

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

Christopher L. Head,

Appellant,

v.

Case No. 2013-REM-02-0050

Department of Youth Services, Central Office,

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.

In his Response to Appellee's Objections, Appellant's counsel requested oral argument before the Board in this matter. On April 15, 2014, Appellant attended the Board's regularly scheduled and advertised Board Meeting. At the Meeting, Appellant stated that he had discovered additional evidence of alleged disparate treatment that had not been previously presented to this Board.

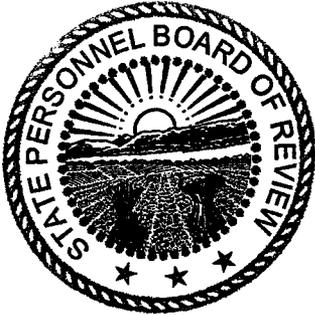
Appellant confirmed that the evidence he wished to introduce concerned *discipline that another employee of Appellee received*. Appellant further confirmed that the facts underlying that discipline, as well as the discipline itself, both took place after the date of Appellant's removal.

Thus, Appellant was apprised, it would have been impossible for Appellee to have considered this evidence when Appellee was considering Appellant's potential discipline. Correspondingly, that same evidence could not in any way be relevant to this Board in regard to determining the appropriateness of Appellant's removal.

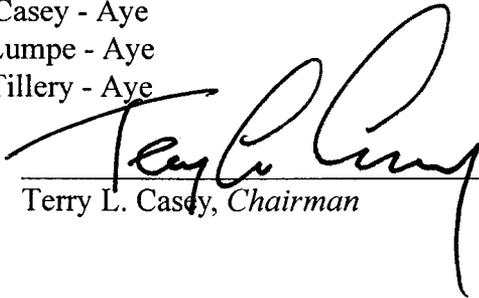
If Appellant's counsel still believes it would still be useful to present this alleged disparate treatment evidence to the Board, Appellant's counsel may timely file a motion for reconsideration and Appellant's motion, along with any optional memorandum *contra* that Appellee may file, will be given appropriate consideration.

4-16-14

Wherefore, it is hereby **ORDERED** that Appellant's removal be **MODIFIED** to reflect a ninety (90) day suspension, pursuant to R.C. 124.03 and R.C. 124.34.



Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (~~the original~~/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, April 16, 2014.


Eric E. Conn
Clerk

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

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

Christopher L. Head,

Case No. 13-REM-02-0050

Appellant

v.

November 18, 2013

Department of Youth Services,
Central Office,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his removal from employment with Appellee. A record hearing was held in the instant matter on June 25 and 26, 2013. Appellant was present at record hearing and was represented by Derek J. Walden, attorney at law. Appellee was present at record hearing through its designee, Deputy Superintendent of Direct Services Shannon Komisarek, and was represented by Joseph N. Rosenthal and E. Linda Ubokudom, Assistant Attorneys General.

The R.C. 124.34 Order provided to Appellant states as the basis for his removal:

... Per the findings of an Administrative Investigation (5501120088) it was determined that on or about the date of July 13, 2012 you turned off the water and air (ventilation fan) in the rooms of two (2) youth housed on Cedar Unit, and displayed unprofessional actions/activities while addressing the youth.

Your actions are in violation of the following Policy 103.17 Rule(s) effective July 8, 2009, specifically:

Rule 5.01P Failure to follow policies and procedures:
Specifically:

ODYS Policy – 103.17 – General Work Rules
ODYS Policy – 304.07 – Youth Personal Grooming
ODYS SOP – 201.02.02 – Youth Housing
ODYS SOP – 201.02.03 – Environmental Conditions

Rule 5.09P Violation of Ohio Revised Code 124.34 – performance related. Including but not limited to such offenses as incompetence, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of the rules of the Director of Administrative Services, or any other failure of good behavior, any other acts of misfeasance, malfeasance or nonfeasance in office or conviction of a felony.

Rule 5.12P Actions that could harm or potentially harm an employee, youth, or a member of the general public.

Rule 5.28P Failure to follow work assignment or the exercise in poor judgment in carrying out an assignment. Failure to perform assigned duties in a specified amount of time or failure to adequately perform the duties of the position or the exercise in poor judgment in carrying out an assignment.

Jurisdiction over the instant appeal was established pursuant to R.C. 124.34.

STATEMENT OF THE CASE

Appellant testified that he was employed by Appellee for approximately fifteen years prior to his removal in February 2013. He noted that he began his employment in 1994, left DYS for approximately four years to pursue other employment, and returned in 2005. Appellant observed that over the course of his employment he received favorable performance evaluations and reviews from his supervisors, including a commendation from the Director, and indicated that he had received no discipline prior to his removal other than a written reprimand in 2009.

Appellant stated that he held several posts during his employment and worked in several different capacities, including Juvenile Correction Officer (nka Youth Specialist), Operations Manager and Unit Manager. Appellant indicated that he became Unit Manager on a permanent basis in 2010 and was assigned to Cedar Unit as Unit Manager in late December 2011.

Appellant testified that a Unit Manager is responsible for ensuring the safety and security of entire unit, the youth housed there and staff assigned to the Unit. He indicated that the Unit Manager ensures that programming occurs, conducts youth hearings, answers preliminary youth grievances, and manages the unit staff. Appellant stated that the Unit Manager is responsible for administering the Unit and making sure that Appellee's policies are followed.

Appellant stated that his direct supervisor in July 2012 was Unit Management Administrator Carolton Daniels, who was supervised by Deputy Superintendent of Direct Services Shannon Komisarek. He noted that he addressed programming concerns to Program Deputy Superintendent Jack Vicencio.

Appellant confirmed that he was familiar with Appellee's general work rules, as well as the penalties for violation of the general work rules. He noted that the work rules were revised from time to time and stated that he had reviewed them in the course of his employment. Appellant confirmed that he was also familiar with Appellee's Youth Personal Grooming policy, which requires that toilet facilities be available to all youth, and agreed that youth should have access to both toilet and wash facilities.

Appellant noted that Cedar Unit's standard operating procedures were not the same as those for general population units because it was a Progress Unit. He confirmed that he had some training in August 2011 before he was assigned to the Progress Unit but did not recall participating in any training with Ms. Komisarek or receiving a draft of standard operating procedures for Progress Units. Appellant noted that most of the direction he received while assigned to Cedar Unit was verbal, and observed that the verbal directions often conflicted with written instructions. He testified that the only Post Orders for Cedar Unit that he was aware of were those signed by former Deputy Superintendent Earl Myles, effective January 2005.

Appellant indicated that youth housed in Cedar Unit do not leave their rooms during third shift. He explained that the youth rooms in Cedar are "wet cells," meaning that they are self-contained, with a toilet and wash basin in each room, and agreed that those fixtures provided the only access to toilet facilities and drinking water while youth were confined to their rooms.

Appellant stated that it was his understanding that water could be shut off to the building, but that it should only be turned off for an emergency situation. He recalled that on one occasion he had to call maintenance to turn off the water. Appellant testified that he had learned only shortly before July 13, 2012, that it was possible to turn off the water through the panel box located behind the YS podium; he confirmed that the box is labeled "Cell Water Shutoffs," and acknowledged that the Unit Manager has keys to the panel box. Appellant testified that he assumed that the numbers on the switches corresponded to individual cells, but indicated that he did not know at the time of the incident what the designations AC and EF meant or what they controlled.

Appellant recalled that he worked his regular first shift assignment as Unit Manager on Cedar Unit on July 13, 2012, and stayed over to fill in as a Youth Specialist on Sycamore Unit for second shift. Appellant noted that he received a call around 5:00 p.m. from the second shift Operations Manager, Mr. Kreis, who told him that Youth C and E on Cedar Unit were being disruptive and refusing to close their cuff ports; he stated that Mr. Kreis asked him if he would go to Cedar Unit to see if he could get the youth to close their cuff ports, as there were not enough employees available to assemble a shield team. Appellant testified that he reminded Mr. Kreis that he was on Sycamore Unit with two new employees, but agreed to go over to Cedar Unit when showers were done.

Appellant stated that when he went to Cedar Unit the youth still had their cuff ports open. He explained that a security risk is created by allowing cuff ports to remain open; he noted that youth could assault staff through an open cuff port, throw things out of the cuff port, expose themselves or destroy the locking mechanism of the cuff port. Appellant recalled that he used verbal strategies to try to get the youth to close the cuff ports but was unsuccessful. He testified that he also engaged in a workout while he was talking to the youth, and talked to the Youth Specialists on duty. Appellant acknowledged that his behavior was inappropriate and unprofessional, but noted that sometimes ignoring misbehaving youth and

denying them the attention they are seeking is an effective way to end their behavior.

Appellant recalled that the youth threatened to break the sprinkler heads in their room, so he tried to bluff and told them he would turn off the water to their rooms. He confirmed that he opened the panel box behind the YS podium and pretended to be looking at the youths' room numbers, but stated that he did not actually know how to turn off the water in the rooms. Appellant testified that he did not recall touching any switches, and that he did not turn anything off.

Appellant indicated that he talked to the youth for about three hours before he left. He stated that it is his practice to talk to Operations before he leaves the facility and testified that he did so when he left that evening, informing Operations Manager Chapman that the cuff ports were still open.

Appellant observed that the investigator found that neither Mr. Kries nor Mr. Chapman had made an entry in their Operations shift logs reflecting the open cuff ports in Cedar Unit, but noted that information has been omitted from the log on other occasions. He acknowledged that both stated in their investigatory interviews with Ms. Belli that they were not aware of the situation in Cedar Unit and Mr. Chapman told Ms. Belli that he did not notice anything unusual when he made his rounds on the evening of July 13, 2012.

Appellant stated that YS Johnson and YS Butler were lying when they told Ms. Belli that he instructed them not to turn on the water or fans in the youths' rooms until they closed their cuff ports. He testified that the log book entry made by YS Johnson was incorrect.

Appellant stated that a few days after the incident Youth C and Youth E told him that he was being blamed for turning off the water to their rooms. He recalled that on or about July 24, 2012, the public defender told Youth E that if Appellant had turned off the water to his room she would report it to the federal monitors. Appellant indicated that he immediately went to Ms. Daniels' office and she instructed him to call Mr. Vicencio; he noted that although he was not able to reach Mr. Vicencio at that time, he called him later in the day and explained what Youth E had told him. Appellant testified that Mr. Vicencio instructed him to write a statement and obtain a statement from Youth E. He noted that he gave his statement and the statement written by Youth E to Mr. Vicencio the next day, prior

to reading a follow-up email from Mr. Vicencio instructing him not to get a statement from the youth. Appellant observed that Mr. Vicencio was not interviewed by Ms. Belli as part of her investigation.

Appellant confirmed that he was placed on administrative leave in August 2012 and received notice of a pre-disciplinary hearing scheduled to take place on October 25, 2012; he noted that the original pre-disciplinary hearing was continued and did not take place until November 15, 2012. He testified that he received a copy of the R.C. 124.34 Order of Removal on the same day it was effective, February 1, 2013.

Dedra Johnson testified that she is presently employed by Appellee as a Youth Specialist at the Scioto Juvenile Correction Facility (SJCF) and has been employed there for approximately two years. She recalled that she worked third shift on Cedar Unit on July 13, 2012; third shift begins at 9:45 p.m. and ends at 6:45 a.m.

Ms. Johnson recalled that when she reported to Cedar that evening, she did not immediately see YS Butler, who was also assigned to work third shift. She stated that Appellant was in the unit when she arrived, the lights were on, and cuff ports were open; the witness noted that Appellant works during the day and is not typically there during third shift.

Ms. Johnson noted that Appellant told her that Youth C and Youth E were being non-compliant by refusing to close their cuff ports; she testified that he told her that their room lights should not be turned off, and their water and air should not be turned back on until first shift. The witness observed that she had never before been directed by staff to take this type of action. She confirmed that she made a log book entry to reflect Appellant's instructions and communicated them to YS Butler when she arrived. Ms. Johnson acknowledged that her original log book entry showed that the air and water was to remain off until the youth closed their cuff ports, but testified that she contemporaneously corrected her entry to show that it was to stay off until first shift.

Ms. Johnson confirmed that she did not see Appellant turn off the air or water to the youths' rooms. She acknowledged that she did not hear him say anything to the youth about the air and water being off and the youth did not say anything about it to Appellant during their conversations with him.

Ms. Johnson explained that water and exhaust fans in individual rooms can be turned off from panel box behind the YS podium and noted that numbers on the panel correspond to the services and the rooms. She indicated that staff members have keys to the panel box and anyone who comes on the Unit with a key can turn it on or off. The witness recalled that other staff showed her how to turn the water and fans off to specific rooms when she was first assigned to the Unit.

She agreed that there are certain situations where it might be appropriate to turn off the water to a youth's room, but to her knowledge, refusal to close the cuff port was not one of those situations. Ms. Johnson noted that she did not have the authority to decide when to shut off the water or fan to an individual room and stated that she would have to get permission from the Operations Manager or a Unit Manager to do so.

Ms. Johnson recalled that when Appellant left the unit around 10:30 p.m. the youth still had their cuff ports open. She stated that she talked to them throughout the evening and tried to get them to close their cuff ports, but they refused. The witness noted that the youths slept a little during the shift, but jumped up and stuck their arm out of the cuff port if anyone came near their rooms.

The witness stated that neither youth mentioned any problems regarding the room lights, water or air, and she did not recall either of them asking her or YS Butler to turn off their lights or turn the water and/or fans back on. She recalled that one of the youth asked to use the bathroom around 4:00 a.m. and YS Butler briefly turned the water back on so he could do so. Ms. Johnson noted that she and YS Butler were not together at all times during their shift, and acknowledged that YS Butler may have had conversations with Youth C and Youth E when she was not present.

The witness testified that she did not contact the Operations Manager during third shift and, to her knowledge, YS Butler did not call Operations during the shift. She observed that the second shift Operations Manager should have been aware of the situation in Cedar since it began prior to the start of third shift.

Ms. Johnson confirmed that she was not disciplined for failing to turn off the youths' room lights or for failing to turn on the fan and water to their rooms.

Tonya Butler testified that she is presently employed by Appellee at SJCF as a Youth Specialist, and confirmed that she worked third shift on the evening of July 13, 2012. Ms. Butler stated that she was assigned to Cedar Unit; she recalled that she got to the unit around 10:00 p.m. that evening and got the count from YS Johnson, who was already there. Ms. Butler indicated that YS Johnson told her that Youths C and E had refused to close their cuff ports, that the water and air were off in the youths' cells, and that per Appellant's instructions, the water and fans were not to be turned back on. She explained that cuff ports should be closed for safety because youth could throw things out of the cuff port or grab staff as they passed. The witness observed that she did not personally see Appellant turn off the water and ventilation fans.

Ms. Butler observed that she had received some upsetting news about her mother and was preoccupied with personal issues that evening. She stated that after she spoke to YS Johnson she went to the group room, where she stayed until it was time for her to make rounds of the unit. The witness testified that she did not see Appellant when she reported to the Unit, but she knew he was there because his office door was open. The witness recalled that while she was in the group room she heard Appellant talking to the youth and instructing them to close their cuff ports; Ms. Butler noted that he told them they could have their air and water back when they closed the ports.

The witness testified that Appellant left around 11:00 p.m. and reiterated before leaving that the water and fans were not to be turned back on until the youth closed their cuff ports. Ms. Butler indicated that after Appellant left she came out into the central part of the unit and sat at the table with YS Johnson. She recalled that she and YS Johnson talked about the water being off and she asked her if Appellant told her what was going on. Ms. Butler stated that she did not hear Appellant tell YS Johnson to leave the water and fans off until first shift.

The witness recalled that the youth talked and were active throughout the evening. She stated that she and YS Johnson used verbal strategies to try to get them to close their cuff ports, but the youth said they were trying to make a point. Ms. Butler noted that the youth asked her to turn the water back on so they could flush their toilets and she did so briefly around 4:00 a.m. The witness acknowledged that turning the water back on was contrary to Appellant's instructions and agreed that she should have made a log entry to document her actions.

Ms. Butler testified that she knows how to turn the water and ventilation fans on or off through the switches in the panel box located behind the podium. She recalled that another Unit Manager, Mr. Blevins, showed her and other employees how to do it, and noted that the switches are marked "on" and "off." The witness noted that all staff on the Unit have a key to the panel box.

The witness observed that she routinely turned the ventilation fans on and off at the request of youth, but not water. She testified that although it is not permissible to turn off a youth's water or air as a punishment, water may be turned off if a youth is flooding his room or trying to flush contraband down the toilet. Ms. Butler explained that a Unit Manager could authorize staff to turn off the water in such a situation, if one were present, but on third shift she would have to call the Operations Manager for approval.

Ms. Butler testified that she assumed that Operations was aware of what was happening in Cedar Unit because Appellant was present and should have informed them. She noted that the youth finally closed their cuff ports and she turned the water and air back on between 5:30 a.m. and 6:00 a.m. The witness confirmed that she did not notify Operations or make a log entry when she turned the water and air back on. Ms. Butler stated that she was not disciplined for her conduct related to the events occurring on third shift that evening.

Nina Belli testified that she has been employed by Appellee as an Investigator for approximately four and one-half years. She indicated that she presently works in the Office of the Chief Investigator in Appellee's Central Office and estimated that during her employment she has conducted more than one hundred administrative investigations. The witness confirmed that she investigated the July 13, 2012, incident.

Ms. Belli explained that the information she originally received alleged that Appellant had turned off the water and air conditioning in youth rooms on Cedar Unit, but that she clarified through the course of her information that Appellant was alleged to have turned off the water and ventilation (or exhaust) fans, rather than the air conditioning. The witness observed that the youth and several of the individuals she interviewed in her investigation used the terms interchangeably.

Ms. Belli testified that she interviewed Youth C and Youth E, who told her that when they refused to close their cuff ports Appellant physically threatened them by swinging, kicking, and doing pushups outside their cells. She recalled that they also told her that Appellant went to the panel box located in the central area of the unit and turned off the water and exhaust fans in their rooms. The witness stated that both youth indicated that they asked Appellant to turn the water and fan back on so that they could use the toilet, but Appellant refused and instructed YS Johnson and YS Butler not to turn the water and fans back on until the youth closed their cuff ports. Ms. Belli confirmed that before she interviewed him as part of her investigation, Youth E wrote a statement saying that Appellant did not turn off his water. She stated that neither youth indicated in their investigatory interview that the water was turned back on during third shift to allow them to flush their toilets.

Ms. Belli testified that she concluded from the information gathered in her investigation that the water and exhaust fans were turned off in the youths rooms for approximately eight (8) hours on July 13-14, 2012. She noted that she was unable to substantiate the allegation made by the youth that Appellant physically threatened them.

Ms. Belli observed that turning off the water and exhaust fans in the youths' rooms generally violated Appellee's housing, grooming and environmental conditions policies, which relate to water being available, toilets being available and accessible, ventilation, temperatures and living conditions in youth rooms. She confirmed that she was not involved in the determination as to what, if any, discipline should be imposed upon Appellant and her only involvement with the matter other than conducting the investigation was to present her investigation findings at Appellant's pre-disciplinary hearing.

Shannon Komisarek testified that she has been employed by DYS since 1996 and has worked at SCJF since February 2012. She indicated that as Deputy Superintendent of Direct Services she currently oversees the Unit Management system at SCJF. The witness explained that Unit Managers are responsible for overseeing unit life and for supervising the youth and staff assigned to their Units. Ms. Komisarek noted that Unit Managers are also responsible for securing youth rights, such as access to food, clothing, hygiene needs, school, and recreation, and for ensuring that youth are treated humanely by all staff who interact with them.

The witness testified that she considered Appellant to be a good employee and was not aware of any previous discipline. She noted that she was not involved in the decision as to what discipline was appropriate and did not participate in Appellant's pre-disciplinary hearing.

Ms. Komisarek recalled that the incidents of July 13, 2012, were first brought to her attention when she was contacted by staff from Appellee's Central Office; she noted that they had concerns generated by their review of Cedar Unit logs and YS Johnson's July 13, 2012, entry. The witness explained that as the result of class action lawsuits brought against Appellee, federal monitors have been assigned to look at the conditions of confinement for youth in Appellee's facilities. Ms. Komisarek stated that the monitors also check for compliance with policies and procedures, and that unit logs are regularly forwarded to the monitors for review. The witness indicated that an investigation was initiated and Appellant was placed on administrative leave until the conclusion of that investigation.

Ms. Komisarek stated that proper protocol was not followed in reporting the July 13, 2012, incident. She indicated that second shift staff should have notified Operations that the youth were refusing to close their cuff ports and developed a plan of action to address the problem; the witness observed that the two options available would have been to either assemble a shield team or to use verbal strategies until the youth complied. Ms. Komisarek noted that the Operations office would have had to contact her for permission to assemble a team and she did not receive a call from either the second or third shift Operations Manager. The witness testified that no log entries were made by either the Youth Specialists working second shift on Cedar Unit or by the second shift Operations Manager, Mr. Kreis, to indicate that the youth were refusing to close their cuff ports.

Ms. Komisarek explained that the Operations shift report should reflect everything that takes place on a shift and stated that there were no log entries to reflect that Mr. Kreis pulled Appellant from his post in Sycamore to address the situation in Cedar. The witness confirmed that it would have been Mr. Kreis' responsibility to go to Cedar Unit to see what was going on. She noted that because no log entry was made by the third shift Operations Manager, Mr. Chapman, she inferred that he was not made aware of the situation. The witness observed that Mr. Chapman stated that he saw nothing out of the ordinary when he did rounds on third shift. Ms. Komisarek noted that Appellant should have contacted Mr. Chapman prior to leaving the facility that evening to notify him that the

cuff ports were still open. She testified that Appellant's failure to follow protocol for notifying Operations about the open cuff ports was the basis of the "poor judgment" charge upon which Appellant's discipline was based.

Ms. Komisarek testified that to her knowledge no other employees were disciplined for failure to document the July 13, 2012, incident. She stated that the situation was more serious as it applied to Appellant because he also turned off the water and ventilation fans in the youths' rooms. The witness stated that turning off the water and ventilation fans placed Appellee in violation of its Environmental Conditions procedures, which require that housing areas provide adequate ventilation and access to a drinking fountain, and its Youth Housing procedures, which require that youth have access to operable wash basins and sanitation facilities.

Ms. Komisarek indicated that there was a draft policy in place for Progress units at the time of the incident. She stated that she distributed the policy to Unit Manager Administrators and Unit Managers in August 2011, either by personal delivery or by email and they received training on and were expected to follow the policy even though it had not yet been approved by federal monitors. The witness confirmed that Appellant was not assigned to Cedar Unit until December 2011. Ms. Komisarek noted that there were also Post Orders in effect for Cedar Unit that were effective September 15, 2011, and revised March 27, 2012.

Ms. Komisarek agreed that it is acceptable to temporarily turn off the water to a youth's room if the youth is engaging in self-harm, has clogged the toilet or washstand to intentionally cause it to overflow, has broken sprinkler heads in the room, is throwing water out of the cuff port or is seen with or suspected to have contraband that may be flushed down a drain. She stated that, in her experience, there are no other legitimate reasons for a Unit Manager to turn off the water. The witness noted that turning off the water is acceptable as a preventative measure to stop behavior that could cause harm to a youth or someone else, but not as a punitive action.

The parties stipulated that Maintenance Superintendent Charles Jackson would have presented testimony to establish that one air conditioning unit covers both the Cedar and Sycamore buildings, and that non-maintenance staff cannot turn off air conditioning to a youth's room without leaving the building and switching it off via the "AC box" outside the building. He would have clarified that the exhaust fans

in each Cedar Unit room are not air conditioning fans. Mr. Jackson would have also testified that there is no automatic or computer-generated information to verify if water in a youth's room has been turned off for a period of time.

The parties stipulated that Youth Specialist Laurel Jeffreys, TWL Unit Manager Turon Hairston and Youth Specialist Kim Williams would have testified that they worked second shift on July 13, 2012. They would have testified that they did not receive any instruction from Appellant regarding how to deal with the two youth. YS Jeffreys would have stated that she did not recall Appellant turning off the water or exhaust fans in the youths' rooms and did not hear him mention turning off the services. YS Hairston would have stated that he did not see Appellant turn off the youths' water or exhaust fans via the unit's switch box and was not aware that the services were turned off in the youths' rooms. YS Williams would have stated that he did not see Appellant turn off the water or exhaust fans in the youths' rooms or hear him state that he had done so; YS Williams would have also indicated that neither of the youth told him that Appellant had shut off their water and/or exhaust fans.

The parties stipulated that Youth Specialist Dion Baines, Youth Specialist Meredith Buckley and Youth Specialist Malinda Lawrence would have testified that they worked first shift on Cedar Unit on July 14, 2012. YS Baines would have stated that he did not recall any specific interaction with YS Johnson or YS Butler regarding instructions they received from Appellant about the youth on the unit, and that he did not recall YS Lawrence informing him about log entries reflecting Appellant's instructions to third shift staff. YS Buckley and YS Lawrence would have testified that they did not recall Youth C or Youth E informing them of any problems they had with Appellant or that their water and exhaust fans had been turned off. YS Lawrence would have stated that she did not recall third shift staff mentioning instructions from Appellant regarding youth on the unit, but did recall YS Butler informing her that the youths had their cuff ports open all night and that Appellant had turned off the water and fan in their rooms for a unspecified period of time during third shift. YS Lawrence would have also stated that YS Butler showed her how to turn off the services to individual rooms.

The parties stipulated that Operations Manager Richard Chapman would have testified that he worked third shift Operations on July 13-14, 2012, and that he was not aware of any problems or issues occurring on Cedar Unit regarding youths' refusal to close their cuff ports. OM Chapman would have confirmed that his

Operation Shift Report did not mention the youths' refusal to close their cuff ports. He would have testified that he was not aware that water and exhaust fans had been turned off in the youths' rooms or that Appellant instructed the YS staff to ensure that the services remained off until the youth closed their cuff ports.

FINDINGS OF FACT

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

Appellant was employed by Appellee for approximately fifteen years prior to his removal in February 2013 and had no discipline prior to his removal other than a written reprimand in 2009. Appellant was familiar with Appellee's general work rules and had reviewed them in the course of his employment. Appellant was familiar with the post orders for Cedar Unit effective in 2005 and signed by then-deputy superintendent Earl Myles.

On July 13, 2012, Appellant held the position of Unit Manager at SJCF and was assigned to Cedar Unit, which is a Progress Unit. As a Unit Manager, Appellant was responsible for ensuring the safety and security of the entire unit, administering the unit, managing staff and making sure that Appellee's policies are followed.

Youth housed in Cedar Unit are confined to their rooms unless participating in programming activities; their rooms are self-contained, with a toilet and wash basin in each room. During third shift, youth are not permitted to leave their rooms and their only access to water is through the plumbing fixtures in their rooms.

On July 13, 2012, Appellant worked his regular first shift assignment as Unit Manager on Cedar Unit and stayed over to fill in as a Youth Specialist on Sycamore Unit for second shift. Youth C and Youth E, housed in Cedar Unit, were refusing to close their cuff ports during second shift on July 13, 2012. The second shift Youth Specialists working on Cedar Unit unsuccessfully used verbal strategies to try to convince the youth to close their cuff ports and made multiple entries in the Cedar Unit shift log documenting their ongoing refusal to close the cuff ports. No entry was made in the shift log, however, to indicate that second shift staff contacted Operations to request assistance and no entry appeared in the second shift

Operations Shift Report for July 13, 2012, indicating that Operations was otherwise made aware of the situation.

Appellant left Sycamore Unit during second shift and returned to Cedar Unit to assist with the situation. Neither Appellant nor second shift staff made an entry in the Cedar Unit log to show that Appellant had returned to the Unit. No entry was made in the second shift Operations Shift Report to indicate that Appellant had been instructed by Operations staff to leave Sycamore and return to Cedar to give assistance.

Appellant also attempted to get the youth in Cedar Unit to close their cuff ports by using verbal strategies. While he was talking to the youth, Appellant engaged in a workout and talked to the second shift Youth Specialists on duty. Appellant told the youth that he was going to turn off the water and fans in their rooms unless they complied with his instruction to close their cuff ports; he opened the panel box behind the YS podium, where the switches to turn off those services are located, and reached into the box. The outside of the panel box is labeled "Cell Water Shutoffs" and the switches inside the box are clearly marked "on" and "off." No staff saw Appellant flip the switches controlling the water and exhaust fans in Youth C and Youth E's rooms, but video evidence shows Appellant reaching into the panel box in the area where the appropriate switches are located.

Appellant was still at Cedar Unit when third shift staff arrived on the evening of July 13, 2012. YS Johnson made a log book entry indicating that Appellant instructed her to leave Youth C and Youth E's room lights on and water and fan off until first shift; she verbally communicated that same information to YS Butler. Appellant continued to use verbal strategies in an attempt to convince the youth to close their cuff ports, but when he left the facility at 11:00 p.m., the cuff ports were still open. No entries were made in the Cedar Unit log book by either Appellant or third shift staff to indicate that the behavior was continuing. Appellant made no log book entry to indicate that he contacted third shift Operations prior to his departure to report that the youth still had their cuff ports open.

Around 4:00 a.m., the youth asked YS Butler to turn the water back on so they could flush their toilets; although she turned the water on briefly to allow them to do so, she did not record her actions in the log book. The youth finally closed their cuff ports at approximately 5:30 a.m. or 6:00 a.m. and YS Butler turned the water and ventilation fans back on in their rooms; she did not make a log entry

indicating either that they had closed their cuff ports and water and fans had been restored. No entry was made in the third shift Operations Shift Report for July 13, 2012, indicating that Operations was made aware of the situation by Appellant or by any other staff.

The original allegations investigated by the Chief Inspector's Office were that Appellant had turned off the water and air conditioning in youth rooms on Cedar Unit; through the course of the investigation it was determined that Appellant was actually alleged to have turned off the water and ventilation (or exhaust) fans, rather than the air conditioning. This revision was discussed and clarified at Appellant's pre-disciplinary hearing.

Appellant was placed on administrative leave in August 2012. He received notice of a pre-disciplinary hearing originally scheduled to take place on October 25, 2012; the pre-disciplinary hearing was continued to November 15, 2012. Appellant received a copy of the R.C. 124.34 Order of Removal on the same day it was effective, February 1, 2013.

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. I find that Appellant had notice of the charges against him and an opportunity to respond to those charges. Appellant noted that the original allegations made against him stated that he turned the air conditioning off in the youths' rooms; the charge was amended at the pre-disciplinary hearing and subsequently referenced in the R.C. 124.34 order of removal to reference "air (ventilation fan)." Information contained in the record indicates that the amended language was discussed at the pre-disciplinary hearing, where Appellant had an opportunity to respond. 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 effectuating Appellant's removal.

Appellant's discipline was premised on allegations that he turned off the water and air (ventilation fan) in Youth C and Youth E's rooms, and that he displayed unprofessional actions/activities while addressing the youth. Appellant conceded that engaging in a workout while on the Unit addressing the youth was unprofessional. Therefore, the remaining factual determination to be made by this Board before proceeding further is whether or not Appellant turned off the water and ventilation fans in the two youths' rooms on the evening of July 13, 2012. Appellant acknowledges that he reached into the panel box behind the YS podium, but contends that he only pretended to turn off the water and fans, stating that he did not know how to actually turn off the services. He further contends that he never told YS Johnson or YS Butler to keep the services off until either the youth closed their cuff ports or the beginning of first shift (there is some dispute as to which event was referenced). In contrast, YS Johnson and YS Butler both presented credible testimony that Appellant instructed them to leave the water and fans off in Youth C and Youth E's rooms. YS Johnson made a log book entry reflecting Appellant's instructions; YS Butler testified that she had to turn the services on during third shift so that the youth could flush the toilets in their room, and that she turned the services back on toward the end of third shift when the youth finally complied with instructions to close their cuff ports.

The standard of proof in this matter is a preponderance of the evidence, i.e. enough evidence to make it more likely than not that the fact to be proven is true. Upon a review of the record, I find that the testimony and evidence submitted in this matter is sufficient to support a conclusion that Appellant did turn off the water and ventilation fans in the youths' rooms on the evening of July 13, 2012. Given this conclusion, the Board may proceed to determine whether or not Appellant's conduct constituted one or more of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order received by Appellant. The R.C. 124.34 Order of Removal filed in this matter indicates that Appellant's removal was based on his alleged violation of Rules 5.01P, 5.09P, 5.12P, and 5.28P.

Appellee alleged that Appellant failed to follow ODYS Policy 103.17 (General Work Rules), specifically ODYS Policy 304.07 (Youth Personal Grooming); ODYS Standard Operating Procedure 201.02.02 (Youth Housing); and ODYS Standard Operating Procedure 201.02.03 (Environmental Conditions). The Youth Personal Grooming policy applies to all ODYS institutional personnel and youth in custody of ODYS and provides, among other things, that toilet facilities shall be available to all youth. Although Youth C and Youth E still had access to the toilets in their room on July 13, 2012, Appellant's conduct rendered them inoperable. I find that Appellant's conduct constituted a violation of ODYS Policy 304.07. A violation of ODYS Policy 304.07 falls within both ODYS Policy 103.17 (Rule 5.01P) and R.C. 124.34 (Rule 5.09P), which encompass the offense of violation of policy or work rules, and I therefore find that Appellant's conduct constituted a violation of these policies.

The Youth Housing operating procedure is applicable to ODYS staff involved with the design and administration of youth housing; no evidence or testimony was introduced to establish that Appellant had responsibility for either design or administration of youth housing, therefore, I find that the provisions of ODYS Standard Operating Procedure 201.02.02 did not pertain to Appellant and his conduct did not constitute a violation of the procedure. The Environmental Conditions operating procedure is applicable to ODYS Office of Construction, Renovations & Maintenance staff, superintendents and all institution maintenance personnel. No evidence or testimony was introduced to establish that Appellant fell within one of the named groups, therefore, I find that the provisions of ODYS Standard Operating Procedure 201.02.03 did not pertain to Appellant and his conduct did not constitute a violation of the procedure.

Appellee asserted that Appellant's conduct represented an action that could harm or potentially harm Youth C and Youth E in violation of Rule 5.12P. Testimony established that the youth had no access to drinking water other than through the fixtures in their rooms; by rendering the fixtures inoperable and instructing staff not to restore service, Appellant effectively withheld access to drinking water for an extended period of time. Upon consideration of the totality of the circumstances, I find that Appellant's conduct was sufficient to constitute a violation of Rule 5.12P.

Deputy Superintendent Komisarek testified that Appellant's failure to follow protocol for notifying Operations about the open cuff ports was the basis of the "poor judgment" charge upon which Appellant's discipline was based (Rule 5.28P). Appellant testified that the only post orders for Cedar Unit of which he was aware were those signed by former Deputy Superintendent Earl Myles, effective January 2005. Those post orders, contained in Ms. Belli's investigation report, are applicable to all SJCF employees and require employees to maintain unit log books with detailed information of what transpired on the unit during the assigned shift, and to document and notify the Operations Manager of any security problems. Appellant testified that open cuff ports presented a security risk, nevertheless, he failed to document them in the log book on either second or third shift. He stated that he verbally notified the third shift Operations Manager of the situation on his way out of the facility, but that notification is not recorded in the third shift Operations report. I find that Appellant's failure to follow the protocol set forth in the Cedar Unit post orders was a violation of Rule 5.28P.

Given the above analysis, I find that Appellee has successfully demonstrated that it had established standards of conduct that were communicated to Appellant, and that Appellant's actions violated those standards of conduct. Having so determined, this Board may consider whether or not the discipline imposed upon Appellant was an appropriate response by Appellee. As previously noted, the Board may consider the seriousness of Appellant's infraction, his prior work record and/or disciplinary history, his employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Information contained in the record indicates that Appellant was a fifteen-year employee with minimal previous discipline and over the course of his employment had received favorable performance evaluations and reviews from his supervisors, including a commendation from the Director. Appellee asserted that

the infractions committed by Appellant were of a serious nature, in that his shutting off of water and exhaust fans was potentially harmful to the youths in Appellee's custody. Also problematic was Appellant's failure to document his actions. Appellant offered evidence that no other staff members received discipline related to this matter. Both YS Butler and YS Johnson failed to notify third shift Operations of the youths' ongoing refusal to close their cuff ports and did not make log book entries reflecting their behavior, other than the initial entry made by YS Johnson. Similarly, the second shift staffs' log entries do not indicate that they notified second shift Operations of Youth C and Youth E's behavior.

Appellant held a supervisory position and was responsible for the safety and security of youth and staff. He confirmed through testimony that he knew that water could be shut off to individual rooms and that it should only be shut off in case of an emergency. Appellant's actions created a potential for harm and he not only personally failed to follow reporting protocols, he failed to direct staff to follow proper procedures. Considered in light of Appellant's tenure and favorable disciplinary history, however, as well as Appellee's failure to impose discipline on other staff members who neglected their responsibility to maintain accurate logs, I find that removal was too harsh a disciplinary response on the part of Appellee.

Therefore, I respectfully **RECOMMEND** that Appellant's removal be **MODIFIED** to reflect a ninety (90) day suspension.


Jeannette E. Gunn
Administrative Law Judge

JEG: