STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Adam Jackson,

Appellant,

v. Case No. 2012-REM-07-0151

Department of Youth Services, Central Office, and
Department of Youth Services, Indian River Juvenile Correction,

Appellee.

ORDER

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

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** the June 26, 2012 removal which constitutes the basis of SPBR Case No. 12-REM-07-0151 is **MODIFIED** to a reduction in pay and position from Operations Manager to Youth Specialist.

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, October 10, 2013.

Clerk

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

10/10/13

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Adam Jackson,

Appellant

v.

Department of Youth Services,
Central Office

and

Department of Youth Services,
Indian River Juvenile Correction,

Appellee

Case Nos. 12-REM-04-0066
12-REM-07-0151

June 6, 2013

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 June 26, 2012, removal from employment with Appellee. A record hearing was held in the instant matter on October 29, 2012; November 7, 2012; and December 21, 2012. Appellant was present at all three days of record hearing and was represented by Michael A. Moses, attorney at law. Appellee was present at all three days of record hearing through its designee, Bureau Chief of Facility Operations Amy Ast, and was represented by Robert E. Fekete and Timothy M. Miller, 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 removal:

> ...
>
> incompetence, inefficiency, neglect of duty, and violation of any policy or work rule of the officer's or employee's appointing authority.
>
> OM Jackson, you failed to follow policies and procedures when you did not guide staff to temper force, you failed to stop staff from

> engaging in non-trained techniques and you also failed to have staff follow your instruction.
>
> You demonstrated incompetence and neglect of duty by failing to identify and recognize the risk of harm to the youth associated with the techniques used by staff. You clearly exercised poor judgment in carrying out a work assignment as a Supervisor. You allowed staff to remain engaged as they used improper technique and allowed them to remain engaged after they demonstrated agitation toward the youth and after staff were identified as a target.
>
> ...

Information contained in the record indicates that that the R.C. 124.34 Order of Removal issued to Appellant with an effective date of April 9, 2012, which is the subject of SPBR Case No. 12-REM-04-0066, was rescinded; the second R.C. 124.34 Order of Removal issued to Appellant, with an effective date of June 26, 2012, is the subject of SPBR Case No. 12-REM-07-0151.

STATEMENT OF THE CASE

Appellant testified that he was employed by Appellee for approximately nine years and held the position of Operations Manager at Appellee's Indian River facility at the time of his removal. He stated that he was a Juvenile Corrections Officer (nka Youth Specialist) for about four years and an Operations Manager for approximately five years. Appellant indicated that part of his responsibility as an Operations Manager was to prevent and respond to incidents that threatened the safety and security of the facility.

Appellant stated that there are usually two Operations Managers working each shift and that one manager oversees the day to day activities within the facility, such as programming and meals, while the other handles assistance calls. He explained that an Operations Manager is required to respond to every assistance call at the facility and typically handles ten to twelve assistance calls each day. Appellant recalled that on October 30, 2011, he was the Operations Manager assigned to second shift who was responding to assistance calls; he testified that it was a very busy day and estimated that he responded to more than thirty assistance calls that shift. Appellant observed that some calls are assistance calls,

which simply request general assistance from other staff, and some calls are "Signal 5" calls, which are more serious and request that all available staff in the facility respond.

Appellant testified that the Operations Manager acts as Incident Commander during Use of Force (UOF) events, is in charge of the entire scene and is responsible for the safety and security of all individuals. He noted that the Incident Commander must determine how best to respond in order to control the event; his initial concern upon responding to any incident would be to secure the scene, assess the situation and resolve the incident as safely as possible. Appellant explained that the Incident Commander is responsible for de-escalating the situation when possible to avoid the use of unnecessary physical force and confirmed that Youth Specialists take their direction from the Incident Commander.

Appellant confirmed that he has received a variety of training while employed with Appellee, including Response To Resistance training, which is now called Managing Youth Resistance. He noted that Appellee's policy requires staff to use the least restrictive level of response to control resistive youth and to moderate any restraint once control has been established. Appellant estimated that he has handled thousands of physically and passively resistive youth during the course of his employment. He testified that Appellee does not teach staff any specifically approved technique for escorting handcuffed youth.

Appellant confirmed that he had participated in Planned Intervention Training for Supervisors on two occasions. He stated that the training emphasizes the need to look for ways to de-escalate a situation before responding and observed that the main difference between the two types of training is the opportunity to plan a response. Appellant agreed that even during a UOF there are moments that can become a planned intervention. He noted that in this instance the need to immediately remove the youth from the area to ensure his safety prevented the development of a planned intervention.

Appellant observed that while Appellee's training teaches staff to employ and exhaust verbal strategies to control a situation before proceeding to physical strategies, circumstances sometimes require staff to proceed immediately to a physical response. He testified that such circumstances could include physical engagement, physically resisting rules, immediate danger to self or others, serious disruption and a clear necessity to move youth.

Appellant stated that he considered the incident which occurred on October 30, 2011, to be an unplanned UOF. He noted that when he responded to the Signal 5 call in Unit A, there was a physical engagement between the youth and staff, which represented an immediate threat to security. Appellant recalled that the youth was being restrained by Youth Specialists Hill and Moore with his hands cuffed behind his back when he arrived on-scene. He indicated that other youth in the room were verbally engaging and antagonizing the youth being restrained, and stated that he directed staff to move them out of the area.

Appellant testified that youth are assigned to Unit A, which houses the most dangerous youth at the facility, as a result of their offense, their mental health status or their behavior while at the Department of Youth Services. He indicated that at the time of the incident, Unit A had the highest occurrence of gang activity at the facility and that the youth involved in the incident was a known gang member. Appellant recalled that he had responded to assistance calls involving that youth prior to that evening and was familiar with his response to uses of force. He noted that the youth was physically combative and had blood in his mouth at that time.

Appellant testified that he was unable to completely remove the other youth from the day room where the incident was taking place because the only other space, the group room, was occupied. Appellant indicated that he considered the other youth in the area to present a security threat and he made the decision to immediately move the restrained youth to his room for his own safety.

Appellant recalled that once the youth had been restrained by Youth Specialists Hill and Moore, he instructed Youth Specialist (YS) Hill to step out of the restraint; he did so and was replaced by YS Mitchell. He stated that he also instructed YS Zoeller to step in for YS Moore on the escort, but YS Zoeller failed to comply or otherwise respond. Appellant stated that he did not repeat his instruction to YS Zoeller or stop the escort, as they were dealing with a very combative youth who was being threatened by other youth in the room. He indicated that YS Mitchell and YS Moore immediately began transporting the youth to his room.

Appellant emphasized that he had to make an immediate decision as to what he thought was safest for the youth. He recalled that he used verbal strategies with the youth throughout the incident, telling him to calm down and that he would come to his room to figure out what was going on; Appellant noted that that listening to a youth is a method of de-escalating a situation, as well as removing the source of agitation and allowing a youth time and space to calm down. He stated that he

made no judgment at the time as to whether or not the youth was at fault in the incident.

Appellant stated that when YS Mitchell and YS Moore began walking the youth to his room he was still looking in the Incident Commander's sling bag for a spit shield because he knew the youth had spit on staff in previous incidents. He recalled that they were walking the youth backward as he had instructed them and when they reached the entrance to the hallway all three of them fell to the ground; he noted that the youth was still resisting physically and he thought they had tripped over the trash can.

Appellant testified that he instructed YS Moore and YS Mitchell to stand the youth up and continue to walk him backwards to his room. He noted that he did not consider replacing either staff member at that point because there were no other unoccupied staff in the area. Appellant acknowledged that YS Twigg was in the hallway holding the door to the youth's room but noted that he did not ask YS Twigg to step in because he was working that Unit and had most likely been involved in the initial problem that led to the incident.

Appellant recalled that after he directed YS Moore and YS Mitchell to walk the youth to his room, the youth spit blood in YS Mitchell's face. He observed that YS Mitchell leaned the youth forward so he could not spit at him again and YS Mitchell and YS Moore held the youth's arms as they walked him forward to his room instead of backward, as instructed. Appellant indicated that during the escort the youth lifted his legs so that YS Moore and YS Mitchell had to carry him; he noted that he did not stop the escort at that point because the only other thing staff could have done to manage the resistant youth would have been to place him on the floor again which, if done incorrectly, carried a greater risk of physical harm. Appellant stated that, as before, there were no other available staff to step into the escort and he did not observe any attempt or intent to harm the youth while transporting him. He stated that he did not observe staff use any prohibited technique in their escort. Appellant reiterated that YS Mitchell and YS Moore were holding the youth by his arms and attempting use the C-grip; he testified that although they did hold the youth's wrists they did not appear to be using any unnecessary force. Appellant estimated that the remainder of the escort to the youth's room lasted approximately seven seconds.

Appellant agreed that a youth crying or screaming could be an indication of harm, but observed that youth typically exhibit the same behavior whenever they are restrained, even if they are not being harmed. He testified that in this instance the

youth screamed and yelled throughout the entire incident. Appellant confirmed that he checked the youth for injuries once he was placed in his room.

Appellant recalled that he used verbal strategies throughout the incident and redirected YS Moore when he felt that YS Moore was escalating the situation by speaking too loudly. He noted that after the incident had concluded he talked to YS Moore about his failure to step out of the escort as instructed, as well as his failure to follow his other instructions, but did not include it in his written report of the incident. Appellant explained that he has never written a disciplinary report for a failure to follow instructions during a UOF, but stated that he made it clear during the UOF investigation that staff did not follow his instructions.

Appellant confirmed that prior to the incident, he had participated in a four-week action plan as well as a seven-week action plan, both of which emphasized that as Operations Manager or Incident Commander he was not to become physically involved in a situation unless there was a genuine risk of harm to staff or youth, which he understood to mean that injury was actually occurring. Appellant observed that the concerns raised in both action plans were his physical involvement in incidents, documentation of an event, and application of policies and procedures. He noted that the plans recommended that he follow procedure in the techniques used, exhaust all other options before initiating physical intervention and to step back from being the "first responder" when there were other available staff. Appellant stated that in his management of the October 30, 2011, incident he did not instruct staff to use improper techniques, did not personally physically intervene, and did not place himself in a position to be a first responder.

Appellant indicated that he was placed on administrative leave on November 1 or 2, 2011, and he did not have an opportunity to explain his response to the incident until his pre-disciplinary hearing. He recalled that he provided the hearing officer at the pre-disciplinary hearing with a list of the verbal strategies he used during the incident and noted that he listened to the audio of the incident video to be sure he recorded them accurately. Appellant observed that he was completely forthcoming with details about the incident during the investigation of the matter and also during his pre-disciplinary hearing.

Appellant indicated that he was removed from employment on April 9, 2012. He noted that his April removal order was rescinded and he was removed a second time, effective June 26, 2012.

Pat Hurley testified that he is presently employed by Appellee as a Field Resource Administrator, a position he has held since May 2009. He noted that he was employed by the State of Ohio prior to that time, retiring with thirty years of service with the Department of Rehabilitation and Corrections.

The witness indicated that the primary focus of his current position is to help Appellee comply with Use of Force guidelines that arose from a class action lawsuit settled several years ago. Mr. Hurley noted specifically that he reviews Uses of Force and the review process surrounding them, develops staff training on responding to and managing Uses of Force and looks for new tools or techniques related to Uses of Force. He confirmed that he knows Appellant and has trained him on Uses of Force on at least one occasion.

Mr. Hurley observed that the general purpose of staff training on Uses of Force is to provide supervisors with guidelines to help manage an incident. He explained that a supervisor's first responsibility is to contain a situation so it does not escalate and overwhelm the supervisor and his or her staff, and agreed that decisions to use or not use force must often be made within seconds. The witness testified a supervisor must assess a situation and consider whether or not a youth is actively combative or resistant in deciding how to respond; a planned Use of Force can be used or an immediate response may be required, depending on whether or not a youth is actively combative. He testified that if a supervisor responded to a situation where the youth was actively engaged with another youth or with staff, the situation would require an immediate response.

Mr. Hurley confirmed that staff training emphasizes that if there is time to convert a situation to one where a planned use of force or no force at all can be used, supervisors should do so. He noted that supervisors are trained to de-escalate a situation once it has been contained. The witness explained that a number of things may have occurred prior to the incident supervisor's arrival. He stated that if the situation is relatively controlled when the supervisor gets there, he or she may have time to ask questions and plan a response.

The witness noted that some tools and techniques apply to both planned Use of Force situations and immediate response situations, and that other than the element of planning, there is not a lot of difference once the implementation of a Use of Force begins. He observed that the first step in containing a situation is to remove uninvolved youth by putting them in another room, controlling access to an area, or putting them against the wall. Mr. Hurley agreed that placing a youth in his or her room could be considered seclusion, but confirmed that it is also an

acceptable method used by staff to contain a situation. The witness explained that once a situation has been contained, a supervisor should gather the staff needed to handle the situation.

Mr. Hurley observed that an incident supervisor is responsible for managing the staff members involved in a Use of Force. He noted that either a youth or a staff member could be an agitator or provoke a situation by their behavior. The witness agreed that a staff member might escalate a situation by yelling but acknowledged that in some situations it might be necessary for a staff member to raise his or her voice. Mr. Hurley testified that if the incident supervisor identified a staff member as a source of agitation, either intentional or unintentional, training materials encourage the supervisor to relieve the staff member by switching them out with another individual or having them "tap out;" if that staff member did not respond to verbal directives or tapping out, the incident supervisor could step in and take his or her place, but that he does not encourage supervisors to do so because they need to be available to supervise the entire situation.

Mr. Hurley testified that staff are trained to temper their uses of force. He noted that they use a training video to show how even the use of an approved restraint technique can lead to an escalated situation if the technique causes undue pain or distress. The witness pointed out that not every escort of a youth escalates to a Use of Force and noted that there is no special discussion in Use of Force training that relates to escorting youth. Mr. Hurley testified that he believes that there is a policy related to planned Uses of Force but stated that he did not see it in Appellee's Exhibit Book. He clarified that a "planned intervention" is the same as a "planned use of force."

Mr. Hurley stated that although he briefly reviewed the video of the incident upon which Apellant's removal was based, he was not involved in any recommendation of discipline. He indicated that supervisors are instructed during training to document their actions and what they saw during the incidents; if they had to redirect staff members, they should include that information in their report. The witness noted that the incident supervisor is responsible for gaining control of a situation and documenting the steps taken in response.

Jack Vicencio testified that he has been employed by Appellee at the Scioto Juvenile Correction Facility as Deputy Superintendent since February 2012. He stated that he previously held the position of Investigator in Appellee's Chief Inspector's Office for approximately four years. The witness explained that he was assigned by the Chief Inspector to conduct the administrative investigation of the

October 30, 2011, incident, which paralleled the investigation conducted by the Ohio State Highway Patrol.

Mr. Vicencio noted that he followed his standard investigatory procedure and gathered written statements and video evidence to support a determination as to whether or not the individuals involved in the incident complied with Appellee's policies and procedures. He identified Appellee's Exhibit 8 as a summary of his investigation findings and testified that he concluded that YS Mitchell and YS Moore used inappropriate force while escorting the youth to his room and that Appellant had failed to properly manage the incident. The witness testified that his findings related to force used both before and after Appellant's arrival at the scene of the incident, and that he made no recommendation as to whether or not discipline for any of the individuals involved was warranted.

Mr. Vicencio testified that while the video evidence demonstrated that Appellant did verbally direct the staff on their way toward the hallway, he ceased to direct them shortly after they got there. He stated that the video did not show that Appellant attempted to stop YS Mitchell and YS Moore's improper use of force in escorting the youth down the hallway. The witness confirmed that escorting the youth to his room is a containment or control technique that is acceptable when it is carried out correctly, but noted that the youth was screaming and accusing YS Mitchell and YS Moore of slamming him on his face. Mr. Vicencio acknowledged that Appellant did make some attempt to intervene at that time but did not stop the progression of the incident.

The witness testified that Appellant should have intervened earlier in the process and replaced YS Moore and YS Mitchell with other staff members. He observed that there were several other points during the incident where Appellant could have stopped what was going on and intervened in the situation but did not do so. Mr. Vicencio stated that he was aware that Appellant alleged that YS Moore and YS Mitchell did not follow his directions, but indicated that he saw no evidence of that and remarked that Appellant should have become physically involved if they failed to comply with assertive direction.

The witness acknowledged that he was aware that Appellant had previously been advised that as Incident Commander it was not appropriate for him to physically intervene unless absolutely necessary. He stated, however, that if Appellant gave directions that were not followed, he could have and should have physically intervened. Mr. Vicencio confirmed that the portion of the incident that was captured by handheld video lasted approximately three minutes and covered

the period of time when Appellant arrived on the scene until the youth was placed in his room.

James Zoeller testified that he is presently employed as a Youth Specialist at Appellee's Indian River facility and has worked at that location for approximately three years. He confirmed that he was working with youth in A Unit on October 30, 2011, when a Signal 5 was called and he responded. The witness explained that a Signal 5 is a staff-initated alarm called to request assistance from other units in the facility.

Mr. Zoeller recalled that when he responded to the alarm, YS Hill and YS Moore were in the day room dealing with a disruptive youth who was trying to bite and spit at them. The witness stated that he assisted them in cuffing the youth, who was laying on the floor; he noted that the youth was cuffed with his hands behind his back. Mr. Zoeller indicated that he arrived on scene before Appellant, who was also present and serving as Incident Commander.

The witness stated that it was very noisy during the incident and there were other youth in the general area who were yelling and screaming. He recalled that Appellant was directing the staff involved, but did not remember Appellant giving him any specific instructions. Mr. Zoeller indicated that he remained in the day room area while YS Moore and YS Mitchell escorted the youth to his room. He testified that as they entered the hallway, the youth was screaming and yelling and the trash can at the entrance to the hallway was kicked over. The witness stated that after the youth was lifted to his feet again he increased his resistance, throwing his body around, lifting his legs, yelling, spitting, and trying to headbutt the escorting staff members.

Mr. Zoeller observed that he has been involved in transporting youth in handcuffs and noted that it is very difficult to transport them if they lift their legs. He explained that because staff cannot carry or drag a youth under these circumstances, they have to let the youth go to the floor and it is difficult to avoid injury to the youth or to staff. The witness testified that the youth was kicking, trying to wrap his legs around the escorting staff members, and was otherwise uncontrollable; he recalled that YS Mitchell had blood on his face where the youth had spit on him.

Mr. Zoeller indicated that he knows and has worked with Appellant and believes that Appellant has a distinctive voice. He stated that he heard Appellant instruct YS Mitchell and YS Moore during the incident to stand the youth up or roll

him over. The witness confirmed that Appellant was giving staff verbal directives but could not recall what exactly was said.

Chris Freeman testified that he has been employed by Appellee for approximately sixteen years and presently holds the position of Facility Resource Administrator in Appellee's Central Office. He noted that he held the position of Deputy Superintendent of Direct Services at Indian River Juvenile Correction Facility and was Appellant's direct supervisor in October 2011.

Mr. Freeman confirmed that he was familiar with the circumstances that led to Appellant's removal; he noted that he reviewed the video of the October 30, 2011, incident. The witness stated that he concluded that Appellant had mismanaged the incident by failing to physically intervene in the situation, and reported his findings to the facility Superintendent. Mr. Freeman testified that he did not know what had happened to provoke the October 30, 2011, incident, but he was aware that the youth involved had a history of engaging in assaultive and violent behavior. He indicated that although it was a permissible response for Appellant to direct the youth to be taken to his room to calm down, Appellant should have stopped YS Moore and YS Mitchell when they began escorting the youth with his restraints above his head. The witness observed that if Appellant was unable to otherwise stop staff from dragging the youth, he should have become physically involved in the situation.

The witness recalled that during the time he supervised Appellant he provided Appellant with direction regarding Uses of Force. Mr. Freeman noted that Appellant had participated in action plans on two occasions to help him understand his role as an Incident Commander, with the most recent action plan taking place in April 2011. He explained that Appellant had been placed on the action plans due to his physical intervention in Use of Force incidents and that they had specifically discussed when it was and was not appropriate for him to become physically involved in an incident. Mr. Freeman confirmed that he instructed Appellant that, as Incident Commander, he was responsible for managing the incident, giving direction and instruction to staff and being a witness to the incident. He indicated that he told Appellant that he should manage staff members instead of becoming physically involved in the incident himself, unless there were insufficient staff available to contain the situation.

The witness stated that Incident Commanders are responsible for generating a report after any incident that is significant or rises to the level of a primary rule infraction. He indicated that the report summarizes what happened during the

incident, gathering information through staff and/or youth statements, the Incident Commander's statement, videos and any other type of available documentation. Mr. Freeman noted that Appellant had received training on how to prepare incident reports and assemble a complete Use of Force packet. He testified that he expected Appellant to include any staff insubordination that occurred during an incident in his report, and never told him that insubordination should only be reported during an investigatory interview.

Mr. Freeman observed that the Operations Manager on every shift is responsible for checking the Incident Commander's sling bag to be sure it is fully stocked and confirmed that spit socks are an item that should be kept in the sling bag. The witness testified that once a youth is restrained, a spit sock is placed over his mouth to prevent him from spitting on staff or other youth. He indicated that Appellee stocks spit socks in several locations throughout the facility and was not aware of any instance when there were none available at the institution.

Amy Ast testified that she is currently employed by Appellee as Bureau Chief. She indicated that she has been employed by Appellee for approximately sixteen years, holding a variety of positions within the agency. The witness stated that in her current position she directly supervises all facility superintendents, as well as five bureau staff. Ms. Ast noted that one of her responsibilities as Bureau Chief is to make recommendations to the Superintendent regarding employee discipline.

Ms. Ast explained that allegations of wrongdoing can be investigated at either the facility level or by Central Office. She noted that if an investigation produces sufficient evidence to substantiate allegations, a pre-disciplinary hearing is held. The witness stated that if the hearing officer finds just cause for discipline, the entire disciplinary packet – which typically consists of the pre-disciplinary hearing officer's report, any relevant documentation or existing video evidence, and information regarding any active discipline in the employee's personnel file – is forwarded to her for review. Ms. Ast confirmed that she reviewed the disciplinary packet forwarded from Appellant's pre-disciplinary hearing before making a recommendation for Appellant's removal to the Superintendent, noting that Appellant had prior discipline in his personnel file.

Ms. Ast testified that Appellant's removal was based on his exercise of poor judgment in carrying out an assignment, which referred specifically to his failure to properly manage the October 30, 2011, incident, and failure to identify risk to youth, which referred specifically to his allowing the youth to be dragged down the hallway by YS Moore and YS Mitchell after being placed on the ground a second time.

Ms. Ast explained that when management staff respond to an incident, the most important thing for them to do is to assess and contain the scene. She noted that management staff should identify any sources that may be escalating the situation and determine how they can de-escalate the incident so that the minimal amount of necessary force can be used. The witness testified that if management staff are not able to defuse the situation and force has to be used, their role is to ensure that youth and staff remain safe.

Ms. Ast observed that while Appellant did some things correctly in managing the situation on October 30, 2011, he did not control the entire incident appropriately. The witness stated that both the youth and staff members involved in the incident were sources of agitation and reiterated that Appellant should have attempted to de-escalate the situation by removing sources of agitation. She indicated that when YS Zoeller failed to follow Appellant's instruction to take YS Moore's place in the escort, Appellant should have used his supervisory authority to either verbally or physically stop the incident until he complied; Ms. Ast observed that Appellant should also have included staff's failure to follow his directives in his incident report.

Ms. Ast confirmed that Appellant had the discretion as Operations Manager to determine whether or not the youth's behavior during the incident created an enforcement necessity. She stated that, in her opinion, Appellant erroneously determined that the youth presented a security threat, although she admitted that the youth appeared to be both emotionally out of control and physically assaultive to staff.

The witness agreed that placing the youth in his room was one way of de-escalating a situation but stated that in this instance it caused further agitation. She acknowledged that Appellant had the discretion as Operations Manager to decide whether or not placing the youth in his room was the best thing to do, and also had the authority to dictate the manner in which the youth was escorted to his room. Ms. Ast confirmed that Appellee's Use of Force policy allows for non-prohibited methods of reasonable manual restraint if they are more practical than agency-trained methods, are no greater than necessary, and do not unduly risk serious harm or needless pain to youth or staff. She testified that there were some occasions during the incident when staff did not use proper technique to restrain and escort the youth.

Ms. Ast noted that when she reviewed the video evidence she observed YS Mitchell and YS Moore "slam" the youth to the ground in the hallway, which was an inappropriate use of force. The witness stated that although at that point the youth was being escorted backwards and the staff had their hands up around the youth's shoulders -- both proper and appropriate techniques -- the youth had no way to protect himself from being slammed on the floor. Ms. Ast explained that instead of allowing YS Moore and YS Mitchell to continue the escort, Appellant should have either replaced them with other staff members in the area or called for additional staff to respond. The witness observed that the youth could not get up or move around at that point and although there were other agitated youth in the general area, they were being controlled by staff on scene. Ms. Ast indicated that although there was an enforcement need to move the youth out of the hallway, there was not an immediate necessity, and Appellant should have stopped the escort to plan for a lower level of response.

The witness recalled that when YS Mitchell and YS Moore lifted the youth to continue the escort to his room, the youth went limp and had to be carried. Ms. Ast acknowledged that youth often resist an escort by going limp, which makes it more difficult for staff to transport them. She stated that if staff are using an appropriate escort technique when a youth goes limp there is not a risk of harm to the youth, but in this instance YS Mitchell and YS Moore were not holding the youth properly when he went limp, which could have resulted in serious physical injury to the youth. The witness agreed that if a youth goes limp while being escorted and falls to the ground, he has created some risk of injury to himself. Ms. Ast testified that although it was only a short distance to the youth's room, it was not appropriate for YS Moore and YS Mitchell to hold the youth's wrists or raise his arms behind his back while completing their transport. She observed that escorting the youth in this position presented an undue risk of harm and caused needless pain, and indicated that Appellant should have stopped the escort when he observed this.

Mr. Philip Hill testified that he has been employed by Appellee for approximately twenty-five years and presently occupies a YS position at its Indian River facility. The witness confirmed that he assisted in restraining the youth involved in the October 30, 2011, incident in A Unit.

The witness recalled that he did not observe the entire escort process because he was monitoring other youth in the area but confirmed that YS Moore and YS Mitchell began their transport of the youth using a C-grip and walking him backward. He stated that the youth was kicking and struggling and otherwise exhibiting defiant behavior during the escort.

Mr. Hill observed that handcuffed youth often resist movement by going limp and that staff usually escort them backwards because it is harder for the youth to resist that way. The witness testified that it is appropriate to place a youth on the ground if they are fighting, destroying property or refusing to take direction from staff and noted that there is no specific technique used to do so.

Mr. Hill acknowledged that not everything can be handled perfectly by staff during an incident, because dealing with actual resistance is different from just talking about it. He indicated that staff talk to the youth throughout an incident like this in an attempt to de-escalate the situation.

Eric Mitchell testified that he was employed by Appellee from 2008 until 2012 as a Youth Specialist. He confirmed that Appellant was his supervisor during October 2011 and recalled that he was part of the escort team participating in the October 30, 2011, incident which led to Appellant's termination. Mr. Mitchell recalled that he responded to an assistance call on that date and when he arrived on scene the youth involved was squirming on the floor with a couple of staff members trying to handcuff him.

The witness recalled that YS Hill was one of the individuals attempting to handcuff the youth and stated that Appellant instructed him to step in and take over for Mr. Hill. Mr. Mitchell testified that after the youth had been restrained, he put his arm under the youth's armpit to pick him up, as he had been taught, and he and YS Moore began to transport the youth to his room. He noted that one he and YS Moore began escorting the youth to his room the rest of the staff "disappeared."

Mr. Mitchell stated that the youth was very combative and it was hard to hold him up as they were escorting him; as they approached the hallway, the witness kicked the trash can out of their way so they could get the youth to his room as quickly as possible. He indicated that after the youth kicked him in the groin and in the shin and continued to resist his escort, he and YS Moore placed the youth on the ground in an attempt to regain control. Mr. Mitchell could not recall whether Appellant instructed them to do so or if they simply did it out of instinct from years of service.

The witness observed that he put his arm under the youth's chest to ease him down to the floor but speculated that the youth may have slipped on trash in the hallway or condensation from the shower area because all three of them ended up on the floor. He testified that when he picked the youth up a second time he put his

arm under the youth's armpit, as he had done earlier. Mr. Mitchell noted that it was about thirty feet from that spot to the youth's room and the youth continued to struggle as they took him down the hall.

The witness acknowledged that he was agitated by the time he and YS Moore got the youth to his room. He stated that he could not recall whether or not Appellant attempted to stop the escort and admitted that even if he had told them to stop he probably would not have done so. Mr. Mitchell stated that other than being taught not to hold a youth by the handcuffs, there is not a trained technique for escorting youth.

He testified that the youth spit blood in his face while he was on the ground in the hallway. Mr. Mitchell recalled that Appellant asked another Youth Specialist to find a spit sock before the escort began but one was never put on the youth. The witness confirmed that after the youth had been placed in his room Appellant instructed him to go to the clinic and get checked out. He recalled that Mr. Matthews operated the hand-held video camera during the incident and Mr. Twigg opened the door to the youth's room.

Mr. Mitchell confirmed that he participated in an investigatory interview a couple of months after the incident and testified that he rewrote a number of things in his interview statement because he believed that the investigator was attempting to coach him to answer in a specific way or get him to incriminate himself. He indicated that he felt that the investigator was condescending and was implying that he had intentionally tried to hurt the youth. The witness acknowledged that he was very frustrated by the end of the interview.

Mr. Mitchell stated that he was ordered to have no contact with youth during the investigation of the incident. He recalled that while he was out on stress leave he got a telephone call notifying him that he was going to receive a three-day working suspension.

Jeff Pritchard testified that he has been employed by Appellee since 1985 and currently holds the position of Operations Administrator at Appellee's Indian River facility. He confirmed that he was Appellant's direct supervisor at the time of the incident. Mr. Pritchard stated that he did not recall any occasions when he was required to counsel or reprimand Appellant during the time he supervised him.

The witness stated that he reviewed a video of the October 30, 2011, incident as part of the Use of Force review process and indicated that he agreed with the

Facility Intervention Administrator, Gary Hart, that there may have been some inappropriate management of the event. He indicated that he considered the incident to be a Use of Force rather than a Planned Use of Force, as the response had already been implemented prior to the time Appellant arrived on scene. Mr. Pritchard recalled that he made a recommendation that there could have been policy violations; he noted that he thought the youth involved could have been put at undue risk for bodily harm due to the manner in which he was escorted.

He recalled that as primary manager of the incident, Appellant was responsible for ensuring that staff involved followed policy requirements. The witness noted that although Appellant gave staff directions, they also act on their own accord within the policy guidelines. Mr. Pritchard agreed that Appellant could have included any failure by staff to follow his directions in his incident report and could also have mentioned it to the investigator or raised it during his pre-disciplinary hearing.

Rochelle Jones testified that she is employed by Appellee as Bureau Chief of Human Resources and Employee Relations and is responsible for oversight of those areas. She noted that she began her employment with Appellee in 2009 and has held her current position since September 2011. Ms. Jones indicated that Appellee's General Work Rules apply to all employees and that all employees are provided with a copy of the policies at their pre-service training. The witness recalled that there was training at every facility in 2009 and that employees were required to sign off on that training.

Ms. Jones observed that Appellee's disciplinary grid provides for progressive discipline ranging in severity from an oral reprimand to termination and lists the disciplinary options available to supervisors. She indicated that although she did not recall Appellant's specific case, she reviews all discipline packets and presents the facts of the case, such as circumstances surrounding the incident and active discipline in the employee's personnel file, to the Director for his or her final decision.

The witness testified that suspensions of more than 5 days, reductions in pay or position or demotions are disciplinary options listed in the grid, although demotion is typically only an option for managerial employees. She noted that two-year last chance agreements can sometimes be utilized in lieu of termination.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at record hearing, as well as stipulations entered into by the parties, I make the following findings of fact:

Appellant was employed by Appellee for approximately nine years and held the position of Operations Manager at Appellee's Indian River facility at the time of his removal. Appellant was placed on administrative leave on November 1 or 2, 2011, as the result of an incident occurring October 30, 2011. He participated in a pre-disciplinary hearing in February 2012 and was terminated in April 2012. His initial order of removal was rescinded and a second order of removal was issued, effective June 26, 2012.

Operations Managers are responsible for preventing and responding to incidents that threaten the safety and security of the facility, youth housed at the facility, and staff. The Operations Manager acts as Incident Commander during Use of Force (UOF) events. The Incident Commander is in charge of the entire incident scene and manages the staff members involved. He or she uses discretion to determine how best to control and resolve an incident and decisions must often be made within seconds.

Appellee's policies and procedures require staff to use the least restrictive level of response to control resistive youth and to de-escalate and moderate any restraint once control has been established. Appellee's Use of Force policy provides that non-prohibited methods of reasonable manual restraint may be used if they are more practical than agency-trained methods, are no greater than necessary, and do not unduly risk serious harm or needless pain to youth or staff. There is no special discussion in UOF training that relates to escorting youth and Appellee does not train staff in any specifically approved technique for escorting handcuffed youth or for placing them on the ground to gain control.

Staff are trained to use verbal strategies to control a situation before implementing a physical response, although in some instances an immediate physical response is appropriate. If there is time to convert a situation from one requiring an immediate physical response to one where a planned use of force or no force at all can be used, supervisors are trained to do so. Appellant received training on Appellee's policy and procedures for managing youth resistance.

On October 30, 2011, Appellant was one of two Operations Managers working second shift when he responded to a Signal 5 assistance call in Unit A. Unit A houses the most aggressive youth in the facility. When Appellant arrived on scene, the youth's mouth was bloody and he was on the floor being handcuffed with his hands behind his back by YS Hill and YS Moore. The youth being restrained and other youth in the room were verbally antagonizing and threatening each other. Acting in his capacity as Incident Commander, Appellant instructed staff to move the other youth away from the immediate area.

Once the youth on the floor had been restrained, Appellant instructed YS Mitchell to step in for YS Hill and move the youth to his room. He also instructed YS Zoeller to replace YS Moore for the escort, but YS Zoeller failed to comply. YS Mitchell and YS Moore escorted the restrained youth toward his room in an appropriate manner until they reached the entrance to the hallway. The restrained youth was yelling and struggling as he was being escorted.

When they reached the entrance to the hallway, YS Mitchell kicked the trash can out of the way so they could pass; the restrained youth continued to struggle and kicked YS Mitchell in the groin and on the shin. YS Mitchell and YS Moore placed the youth on the ground in order to regain control of the escort. Once on the ground, the restrained youth spit blood on YS Mitchell's face.

Appellant instructed YS Moore and YS Mitchell to stand the restrained youth up and continue to walk him backwards to his room. When YS Mitchell and YS Moore lifted the youth from the floor to continue the escort, the youth lifted his legs, went limp, and had to be carried. Rather than walking the youth backwards, YS Mitchell and YS Moore held the youth's arms and wrists and walked him facing forward to complete the remaining thirty feet of the escort. The restrained youth continued to physically resist and yell throughout the entire incident.

Approximately three minutes elapsed from the time Appellant arrived on scene until the time the youth was placed in his room. Appellant used verbal strategies throughout the incident to try to calm the youth down and to direct staff. Upon completion of the escort, Appellant checked the youth for injuries.

Appellee's internal investigation of the October 30, 2011, incident concluded that Appellant had failed to properly manage the incident. Appellant's subsequent removal was premised on his alleged exercise of poor judgment in carrying out an assignment, which referred specifically to his failure to properly manage the October 30, 2011, incident, and his alleged failure to identify risk to youth, which referred

specifically to his allowing the youth to be dragged to his room by YS Moore and YS Mitchell after being placed on the ground at the entrance to the hallway.

Appellant did not include information in his incident report regarding staff members' failure to follow his verbal directives. He did inform Appellee's internal investigator during the investigatory interview that they had not followed his instructions.

Since the time of the incident, Appellee has introduced the Emergency Response Belt device, to be used in the escort of handcuffed youth. The Emergency Response Belt was not used at the time of the incident and was not available to staff.

CONCLUSIONS OF LAW

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

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant was

notified of and had the opportunity to participate in a pre-disciplinary hearing. Appellant had notice of the charges against him and an opportunity to respond to those charges. Accordingly, I find that Appellant's due process rights were observed. I further find that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based upon Appellant's alleged failure to follow policies and procedures by not instructing staff to temper force, by not stopping staff from engaging in non-trained techniques and by not requiring staff to follow instruction; his alleged incompetence and neglect of duty in failing to identify and recognize the risk of harm to the youth associated with the techniques used by staff; his poor judgment in carrying out a work assignment as a Supervisor evidenced by allowing staff to remain engaged as they used improper technique, demonstrated agitation toward the youth and after being identified as a target. All of these alleged behaviors occurred as part of the use of force incident which took place on October 30, 2011.

Testimony and evidence admitted at record hearing demonstrated that Appellee had established standards of conduct which prohibit an excessive, inappropriate, and/or unwarranted use of force against youth in Appellee's custody. Appellee's policies and procedures require staff to use the least restrictive level of response, such as verbal strategies, to control resistive youth and to de-escalate and moderate any restraint once control has been established. Appellee's policies further allow for use of non-prohibited methods of reasonable manual restraint, where they are more practical than agency-trained methods, are no greater than necessary, and do not unduly risk serious harm or needless pain to youth or staff.

Testimony also confirmed that Appellee does not provide specific training on approved techniques for escorting handcuffed youth or for placing resistant youth on the ground to establish control. Appellant acknowledged that he was familiar with Appellee's policies and procedures and had received training on the applicable policies and procedures. Having determined that standards existed, this Board must consider whether or not Appellant's actions violated those standards.

The general assertion made by Appellee is that Appellant exercised poor judgment in carrying out a work assignment – the specific charges arise from Appellant's assessment and management of the incident that occurred on October 30, 2011. Appellant testified that when he arrived on scene in Unit A he observed a

youth who was being restrained, but who was also actively engaged in antagonizing and threatening other youth in the area. The Unit in which the incident took place houses the most aggressive youth in the facility. Due to space constraints it was not possible to move the other youth to another room in the unit. Based upon his assessment of the ongoing physical engagement between the youth and staff, the area in which the incident was taking place and his previous interaction with the youth involved in the incident, Appellant concluded that a threat to the security of youth and staff existed which warranted an immediate physical removal of the youth to his room.

Although Ms. Ast testified that she disagreed with Appellant's conclusion that the youth presented a security threat and enforcement necessity, she acknowledged that he acted within his authority as Operations Manager and Incident Commander in making that assessment, determining how best to respond to the situation, and dictating the manner in which the response was carried out, and that he managed portions of the incident properly. Ms. Ast noted that Appellant should have stopped the escort while the youth was restrained in the Unit's day room area and required YS Zoeller to step into the escort. She stated that Appellant should have stopped the escort when the youth was placed on the ground at the entrance to the hallway to replace the escorting Youth Specialists with other staff members. Finally, Ms. Ast stated that Appellant should have stopped the escort when he observed the escorting staff using an improper technique to move the youth, after he had lifted his legs and gone limp in the hallway.

Appellant argued that he was aware of the points identified by Ms. Ast but did not stop the escort to address them because he believed that the immediate need to move the youth to a safe area and the need to keep staff safe outweighed the merit of stopping the escort to gain compliance with his instructions or to replace staff. For example, Appellant stated that he did not stop the escort in the day room to require YS Zoeller to step in, due to the potential risk of harm to the restrained youth and staff from the other youth who were still in the immediate area; he did not stop the escort when the youth was placed on the ground at the entrance to the hallway because of the continued proximity to the day room and because of the risk to staff caused by the youth's aggressive behavior in kicking and spitting blood on the escorting Youth Specialists. Appellant testified that he observed no inappropriate force while the youth was on the ground and permitted the escort to continue from that point to the youth's room because it was nearby and he believed that there was still a safety risk.

Reviewing professionals who had the advantage of watching video of the events at a later date in a less disruptive environment opined that, once restrained, the youth did not present a security threat that required an immediate response. However, given the environment in which the incident occurred, Appellant's previous experience in dealing with this youth, and the youth's consistently aggressive and emotional behavior displayed throughout the incident, I find that Appellant's assessment of the situation as presenting a security threat and enforcement necessity was not unreasonable. As such, I find his justification for continuing the escort process from the day room, despite YS Zoeller's failure to comply with his instruction to step in, and his justification for continuing the escort at the entrance to the hallway, when the youth spit on YS Mitchell, to have merit.

Testimony and evidence presented at record hearing established that Appellant and the other staff involved in the incident consistently used verbal techniques in an attempt to de-escalate the situation; Appellant redirected YS Moore when he believed YS Moore's verbals were escalating the incident and YS Moore responded to Appellant's instruction. Testimony also established that Appellant followed up the incident by speaking directly with involved staff about their failure to follow his directives. While there was testimony at record hearing related to Appellant's failure to include staff's non-compliance with his directives in the incident report, I note that Appellant was not charged with any violation of policy or procedure for his failure to do so.

The remaining opportunity to stop the escort process identified by Ms. Ast was when the youth lifted his feet and went limp, after having been stood up a second time by the escorting staff. Testimony and evidence indicate that at that point, the escorting staff and the restrained youth had progressed further into the hallway, thereby creating a greater separation from the youth in the day room, and were only a short distance from the youth's room. Although testimony indicated that Appellee does not teach a specific technique for escorting youth in handcuffs, YS Mitchell and YS Moore were clearly not escorting the youth backwards as previously instructed and the youth's arms and wrists were held above his head. As previously noted, Appellee's policies allow for use of non-prohibited methods of reasonable manual restraint, where they are more practical than agency-trained methods, are no greater than necessary, and do not unduly risk serious harm or needless pain to youth or staff. In this instance, I find that the manner in which YS Mitchell and YS Moore held the restrained youth's arms created a risk of serious harm or needless pain to the youth that was not outweighed at that point by a security need to immediately place him in his room. Appellant should have instructed staff to stop the escort to adjust their grip and/or permit the youth to regain his footing. I find that

Appellant's failure to stop YS Mitchell and YS Moore from using a non-approved technique that risked serious harm to transport the youth the remainder of the distance to his room constituted a violation of Appellee's policies and procedures. I further find that by failing to stop YS Mitchell and YS Moore, Appellant neglected his duty to identify and recognize the risk of harm to the youth associated with the techniques used by staff, and used poor judgment in carrying out a work assignment by allowing staff to remain engaged as they used improper technique.

Appellee asserts that removal was a proper disciplinary response to Appellant's conduct in light of the seriousness of his conduct and Appellant's prior disciplinary history; Appellant had prior discipline in his personnel file at the time of the incident involving Appellant's alleged improper management of the restraint of a youth. Appellant argues that removal was too harsh a discipline and that he acted within his discretion to assess the situation and acted to ensure the safety of youth and staff.

Given the totality of the circumstances, I find that termination is too harsh a discipline for the conduct proven by Appellee. The youth's consistently aggressive behavior required an active response by staff to maintain control of the situation, and no evidence was presented to establish that Appellant or the other staff involved acted with a malicious intent to harm or punish the youth. Appellant testified that his primary concern throughout the incident was to ensure the safety of all of the parties involved; Appellant should have, however, recognized the risk of injury arising from the use of a non-approved technique and stopped the escort once the parties were in the hallway to allow for the utilization of another method of transport.

Although this Board is not bound by the disciplinary measures and disciplinary grid contained in Appellee's policies, I note that Appellee's disciplinary policy provides for demotion as a disciplinary option. Failure to identify and act on a risk of harm to youth in Appellee's custody is not a rule infraction to be taken lightly, however, in this instance I find that a reduction in position from Operations Manager to Youth Specialist is a disciplinary response that is more appropriate than removal.

Therefore, based upon the above analysis and application of law to the facts of the instant appeal, I respectfully **RECOMMEND** that the June 26, 2012 removal which constitutes the basis of SPBR Case No. 12-REM-07-0151 be **MODIFIED** to a reduction in pay and position from Operations Manager to Youth Specialist. I further

RECOMMEND that SPBR Case No. 12-REM-04-0066 be **DISMISSED**, as the disciplinary action appealed therein was rescinded by Appellee.

Jeannette E. Gunn
Administrative Law Judge

JEG: