discipline may be based.

Appellee further alleged at record hearing that Appellant was deficient in his role as Shift Commander because he tasked Lieutenants Wright and Heath with responding to the majority of the situations arising from Inmate McGlaughlin's behavior rather than handling the matters personally. No evidence was presented to establish that Appellee's policies, procedures or work rules required Appellant to personally respond to each occurrence and Appellee did not refute Appellant's testimony that it was standard practice to delegate such duties to the shift lieutenants. Similarly, no testimony was offered to rebut Appellant's assertion that he did not accompany the lieutenants to the SMU because it was accepted practice within the facility that all three shift supervisors not be in one area at the same time.

I find that Appellant did not violate an established policy or procedure by assigning Lieutenants Wright and Heath to respond to the incidents involving Inmate McGlaughlin or by failing to personally respond to each incident. Both Lieutenant Wright and Lieutenant Heath were assigned to work as shift supervisors that evening. Although Appellee alleged a failure to supervise based upon improper techniques used during the cell extraction process, there was no requirement that Appellant, as Shift Commander, be present to personally direct their actions; Lieutenants Wright and Heath were responsible as site supervisors to oversee the cell extraction process, and I find that Appellant's failure to accompany them and/or personally direct their actions as they responded to the incidents did not constitute a failure to supervise or to enforce work rules.

Appellee also alleged that Appellant improperly chose to place Inmate McGlaughlin in the SMU for constant watch rather than a cell in the medical area, which might have prevented the inmate from hiding from the Officer on constant watch duty. Appellee presented no policy, procedures, work rules or other guidelines dictating a specific location in which inmates on constant watch were required to be housed. Accordingly, I find that Appellant's decision to place the

inmate in a safe cell in the SMU did not constitute a policy or procedure violation, a failure to enforce work rules or a failure to supervise upon which discipline may be based.

Appellee alleged in the R.C. 124.34 Order of Reduction and at record hearing that the force authorized by Appellant to be used on Inmate McGlaughlin was inappropriate and that Appellant's authorization of restraint mitts violated policy. Testimony and evidence admitted at record hearing demonstrated that Appellee's policies and procedures provide that force may be used when necessary to control an inmate who refuses to obey prison rules, regulations or orders, if no other means of obtaining compliance has been effective. Testimony further established that force was used on Inmate McGlaughlin on at least four occasions during the course of the November 16, 2011, incidents: the inmate's removal from the SMU strip cage, the inmate's extraction from the SMU safe cell and initial placement in five-way restraints, the first reapplication of restraints, and the second reapplication of restraints with the addition of transport restraint mitts.

Upon a review of the testimony presented and evidence admitted, I find that Appellant did not authorize the initial use of force against Appellant and was neither present to witness nor involved in the initial use of force. Appellant was notified by Lieutenant Wright after the fact that force had been used to remove the inmate from the safe cell in order to prevent him from further striking his head and to gain compliance with orders to make his hands visible and disrobe.

After personally observing and instructing Inmate McGlaughlin to remain visible, Appellant did authorize Lieutenants Wright and Heath to assemble a cell extraction team and restrain Inmate McGlaughlin with four-way restraints when the inmate later failed to comply. Given the inmate's consistent refusal to remain visible, an extraction and the application of physical restraints to ensure that he stayed in sight of the constant watch officer was reasonable and appropriate. As on-site supervisors, Lieutenants Wright and Heath used their discretion in determining whether or not it was necessary to implement the use of force. Appellant authorized the addition of a chest strap as a fifth point of restraint only after receiving information from the lieutenants that the inmate was continuing to resist by scooting down in the bed; Appellant's authorization of the chest strap to prevent such behavior was both reasonable and appropriate.

Per Appellee's policies, Appellant had attempted to address Inmate McGlaughlin's overall behavior through less restrictive interventions prior to authorizing the cell extraction and use of restraints. Although no crisis or hostage negotiator was on duty on third shift, testimony and evidence established that Appellant directed Mental Health Nurse Laux to attempt to de-escalate Inmate McGlaughlin's behavior by talking with him; Appellant also directed initially that the inmate be placed in a crisis cell without restraints. In addition, Appellant personally observed and interacted with Inmate McGlaughlin prior to authorizing the use of restraints.

Although the use of transport mitts as a restraint mechanism is not *per se* inappropriate, Appellant clearly failed to obtain the required pre-approval of the Clinical Services Director or designee of the Bureau of Mental Health Services prior to authorizing their use on Inmate McGlaughlin. This failure constitutes a policy violation.

Testimony and evidence presented at record hearing also indicate that Appellant failed to ensure that each of the Uses of Force were documented by all of the officers who were involved in and/or witnessed the Uses of Force, failed to ensure that all of the relevant forms were included in the packet, and/or failed to direct Lieutenant Wright or Lieutenant Heath to obtain the necessary documentation. Appellant's conduct constitutes both a policy violation and a failure to properly supervise.

Finally, Appellee alleges that Appellant violated policy and procedures by leaving Inmate McGlaughlin in restraints for longer than two hours without medical authorization. It is undisputed that Inmate McGlaughlin was first placed in restraints at approximately 3:36 a.m., and that first shift officers removed his restraints approximately three hours later. Although third shift officers reapplied Inmate McGlaughlin's restraints twice during that time after he freed his hands, no evidence was presented to demonstrate that the restraints were completely removed prior to 6:37 a.m. I find that Appellant's failure to remove Inmate McGlaughlin from restraints within a two-hour time period or to direct staff to remove the inmate from restraints constitutes both a violation of Appellee's policies and procedures and a failure to properly supervise.

Therefore, I find that Appellee has met its burden of proof with regard to the allegations that Appellant failed to follow policies and procedures, and failure to

properly supervise or enforce work rules in that Appellant improperly authorized the use of transport mitts as a restraint, Appellant failed to submit a complete Use of Force packet and Appellant failed to ensure that Inmate McGlaughlin was removed from restraints within a two-hour time period. It is my determination that Appellant's conduct was not sufficient to constitute incompetency, as referenced by Appellee's work rule 50 and R.C. 124.34.

In evaluating whether or not the discipline imposed upon Appellant was an appropriate response by Appellee, several factors are worthy of note. Appellant is a 24-year employee of Appellee with minimal prior discipline, consisting of an 8-hour suspension and a 16-hour suspension. Testimony established that Uses of Force were a rare occurrence at Grafton, with Appellant indicating that he had not previously been involved in a Use of Force as Shift Commander, and that it was also the first time during his tenure that staff were required to strap down an inmate. The record also contains evidence demonstrating that the majority of the other individuals involved in the events of November 16, 2011, received written reprimands, with the most stringent disciplinary action being taken against Lieutenant Wright, who received a forty-hour fine as a result of his alleged conduct.

Upon a review of all of the information contained in the record, and in consideration of the limited number of allegations proven by Appellee at record hearing, I find that a reduction in rank from Captain to Lieutenant was too harsh a disciplinary response to Appellant's conduct. Therefore, I respectfully **RECOMMEND** that Appellant's discipline be **MODIFIED** to reflect a temporary reduction in rank from Captain to Lieutenant, and that Appellant be reinstated to the rank of Captain as of the date of this Board's Final Order.


Jeannette E. Gunn
Administrative Law Judge

JEG: