

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

Brandon Pierce,

Appellant,

v.

Case No. 2015-RED-10-0205

Department of Rehabilitation & Correction,

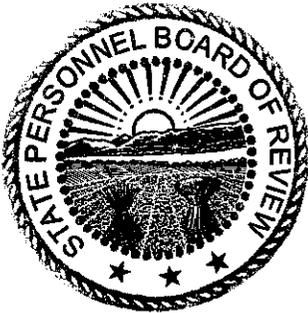
Appellee,

ORDER

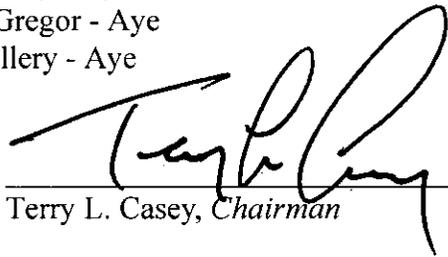
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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** that Appellant's reduction from a Correction Captain to a Correction Lieutenant is **AFFIRMED**, pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.



Casey - Aye
McGregor - 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, June 24, 2016.



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 July 1, 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: 2015-RED-10-0205

Transcript Costs: \$510.00 Administrative Costs: \$25.00

Total Deposit Required: * \$535.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: July 11, 2016

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

Brandon Pierce,

Case No. 2015-RED-10-0205

Appellant

v.

May 6, 2016

Madison Correctional Institution,
Department of Rehabilitation and Correction,

Elaine K. Stevenson
Administrative Law Judge

Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant's filing of an appeal with the State Personnel Board of Review of a reduction in position imposed by Appellee pursuant to O.R.C. § 124.34. This Board's jurisdiction to consider Appellant's appeal was established pursuant to O.R.C. §§ 124.03(A) and 124.34.

Appellant's O.R.C. § 124.34 Order of Reduction states as follows:

You violated Standards of Employee Conduct Rules
5(F) – Damage, loss, or misuse of state owned or leased computers, hardware/software, email, internet access/usage.
12(A) – Making obscene gestures or statements or false abusive or inappropriate statements.
13 – Improper conduct or acts of discrimination or harassment on the basis of race, color sex, age, religion, national origin, disability, sexual orientation, gender identity or military status.
24 – Interfering with, failing to cooperate in, or lying in an official investigation or inquiry.
59 – Any violation of ORC 124.34, and or incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

During the course of an Administrative Investigation it was found that you violated the Standards of Employee conduct. You admitted to the misuse of state owned computer system by producing / storing manipulated non work-related pictures, including photos and a flyer made up about another staff member. You used the institutional camera system inappropriately to view female officers and ask them what they were eating, wearing, etc. You made inappropriate innuendos and or statements of a sexual nature toward female staff. During your interview you denied accessing or attempting to access social media to view personal pictures of a female staff member. You admitted doing so after the interview. Your actions and failure of good behavior as a captain have contributed to an unprofessional work environment and are unacceptable.

On February 2 and 25, 2016, a two-day evidentiary hearing was held in this matter. Appellant was present at the hearing and was represented by Henry A. Arnett, Attorney at Law. Appellee was present at the hearing through its designee, Amy C. Parmi, Human Resources Director, and was represented by Matthew J. Karam, Associate Assistant Attorney General, and Kevin C. Hulick, Assistant Attorney General. Appellee called six witnesses and Appellant called six witnesses.

STATEMENT OF THE CASE

In Appellee's case-in-chief, **Appellant** testified as if on cross examination. Appellant has been employed with Appellee since 1995 and currently holds the position of Correction Lieutenant at Madison Correctional Institution (MaCI). Appellant recalled his employment history, including his promotions through the ranks. Appellant confirmed that he was demoted from the position of Correction Captain to Lieutenant for disciplinary reasons on October 18, 2015. Appellant identified all exhibits related to his demotion, and he confirmed that he attended his pre-disciplinary hearing. Appellant also confirmed that the position description marked as Appellee's Exhibit 25 accurately describes the job duties he performed as a Captain. Appellant confirmed that he received Appellee's Standards of Employee Conduct and is familiar with those standards. Appellant further confirmed that he is familiar with Appellee's rules, regulations, and policies, including those related to use of equipment systems assets including computers, telephones, printers, cameras, etc.

Appellant served as a Captain (Shift Commander) at MaCI from October 2010 to October 2015. He worked 3rd shift, from 10:00 p.m. to 6:00 a.m. (Shift Commanders report at 9:30 a.m. and leave at 10:30 p.m.) Appellant indicated that MaCI is a circular structure comprised of two multi-level compounds (Zone A and Zone B). Zone A houses

Level 2 and Level 3 inmates and Zone B houses Level 1 inmates. The center of the structure contains the administrative area where the Captains' offices are located.

Appellant testified that he reports directly to Major Jason Berchtold. Major Berchtold reports directly to the Warden. Appellant indicated that as a Captain he was responsible for directly supervising four Lieutenants and supporting the Correction Officers (COs) in their work. Appellant stated that the Warden and Major are generally not on site during the 3rd shift and, therefore, the Captains act in place of the Warden and are responsible for the security of the institution and ensuring that all employees follow MaCI rules and regulations. Appellant indicated that COs are required to make rounds in their assigned areas at thirty-minute staggered intervals.

Appellant admitted that he used Appellee's computer equipment to photoshop a picture with Lt. DiNardo dressed as a "Ninja." Appellant admitted that he circulated the photo among staff members, including Captain Lanum and the COs. Appellant stated that the photo was for "camaraderie." He explained that he and Captain Lanum shared photos of employees for camaraderie and morale purposes. Appellant stated that Lt. DiNardo posted the "Ninja" photo behind his (Lt. DiNardo's) desk.

Appellant admitted that he took photographs of COs marked as Appellee's Exhibits 23 and 24. Appellant admitted that he viewed a flyer created by Captain Lanum entitled, "DiNardo's 3rd Shift Power Rangers." The flyer contains derogatory nicknames for various employees and it contains derogatory comments regarding these employees and Lt. DiNardo's role as their direct supervisor. Appellant stated that the flyer was an attempt at camaraderie because Captain Lanum and Lt. DiNardo were not getting along. Appellant admitted that he downloaded the flyer from MaCI's shared file and saved it to his personal file at work. Appellant explained that he mistakenly placed the flyer in his personal computer file because he keeps everything electronically.

Appellant denied that he used MaCI's closed circuit surveillance system inappropriately to view certain female COs and ask them questions such as what they were eating or wearing. Appellant explained that MaCI's surveillance system has approximately 100 cameras strategically placed throughout the institution to monitor activities of inmates and staff. Appellant stated that his monitoring activities were performed in accordance with policy and at the direction of management. He noted that Major Berchtold issued a memorandum on February 3, 2015, directing shift supervisors to review five hours per week of housing unit camera footage to ensure security rounds were being conducted in accordance with the institution's rules and regulations. Each supervisor is required to view selected camera footage and compare the footage to the electronic log system the COs use to document their rounds. The camera footage must match the actual rounds documented on the electronic log. Appellant indicated that his five hours of review per week consisted of approximately ninety percent recorded footage and ten percent live footage.

Appellant denied making any inappropriate innuendos or statements of a sexual nature toward female staff. Appellant denied asking CO Kirsten Anderson what happened to the "hot" pictures she had posted on her Facebook page. Appellant denied making the comment: "What, you don't like when I finger the hole?" Appellant denied that he told CO Kristin Dye that she was jealous of the relationship between Lt. DiNardo and CO Anderson. Appellant denied that during a discussion with Lt. DiNardo regarding his relationship with CO Anderson, he stated that, "I'd fuck her, too." Appellant denied that he made comments regarding female COs' breasts.

Appellant testified that sexual comments and sexual innuendo are inappropriate in the workplace. Appellant stated that he has never made a sexual comment at work, and if he heard such a comment, he would instruct that, "We are not going to talk about that." Appellant stated that he did discuss rumors, but did not buy into it. Appellant further stated that no one ever approached him to discuss any comments he made.

Appellant admitted that during his investigatory interview he denied accessing or attempting to access social media from his home to view personal pictures of a female staff member but later admitted that he did do so. Appellant recalled the social media incident involved Facebook and took place approximately one and one-half years prior to the interview. Appellant recalled that certain COs had told him that CO Anderson had posted promiscuous photographs of herself on her Facebook page. Appellant remembered that his son showed him Facebook and that he briefly viewed Officer Anderson's page at that time and saw a photo of a little boy in a baseball uniform. Appellant further recalled that when he asked CO Anderson about her Facebook page the next time they were at work, she stated that the page had been hacked. Appellant noted that at the time of his investigatory interview, he had only a couple hours of sleep and he did not remember the incident with his son showing him Facebook. Appellant stated that he immediately contacted the investigator to revise his statement once he recalled the incident with his son.

Appellee called **Anthony DiNardo** as its second witness. Mr. DiNardo testified he is currently employed by Appellee as a CO. The witness confirmed that he was demoted from the position of Lieutenant to CO for disciplinary reasons effective in December 2015. Mr. DiNardo acknowledged that he was disciplined for not being honest regarding his relationship with CO Kirsten Anderson when questioned during an investigation and for using his work computer to send non work-related emails. Mr. DiNardo currently works the 2nd shift at MaCI.

Mr. DiNardo testified that, as a Lieutenant, he worked the 3rd shift with Appellant and another Captain from approximately June 2014 through October 2015. Mr. DiNardo recalled that problems began when Captain Lanum was assigned to 3rd shift. There were incidents of teasing and refusing to conduct post checks with COs that the Captains did not like. Morale was low. Mr. DiNardo recalled that the Appellant and

Captain Lanum would discuss the personal lives of subordinate staff and discuss rumors regarding staff.

Mr. DiNardo testified that Appellant discussed certain female COs in a sexual manner. He stated that Appellant also watched certain female COs on camera and asked them "off key" questions such as what they were eating. Mr. DiNardo indicated that Appellant made comments regarding COs' breast sizes on occasion. Mr. DiNardo stated that Appellant's comments made him uncomfortable and created a culture where it was okay to treat female COs that way. Mr. DiNardo stated that he attempted to discuss these problems with Appellant and Captain Lanum but he was met with resistance and nothing was ever resolved.

Mr. DiNardo testified that Appellant and Captain Lanum expressed concerns about his relationship with CO Anderson. He stated that Appellant commented that, "I'd fuck her, too." Mr. DiNardo stated that Appellant and Captain Lanum always indicated that he was having inappropriate relationships with various COs and would tease him for conducting post checks with certain female COs. Appellant also would make cat calls when the witness was in CO Anderson's vicinity. Mr. DiNardo stated that Appellant's conduct undermined his authority as a supervisor over the COs. Mr. DiNardo stated that the "Ninja" photograph and the "Power Rangers" flyer were circulated within the institution and further undermined his authority as a supervisor. Mr. DiNardo noted that he had gotten along well with Appellant for eighteen years, and that they had been friends until Captain Lanum was assigned to 3rd shift and the work environment "went south."

On cross examination, Mr. DiNardo acknowledged that CO Anderson and CO Dye discussed their issues regarding Appellant's behavior and comments with him, but he did not report their complaints to anyone above him in the chain-of-command. Mr. DiNardo confirmed that he did not report the comments he overheard when Appellant was observing female COs on camera. Mr. DiNardo acknowledged that he was under an obligation to report sexual harassment but did not because "it was a gray area." He stated that he also feared retaliation because Appellant was a personal friend of Major Berchtold.

Appellee called **Kirsten Anderson** as its third witness. Ms. Anderson testified that she began her employment as a CO with Appellee at MaCI on March 10, 2014. Ms. Anderson indicated that COs are responsible for conducting inmate counts and rounds to ensure that safety and security are maintained. Ms. Anderson stated that she has received a written reprimand and a five-day working suspension. Ms. Anderson confirmed that the five-day working suspension was for dishonesty during an administrative investigation, specifically, she was not forthcoming regarding her relationship with Lt. Anthony DiNardo. Ms. Anderson stated that she worked the 3rd shift and that Appellant was her Captain on 3rd shift. She confirmed that the Captain is usually the highest ranking officer on duty on the 3rd shift.

Ms. Anderson recalled that she first began working at MaCI in March 2014. Ms. Anderson stated that Appellant was her favorite Captain because he was personable and helpful and he encouraged her interest in the institution's functions. Ms. Anderson stated that approximately four months after she began her employment, their interactions changed when Appellant began to make awkward comments and cause dissent between COs by spreading gossip. Ms. Anderson stated that Appellant would make sexual jokes and inappropriate comments on a daily basis and he would often stare at her chest. Ms. Anderson recalled that in the fall of 2014, Appellant commented to her that he was looking for the "hot" pictures of her on her Facebook page. Ms. Anderson recalled another incident that involved a leak in the ceiling that Appellant was checking. Ms. Anderson stated that Appellant had put his fingers in a hole in the plaster where the leak had been and when she asked him what he was doing, Appellant responded: "What, you don't like when I finger the hole." Ms. Anderson indicated that this incident happened in the housing unit when only the two of them were present. Ms. Anderson further testified that Appellant would make inappropriate comments when observing her on camera. Appellant would call her when she was in the unit to ask her what she was eating or what she was wearing. Ms. Anderson stated that she believed Appellant did this to let her know that he was watching her on camera. She recalled that this occurred approximately six times and it made her feel uncomfortable.

Ms. Anderson testified that she spoke many times with various Union representatives regarding Appellant's conduct. She stated that she also spoke to Appellant regarding his inappropriate comments. Ms. Anderson explained that at first she tried to brush off Appellant's comments because you are not supposed to be a snitch. She stated that she did not want to file a written complaint because she was a probationary employee and did not want to jeopardize her job. Ms. Anderson recalled that she sent an email regarding her complaints to Union Vice President Bradley Walborn on June 25, 2015, but she not intend for the email to go further than the Union. The Union, however, did forward her email to MaCI investigators. Ms. Anderson stated that she did not want this to become a big issue and wanted to take care of it at the union level. Ms. Anderson stated that she is scared and did not want to testify at today's hearing.

On cross examination, Ms. Anderson was questioned regarding an incident that occurred shortly before she sent her email to Union Vice President Walborn on June 25, 2015. Ms. Anderson recalled that a few days prior to June 25, 2015, Appellant and Captain Lanum informed her that she had inappropriately received days off that should have been given to a more senior employee. Ms. Anderson stated that she had completed the appropriate leave requests but those documents disappeared. Ms. Anderson noted that their accusations regarding the leave issue were proven false during the investigation. Ms. Anderson noted that she sent her June 25, 2015 email to Mr. Walborn a couple days after Appellant made the "finger the hole" comment.

Ms. Anderson confirmed that she made the allegation during her investigatory interview that Appellant sent her inappropriate emails in the fall of 2014. The investigator did not find the emails. Ms. Anderson identified Appellant's Exhibit 3, page 9, as a series of emails between her and Appellant. Ms. Anderson noted that Appellant emailed her at work from his home.

Appellee called **Kristy Dye** as its fourth witness. Ms. Dye testified that she is currently employed by "Opportunities for Ohioans with Disabilities" as a Caseload Assistant. Ms. Dye indicated that she was previously employed as a CO at MaCI for approximately four years, from May 23, 2011 through April 19, 2015. Ms. Dye stated that she returned to work for Appellee in February 2016 at Pickaway Correctional Institution as a Case Manager.

During the majority of her employment at MaCI, Ms. Dye worked the 3rd shift, from June 2011 through March 2015. Ms. Dye confirmed that she worked with Appellant on 3rd shift and they had daily interaction during post checks and roll call. Ms. Dye recalled that, after March 2015, she transferred to 1st shift "to get away from the mess" on 3rd shift. She explained that there were problems with the Captains and Lieutenants and she noted that Appellant tried to create problems between her and CO Anderson.

Ms. Dye stated that Appellant was good with words in that he would make a statement that could be taken professionally or in a sexual manner. She indicated that Appellant would make such a statement and look at you to let you interpret the comment. Ms. Dye indicated that Appellant made these comments regularly and on every post check they conducted together. Ms. Dye stated that she tried to shake off his comments and redirect him. Ms. Dye recalled that she prepared written professional work-related questions in advance to keep things professional. If Appellant started to go off track she would ask him one of her prepared questions regarding work to try to get him to stay on track and keep it professional.

Ms. Dye confirmed that Kirsten Anderson was a fellow CO she worked with at MaCI. Ms. Dye also confirmed that she also worked with Anthony DiNardo when he was a Lieutenant on 3rd shift at MaCI. She recalled that Appellant would raise questions regarding Mr. DiNardo and Ms. Anderson's relationship on a nightly basis. Ms. Dye recalled that Appellant told her that he thought she was jealous of DiNardo and Anderson's relationship. Ms. Dye stated that she was angry with Appellant's comments and stopped speaking to him.

Ms. Dye testified that Appellant watched her on camera. She recalled that he would call her to ask her what she was eating and on another occasion he called her three times to ask her what she was reading. Ms. Dye stated that the questions were not work-related. Ms. Dye confirmed that Appellant showed her the photo-shopped picture of Lt. DiNardo as a "Ninja." On cross examination, Ms. Dye stated that the lack of professionalism was widespread.

Appellee called **Orlanzo Williams** as its fifth witness. Mr. Williams testified that he has been employed with Appellee for twenty-two years. Mr. Williams has been a Correction Lieutenant at MaCI for the past five years and currently he is on special duty. Mr. Williams previously worked the 3rd shift and he confirmed that he worked with Appellant and Captain Lanum. He indicated that Captains act as shift commanders and they are in direct supervision of all operations. He recalled that the situation was tense and morale was low during the time he worked on 3rd shift with Appellant and Captain Lanum. He indicated that there was a division between senior staff and newer staff. Mr. Williams indicated that senior staff pretty much stayed together and the younger staff had to prove themselves before they were trusted by senior staff.

Mr. Williams further testified that the work environment was unprofessional. As an example, Mr. Williams recalled the "Ninja" photo of Lt. DiNardo that had been posted in various locations. Mr. Williams stated that this behavior was professionally uncalled for and had contributed to insubordinate behavior from COs. Mr. Williams explained that subordinate employees often felt that they did not have to listen to supervisory staff and were reluctant to carry out duties.

Mr. Williams confirmed that he saw the "Power Rangers" flyer in the shift commander's office. Mr. Williams stated that the flyer was inappropriate because it put down staff members and affected their ability to carry out their job duties. He further stated that the some of the statements contained in the flyer would encourage poor work performance, statements such as "Live by the dark side." Mr. Williams noted that the flyer contained names of probationary employees who had been removed, and he indicated that the negative message of the flyer compromised the supervisors' authority and ability to supervise new staff. Mr. Williams stated that Appellant was aware of the flyer and he recalled Appellant discussing the flyer and laughing about it. Mr. Williams noted that the yard officers were aware of the "Power Rangers" flyer as it had been posted in a number of places in the institution.

Mr. Williams confirmed that he overheard Appellant making inappropriate comments to certain female COs while he was watching them on the surveillance cameras. Mr. Williams stated that he observed Appellant using live footage to monitor certain female staff, and he indicated that Appellant would call the CO while observing to ask what they were eating or what they were doing.

Mr. Williams stated that he overheard Appellant make jokes about staff members and how they conducted themselves. Mr. Williams stated that Appellant made jokes regarding certain body parts of female COs. Mr. Williams stated that he was uncomfortable when Appellant made such comments. Mr. Williams further stated that he was embarrassed when these comments were directed toward a female, and he indicated that he did not want to be perceived as supporting Appellant's comments. Mr. Williams stated that when these situations arose he would try to redirect the

conversation and keep focused on the task at hand. Mr. Williams stated that Appellant would make comments in such a manner that would invite a direct response or an attempt to move the conversation in another direction. Mr. Williams recalled an incident where Appellant made a comment regarding CO Dye's breasts while he, Appellant, CO Dye, and another CO, were making rounds. Mr. Williams did not want to be part of the conversation and focused his attention on making unit rounds. Mr. Williams recalled that CO Dye redirected the conversation.

Mr. Williams confirmed that he worked with CO Anderson on 3rd shift. Mr. Williams confirmed that Appellant made inappropriate comments regarding CO Anderson. Mr. Williams recalled that Appellant stated that he admired CO Anderson but Lt. DiNardo was getting himself in trouble with her and he hoped Lt. DiNardo "would just fuck her and get it over with." Mr. Williams stated that he did not respond to Appellant's comment but he felt that if the inappropriate conduct continued, the work environment would be out of control. Mr. Williams explained that new officers are impressionable and hang-on the words of their supervisors, and when supervisors engage in inappropriate conduct, their credibility as supervisors is jeopardized. Mr. Williams stated that the supervisory staff carried a negative approach that empowered the darkness in the corrections environment. He noted that older staff followed Appellant and Captain Lanum's lead and ostracized anyone who came in as an outsider with an opinion regarding how to conduct work. Mr. Williams testified that subordinate staff on 3rd shift were difficult to supervise and were often insubordinate. He noted that he is being written-up by his subordinates on a weekly basis, and that he has no support from other supervisors. Mr. Williams stated that he did not report any of the alleged misconduct described at this hearing because it has been very difficult for him as a supervisor in the work environment at MaCI.

On cross examination, Mr. Williams acknowledged that he was under an obligation to report the misconduct he described in his testimony but he did not do so. Mr. Williams confirmed that he was not disciplined for failing to report misconduct. Mr. Williams stated that MaCI's surveillance camera system is a serious system designed to monitor the institution and the comments he overheard Appellant make while monitoring certain COs on camera were not work related. Mr. Williams confirmed that he had nicknamed Lt. DiNardo "Lt. Star." He stated that he did not consider the nickname a put down. Mr. Williams explained that he called him "Lt. Star" due to his catching a mistake the witness had made on the work schedule.

Appellee called **Rhonda R. Richard** as its final witness. Ms. Richard testified that she has been employed by Appellee for approximately nineteen years. Ms. Richard has held the position of Warden at MaCI for the past five years. Ms. Richard stated that she is responsible for managing all aspects of the facility, including security, fiscal, and personnel. Ms. Richards confirmed that she approves discipline.

Ms. Richard testified that after an investigation was conducted by an outside party, Appellant received a pre-disciplinary hearing. Ms. Richard stated that after reviewing the investigative reports and documents and the pre-disciplinary hearing report, she determined that a reduction in position was the appropriate level of discipline. Ms. Richard stated that she approved Appellant's reduction in position from Captain to Lieutenant based upon the serious nature of the charges. Ms. Richard noted that Appellant, as a Captain, was a shift commander and as such she must be able to rely upon Appellant to act in her place to secure the facility for inmates and employees. Ms. Richard stated that the investigation results indicated to her that she could no longer trust Appellant in the role of shift commander.

Ms. Richard confirmed that other supervisory staff were disciplined based on the investigation of the 3rd shift Captains. Ms. Richard stated that Appellant, Captain Lanum, and Lt. DiNardo were reduced in position and Major Berchtold received a written reprimand. On cross examination, Ms. Richard reiterated that she reviewed the investigation documents and pre-hearing packet in their entirety to make her decision regarding the discipline imposed.

In his case-in-chief, Appellant called **Gregory Haddox** as his first witness. Mr. Haddox testified that he currently is employed as an Administrative Organizer for "SEIU." Mr. Haddox stated that he was a CO at MaCI from December 2012 to January 2015. Mr. Haddox indicated that he worked the 3rd shift and served as Union Steward for "OCSEA." Mr. Haddox confirmed that he knows Appellant and Ms. Anderson. Mr. Haddox stated that Ms. Anderson complained to him regarding gossip concerning her relationship with Lt. DiNardo, but she never complained that Appellant was harassing her. On cross examination, Mr. Haddox stated that Ms. Anderson did not request to file a formal grievance and she did not follow-up with him regarding her concerns.

Appellant called **Jason Berchtold** as his second witness. Mr. Berchtold testified that he has been employed by Appellee for approximately twenty-nine years. Mr. Berchtold has held the position of Major at MaCI since 2010. He directly supervised Appellant as 3rd shift Captain at MaCI. Mr. Berchtold confirmed that he viewed the investigation materials and was familiar with the charges but has no authority to impose discipline.

Mr. Berchtold testified that an employee may choose to report a complaint directly up the chain-of-command, or, if they are not comfortable with reporting within that structure, they may go outside the chain-of-command to report misconduct. Mr. Berchtold stated that he never received any complaints regarding Appellant.

Mr. Berchtold recalled that he had heard rumors that there was something inappropriate between Lt. DiNardo and CO Anderson but there was no proof. Mr. Berchtold stated that just prior to the investigation into the 3rd shift Captains' conduct, Captain Lanum and Appellant indicated to him that they found an irregularity in the

schedule book involving CO Anderson's schedule. Mr. Berchtold stated that the investigation of the 3rd shift Captains never found any scheduling irregularities.

Mr. Berchtold confirmed that he issued a memo to shift supervisors instructing them to compare camera footage of security rounds to the entries made in the e-log system by the COs. He confirmed that the supervisors were required to view five hours of camera footage per week and compare the footage to the e-log system to ensure the e-log entries matched the actual rounds completed. Mr. Berchtold stated that the intention of the memo was to have the supervisor compare historical camera footage of completed rounds. Mr. Berchtold noted that it is more efficient to view historical footage rather than live footage; however, he stated that he never instructed the Captains that they could not use live footage when viewing CO rounds.

Appellant called **John Ruth** as his third witness. Mr. Ruth testified that he is employed by Appellee as a Correction Lieutenant at MaCI. Mr. Ruth indicated that he worked approximately two days each week with Appellant on Zone A. Mr. Ruth stated that he never heard Appellant make inappropriate statements or inappropriately use the camera surveillance system.

Appellant called **Shawn Peterman** as his fourth witness. Mr. Peterman testified that he has been employed by Appellee since 1999. Mr. Peterman indicated that he worked with Appellant at MaCI intermittently. Mr. Peterman stated that they worked together approximately thirty days and he never heard Appellant make sexual or inappropriate comments and he never observed Appellant using the camera system in an inappropriate manner.

Appellant called **Michael Hackworth** as his fifth witness. Mr. Hackworth testified that he is employed by Appellee and has worked with Appellant off and on. Mr. Hackworth indicated that he also worked with CO Anderson for approximately one month. Mr. Hackworth stated that he never heard Appellant make any inappropriate comments.

Appellant testified in his case-in-chief. Appellant described his work history with Appellee and his job duties as a Captain. Appellant testified that he has no previous discipline in his record. Appellant stated that his interaction with CO Kirsten Anderson was the same type of interaction he had with every other officer. Appellant testified that he had a good working relationship with Ms. Anderson. Appellant stated that Ms. Anderson never complained of any misbehavior. Appellant noted that he conducted a review of work schedules and assignments and, based on his review, he estimated that he and Ms. Anderson worked together six days during the six months prior to the investigation.

Appellant testified that Captain Lanum discovered a work schedule irregularity involving CO Anderson. He indicated that there was no paperwork approving a day off

for the July 4th holiday. Appellant stated that he and Captain Lanum mentioned the issue to Ms. Anderson and then reported the issue to Major Berchtold. Appellant indicated that the investigation into the 3rd shift Captains began the same day they reported the work schedule irregularity.

Appellant testified that he never made sexual jokes at work, never made comments regarding a woman's breast size, and he never stated that he would have sex with Ms. Anderson. Appellant testified that he never used the surveillance cameras to inappropriately watch female COs. Appellant testified that he was honest during the investigation and promptly corrected information he erroneously provided regarding social media.

FINDINGS OF FACT

Based upon a thorough review of the record evidence as a whole and, where relevant, credibility determination of witness' testimony, I make the following Findings of Fact:

1. Appellant has been employed by Appellee since 1995. Appellant currently holds the position of Correction Lieutenant. Appellant has received Appellee's Standards of Employee Conduct and he is familiar with those standards. Appellant is familiar with and understands all of Appellee's rules, regulations, and policies.
2. Prior to October 18, 2015, Appellant held the position of Captain. As a Captain, Appellant directly supervised four Lieutenants and supported the Correction Officers in their work. The Warden and Major are generally not on site during 3rd shift. The Captains are the Shift Commanders and are responsible for the security of the institution.
3. Appellee conducted an investigation and held a pre-disciplinary hearing regarding allegations made against Appellant. Appellant received notice of the charges made against him, an explanation of the evidence, and was given an opportunity to respond.
4. Appellee timely and properly served Appellant with an O.R.C. § 124.34 Order of Reduction, effective October 18, 2015. Appellant was reduced from Correction Captain to Correction Lieutenant. Appellant timely filed an appeal of his reduction with the State Personnel Board of Review.
5. Appellant violated Rule 5(F) of Appellee's Standards of Employee Conduct when he used Appellee's computer system to produce and store manipulated non work-related pictures, including photos and a flyer made up about other staff members.

6. Appellee violated Rules 5(F), 12(A), and 13 of Appellee's Standards of Employee conduct when he used Appellee's camera surveillance system inappropriately to view female officers and ask them what they were eating, wearing, or reading, etc. Appellant made inappropriate comments while observing female COs on a number of occasions. Appellant made inappropriate comments when observing CO Kirsten Anderson on camera on a number of occasions. Appellant called CO Anderson when she was in the unit to ask her what she was eating and what she was wearing. Appellant made inappropriate comments when observing CO Kristy Dye on camera on a number of occasions. He asked her what she eating and what she was reading.
7. Appellant violated Rules 12(A) and 13 of Appellee's Standards of Employee conduct when he made inappropriate innuendos, statements, and comments of a sexual nature toward female staff members CO Kristy Dye and CO Kirsten Anderson. Appellant made comments in front of staff members Lt. Williams and Lt. DiNardo regarding COs' breast sizes. In reference to CO Anderson, Appellant stated to Lt. DiNardo that: "He'd fuck her, too." Appellant made sexual jokes and inappropriate comments on a daily basis while working with CO Anderson and CO Dye. On one occasion, Appellant placed his fingers in a hole in the ceiling to check for a leak. When CO Anderson asked him what he was doing, he responded: "What, you don't like when I finger the hole."
8. Rule 59 references the grounds for discipline set forth in O.R.C. 124.34. The misconduct described in Findings of Fact Nos. 5, 6, and 7 constitute failure of good behavior under O.R.C. § 124.34.
9. Appellant also was charged with violation of Rule 24, specifically: "During your interview you denied accessing or attempting to access social media to view personal pictures of a female staff member. You admitted doing so after the interview."

CONCLUSIONS OF LAW

The issue in this case is whether Appellant, as a classified civil service employee, was appropriately reduced in position. Ohio's civil service laws are set forth in O.R.C. Chapter 124. Appellee bears the burden to prove by a preponderance of the evidence that Appellant's due process rights were observed, that Appellee substantially complied with the procedural requirements set forth in O.R.C. § 124.34 and Ohio Administrative Code Rule 124-3-01, and that the Appellant committed one or more of the enumerated infractions listed in Appellant O.R.C. 124.34 Order. If Appellee meets its burden of proof, the Board will weigh the appropriateness of the discipline imposed

upon Appellant by considering the seriousness of the infractions, Appellant's prior work history, and any evidence of mitigating circumstances.

The evidence establishes that Appellee substantially complied with the procedural requirements set forth in O.R.C. § 124.34 and Ohio Administrative Code Rule 124-3-01. Appellant is alleged to have violated four of Appellee's Standards of Employee Conduct. **(1)** Rule 5(F) - Misuse of state owned computer system; **(2)** Rule 12(A) – Making inappropriate innuendos, statements, and comments of a sexual nature; **(3)** Rule 13 – Improper conduct or acts of discrimination or harassment on the basis of sex; and **(4)** Rule 24 – Interfering with, failing to cooperate in, or lying in an official investigation. Appellee has met its burden of proof with respect to Appellant's violations of Rules 5(F), 12(A), and 13.

At hearing, Appellant admitted that he used Appellee's computer equipment to photoshop a picture with Lt. Anthony DiNardo dressed as a "Ninja." Appellant admitted that he circulated the photo to staff, including Captain Lanum and the COs. Appellant admitted that he took photographs of COs marked as Appellee's Exhibits 23 and 24. Appellant admitted that he viewed a flyer created by Captain Lanum entitled, "DiNardo's 3rd Shift Power Rangers." The flyer contains derogatory nicknames for various employees and derogatory comments regarding these employees and Lt. DiNardo's role as their direct supervisor. Appellant admitted that he downloaded the flyer from MaCI's shared file and saved it to his personal file at work. Appellant admitted that all of these actions violated Rule 5(F) of Appellee's Standards of Employee Conduct. Although Appellant claimed that these photos and flyer were for camaraderie, other staff members believed that the photos and flyer contributed to divisiveness in the workplace. Both Lt. DiNardo and Lt. Williams testified that Appellant's conduct regarding the photo and flyer undermined the Lieutenants' authority as supervisors over the COs. Lt. Williams stated that this type of behavior was unprofessional and contributed to insubordinate behavior from COs.

Appellee presented four witnesses who worked with Appellant and directly observed Appellant use the camera system in an inappropriate manner on a number of occasions. CO Kirsten Anderson testified that Appellant would make inappropriate comments when observing her on camera. Ms. Anderson testified that Appellant would call her when she was in the unit to ask her what she was eating or what she was wearing. Ms. Anderson stated that she believed he did this to let her know that he was watching her on camera. Ms. Anderson recalled that this conduct occurred on several occasions and it made her feel uncomfortable. Kristy Dye, who was a CO working 3rd shift at MaCI during the relevant time period, testified that Appellant watched her on camera a number of times. Ms. Dye stated that Appellant called her to ask her what she was eating and on another occasion he called her three times to ask her what she was reading. Lt. Orlanzo Williams testified that he observed Appellant using the camera system to monitor certain female staff, and he stated that Appellant called female staff while he was watching them on the camera to ask them what were they eating or what

they were doing. Lt. Anthony DiNardo testified that he was aware that Appellant watched certain female COs on camera and asked them "off key" questions regarding what they were eating. All four witnesses testified that Appellant's conduct was not a proper use of the camera system.

Appellant denied that he used the MaCI's camera surveillance system inappropriately to view female officers and ask them what they were eating, wearing, etc. Appellant stated that his monitoring activities were performed in accordance with policy and at the direction of management. He noted that Major Berchtold had issued a memorandum in February 2015 directing shift supervisors to spend five hours each week reviewing camera footage and comparing the footage to the electronic log system to ensure rounds were being conducted in accordance with the institution's rules and regulations. Appellant also called two witnesses, Lieutenants John Ruth and Shawn Peterman, who testified that they never observed Appellant use the camera system inappropriately.

Although Appellant categorically denied that he used the camera system inappropriately, his explanation regarding his monitoring activities was not persuasive. Much of Appellant's testimony centered upon Major Berchtold's February 2015 directive regarding reviewing camera footage and the electronic log to ensure COs make their rounds. While it is true that Appellant would have used the camera system to carry out certain job duties, it does not follow that every use of the camera by Appellant was a proper one. Major Berchtold's directive does not in any way authorize the type of camera surveillance that Appellant engaged in when he observed certain female COs on camera and asked them inappropriate questions. With regard to Appellant's witnesses, it is noted that their testimony does not directly rebut the testimony presented by Appellee's witnesses as no evidence was presented to establish that these two staff members were with Appellant during any of the alleged incidents described by Appellee's witnesses.

Substantial credible testimony was presented to establish that Appellant made inappropriate innuendos, statements, and comments of a sexual nature toward female staff. Former CO Kristy Dye testified that Appellant was good with words in that he would make a statement that could be taken professionally or in a sexual manner. Ms. Dye testified that Appellant made these comments regularly and on every post check they conducted together. Ms. Dye stated that she tried to shake off his comments and redirect him and she even went so far as to prepare written professional work-related questions in advance to keep things professional. CO Kirsten Anderson testified that Appellant would make sexual jokes and inappropriate comments on a daily basis and he would often stare at her chest. Ms. Anderson recalled one instance that involved a leak in ceiling that he was checking. Ms. Anderson stated that he had put his fingers in a hole in the plaster where the leak had been and when she asked him what he was doing, he responded, "What, you don't like when I finger the hole." Both Ms. Dye and Ms. Anderson testified that they felt uncomfortable with Appellant's comments and

made every effort to keep the conversation on a professional level. Ms. Dye testified that she transferred to 1st shift to “get away from the mess on 3rd shift.”

Anthony DiNardo and Orlanzo Williams, who were Lieutenants at MaCI during the relevant time period, gave credible testimony that corroborated the testimony of Kirsten Anderson and Kristy Dye. Both Mr. DiNardo and Mr. Williams testified that they heard Appellant make comments regarding COs’ breast sizes on a number of occasions. Mr. DiNardo stated that Appellant’s comments made him uncomfortable. Mr. DiNardo testified that Appellant questioned his relationship with CO Anderson and commented that, “I’d fuck her, too.” Mr. Williams’ testimony was similar. He testified that Appellant made jokes regarding certain body parts of female COs. Mr. Williams stated that he was uncomfortable when Appellant made such comments. Mr. Williams further stated that he was embarrassed when these comments were directed toward a female, and he indicated that he did not want to be perceived as supporting Appellant’s comments. Mr. Williams recalled an incident where Appellant made a comment regarding CO Dye’s breasts while he, Appellant, CO Dye, and another CO, were making rounds. Mr. Williams did not want to be part of the conversation and focused his attention on making unit rounds.

Appellant denied making any inappropriate innuendos or statements of a sexual nature toward female staff. Appellant denied making the comment to CO Anderson, “What, you don’t like when I finger the hole?” Appellant denied that he made comments regarding female COs’ breasts. Appellant denied making comments regarding having sex with CO Anderson. Appellant called three witnesses who had worked with him at various times, John Ruth, Shawn Peterman, and Michael Hackworth. Each witness testified that he never heard Appellant make any inappropriate comments. Although these witnesses indicated that they worked with Appellant at various times, no evidence was presented to establish that these employees were with Appellant during the incidents described by Appellee’s witnesses. Therefore, I find that their testimony has little probative value.

In an effort to undermine the testimonial evidence presented by Appellee, Appellant noted in his case-in-chief that CO Anderson never filed a complaint to a higher-level administrator until June 25, 2015, when he and Captain Lanum discovered alleged discrepancies in certain of her leave requests and confronted her with their discovery. This is an issue that was explored during the investigation and led to the conclusion that there was no wrong doing. At hearing, Appellant noted that all four of Appellee’s primary witnesses had a duty to report Appellant’s misconduct but failed to do so. Appellant’s statement in this regard is accurate; however, Appellee’s witnesses gave believable reasons for their failure to report, primary among them, was their fear of retaliation from coworkers. Given the extensive testimony regarding Appellant’s misconduct, I find that the issues raised by Appellant do not undermine the credibility of Appellee’s witnesses.

The final allegation to consider is whether Appellant violated Rule 24 of Appellee's Standards of Employee Conduct when he denied accessing or attempting to access social media to view pictures of a staff member. At hearing, Appellant admitted that he denied this allegation during his investigatory interview. However, Appellant noted that he contacted the investigator to correct his mistake after the interview. Appellant explained that the incident took place approximately eighteen months prior to the interview when certain COs had told him that CO Anderson posted promiscuous photographs of herself on her Facebook page. Shortly after this was mentioned to Appellant and he was at home, Appellant's son showed him Facebook. Appellant stated that it was at that time he briefly viewed Officer Anderson's page and saw a picture of little boy in a baseball uniform. Appellant asked CO Anderson about her Facebook page the next time they were at work. Appellant stated that as soon as he remembered this incident with his son and Facebook, he promptly called the investigator to revise his statement. Although Appellant initially misspoke when he denied his use of social media, it is noted that Appellant corrected his mistake as soon as he recalled the incident. I find that Appellant's statement during his investigatory interview with regard to accessing social media did not rise to the level of interference, failure to cooperate, or lying.

The weight of the testimonial and documentary evidence presented established that Appellant misused Appellee's computer and camera system and made inappropriate statements, innuendos, and comments of a sexual nature toward female staff. I find that Appellant's misuse of Appellee's computer and camera system and Appellant's inappropriate statements and sexual comments and innuendos constitute "failure of good behavior" as contemplated by O.R.C. § 124.34. *Ashbaugh v. Bahr*, 68 Ohio App. 308, 40 N.E.2d 677, *Black's Law Dictionary*, Deluxe 6th Ed., p. 595 (while O.R.C. § 124.34 does not define "failure of good behavior," *Black's Law Dictionary* defines "failure of good behavior" as behavior that is contrary to recognized standards of propriety and morality, misconduct or wrong conduct).

In considering the appropriateness of the discipline imposed in this case, it is noted that Appellant is a long-term employee of Appellee with no previous discipline in his record. Notwithstanding Appellant's work history, it is important to keep in mind that Appellant held the rank of Captain and was third in the chain-of-command at MaCI. As Captain, Appellant directly supervised four Lieutenants and supported the COs in their work. Appellant worked 3rd shift when the Warden and Major generally were not on site and, therefore, he acted in place of the Warden and was responsible for the security of the institution and ensuring that all employees follow MaCI rules and regulations. The evidence established that Appellant's misconduct contributed to an unprofessional work environment that adversely affected staff members' ability to carry out their duties. Under the facts of this case, I find that Appellant's reduction in position from Correction Captain to Correction Lieutenant is appropriate discipline.

Based on the foregoing, I respectfully **RECOMMEND** that Appellant's reduction from a Correction Captain to a Correction Lieutenant be **AFFIRMED**, pursuant to O.R.C. §§ 124.03 and 124.34.


Elaine K. Stevenson
Administrative Law Judge