

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

JODY SPARKS,

Appellant,

v.

Case No. 12-REM-05-0075

DEPARTMENT OF REHABILITATION AND CORRECTION,
LEBANON CORRECTIONAL INSTITUTION,

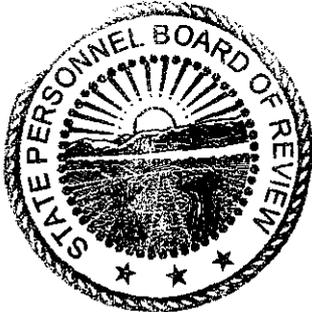
Appellee.

ORDER

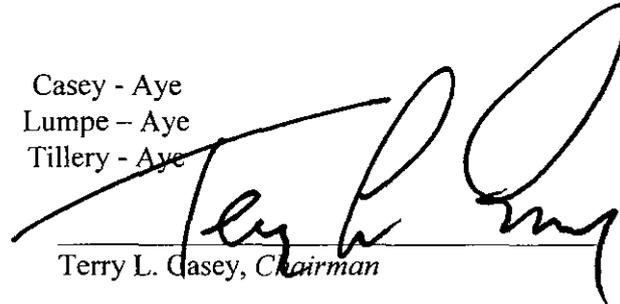
This matter came on for consideration on December 19, 2012, upon Appellee's December 17, 2012 timely filing of a Motion for Reconsideration.

Having thoroughly reviewed Appellee's Motion for Reconsideration, the Board finds no reason to set aside its final Order issued on December 5, 2012.

Wherefore, it is hereby **ORDERED** that the final Order issued in this matter on December 5, 2012 **STANDS AS ISSUED**.



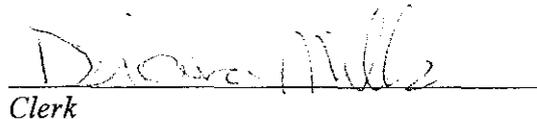
Casey - Aye
Lumpe - Aye
Tillery - Aye


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 the foregoing is ~~(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, December 19, 2012.


Clerk

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

12-19-12

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

JODY SPARKS,

Appellant,

v.

Case No. 12-REM-05-0075

DEPARTMENT OF REHABILITATION AND CORRECTION,
LEBANON CORRECTIONAL INSTITUTION,

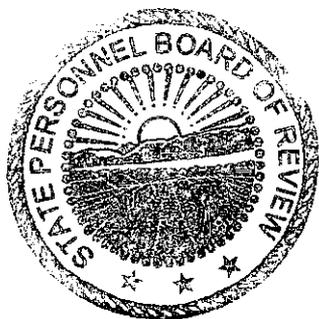
Appellee

ORDER

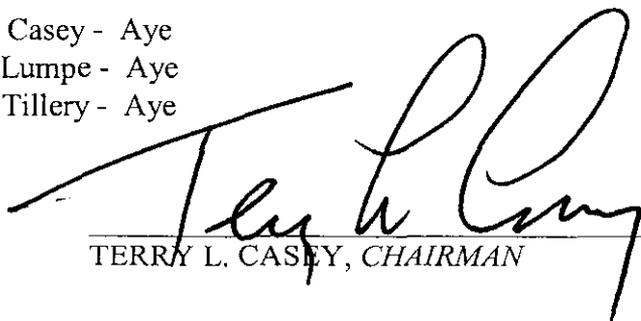
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and 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 removal from the position of Correctional Lieutenant be **DISAFFIRMED**, pursuant to O.R.C. §§ 124.03 and 124.34.



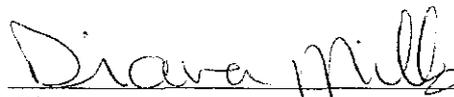
Casey - Aye
Lumpe - Aye
Tillery - Aye


TERRY L. CASEY, CHAIRMAN

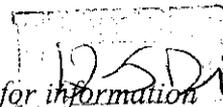
CERTIFICATION

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, December 5 2012.


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**

JODY SPARKS,

Case No. 12-REM-05-0075

Appellant

v.

September 17, 2012

DEPARTMENT OF REHABILITATION AND CORRECTION,
LEBANON CORRECTIONAL INSTITUTION,

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on August 30, 2012 and August 31, 2012. Present at hearing was Appellant, who appeared *pro se*. Appellee, Department of Rehabilitation and Correction (DR and C), was present through its designee at Day 1, Tim Brunzman, former Warden of the Lebanon Correctional Institution (LCI), and was represented by Timothy M. Miller, Assistant Attorney General. Also present for Appellee was Amy Parmi, DR and C Counsel.

This cause comes on due to Appellant's June 1, 2012 filing of a notice of appeal from his removal from the position of Correctional Lieutenant (Lt.) at LCI. Appellant received the instant R.C. 124.34 Order of Removal (*but only Page 1 of that Order*) on April 6, 2012 and the Order was effective on April 6, 2012.

On June 8, 2012, Appellee filed Appellee's Response to Appellant's Notice of Appeal. Because Appellee did not provide Appellant with the second page of his Order, Appellee did not contest that Appellant had timely filed the instant appeal. *Further, the undersigned finds that this Board's filing provisions contained in O.A.C. 124-1-03 (I) mandate that Appellant's appeal was timely filed with this Board.*

On August 7, 2012, a pre-hearing was held in this matter. During the pre-hearing, potential witnesses were identified, the procedures for hearing were reviewed with the parties, and various other procedural posture matters were discussed with the parties, including the history of this case. Appellant also offered,

on the record, extensive thought on the history of this case and on the process that led up to the pre-hearing.

Thereafter, on August 10, 2012, Appellant requested the service of approximately 19 subpoenas, which request was granted. On August 17, 2012 Appellee moved to exclude some of those witnesses. On August 24, 2012, Appellant fax filed a response to Appellee's request. Further on August 24, 2012, Appellee's request was granted in part and denied in part, with Appellant being allowed all but five of his 19 requested witnesses.

Unfortunately, a number of Appellant's subpoenas (that Appellee agreed to receive and then serve on a number of Appellant's potential witnesses at LCI) either did not arrive at LCI or otherwise became diverted and were never served. Nonetheless, Appellee attempted to make available, where possible, those of Appellant's witnesses who were present at work and were available to testify at hearing.

It should be noted that counsel for Appellee and that Appellant, appearing *pro se*, both performed well in the hearing. Both did a fine job in presenting a variety of complex testimonial and documentary evidence and in offering cogent and meaningful opening statements and closing arguments.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03, R.C. 124.34, and O.A.C. 124-1-03 (I).

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The pertinent R.C. 124.34 Order of Removal states, in pertinent part:

The reason for this action is that you have been guilty of Standards of Employee Conduct Rules 7 – Failure to follow post orders, administrative regulations, policies or directives; 24 – Interfering with, failure to cooperate in, or lying in an official investigation or inquiry; 27 – Failure of a supervisor to properly supervise or enforce work rules or the failure to properly process employee payroll forms; 40 – Use of

excessive force toward any individual under the supervision of the Department or a member of the general public. 50 – Any violation of ORC 124.34 - ... and for incompetency, inefficiency, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such section 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 February 19, 2012, you responded to a disturbance in C-block as the supervisor in charge. Under your directive, Officers B. Traud, J. Murray and D. Brewer responded with you. Inmate Adams was making threats to fight any officer who entered the cell. You ordered the cell door opened. Force was used on Inmate Adams. The Use of Force Committee determined that the force was not justified and was excessive. You failed to follow policies, failed to properly supervise staff and were untruthful in your reports, statements and interviews regarding this incident. Your actions are unacceptable and will not be tolerated.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant's background

First to testify at hearing was Jody Sparks, Appellant. Appellant was first called as if on cross examination by Appellee. Later, he offered his direct and re-direct examination testimony during his case-in-chief.

Appellant served with DR and C for more than 14 years, and, as of his removal date, was serving as a Correctional Lieutenant at LCI. Appellant had a disciplinary record that, prior to his removal, contained a Written Reprimand.

Appellant was named as the LCI Corrections Officer of the Year for 2011, prior to his promotion to Lt. Further, Appellant was named: in March, 2004 as the LCI Fourth Shift Corrections Officer of the Year; in April 2004 as the LCI Employee of the Month; and in March 2010 as the LCI Employee of the Month.

General Background

On the day in question (**February 19, 2012**), Appellant was serving as Lt. on a shift and responded to a call from a subordinate that a disturbance was occurring on C-block that likely required his attention. The disturbance involved Inmate Adams, who, the record reflects, was often disruptive and had previously attempted to remove a portion of his interior cell wall. The record reflects that Inmate Adams may have also engaged in other fights with inmates at LCI and was, on February 19, 2012, in a single-inmate cell.

On this particular day, Inmate Adams continued to render his cuff port/pass-through in his cell door open or inoperable; by kicking it open, despite repeated orders from staff present to cease this activity. Inmate Adams' repeated kicking of his cell door was causing a disturbance on the block that was likely to be picked up and repeated by other inmates on the block, causing a general disturbance to the good order of the block.

When Appellant came to C-block, he brought three COs with him, in case they were needed to manage the behavior of Inmate Adams. Appellant's responses to interview questions from his March 13, 2012 interview indicate that, when Appellant arrived at Inmate Adams' cell, Inmate Adams was threatening to fight all the officers present individually. Appellant stated to Inmate Adams that to fight Inmate Adams was not Appellant's purpose and that Appellant's purpose was to calm Inmate Adams down and remove him from the block.

Testimony from all observers, who actually witnessed the pertinent interactions that day with Inmate Adams and who subsequently testified at hearing, was that Inmate Adams had his mattress up to the window and/or in front of himself and could not be adequately observed from the window in his cell door. Testimony was also presented that this prevented Appellant or other staff from utilizing a chemical agent to subdue Inmate Adams.

Contained within Appellant's Incident Report and within his statements is Appellant's assertion that, since he could not see Inmate Adams and since Inmate Adams was refusing to comply with orders, the personal safety of Inmate Adams at this point could not be ensured and Appellant made an on-the-scene decision to lead a team into Inmate Adams cell to secure his person. The testimony, statements, and responses from all witnesses present with personal knowledge who

also testified at hearing was that, despite repeated instructions from Appellant to cease his kicking of the door and to place his hands in the port to be cuffed, Inmate Adams, who was yelling about his food tray, refused to comply and continued to use the mattress to fully or partially block the view of staff.

At this point, Appellant ordered the cell door to be opened and Duty CO Bowling unlocked and opened the cell door. Here, in particular, is where Appellant's recitation and also that of his witnesses diverge from two inmates' statements and from what DR and C asserts happened next.

Appellant and his witnesses with knowledge have testified that, when the door to the cell opened, following a short pause where Appellant again tried to talk Inmate Adams in to complying, Adams threw/directed the mattress at Appellant with Adams' left hand and attempted to strike Appellant with Adams' right hand in a closed fist.

Conversely, Appellee asserts that Inmate Adams was "surrendering" or "submitting" by placing his hands behind his back with his arms rotated and that, instead of cuffing him, Appellant pushed him back into his cell. Appellee does not necessarily posit a specific view on what happened thereafter in Inmate Adams cell, but that Adams was pushed back into his cell where some type of force occurred.

Appellant's consistent reports and statements and those of multiple statements of witnesses present who testified at hearing indicated that Appellant reiterated his order to Inmate Adams to drop his mattress and place himself against the wall of his cell for cuffing. Adams did back up to or near the cell wall and began to engage in a brief conversation with Appellant but then threw the mattress at Appellant and attempted to strike Appellant with a balled right hand.

Appellant eluded Inmate Adams' attempted strike and pushed/[placed Inmate Adams on his bunk for cuffing. Inmate Adams was still resistant and still refused to show his hands, so Appellant gave Inmate Adams an elbow strike to the shoulder to free up Adams' hands. Adams attempted to kick Appellant and CO Randy Brewer subdued Adams' legs.

Eventually, cuffs were applied to Inmate Adams and he was escorted to Medical (*i.e.* the Infirmary). Unfortunately, on the way, Inmate Adams continued to be combative and resistant, attempting to garner disruptive support from a

contingent of the Aryan Brotherhood in nearby cells and pulling away from his escort. Adams was taken to the floor where a PR-24 baton escort technique was used to pick up Adams and finish the escort to Medical.

Inmate Adams' Medical Exam Report indicates (per Appellee's Exhibit 11) that Adams presented with a "Left corner eye bruise, right eye red, multiple scratches on back, large bruise right clavicle, and multiple scratches on chest. No other injuries noted."

Because no double-door cell was available at that time to house Inmate Adams, following his medical evaluation he was returned to his cell in C-block. Inmate Adams did not file any contemporaneous complaint about the process that had occurred concerning the pertinent events of February 19, 2012.

On **February 16, 2012**, Inmate Adams had been involved in another use of force, wherein another (earlier) Medical Exam had been conducted and a Medical Exam Report completed, noting corresponding injuries incurred by Inmate Adams.

Kevin Wulff's Incident Report

However, approximately four days after the February 19, 2012 incident, on **February 23, 2012**, Inmate Adams conversed with/was interviewed by Kevin Wulff, a Psychology Assistant 2. Here, Inmate Adams first alleged that Appellant's team used a high level of unauthorized force and used unapproved fighting techniques on Adams, causing him to evacuate and to pass out in his cell. These techniques included allegedly stomping on his penis and CO Murray choking him with a PR-24 baton. Further, according to Adams, he was then dragged to the Infirmary, where a "white shirt" [the uniform shirt worn by Corrections Lieutenants], identified by Adams as Appellant, ordered the Infirmary Nurses to clear out and Adams' beating continued.

Accordingly, Mr. Wulff completed an Incident Report and submitted it to the Deputy Warden of Operations.

CO Randy Elbert

Mr. Wulff's report also notes that Inmate Adams alleges that CO Randy Elbert approached Inmate Adams with two kites and two informal complaints, saying he

had been told not to give Adams anything but that he (Elbert) would come forward as a witness because he had seen what happened. However, again accordingly to Adams (as reported in Mr. Wulff's document), the paperwork was taken from him (presumably Elbert) later.

It is noted that CO Elbert testified at hearing and neither party to this matter examined him on this component of Mr. Wulff's report.

In the use of force committee report's incident summary, Appellee places significant weight on CO Randy Elbert's oral interview statement that he may have observed Appellant talking to Inmate Adams in the cell for possibly a minute after they entered or re-entered the cell and before the altercation occurred involving Inmate Adams, Appellant, and his staffers. CO Elbert testified at hearing that he did not actually witness any use of force and that he went down the range to perform other duties, including searching for hidden illegal weapons.

CO Elbert, who has served for many years as a police officer when off-duty, mentioned nothing at hearing about a conversation that Inmate Adams alleged that he had with CO Elbert. CO Elbert further testified that he had been 100 percent cooperative with the investigation and had been 100 percent truthful in his responses to same.

The Video: Two Angles

This brings us to the video of a small component of the incident in question, namely Appellee's Exhibit 10, a CD-R recording of two camera angles from outside Inmate Adams' cell on the day in question.

The **first angle** is much clearer and utilizes much better lighting. Unfortunately, this angle is from a perspective where CO Bowling's body blocks the operative moment when one of Inmate Adams' arms appears to be briefly stuck out through the entrance of the open doorway, after which the team enters Inmate Adams' cell.

The **second angle** (upon which Appellee places great importance) better shows this activity, yet is marred by harsh glare and offers only about a maximum of three seconds to attempt to discern what is occurring in this shot.

The shot is preceded by the some miscellaneous activity and then by activity of the team coming up and CO Bowling unlocking the cell door. It is concluded by Inmate Adams being escorted away and then some miscellaneous action thereafter.

Appellee posits that the pertinent approximate three-second shot shows Inmate Adams sticking a rotated left arm out of his door with his hand behind his back. Appellee asserts that Appellant must have ignored Inmate Adams' submission and must, instead, have pushed Inmate Adams back into the cell where the team is alleged to have used "some type of force" on Adams. (Use of force committee report incident summary at paragraph 2., line 7.)

Appellee also asserts that, although he could have cuffed Adams here, Appellant could, as needed, have also taken the extra time to have assembled a cell extraction team and then removed Adams from his cell. As well, there is a question as to whether Appellee at first asserted, and then later informally retracted, an allegation that Appellant should not have, himself, led the team into Adams' cell. Further, former Warden Brunsman, who served as Appellant's appointing authority at the time of Appellant's removal, has asserted that a "best practice" would have Appellant bringing an available small digital camera with him to record the pertinent activity.

Appellee appears to view these allegations as evidencing a failure to properly supervise. Perhaps more importantly, Appellee views this course of events as constituting an unjustified and excessive use of force by Appellant and by the COs present in Inmate Adams' cell on this day under the command of Appellant.

Finally, Appellee asserts that the contents of Appellant's pertinent Incident Report and his refusal to change his assessment of what happened on the day in question respectively constitute falsification of an official report and interference with an official investigation.

We note from the outset that the pertinent video angle (i.e. the "second angle") that is the linchpin of Appellee's case presents what appears to be an arm sticking out very briefly from the cell door frame area.

Appellee asserts that the delineating line of Inmate Adams's tricep muscle can be seen from the video and that this view can be interpreted to show that Inmate

Adams' body was reversed to Appellant's team with Adams' hands behind his back in a posture of submission or surrender.

It does appear that Inmate Adams' elbow seems, albeit very briefly, to be in an upward position. Thus, we can find that Inmate Adams did present *one and only one arm rotated upward*. Yet, Adams presentation of a single arm in this position for fewer than three seconds and then his apparent withdrawal of that one arm or his simply re-entering his cell, provides little weight on which to rely regarding the assertion that Appellant could have and should have cuffed Adams at this point.

Neither does the video show that Inmate Adams was in any way pushed into his cell.

Moreover, neither of the angles of the video appears to reveal any type of fecal or urine stains on either the front or rear of Inmate Adams' uniform pants at that point in time.

Additionally, while Inmate Adams stumbles once while turning the corner out of his cell and when under escort, he appears to be ambulating under his own power.

It is not clear from Mr. Wulff's recitation of Inmate Adams' statement whether Adams alleged that: 1) he was dragged as he left his cell and immediately thereafter; 2) he was dragged at a point after he pulled away and a PR-24 escort was then employed on him; or 3) he was dragged at both points.

Neither video angle supports or refutes Appellee's assertion that Appellant could have effectuated a cell extraction to remove Inmate Adams from his cell.

Upon leaving his cell, then, Inmate Adams does not appear to have evacuated upon himself, does not appear to have just been choked to the point of passing out, and does appear basically to be walking under his own power.

Since Appellee's video evidence here does not appear to be sufficient, in and of itself, to demonstrate any impropriety concerning the activities of Appellant and of his team concerning the events in question, it is necessary for Appellee to attempt to bear its burden of proof through other evidentiary means.

Do Inmate Adams' and Inmate Striblin's statements constitute credible evidence?

Appellee also utilized the Incident Report authored by Psychology Assistant 2 Kevin Wulff, who testified at hearing concerning this report. This report essentially contains the statement that Inmate Adams offered to Mr. Wulff regarding Adams' view of what happened on February 19, 2012.

This offered statement, if it is considered to constitute an accurate recitation of the course of events that day, has Appellant's team choking and stomping on Inmate Adams such that he evacuated and passed out. (Please see the analysis of both of the video angles of Inmate Adams that are assessed, above) Adams' statement also has the team dragging him down to the Infirmary, where Appellant orders the Nurses to leave the scene and where the team continues to beat Adams.

Further, although it is a little unclear from the recitation contained in Mr. Wulff's report, it appears that Inmate Adams has also alleged that CO Brewer came up to Adams later on the evening of February 19, 2012. Per Wulff's Incident Report, Adams alleged that Brewer stated, among other things, that Brewer saw what happened and would come forward as a witness at the right time.

Mr. Wulff's Incident Report was one of the key pieces of evidence that the Deputy Warden of Operations reviewed when assessing whether to proceed concerning a possible excessive use of force.

Inmate Adams was also interviewed on February 27, 2012 by the use of force committee staff. (See Appellee's Exhibit 10) According to the use of force committee report, Adams verifies that he was kicking his cell door and refused orders to stop. He stated that he did turn around when his cell door opened and stuck his hands out the door to be cuffed but was pushed back into the cell.

The report notes that Adams then stated that a conversation ensued and that he was then thrown on the bed, struck numerous times, and was choked by CO Murray, losing consciousness at least once. Then he was removed from his cell and, according to the report, once in the hallway, he was placed on the floor where they used the PR-24 to pick him up. Next, he states, per the report, he was escorted to the Infirmary, where the beating continued and he was then returned to his cell in C-block.

Further, the use of force committee report notes that Inmate Strilbin was also interviewed by the committee on March 1, 2012. Inmate Strilbin's cell is next door to Inmate Adams' cell in C-block.

Again, according to the use of force committee report, Inmate Strilbin offered that what happened to Inmate Adams was "wrong". The report notes that Strilbin was looking out the door "... and saw Adams placing his hands out to be handcuffed but the "white shirt" would not put handcuffs on him. He said after that the door opened and they all went in the cell."

It appears that in the use of force committee report, we are first presented with Inmate Strilbin's allegation that Inmate Adams' put his hands through the cuff port/pass-through to be handcuffed but that Appellant refused to do so and ordered the cell door to be opened.

These assertions are, accordingly, contained within the use of force committee incident summary and supplementary information components. (Again, please see Appellee's Exhibit 10) The report's recitation of Inmate Strilbin's interview statements appears to fairly clearly set forth Strilbin's assertion that Inmate Adams presented his hands through the cuff port.

Yet, the use of force committee report's recitation of Inmate Adams' interview statements is not as clear on his point. Interestingly, Mr. Wulff's recitation of Adams' statements to him does not mention anything about Adams' first placing his hands through the cuff port to be cuffed.

Thus, although it they were not contemporaneously communicated, we do have two inmate accounts in official DR and C reports to support Appellee's contention of what happened on the day in question. Specifically, Inmate Adams' statements are set forth both in Mr. Wulff's Incident Report and in the use of force committee report's incident summary and supplementary information. Inmate Strilbin's statements are set forth in the use of force committee's report incident summary and supplementary information components.

Yet, it may be problematic for this Board to place much weight on Mr. Wulff's Incident Report or on the use of force committee's recitation of Inmate Adams' interview with them.

JODY SPARKS

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First, for understandable reasons, neither Inmate Adams not Inmate Striblin took the stand during this hearing, thus presenting a hearsay problem. True, Mr. Wulff did take the stand and was the author of his Incident Report, but he was not the person who uttered the statement and the statement goes to the truth of the matter asserted. Thus, while admitted in this setting, this Board can likely put only a little weight on the statement.

Aside from the obvious hearsay issues noted, above, we would also be remiss in not reviewing the context in which Inmate Adams offered his statement to Mr. Wulff. We note that Inmate Adams first refused an offer to file a Subjective Evaluation statement on his contemporaneous inmate Medical Exam Report authored on February 19, 2012. It was not until four days later that Inmate Adams complained of his treatment on the day in question.

Further, Inmate Adams was not known to be a model inmate. He was known to throw urine on staff and had apparently even attempted to remove a portion of his interior cell wall. Additionally, on the day in question, Inmate Adams had caused a disruption on the block, had repeatedly refused to comply with staff orders, and had directly threatened staff. As well, Inmate Adams had been involved in another use of force four days prior to the incident in question.

Moreover, as discussed above, neither video angle appears to offer any corroborating evidence that Inmate Adams had just passed out, had just evacuated upon himself, and was less than fully ambulatory.

Only one angle (the "first angle") offers the briefest of views of Inmate Adams' cuff port, at the time the team is at Adams's cell door. It does not show Adams' arm or hand coming out of the cuff port.

As well, the "first angle" reveals no movement in Inmate Adams' cuff port either prior to the approach of the team or as the team nears Adams' cell door.

Thus, neither the "first angle" nor the "second angle" in any way corroborates Inmate Striblin's statements that Adams' presented his arm or hand through the cuff port and that Appellant ignored that presentation.

Finally, to note the obvious, Inmate Adams is a convicted felon who must be housed in a single-person cell.

We must also question whether Inmate Strilbin, also a convicted felon also in a single-person cell, had an adequate visual viewpoint out of his cell window to be able to see either whether Inmate Adams stuck his hands out of his cuff port. The use of force committee's report does not indicate that Strilbin observed Inmate Adams' arm sticking out of the cell door. Inmate Strilbin was not interviewed until March 1, 2012.

It is possible that, by virtue of his proximity to Inmate Adams (next door) and by virtue of the nearly two weeks that elapsed from the February 19, 2012 events in question until March 1, 2012, Inmate Strilbin could have cooperated/conspired with Inmate Adams to validate Inmate Adams' own story after the fact of what happened.

Conversely, Inmate Strilbin may be telling the truth and may have had a favorable vantage point from which to observe Inmate Adams' cuff port during the incident in question.

Thus, we cannot say with certainty that Inmate Adams was being untruthful in his recitation of events to Mr. Wulff. Yet, neither can we place substantial weight on either his or Inmate Strilbin's recitation of events on the day in question. Further, since DR and C had no video evidence to verify Inmate Adams' allegations concerning alleged excessive uses of force in the hallway on the walk to the Infirmary or at the Infirmary, DR and C chose at some point to discontinue any further pursuit of those allegations against Appellant and his team.

Other points of evidence from Appellee

Appellee also offered some additional points of evidence and viewpoints, the review of which help to build a full and fair record.

One particular component of its case upon which Appellee appears to place great weight is the assessment of the pertinent video by former LCI Warden Tim Brunsmann, who served as the appointing authority for purposes of the instant removal and who also served as Appellee's designee on Day 1 of the hearing. The record reflects that former Warden Brunsmann has served in many positions at DR and C, including a number of positions directly involving interaction with DR and C

inmates. Warden Brunzman was also the LCI Warden at the time of the promotion of Appellant from CO to Lt. Mr. Brunzman currently is assigned to Madison Correctional Institution.

Mr. Brunzman offered that his opinion was that, based on the video, Inmate Adams had stuck his arm out of the cell door and that his arm was behind his back, signaling surrender or submission. Mr. Brunzman also indicated that Appellant should have, at his point, simply handcuffed Inmate Adams. While it is not a suggested practice to ever have an inmate out in a hallway without restraints, here Mr. Brunzman indicated it might have been acceptable to have Inmate Adams step out into the hall to be cuffed, since Adams was no longer non-compliant.

Mr. Brunzman also indicated that he believed that Appellant could have taken the time to assemble and utilize a cell extraction team to extract Inmate Adams from his cell in C-block. He offered that Inmate Adams' situation did not appear to constitute a present threat or emergency, such that an immediate need had arisen to get Adams out of his cell.

Further, Mr. Brunzman offered, an extraction team, and especially the video camera that is utilized during the course of same, would have provided useful information/evidence to rebut or confirm any charge concerning the use of excessive force. He also noted that, while he was the LCI Warden, he had procured several small digital video cameras, any one of which could have been used to assist with documenting the events in question.

As to the video, Mr. Brunzman also offered that his assessment of Inmate Adams' surrender is bolstered by the impression that Appellant's team "moseyed" in to the cell, as opposed to rushing into the cell when a supervisor comes under attack. He also opined that CO Bowling's occasional turning to see what was happening in Adams' cell and CO Bowling's engaging in conversation with other staff during this incident bolsters the viewpoint that Adams did not attempt to assault Appellant.

Mr. Brunzman analogized the situation to that of an auto accident to make his point, offering testimony to the effect that you do not look away from an auto accident, you look toward it. Thus, here, if Appellant had come under an attempted assault and the team had come to his defense, CO Bowling would have been concentrating his attention in that direction, Mr. Brunzman opined.

As well, Mr. Brunzman averred that, if Inmate Adams had been covering up his cell window with a mattress, one would not view light and shadow as are apparent in the video.

Mr. Brunzman did note that, sometimes, supervisors want to lead the team into a cell, a practice that is at least understandable; since a supervisor does not want to subject his or her employees to any situation in which the supervisor would not also be involved.

Appellee also offered testimony by Casey Barr, a Corrections Warden's Assistant 1/Investigator. Mr. Barr, among many other witnesses, identified Appellee's Exhibit 4 as the DR and C Use of Force Policy. That policy essentially indicates that force is to be employed, if at all, only in the least amount of force needed to address a pertinent situation.

In particular, Mr. Barr focused on the investigative process concerning the use of force regarding Inmate Adams. Mr. Barr indicated that he felt that Appellant exhibited a defensive attitude during Appellant's interview. Mr. Barr also noted that he felt that other team members appeared to exhibit stress during the interview process, especially after being shown the pertinent video. Examples of this, he noted, included sweating, discoloration of the face, *et cetera*. He averred that CO Traud stuck out in Mr. Barr's mind because CO Traud apparently indicated that he did not know that a particular camera angle existed in the hallway of C-block.

Appellant's response to Appellee's other points of evidence

Conversely, Appellant offered that, as noted, Inmate Adams first backed up, then threw the mattress at Appellant, and then tried to take a swing at Appellant. Appellant also indicated that all staff present at the time of the incident offered statements that were consistent with his recitation of events and that they did not change their accounts even after pressure was brought to bear on them and their veracity was challenged.

[CO Elbert did not complete an Incident Report, since he was not immediately involved in the incident and observed only a small component of same. However, his oral statement, as relayed in the use of force committee report, appears consistent with the recitation offered by Appellant and the team members. This

includes a statement that CO Elbert believed he observed Appellant conversing with Inmate Adams for up to a minute before CO Elbert continued to perform his official duties "down range" in another part of the institution.]

Appellant has also indicated in the record that he needed to make a decision in a short amount of real time, given that he could not see and thus could not guarantee the personal safety of Inmate Adams and that, secondarily, C-block was becoming increasingly disrupted by Adams' actions that day.

Thus, Appellant asserts, he did not have the 15 to 20 minutes it would have taken to have assembled and equipped a cell extraction team and to executed a planned use of force. Further, he argues, the chances of a high level of force being used on Inmate Adams would have increased with a utilization of a cell extraction team, which goes in hard with riot helmets and shields, and where many hard surfaces would thus be present, he offered.

Appellant also notes that Inmate Adams' alleged attempted assault did not occur immediately and there was no reason for the team to immediately rush into the cell to Appellant's defense and the need to use force on Adams actually arose only after Adams allegedly threw the mattress at Appellant and attempted to take a swing at him.

Appellant stated that he turned in his Incident Report by the end of his shift on February 19, 2012 and, thus, would not have had time before the report was turned in to conspire with anyone to create a fictitious account of the events in question.

As well, Appellant disputes that the external consistency of the participants' reports is a sign of conspiracy and duplicity. He asserts, conversely, that this is a sign that things happened the way all the actual DR and C participating staff said they did and that remaining consistent in their viewpoints would connote a good faith belief in their reports' respective accuracy; in other words, there is no reason to recant the truth.

Further, Appellant noted that the temperature inside LCI is often quite hot or quite cold. Thus, an employee participating in a stressful interview could sweat even if the employee is being truthful in his or her responses, Appellant suggested.

Additionally, one of the COs present during all these events who also testified at hearing, CO Traud, has served with DR and C for 14 years. For more than 10 of those years, CO Traud has served as a DR and C trainer not only in the use of force but also regarding the PR-24 baton and SRT.

Findings

Based on the testimony presented and evidence admitted at hearing, I make the following Findings.

First, I note that I incorporate, herein, any finding set forth, above, whether express or implied.

Next, I find that Appellee has demonstrated by a preponderance of the evidence that the "second angle" of the video of the events in question (or at least the approximately three seconds of same) demonstrates that Inmate Adams had his arm sticking out of his cell door frame with his elbow raised. However, the record cannot support a finding that Appellee has proven, by a preponderance of the evidence, that Appellant's one arm showing for under three seconds demonstrates that Inmate Adams was surrendering on the day in question. While it is certainly possible that this is the case, possible is not the evidentiary standard under which this Board must operate.

I further find that the statements of Inmate Adams and Inmate Striblin, which must be discounted for the several reasons set forth above, do not bear the same weight as the statements and testimony of the first-hand staff participants in this matter, which I find to be credible.

Additionally, I cannot find that Appellant failed to properly supervise his team under these circumstances. The record supports the contention that Appellant was faced with a situation where his view of Inmate Adams, who was being highly resistant, was impaired and where he could not utilize a chemical agent because of the presence of Inmate Adams' mattress across the window or in front of Inmate Adams' person.

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As such, Appellant determined that he needed immediate access to Inmate Adams to secure his person and to remove him from his cell; without taking the time to assemble and equip a cell extraction team. Thus, I cannot find that Appellee demonstrated by a preponderance of the evidence that Appellant failed to properly supervise under these circumstances.

Moreover, it is not inconsistent with the COs' statements, nor with the testimony of Appellant and COs Brewer and Traud, to posit that, once his cell door opened, Inmate Adams appeared to be transitioning into compliance for a short time, thus not requiring a rush into the cell.

Further, would this not justify or explain the team's "moseying" into the cell, CO Bowling's re-focusing of his attention (per the use of force committee report, "... he believed the four Officers could handle it."), and CO Elbert's moving on to other duties?

It was only as or after Inmate Adams backed to the wall in the presence of the team in the cell that Adams proceeded to, again, become aggressive. Here, the team restrained Adams, in spite of his resistance, and removed him from his cell.

Further, when viewing the demeanor of the team as they are exiting the cell and performing escort duty, they appear to be calm and professional and Inmate Adams does not exhibit signs of a severely violent struggle where he alleged he was choked, stomped on, and passed out.

As well, I cannot find that Appellee demonstrated by a preponderance of the evidence that Appellant either falsified a report or interfered with an investigation; since there is very little direct credible evidence to support such contentions.

Accordingly, I cannot find that Appellee has demonstrated, by a preponderance of the evidence, that Appellant violated the use of force policy or employed or ordered the employ of excessive force. If Appellant is to be believed, Appellant found himself in a situation where the use of force policy would allow the use of force in an emergency where the personal security of an inmate could not otherwise be secured. Further, I cannot find that, under these circumstances, DR and C policy mandated that Appellant assemble and equip a cell extraction team and plan a cell extraction.

Moreover, the record does not adequately support any contention that Inmate Adams stuck his hand(s) out of the cuff port to be handcuffed prior to his cell door being opened by CO Bowling.

To briefly summarize, the circumstances justified Appellant acting quickly with available resources and not assembling a cell extraction and utilizing same. It likely appeared to the team that Inmate Adams was, for a very short period, at least potentially beginning his transition to compliance. Thus, a cell extraction team would not have been needed. It was only after Appellant undertook to ensure the personal well-being of Inmate Adams by ordering the cell door opened to check on him, and then only after Adams backed near the wall but did not fully transition to compliance but attacked Appellant with a mattress and a swing, that the team exercised reasonable force to bring Adams into compliance and remove him from the cell.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant failed to properly supervise, used or caused to be used excessive force, falsified an official report, and interfered with an official investigation, and by doing so, also committed disciplinable offenses contained within R.C. 124.34? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the negative and, so, should disaffirm Appellant's removal.

I have found, above, that the weight of the evidence does not support the contention that either Appellant or his team of subordinates utilized excessive force in subduing Inmate Adams on February 19, 2012. As such, all allegations concerning failure to supervise, failure to follow DR and C policies, falsification of an official report, and obstructing an official investigation, and committing any offense named in R.C. 124.34 must also fail.

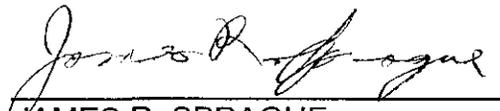
Yet, if this Board finds that the weight of the evidence assigned to the video and to Inmate Adams' and Inmate Striblin's respective statements (as taken by the pertinent DR and C employees) is insufficient and should be increased, then it is respectfully suggested that this Board remand this matter back to the undersigned for an additional review and assessment of the impact of this evidence on

Appellee's burden of proof. Barring such a remand, the undersigned cannot find that Appellee has met its burden of proof to demonstrate sufficient of the allegations contained within Appellant's R.C. 124.34 Order of Removal to justify Appellee's removal of Appellant from his Lieutenant position at LCI.

In closing, the undersigned notes that it is possible that the events in question unfolded as Appellee and as Inmates Adams and Striblin respectively assert. It is also entirely understandable that Appellee must maintain the safety of its inmates and keep them free from violence and free from the excessive use of force. Yet, in this case, the evidence that appears to have been available to Appellee neither supports Appellee's contention regarding the level of force utilized on February 19, 2012 nor supports the other allegations that flow from that contention.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISAFFIRM** Appellant's removal from the position of Correctional Lieutenant, pursuant to R.C. 124.03, R.C. 124.34, and O.A.C. 124-1-03 (I).



JAMES R. SPRAGUE
Administrative Law Judge

JRS: