

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

Dan Grimsley,

*Appellant,*

v.

Case No. 2014-REM-01-0014

Department of Youth Services,

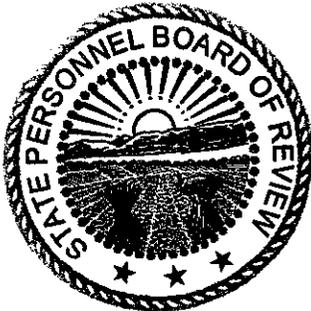
*Appellee,*

**ORDER**

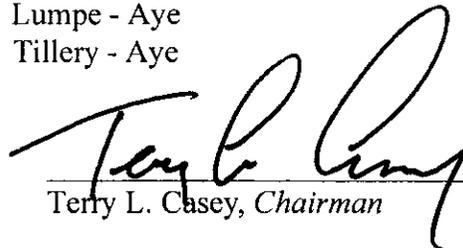
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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** that Appellant's removal is **DISAFFIRMED**.



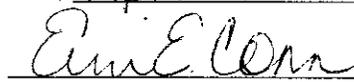
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
\_\_\_\_\_  
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 22, 2016.

  
\_\_\_\_\_  
Annie E. Conn  
Clerk

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

## NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

**IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD.** Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

**METHOD OF PAYMENT:** for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

**IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE April 29, 2016.** You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

**If you have any questions regarding this notice, please contact the Board at 614/466-7046.**

Case Number: 2014-REM-01-0014

Transcript Costs: \$705.00 Administrative Costs: \$25.00

Total Deposit Required: \* \$730.00

Notice of Appeal and Deposit Must  
Be Received by SPBR on or Before: May 9, 2016

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

Dan Grimsley

Case No. 14-REM-01-0014

*Appellant*

v.

December 2, 2015

Department of Youth Services,  
Indian River Juvenile Correction Facility

Jeannette E. Gunn  
*Administrative Law Judge*

*Appellee*

**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. Record hearings were held in the instant matter on October 20, 2014 and February 9, 2015. Appellant was present at both days of record hearing and was represented by Brian Zimmerman, attorney at law. Appellee was present at record hearing through its designee, Bureau Chief of Facility Operations Amy Ast, and was represented by Ryan D. Walters and Erin Butcher-Lyden, Assistant Attorneys General.

Appellant was removed from employment with Appellee effective January 22, 2014. The R.C. 124.34 Order effectuating Appellant's removal stated as grounds for his termination:

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

Rule 4.09P Use of excessive force – without injury  
Physical response beyond what was necessary to  
control/stabilize the situation

- Rule 5.01P Failure to follow policies and procedures  
Specifically:  
ODYS Policy – 301.05 – Managing Youth Resistance  
ODYS SOP – 301-05-01 – Use of Force
- Rule 6.05P Use of prohibited physical response  
Techniques or practices that unduly risk serious harm or  
needless pain to the youth. May not be used unless in  
an emergency defense situation to prevent an act which  
could result in death or severe bodily injury to oneself or  
to others.

### **CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT**

Appellant was employed by Appellee at its Indian River facility for approximately twenty years prior to his removal; he had no history of prior discipline. Appellant held the position of Operations Manager at the time of his termination.

As an Operations Manager, Appellant served as a shift manager and was routinely called on to oversee the response to incidents at the facility. Appellant had been trained in a variety of response techniques, including mechanical restraints and managing youth resistance.

On August 31, 2013, Appellant and three additional staff members responded to an assistance call from the Mental Health Unit (Unit C). Youth Specialist (YS) Emily Parker, YS Antonio James, General Activities Therapist (GAT) Dan Grimsley, Jr., Unit Manager (UM) Gloria Robbins and staff psychologist Dr. Bixler were all on scene at the time of the incident which formed the basis for Appellant's removal.

UM Robbins had been conducting an Intervention Hearing for the youth involved in the incident, who was being held in seclusion for an earlier assault on a staff member. The youth left his room during the hearing and refused to return, which prompted UM Robbins' call for assistance. When Appellant arrived at the Mental Health Unit, Ms. Robbins stepped away from the incident and allowed him to handle the situation as Incident Commander; she and another staff member took

several youth into the group room.

Upon arriving at the Unit, Appellant and YS James initially utilized verbal strategies to convince the youth to comply and go back to his room. While they were standing in the hallway with him, the youth unexpectedly charged YS James. The youth was violently kicking, spitting and striking out with his fists; he, YS James and Appellant fell to the floor as Appellant and YS James attempted to gain control of the youth. The youth continued to punch, kick and spit at Appellant and YS James after he was taken to the ground. Both Appellant and YS James attempted to deflect his blows and gain physical control of the youth. Appellant was struck in the face and had a bloody lip as a result of the youth's actions.

After unsuccessfully attempting to gain control of the youth using other methods, Appellant struck the youth two or three times with a closed fist. This action is a prohibited physical response, however, in some instances Appellee's policies permit its use as an emergency defense technique. Appellee's Use of Force policy provides that staff may use this level of physical response only in certain limited circumstances to prevent an act which could result in death or severe bodily injury to oneself or to others.

Appellant stepped away from the situation after striking the youth and GAT Grimsley, YS James and Dr. Bixler successfully secured the youth's arms and legs. Appellant re-engaged briefly to assist in applying restraints and a spit mask to the youth. The youth was examined by medical personnel following the incident and was not injured.

Appellant was familiar with Appellee's policies and participated in a pre-disciplinary meeting on December 6, 2013. He testified that, based on his training, he believed his actions were permissible as an emergency defense, and stated that he used only the amount of force necessary to take control of the situation and ensure the safety of all of the individuals involved in the incident.

### **CONCLUSIONS OF LAW**

In any disciplinary appeal before this Board, Appellee bears the burden of establishing certain facts by a preponderance of the evidence. 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. Evidence contained in the record indicates that Appellant was notified of and had an opportunity to participate in a pre-disciplinary hearing on December 6, 2013. Appellant had notice of the charges against him and an opportunity to respond to those charges. The record further indicates that a copy of the R.C. 124.34 Order of Removal was signed by the Director of the Ohio Department of Youth Services and hand-delivered to Appellant on January 22, 2014, which was the effective date of the employment action. 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 policy violations, specifically Appellee's Rule 4.09P, 5.01P, and 6.05P. There is no dispute that Appellant struck a youth with a closed fist during the August 31, 2013, incident at issue in this matter. There is no dispute that striking a youth is a prohibited use of physical response, although the parties agree that use of prohibited forms of physical response are permissible in an emergency defense situation.

Appellant argued that he utilized a prohibited physical response technique because he believed that he was in an emergency defense situation and at risk of serious injury. He testified that his intent was to secure the youth to prevent him from causing further injury to himself or to staff, and that he used only the amount of force necessary to do so. Appellee's SOP 301.05.01 provides that "emergency defense" applies in certain limited circumstances, to prevent an act which could result in death or severe bodily injury to oneself or to others." Although a copy of Appellee's Rule 6.05P was not introduced at record hearing, the language of the rule contained in the R.C. 124.34 Order of Removal similarly states that prohibited physical response may not be used unless in an emergency defense situation to prevent an act which could result in death or severe bodily injury to oneself or to others.

Appellee's policies do not explicitly require individuals to wait until an assailant has gained a physical advantage over them or until they have actually suffered an injury to defend themselves, either in an emergency situation or otherwise. Appellee's policies do not cite the use of alternative response techniques as a prerequisite to an emergency defense. Policy 301.05, SOP 301-05-01, and Rule 6.05P all require a subjective determination by the individual involved in the situation as to whether or not a risk of severe bodily injury or death exists. "Severe bodily injury" is not defined by Appellee's policies.

Both Dr. Bixler and YS Parker, who were physically present at the time of the incident, agreed that the youth was affirmatively resisting and presented an immediate danger to himself and to others. They both stated that Appellant acted defensively and characterized the youth's actions as presenting the possibility of severe bodily harm. They agreed that the youth presented an immediate danger to himself and others, and neither witness believed that Appellant's actions were excessive.

The individuals who reviewed the video recording of the incident as part of Appellee's investigation concluded that Appellant was not at risk of severe bodily injury, however, upon a review of the totality of the testimony and evidence presented at record hearing, I disagree. I find Appellant's determination that an emergency defense was warranted to be both reasonable and justifiable. I further find that his limited use of force was not excessive. Although some question was raised at hearing as to whether or not Appellant also struck the youth with his knee

when he re-engaged, Appellant denied doing so and insufficient testimony was offered by witnesses to establish that he did.

Because Appellant's determination that an emergency defense was warranted was reasonable and justifiable, and his limited use of force was not excessive, I find that Appellant's conduct did not violate Appellee's policies. Therefore, I respectfully **RECOMMEND** that Appellant's removal be **DISAFFIRMED**.

In the event, however, that this Board should determine that Appellant's use of a prohibited physical response was unjustified, and that his conduct violated Appellee's policies, several mitigating factors should be considered in determining whether or not the discipline imposed by Appellee was appropriate. The parties agreed that Appellant's actions did not result in any injury to the youth. The parties also agreed that Appellant had no history of prior discipline during his 20 years of employment with Appellee. Given the lack of definition provided in Appellee's policies and the circumstances of the incident described, I find that the discipline imposed by Appellee was too harsh and would alternatively **RECOMMEND** that Appellant's removal be **MODIFIED** to a 30-day suspension.

  
Jeannette E. Gunn  
Administrative Law Judge