

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

Cor-re-don Rogers,

Appellant,

v.

Case No. 2015-REM-01-0002

Department of Rehabilitation and Correction,
Marion Correctional Institution,

Appellee,

ORDER

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

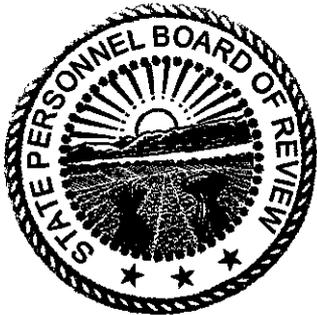
The Full Board has conducted a complete and very thorough examination of the entirety of this comprehensive and very lengthy record. This included a review of the highly detailed Report and Recommendation of the Administrative Law Judge (ALJ) and a review of the objections to that report and responses thereto which have been timely and properly filed. In addition to those examinations, the three Board members and staff conducted a nearly ninety-minute Oral Argument with representation by attorneys from both sides. At this Oral Argument before the Full Board, there was a focus on the use of force questions in this case and a review of video evidence from two different locations within the Corrections Facility. Based on that careful review, the Board hereby adopts the findings of the ALJ and modifies the Recommendation of the ALJ as reflected, below.

We find that Appellant's offense, while serious, must be weighted carefully against Appellant's work record, which reflects more than 21 years of service with Appellee and a clean disciplinary record. The Board cannot condone Appellant's use of force under these circumstances and understands why Appellee chose to utilize the discipline it did in this case. Nevertheless, the Board cannot accept Appellant's removal; given Appellant's exemplary service record and his complete lack of any pertinent prior discipline. *Accordingly, Appellant shall receive a lengthy suspension. Moreover, Appellee is hereby permitted to require Appellant to attend and complete a comprehensive use of force training as soon as practicable following Appellant's reinstatement.*

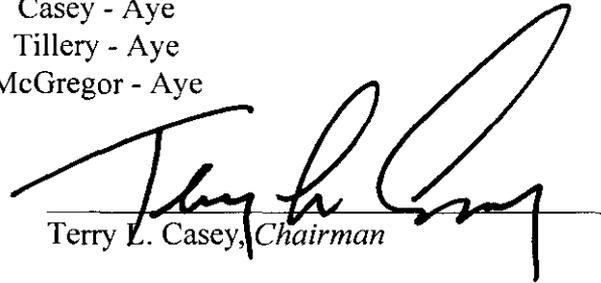
Wherefore, it is hereby **ORDERED** that Appellant's instant **REMOVAL** be **MODIFIED** to a **SUSPENSION** equivalent to the entire length of time from the effective date of Appellant's removal to the effective date of Appellant's reinstatement to the rank of Correction Lieutenant, pursuant to R.C. 124.03 and R.C. 124.34. (The effective date of Appellant's reinstatement to Correction Lieutenant shall be considered to be the same date as the date of issuance of this final Order).

It is further **ORDERED** that this Suspension should be construed as the highest level of discipline short of removal contained within the Disciplinary Grid of the Department of Rehabilitation and Correction.

Finally, it is **ORDERED** that Appellee may require Appellant to attend and complete a comprehensive use of force training as soon as practicable following Appellant's reinstatement.



Casey - Aye
Tillery - Aye
McGregor - 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, July 27, 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 August 3, 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-REM-01-0002

Transcript Costs: \$1401.00 Administrative Costs: \$25.00

Total Deposit Required: * \$1426.00

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

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

Cor-re-don Rogers

Case No. 2015-REM-01-0002

Appellant

v.

April 12, 2016

Department of Rehabilitation and Correction,
Marion Correctional Institution

Appellee

James R. Sprague
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on July 20, 2015, July 21, 2015, and October 9, 2015. Present at the hearing was Appellant, who was represented by James J. Leo, Attorney at Law. Appellee, Department of Rehabilitation and Correction (DR and C), Marion Correctional Institution (MCI), was present through its designee, MCI Warden Jason Bunting, and was represented by Robert E. Fekete and E. Joseph D'Andrea, Assistant Attorneys General.

This cause comes on due to Appellant's January 5, 2015 filing of an appeal from his removal from the position of Correction Lieutenant at MCI. Appellant received notice of his removal on December 31, 2014, which was also the effective date of the removal.

Unfortunately, due to technical and other reasons, there was a delay in delivery of the transcript following the last date of hearing. Correspondingly, respective counsel were delayed in filing their post-hearing briefs. However, once they received the transcript, both counsel did then timely file their briefs and the record was closed.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant's R.C. 124.34 Order of Removal reads, in pertinent part:

Violation of Department of Rehabilitation and Correction Standards of Employee Conduct:

Rule 40: Use of excessive force toward any individual under the supervision of the Department or a member of the general public.

Rule 50: Any violation of ORC 124.34 [Order sets forth most R.C. 124.34 disciplinable offenses] ...

Specifically, on 9/17/14 you used excessive force while escorting an inmate who was under your control and handcuffed from behind.

At hearing, eight witnesses testified.

First to be called by Appellee was **Jason Bunting**, MCI Warden. Warden Bunting also served as Appellee's designee at hearing.

Next to be called was **Tim Milligan**, Deputy Warden of Special Services at Richland Correctional Institution (RCI). Deputy Warden Milligan conducted the use of force investigation cited in the instant R.C. 124.34 Order of Removal.

Next to be called was MCI Lieutenant (Lt.) **Virgil Hashman**, who was working on September 17, 2014.

Next to be called was **Cor-re-don Rogers**, Appellant, on as if on cross-examination. As noted, Appellant served as an MCI Lieutenant until his December 31, 2014 removal.

Next to be called was **Philip Rader**, DR and C Labor Relations Officer (LRO).

First to be called by Appellant was **Randy Rose**, MCI Correction Officer (CO), who was working on September 17, 2014 and who witnessed events leading up to the use of force event.

Next to be called was MCI CO **Dewey Boyd**, who was also working on September 17, 2014 and who also witnessed the events leading up to the use of force event.

Next to be called was MCI CO **Kevin Steele**, who has acted as a use of force trainer. CO Steele has offered pertinent opinions on the use of force at various review hearings. He was called by Appellant to review the pertinent videos in this matter and to offer analysis concerning same.

Last to be called was **Cor-re-don Rogers, Appellant**, on direct examination.

Appellee has alleged Appellant violated DR and C Rules 40. and 50.

Specifically, this case involves Appellant's escorting a handcuffed inmate (Inmate Cernoga). During the escort, Appellant placed that inmate "against the wall" (a control technique) three times. During the third time, Appellant slammed Inmate Cernoga's head and his body into a cement wall.

The force of Inmate Cernoga hitting the wall caused a laceration near the offender's right eye, which required three Steri-strips (a.k.a. butterfly bandages) to close. Because the event left drops of blood on the hallway floor, plastic cones were put out in the hallway to alert passers-by and a blood clean-up crew was summoned to clean the blood off the floor.

A use of force investigation followed. This culminated in Appellee removing Appellant for an alleged excessive use of force (Rule 40.) and for violating R.C. 124.34 (Rule 50.).

Appellee asserts that at the time of the incident, Inmate Cernoga was no longer resisting, was handcuffed from behind, was much smaller in stature than Appellant, and posed no physical threat to Appellant. Further, Appellee alleges that Appellant had several other staff present who could have assisted Appellant if needed.

Moreover, Appellee asserts, if Appellant legitimately believed Inmate Cernoga was still resisting, Appellant could have hit Appellant's "man-down" alarm to rapidly summon additional staff assistance. Appellee alleges that, when Appellant slammed Inmate Cernoga's head into the wall, Appellant and Cernoga were actually distancing themselves from the location of Cernoga's oral exchange with a few other inmates. Indeed, Appellee alleges that Appellant and Cernoga had already passed a security point and had entered another hallway at MCI.

The pertinent physical layout of MCI involves two intersecting hallways, Main Hall and South Hall. Main Hall, which is a high-traffic area, houses the Chapel and various living units. South Hall, which is a lower-traffic area, houses the Lieutenants' office, the Captains' office, the Major's office, Medical, Segregation, *et cetera*, and so, usually has various staff present therein. South Hall dead-ends into Main Hall.

Main Hall and South Hall are separated by a Sally Port, which consists of two prison gates which are generally open but can be closed at any time as needed. A

Point Officer also generally staffs this area. By way of reference, the Chapel entrance (which is down Main Hall) is fewer than 50 feet away from this Sally Port.

All DR and C institutions maintain standards regarding respect and proper treatment. MCI has an institutional culture that holds respect and proper treatment of staff and inmates in particularly high regard.

MCI Warden Jason Bunting offered at hearing that he both instills and reinforces this philosophy with MCI's staff and its inmates. He further declared that mission statement acronyms regarding respect and proper treatment are placed prominently throughout the institution. Because of this philosophy, MCI allows freer passage to certain MCI inmates than would other DR and C institutions.

On the evening in question, Chapel at MCI had just ended and the inmates who attended were beginning to come out of the Chapel and go to other locations. At this particular time, an "open pass" had been issued, which permitted various inmates who wished to attend Chapel to come to and go from Chapel as they pleased.

At this time, Inmate Cernoga, who is white, began walking down Main Hall, waving his arm or arms in the air, and yelling racial slurs at several African American inmates in the vicinity of the Chapel. Very soon thereafter, Cernoga focused his behavior upon one specific African American inmate. That particular inmate had apparently acted as Cernoga's "mentor" during Cernoga's time at MCI. (Please see pages 17. through 18., *infra*, for a further explanation of Cernoga's relationship with this inmate.)

That inmate was apparently late for Chapel, which may have contributed to other attendees at Chapel being able to pick on Appellant at Chapel. Inmate Cernoga was, therefore, upset at some of the attendees and at his mentor in particular.

Appellant encountered Inmate Cernoga in MCI's Main Hall as Cernoga walked down Main Hall away from the Chapel. Appellant ordered Inmate Cernoga to stop yelling these slurs and to stop walking away from him, but Cernoga did not comply.

Pursuant to Appellant's instructions, a CO down Main Hall then stopped Inmate Cernoga. Cernoga was then handcuffed with his hands behind his back.

Appellant then began escorting Cernoga down Main Hall toward the Segregation Unit. A Correction Lieutenant and several Correction Officers were also present to observe this escort and to offer assistance if needed.

Inmate Cernoga did not physically resist Appellant, but continued to yell racial slurs, mostly at his mentor, as Cernoga was being taken to Segregation. During the escort, Appellant continued to give Inmate Cernoga orders or verbal direction to be quiet. Appellant "placed Cernoga against the wall" two times to help to persuade Cernoga to be quiet and to stop yelling slurs. Each time, Inmate Cernoga complied but only for a short time.

Almost immediately after Appellant and Inmate Cernoga turned the corner onto South Hall and passed the second Sally Port door, Appellant placed Inmate Cernoga on the wall a third time, yet this time Appellant lead with Cernoga's head.

Due to his injuries, Inmate Cernoga was then taken to Medical for an assessment. It was at Medical that Inmate Cernoga apparently explained to Appellant and another staffer why he had been so upset.

Testimonial and documentary evidence presented at the hearing demonstrated Inmate Cernoga impacted the wall with sufficient force to cause a 1.5 x 0.2 x 0.1 centimeter actively bleeding laceration near his right eye, which required three Steri-strips to close. This is shown by a Medical Exam Report, which was completed by a Nurse at MCI (Appellee's Exhibit 31).

At hearing, Appellee introduced Appellee's Exhibit 12, which is a CD-ROM of video camera shots taken from **four different security cameras**.

The video labeled **9-17 dorm 1 west_MCI-DORM 1 WEST** shows Inmate Cernoga walking toward the camera and then out of view at about the eight-second mark. At about 37 seconds Appellant, followed closely by CO Randy Rose, comes into view of the camera and starts walking toward where Cernoga is located. At 47 and again at 50 seconds, Appellant points in the direction of Cernoga. At 1:15, CO Dewey Boyd comes into view and walks toward where Cernoga is located. At 1:55, Appellant and Cernoga come back into the camera's view in the lower right corner. Cernoga is handcuffed behind his back and Appellant has his right hand either on the upper part of Cernoga's back or on the back of Cernoga's neck.

The second video on Appellee's Exhibit 12 is labeled **9-17 point north_MCI-POINT NORTH**. At 18 seconds, Inmate Cernoga and Appellant enter the screen from the left side. Cernoga is still handcuffed behind his back and Appellant appears to have his right hand on the back of Cernoga's neck. Appellant and Cernoga turn left into the Sally Port and continue away from the camera. Once they reach the other side of the Sally Port, *Appellant and Cernoga, make a hard right turn into the wall at the 27-second mark*. At the 30-second mark, CO Rose comes into view from the left side of the screen and walks toward Appellant and Cernoga.

At the 35-second mark, CO Boyd comes into view from the left side of the screen and walks toward Appellant and Cernoga.

The third video on Appellee's Exhibit 12 is labeled **main hall_MCI-1 DORM GATE EAST**. At one second, Inmate Cernoga enters the bottom right of the screen heading away from the camera. Cernoga looks over his shoulder, stops, and turns around as though he is talking to someone. He then turns and continues down the hallway. At 39 seconds, Appellant enters the bottom left of the screen walking away from the camera in the direction of Cernoga. At 49 seconds, CO Rose enters the bottom left of the screen walking in the direction of Appellant and Cernoga. At 1:18, CO Boyd enters the bottom left of the screen walking in the direction of Appellant and Cernoga. At 1:40, after a skip in the tape, Appellant is walking with Cernoga in handcuffs and Appellant's hand on the back of his neck, followed both by CO Rose and CO Boyd as they walk toward the camera until they disappear out of view.

The fourth and final video on Appellee's Exhibit 12 is labeled **Rogers Use of Force_MCI-SOUTH HALL**. At 38 seconds, Lt. Virgil Hashman starts walking down the hallway toward the camera and the Sally Port. At 45 seconds, Appellant and Cernoga enter the bottom right of the screen. Appellant has his hand either on the top of Cernoga's back or the back of his neck. Appellant pushes Cernoga to the wall at 46 seconds.

Inmate Cernoga's head seems to be the first part of his body to contact the wall. Multiple viewings of this incident at hearing confirm this fact.

At this point in the video, Lt. Hashman is still walking toward Appellant and Cernoga. At 1:00, Appellant pulls Cernoga off the wall and continues the escort away from the camera. During the time between 46 seconds and 1:00, Appellant appears to be giving Cernoga "verbal instructions". After a skip in the video, the blood spill clean-up inmate can be seen at 1:54 putting down cones to mark where the drops of Cernoga's blood are on the floor.

Appellant reported the incident by filling out a Supervisor's Use of Force Summary Report (Appellee's Exhibit 22). Appellant completed a Conduct Report, which describes the incident and how the inmate violated the rules (Appellee's Exhibit 24). Appellant completed an Incident Report, which gave a description of the incident (Appellee's Exhibit 26).

Inmate Cernoga completed an Inmate Use of Force Statement detailing his description of the event (Appellee's Exhibit 25). CO Randy Rose completed an Incident Report describing the events leading up to the use of force event (Appellee's Exhibit 27). CO Dewey Boyd completed an Incident Report describing the events leading up to the use of force event (Appellee's Exhibit 28). Lt. Virgil

Hashman completed an Incident Report describing some of the events leading up to the use of force event and also the use of force event (Appellee's Exhibit 29).

Upon confirming Appellant's afore-mentioned actions, MCI Deputy Warden of Operations Kristen Faine recommended to Warden Bunting on September 17, 2014 that the Use of Force Committee review the incident. Warden Bunting concurred by signature on September 22, 2014 (Appellee's Exhibit 20). Warden Bunting had placed Appellant on administrative leave on September 18, 2014 (Appellee's Exhibit 15).

Warden Bunting requested that Deputy Warden Tim Milligan of Richland Correctional Institution conduct a use of force investigation. That investigation was completed October 24, 2014. Warden Bunting concurred with the findings by signature on October 28, 2014 and initiated a Pre-disciplinary Conference (Appellee's Exhibit 19).

Appellant was properly provided with a Pre-disciplinary Conference notice (Appellee Exhibit 17). The Pre-disciplinary Conference took place November 18, 2014, presided over by Hearing Officer George A. Frederick, II.

The Hearing Officer found Just Cause to support a finding that Rules 40. and 50. were violated. The Hearing Officer cited three grounds to support his recommendation: the video evidence of the use of force event; Appellant's failure to call for assistance; and Appellant's failure to effectively supervise the scene (Appellee's Exhibit 16). Appellant received his R.C. 124.34 Order of Removal on December 31, 2014 (Appellee's Exhibit 13).

At hearing, Appellee introduced Appellee's Exhibit 3, which is **DR and C Policy 31-SEM-02 Standards of Employee Conduct**.

Policy 31-SEM-02 reads, in pertinent part: "The purpose of this document is to provide written notice to all employees of the Ohio Department of Rehabilitation and Correction of the Department's standardized rules of conduct that specify prohibited behaviors and associated penalties for engaging in those behaviors. All Ohio Department of Rehabilitation and Correction employees are subject to these standards." [Policy 31-SEM-02 at 1 (body of text)]. "The Warden or Appointing Authority or designee of each facility or office . . . has the primary responsibility for ensuring that the Standards of Employee Conduct are provided to and acknowledged by their respective employees." [*Id.*] "The Department will not permit brutality [or] physical violence . . . [of] offenders . . . by any employee. Any force used upon an individual in the care or custody of the Department of Rehabilitation and Correction shall be in accordance with the Administrative Regulations, and any

other policy, directive, procedure or post order which deals with the use of force.”
[*Id.* at 4]

At hearing, Appellee introduced Appellee’s Exhibit 4, which is **DR and C Policy 63-UOF-01 Use of Force**.

Section V of the Use of Force Policy states, “ ... Only the amount of force necessary to control the situation shall be used.” Policy 63-UOF-01 at 3.

Section VI subsection A states “ ... Circumstances presented by the inmate involved in the use of force situation must be considered. Other factors should also be taken into account before deciding how much and what kind of force, if any, is to be used in any specific situation.” *Id.*

Section VI subsection A3b states “ ... Whenever possible, an employee shall summon assistance before becoming involved in a use of force.” *Id.*

Section VI subsection A5 requires “ ... The employee must evaluate the circumstances and surroundings, and determine the level of threat to self, others and the security of the institution. The employee should consider five factors. All these factors must be weighed together in determining the appropriate response:

- a. The harm being threatened must be imminent and likely if force is not used. Physical harm must be a likely consequence of the threat if carried out.
- b. The inmate must have the opportunity and ability to carry out the threat.
- c. The staff member must perceive himself or another to be in jeopardy.
- d. The employee must evaluate what force is necessary to effectively control the situation and the availability of alternatives. A greater potential of harm justifies a greater level of force.
- e. The use of force is necessary to control or subdue an inmate who refuses to obey prison rules, regulations, or orders.” *Id.* at 4.

Section VI subsection A6 states “Force may be used when necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders, if no other means of obtaining compliance has been effective.”

Section VI subsection A7 states, “Whenever it is necessary to use force, it is ideal to have enough staff to safely control the situation. The staff person who is confronted with a situation must consider the availability and nearness of other staff, and whether the situation can wait for other staff before responding.” *Id.*

Section VI subsection C and C1 allows “[a]n employee [to] use less-than-deadly force whenever force is necessary as self defense or defense of a third

person, to control or subdue an inmate who refuses to obey prison rules, regulations or orders, to prevent commission of a crime, including riot or escape[.] An employee shall use only the amount of force that is necessary to control the situation or to overcome the resistance of the inmate." *Id.* at 5.

Testimonial and documentary evidence established Appellant was sufficiently and repeatedly trained on DR and C Policy 63-UOF-01 Use of Force.

Testimony offered by Warden Bunting and also Appellant's Exhibit P confirm that the Rules Infraction Board found that Offender Cernoga violated Rule 20. when Cernoga physically resisted the direct orders given to him by Appellant. However, this information was not included in the use of force investigation summary report (Appellant's Exhibit E). Neither was it included in the pre-disciplinary conference Hearing Officer's Report (Appellee's Exhibit 16). The summary report does not state whether this apparent resistance occurred in relation to Inmate Cernoga's first, second, or third trip to the wall.

Following the above-referenced events, Inmate Cernoga was transferred to Richland Correctional Institution.

At hearing, **Warden Jason Bunting** testified regarding the video and Appellant's Exhibit W showing the use of force event involving CO Anthony Lucki. This video and exhibit were introduced by Appellant to potentially demonstrate *disparate treatment*. This incident (described, below) resulted in a Use of Force investigation, which found force was not justified and was not appropriate under the circumstances.

Appellant's Exhibit X showed that CO Lucki received a five-day suspension. That suspension was reduced to a two-day suspension, and subsequently to a *non-disciplinary corrective counseling*.

The record reflects that CO Lucki believed that an inmate had impermissibly entered the office of a Case Manager after the office was closed to inmates for such discussions. CO Lucki ordered the offender out of the Case Manager's office. The offender then either refused to obey these orders or was doing so but was explaining himself.

Possibly when the inmate turned sideways to go by CO Lucki or when the inmate refused to leave the office, CO Lucki took physical hold of the inmate who, unfortunately, then appeared to slip and go to the floor. The man-down alarm was activated and the other inmates in the area were ordered to go to their beds. The inmate involved sustained no injuries as a result of this incident.

It is noted that CO Lucki was under collective bargaining for purposes of discipline. However, all other things being equal, this Board may consider an employee under collective bargaining to constitute a potential disparate treatment comparator; when an Appellant before this Board alleges that a work rule (which is to be uniformly applied to all personnel) has been selectively applied.

The undersigned allowed evidence concerning CO Lucki's actions and subsequent events related thereto to come into the record. Yet, a further review of same appears to indicate that CO Lucki ultimately did not receive discipline for the purpose of a disparate treatment comparison, since a corrective counseling does not qualify as discipline. (Please see, O.A.C. 124-9-04 (B))

Warden Bunting also testified regarding Appellee's Exhibit 3 p. 16, the DR and C Disciplinary Grid. He noted that, as applied to Rule 40., the grid provides the appointing authority with the discretion: to seek a suspension of an employee for two days or to remove the employee on the first offense; to suspend the employee for 5 days or to remove the employee on the second offense; and to remove the employee on the third offense based on the totality of the circumstances.

Warden Bunting also offered that the rank of the alleged offending employee (here CO Lucki) is taken into consideration when the appointing authority considers the expectation of conduct for that employee. Those encumbering *supervisory positions* are held to a higher standard of conduct at MCI, he averred. Warden Bunting stated this is due to the supervisor's or manager's responsibility to lead others and to lead by example.

Warden Bunting differentiated the use of force incident that involved CO Lucki from the use of force incident that involved Appellant. The Warden offered that CO Lucki was intervening on behalf of another staff member who was not a fellow CO. As previously noted, it does not appear that the offender involved in CO Lucki's use of force incident sustained any injuries as a result of that involvement.

Warden Bunting testified he did not believe that retaining Appellant as a DR and C employee in any capacity, at any facility, would be good for Appellant or the organization. Warden Bunting indicated that reducing Appellant was not an option, according to DR and C Labor Relations. Allowing Appellant to continue with DR and C, either in the capacity of a *Correction Officer* or in the capacity of a *Correction Sergeant*, would put Appellant in contact with even more offenders than when Appellant was a Lieutenant, Warden Bunting stated.

Warden Bunting conceded that there are a few gaps in the pertinent videos involving Appellant and Inmate Cernoga that do not capture the entirety of the

escort. Warden Bunting opined that he believed the statements of Offender Cernoga over those of Appellant based on video evidence.

Warden Bunting testified guards are encouraged to use all available resources including chemical munitions (pepper spray) depending on the circumstances; prior to putting their hands on offenders. This is to avoid injuries to both parties, he offered.

Unlike Appellant, CO Lucki was not put on administrative leave after his pertinent use of force incident. Regarding the Response to Resistance Continuum, (Appellee's Exhibit 5, p 7 of 7), Warden Bunting testified that Appellant's use of force event falls within the Green section of the Continuum.

He stated staff members may use the responses listed in the Continuum to counter the corresponding inmate actions listed in the Continuum. Staff member responses listed may be used based on the totality of the circumstances and staff members may always use less than the maximum allowed force.

There are staff member/inmate factors and special circumstances listed on the Continuum that are to be taken into account when an employee decides to use force and at what level. Warden Bunting agreed that an inmate's being injured or not being injured is irrelevant in determining whether the force used was appropriate or, conversely, was excessive.

RCI Deputy Warden Tim Milligan conducted the use of force investigation regarding Appellant's use of force incident. He testified the standard of review for these incidents is "objective reasonableness", meaning what any reasonable person would have done in the same situation.

Employees know what is reasonable based on yearly use of force training, the use of force policy, and the Response to Resistance Continuum, he averred. Staff member/inmate factors and special circumstances listed on the Continuum are to be taken into account when employees decide to use force and at what level.

He offered that the use of force in this event was found to be excessive; based upon video evidence and based upon the inmate appearing to be compliant. Deputy Warden Milligan stated he did not believe the situation required pushing Offender Cernoga's face into the wall, which constituted an *escalation* of force.

Deputy Warden Milligan indicated that when he conducted the use of force investigation, he considered Appellee's Exhibits 20 and 22 through 31. He also conducted interviews with Appellant, Lt. Hashman, and two Correction Officers.

He declared that the available documentation regarding Appellant's use of force incident did not accurately represent what the videos showed. He noted that, as part of his investigation, he watched and considered all four videos. Deputy Warden Milligan offered that the video evidence did not support a conclusion that there was a risk of riot due to Inmate Cernoga's actions.

Deputy Warden Milligan's narration of video evidence does not appear to indicate that he believed Inmate Cernoga was resisting at any point. He also noted Appellant had his hand on the back of Cernoga's neck, which, he noted, is not how officers are trained to escort inmates. At hearing, Mr. Milligan highlighted the language used in Appellee's Exhibit 26 incident report regarding of the use of force event, specifically "... as I placed him on the wall, he did bump his head on the wall causing a small cut over his right eye."

Deputy Warden Milligan stated, based on the video, Appellant slammed Cernoga's body and head against the wall. He offered that another staffer should have assisted in Cernoga's escort. He concluded this was an improper use of force and that, even if Cernoga were resisting, it would still not have been proper.

Mr. Milligan declared that Inmate Cernoga was simply not responding to verbal commands. Accordingly, he declared, *Inmate Cernoga's* actions fell within the Blue band on the use of force Continuum. Yet, Deputy Warden Milligan declared, *Appellant's* response fell in the Yellow section (two levels higher), because Appellant used the wall.

Deputy Warden Milligan opined that Offender Cernoga had no opportunity or ability to hit Appellant due to being cuffed and that Appellant was, therefore, in no jeopardy. Additionally, Mr. Milligan indicated that he took into consideration that Inmate Cernoga could not have easily done bodily harm to Appellant given that Cernoga was cuffed with his hands behind his back.

Referencing Appellee's Exhibit 19, Deputy Warden Milligan discussed the four components of use of force: ability; jeopardy; opportunity; and preclusion. Mr. Milligan offered the following analysis.

Under *ability*, Inmate Cernoga was handcuffed and did not have the ability to cause harm. Under *jeopardy*, Appellant initiated the use of force and Cernoga did not attempt to attack Appellant. Under *opportunity*, Cernoga had the opportunity to do bodily harm, but he did not. Under *preclusion*, Appellant did not use his man-down alarm or attempt to talk Cernoga down prior to using force.

Mr. Milligan testified Appellant should have used his man-down alarm, called for assistance, and used the least amount of force necessary. He noted that when

a Correction Officer uses the appropriate amount of force to effectuate a takedown, then any unintended consequences that occur during the takedown are not grounds for discipline.

Three of the witnesses to the Cernoga use of force event indicated in their written statements that Inmate Cernoga disobeyed direct orders by Appellant both verbally and physically. Deputy Warden Milligan confirmed he used these statements during the investigation, but that information of disobeying orders did not appear in his use of force investigation report.

Deputy Warden Milligan conceded, by writing in his report that Appellant did not attempt to talk Inmate Cernoga down prior to physically using force, Mr. Milligan committed an error and that his statement to that effect is incorrect. He also clarified that using the man-down alarm is in the use of force training, but is not in the policy.

Deputy Warden Milligan confirmed the content of the statement at the top of the Response to Resistance Continuum "The staff member shall choose the necessary response to gain control of the situation based on departmental policy, their physical capabilities, perception, training, and experience." These are all the factors to be weighed by a staff member when deciding what level of force to use.

Noting that Inmate Cernoga continually disobeyed a direct order to stop talking throughout the escort, Mr. Milligan indicated he does not believe Cernoga was resisting the escort or leaning back based on the video. He further stated Correction Officers will many times say in their reports that they placed someone against the wall whether they lightly put them against the wall or they smashed them against the wall. Deputy Warden Milligan offered that he presumes officers will many times put the same things in their reports on incidents as have other officers, after they have discussed what they wrote.

Deputy Warden Milligan stated whether Appellant attempted to talk Inmate Cernoga down does not change the fact that the use of force was not appropriate under the circumstances. Even if Appellant *had* talked him down, the outcome of inappropriate force would have been the same, he opined.

Deputy Warden Milligan reiterated that, at multiple times throughout their careers, DR and C employees receive training on when to use their man-down alarms. He stated man-down alarms should be used when the employee knows he or she will need to use force and is then physically able to activate the man-down alarm. It is within the employee's discretion as to whether or not to push the man-down alarm. Yet, since it is mandatory in certain situations, the employee cannot disregard pushing it during such situations, he reaffirmed.

When viewing the video labeled **Rogers Use of Force_MCI-SOUTH HALL**, Deputy Warden Milligan stated it appeared both of the Correction Officers were walking very casually. He conceded the video makes it very difficult to know whether Inmate Cernoga was using dead weight.

He further stated that, if Cernoga were using dead weight, this action would fall within the Green bar under the Response to Resistance Continuum. When asked whether using the man-down alarm is required, Deputy Warden Milligan stated it was not in the use of force policy nor is it specifically listed in the use of force training lesson plan. A man down alarm is not required in every use of force scenario, he averred. Security policies speak to when to use a man-down alarm and Deputy Warden Milligan declared that he does not believe Appellant exhausted all options available to him prior to using force.

While viewing the video labeled **9-17 point north_MCI-POINT NORTH**, Deputy Warden Milligan stated, it does not appear at any time that Inmate Cernoga locks up or uses dead weight to resist the escort. Deputy Warden Milligan testified the Response to Resistance Continuum is not the only thing he considered when rendering a decision regarding whether this use of force was appropriate. He averred that he based his decision on the totality of the circumstances and agreed the safety of the institution is a factor.

In reference to the Response to Resistance Continuum, Deputy Warden Milligan agreed some inmate resistance actions are more visible than others. A dead weight scenario can be subtle in nature and difficult to discern from a video, he stated. He opined that if the video had sound, it would have been helpful in figuring out what was being stated. Additionally, he offered, it would have been better if the camera were closer to where the use of force event occurred. Limitations of the video equipment made the investigation more difficult, he concluded.

Lt. Virgil Hashman testified that he witnessed the use of force event and that it did not appear Inmate Cernoga was physically resisting the escort in any way, only that Cernoga would not stop yelling obscenities. Lt. Hashman stated when Appellant put Cernoga on the wall, Appellant was yelling at Cernoga to get him to stop yelling obscenities. He stated that Appellant did not appear angry, but appeared to be trying to gain Cernoga's compliance.

After the incident, everyone involved went to the Captain's office and completed their reports. Lt. Hashman viewed the video of the use of force event and stated it did not look right to him; so he reported it to Lt. Byrd and Byrd told Captain Straker about it. Lt. Hashman stated he did not see the event leading up to

the use of force event or the event itself. He concluded, after the event, once the blood spill clean-up inmate was called, something was not right and the situation warranted further investigation.

Lt. Hashman confirmed Inmate Cernoga was referring to black inmates as “niggers” and “monkey ass motherfuckers.” He confirmed that Inmate Cernoga was screaming these words and being noncompliant with directives to be quiet. Appellant appeared to remain calm and maintain a professional demeanor during the incident, but was speaking to Cernoga in a loud voice. Lt. Hashman stated. He confirmed that that there was nothing to block his view but, nonetheless, he did not see Cernoga go up against the wall at the time it occurred.

When viewing **Rogers Use of Force_MCI-SOUTH HALL** video, Lt. Hashman stated he believed he was 30 to 40 feet from Appellant when Appellant put Inmate Cernoga on the wall. While walking up the hallway toward the camera and Appellant, Hashman is looking straight ahead until he comes within about 10 feet of Appellant and Cernoga, at which time he turns his head and looks directly at them.

After Appellant takes Cernoga off the wall and continues down the hallway to O block, Hashman turns around and follows them, but does not offer any assistance, since, he stated, he believed none was needed. Lt. Hashman testified, while he has never had an inmate stiffen up on him, the motion of doing so could be slight and not readily noticeable.

During Appellant's testimony on as if on cross, **Appellant** acknowledged he received a copy of DR and C's Standards of Employee Conduct and that they applied to him. He agreed a violation of Rule 40 can result in a suspension or removal on the first offense. He further agreed a violation of Rule 50 can result in a written reprimand or removal on the first offense.

Moreover, he acknowledged that, as a DR and C employee, he should only use the amount of force necessary under the circumstances as shown in Appellee's Exhibit 4. Appellant agreed there is a significant size difference between himself and Inmate Cernoga and that Appellant is taller and heavier than is Inmate Cernoga.

Appellant averred he did not recall any interaction with Inmate Cernoga prior to the use of force incident. Appellant offered that when Appellant heard Cernoga cussing, Appellant called to him and told him to come here, but Cernoga did not hear him. Appellant told a Correction Officer to stop Cernoga, which the officer did.

Appellant then handcuffed Cernoga and took him to segregation. Appellant stated that while Cernoga was yelling racial slurs in the hallways, other inmates

were starting to respond and Appellant continued to tell him to stop. Appellant testified, at no time did he become angry or take offense at what Cernoga was saying. (Appellant confirmed that he is of African-American descent.)

While viewing the **main hall_MCI-1 DORM GATE EAST** video, Appellant stated Cernoga did physically resist his escort. Counsel for Appellant correctly asserted that there appear to be several points in this video where it skips. Yet, they do not appear to be relevant to the issues in this appeal.

Appellant offered he put Cernoga on the wall three times during the escort to give him direction to stop yelling. Cernoga would stiffen up when Cernoga started talking, Appellant offered. Appellant initially stated that Cernoga was dead weight. Between 1:40 and 1:48, Appellant stated, Cernoga is leaning back and stiffening up. Appellant was going to put Cernoga on the wall, but Cernoga started to comply and continued walking, Appellant testified.

When viewing the **9-17 point north_MCI-POINT NORTH** video, Appellant stated when Cernoga gets through the second gate, he starts to stiffen up again, but Appellant is able to continue escorting Cernoga; due to Appellant being larger than Cernoga. He further declared that once he and Cernoga get through the second gate, Appellant guides Cernoga to the wall.

While viewing the **Rogers Use of Force_MCI-SOUTH HALL** video, Appellant again stated he guided Cernoga to the wall and did not slam his head against the wall. Appellant conceded he used more force to put Cernoga against the wall when Cernoga was injured than Appellant had previously used.

At this point in the escort, Appellant stated, there were fewer inmates around than there were previously. At 0:46, Appellant confirms, Cernoga's head is against the wall and that he was leaning against Cernoga.

Appellant stated he knew what a man-down alarm was and that he was carrying one that day, but chose not to use it. Appellant offered that he used the least amount of force necessary, as there was no other option for him.

Appellant asserted he did not ask for any other assistance; since there were plenty of other officers in the immediate area. It is up to the staff member when to use his or her man-down alarm, he offered.

It is stressed during yearly defense training to use the man-down alarm only when absolutely needed as officers can get hurt responding to these alarms, he stated, and further stated he did not believe he had an alternative here. So, he averred, he guided Cernoga to the wall. From 0:45 through 0:57, Appellant

admitted, he was yelling at Cernoga and that his affidavit was not correct in this respect.

Referencing Appellee's Exhibit 22, Supervisor's Use of Force Summary, Appellant testified it was normal for the supervisor involved in the use of force event to fill this form out. On this form, Appellant marked security footage was not available or preserved. Appellant stated he was told by a supervisor to mark this form this way unless it was a planned use of force such as a cell extraction. Referencing Appellee's Exhibit 21, Serious Incident Form, Appellant stated he marked video save/completed as "no", because the system used to pull up the video was inoperable that night.

During redirect, Appellant drew a picture of the two hallways at MCI which is marked Appellant's Exhibit BB. Appellant wrote "CR" for where he was. He drew a red line from the gate toward the living area. He wrote a "C" with a circle around it where Cernoga was, when Appellant first heard him acting out. Cernoga moved down the hallway away from Appellant toward the living area, B dorm. Appellant wrote "C2" where another officer stopped Cernoga and Appellant cuffed Cernoga after patting him down.

Inmate Cernoga's use of racial slurs got Appellant's attention, he stated. Other inmates in the hallway were African-American and were the focus of Cernoga's slurs, he declared. Appellant and Cernoga started walking back down the hallway. Appellant was holding Cernoga's arm and had his other hand on Cernoga's collar, which, Appellant stated, is the way he normally escorts an inmate.

Appellant marked "C3" on the illustration created at hearing to identify where Appellant put Cernoga on the wall and gave him orders to stop using racial slurs and to walk. Cernoga was making his body stiff and Appellant believed this would lead to Cernoga halting or falling face first, he averred.

Inmate Cernoga did not say anything and stopped talking, but then started talking again, Appellant stated. They continued past the Library. "C4" indicates where they were when CO Boyd and CO Rose were behind them. Appellant offered that Cernoga then started leaning back and continued talking to other inmates; Appellant put him on the wall again as indicated by "C5." Appellant then took him off the wall and continued walking.

"I" indicates where inmates were standing. Inmate Cernoga was using racial slurs because other inmates were picking on Cernoga and calling him names, and, as a result, Cernoga was upset, Appellant offered. As noted, Appellant indicated he later learned from Cernoga that Cernoga was upset that Cernoga's mentor was not in the Chapel, as perhaps Cernoga and the mentor had previously arranged.

Appellant and Inmate Cernoga passed his mentor in the hall. Cernoga told his mentor "You motherfucker. If you had been in there, I wouldn't be going through this shit right now.", according to Appellant. They continued through the Sally Port and Cernoga was put on the wall at "C6." Cernoga was the most agitated at this point of the escort, Appellant opined.

When asked where "stiffening up" fell on the Response to Resistance Continuum, Appellant stated that he believed it fell within in the Green section. He believed this to be the case because, according to Appellant, stiffening up is a precursor to other physical resistance.

Appellant declared that, the last time Appellant put Cernoga on the wall, Appellant told him that if he stiffened up again, Appellant was going to "take him down" (*i.e.* to the floor). Cernoga complied with walking from that point on, Appellant offered.

While viewing **Rogers Use of Force_MCI-SOUTH HALL**, Appellant confirmed that when he put Cernoga on the wall, it was the third and final time he had to do so during the escort. At hearing, Appellant attempting to read his lips as reflected in the video. Appellant testified that he believed he said, "You need to calm down. I'm not going to keep telling you. If you do this again and if we have to stop again, I'm going to put you on the ground. Why don't you stop? What is the matter with you? Now let's walk."

It appears that Cernoga did not say anything further and the escort continued. Appellant admitted to raising his voice and declared he is allowed to do so if either the offender's action or the offender's behavior falls within the Blue section of the Response to Resistance Continuum.

Appellant stated he did not use his man-down alarm because a fire drill was taking place in Segregation and other living areas were short-staffed. Appellant explained this was due to staff being temporarily assigned to Segregation to complete a cell sweep and count.

Specifically, Appellant offered that Officers in the living areas were watching two areas and if they had responded to a man-down alarm, they would have left those two areas uncovered. CO Rose and CO Boyd were following closely behind Appellant and, he declared, he had adequate staff to assist in getting Cernoga out of the hallway.

Appellant offered that he believed Inmate Cernoga put himself, staff, and the institution in danger by using racial slurs toward black inmates. He declared that

racial tensions run high in a prison. He offered that, if some of the inmates had made a move on Cernoga, the guards could have lost control of the situation; since a number of staff were temporarily reallocated to Segregation.

Appellant stated using words like "nigger" and "monkey ass motherfucker" is dangerous in a prison. Appellant testified he has seen fights prompted by race. There are gangs at MCI and some of them break down along racial lines, he noted.

Appellant offered that Offender Cernoga had the opportunity to be harmed due to other inmates being able to move freely. Preclusion is talking to the inmate and trying to get the inmate to calm down, but, Appellant asserted, Cernoga was not responding to "verbal direction". Appellant stated that Cernoga used racial slurs throughout the transport until Appellant put him on the wall for the third time.

In looking at Appellant's Exhibit O at VI.A.3, Appellant testified he believed Cernoga posed a threat to the institution by using racial slurs and believed that Appellant had reason to act.

Appellant declared he did not have the ability to erase video footage from the system at MCI. The record reflects that video footage is normally reviewed as part of the process after a use of force event. The institution's Major is normally the staffer who performs this video review following a use of force event.

Appellant stated he was denied the ability to have witnesses testify at his pre-disciplinary conference.

On re-cross by Appellee, Appellant stated that while he thought Cernoga would stop walking during the escort, Cernoga never did. Appellant offered he could have lost the hall to the inmates if they had decided to attack Cernoga in the Main Hall.

South Hall is a lower-traffic area. Appellant considered South Hall to be a lower-security hall and agreed that the security gates at the Sally Port to South Hall could be closed if needed. Appellant noted he put Cernoga against the wall with force in the lower-security South Hall, not in the Main Hall.

Appellant confirmed there was no riot on the date of this incident. There has not been a race riot at MCI in the last ten years, but there have been multiple race-related fights in the yard in the last three years, he offered. He further stated that in 1994, staff lost control of the Main Hall due to a racially-based fight.

Appellant later testified that the final time he used force on Inmate Cernoga, Appellant utilized the most force. Appellant offered this was the case, because it was then that Cernoga was at his most agitated.

Previous attempts to control Cernoga's language had been unsuccessful, Appellant explained. Appellant testified that the distance from the Chapel to the crash gates at the South Hall is 15 feet. There were inmates in the Chapel and coming out of the Chapel when Cernoga was yelling at his mentor, Appellant stated.

While there was no riot that night, Appellant indicated he believed the potential was there. He offered: the 1994 riot at MCI started on the Recreation Yard when one inmate slapped another. The yard was closed and everyone was sent to the dorms 20 minutes later. There were man-down alarms activated in almost all of the dorms. 30 inmates were taken to Lucasville Correctional Institution that night. Appellant thus highlighted that it is staff's responsibility to keep riots from occurring at MCI.

On direct examination from Appellant's counsel, **CO Randy Rose** testified that he was serving as the Point Officer on the night in question and that Inmate Cernoga was yelling racial and other obscenities at a group of black inmates in the Main Hall. He offered that even after Cernoga was cuffed, his attitude and behavior did not change and he was still trying to pull away and cussing.

CO Rose noted that Cernoga did calm down after Appellant gave Cernoga verbal direction and placed Cernoga on the wall. As they approached the Sally Port, CO Rose slowed down to stay near the Point. Cernoga was still yelling and CO Rose observed a little blood where Cernoga's head had impacted the wall.

CO Rose stated that during the portions of the escort he observed, Inmate Cernoga was at times turning into Appellant, trying to jerk his arm away, and was running his mouth. He indicated that Appellant's behavior was professional and that Appellant gave Cernoga more chances than CO Rose probably would have given him. CO Rose opined that, since Inmate Cernoga turned into Appellant during the escort, which constitutes resistance, Cernoga should have probably been put on the floor. He further offered that there is always a disturbance if it is "a black/white thing".

CO Rose also indicated that he believed that a suicide drill may have been taking place at this time. He further offered that since no one was down and there were two officers already there, activating a man-down alarm would have been unnecessary. CO Rose averred that using a man-down alarm is more applicable to situations such as when an inmate swings on a staff member or when inmates are fighting.

On cross, CO Rose indicated that he did not observe Inmate Cernoga go dead-weight. He agreed that Cernoga was handcuffed during the entire escort.

He also agreed that Inmate Cernoga was significantly smaller in stature than was Appellant and that Cernoga did not try to attack Appellant, he just kept turning. CO Rose stated that he did not intervene because he was not requested or instructed to do so and, since Cernoga was handcuffed, there was no real risk of Cernoga attacking anyone.

He agreed that it is DR and C policy to use the least amount of force under the circumstances. He declared that DR and C staff reacts to the inmate's actions, with Inmate Cernoga's actions here in the Green band of the Use of Force Continuum.

On direct examination from Appellant's counsel, **CO Dewey Boyd** testified that, during the events in question, he heard voices in the hallway and saw Appellant escorting Inmate Cernoga down Main Hall. He offered that he accompanied them, in case assistance was needed. He confirmed that, during the escort, Cernoga appeared to be looking back at the group of inmates gathered in the area and apparently continued to yell racial and other slurs at them and was kind of out there, in CO Boyd's phrasing. He indicated that Inmate Cernoga continued to yell and would not respond to verbal commands.

CO Boyd confirmed that he saw Inmate Cernoga taken to the wall one time. He offered that an inmate's buckling his or her legs and leaning against direction are forms of resistance. He opined that leaning into an Officer falls within the Green band on the Continuum and that Cernoga appeared to be resisting.

On cross, CO Boyd stated that during the escort, Appellant did not ask for assistance. CO Boyd stated he felt he needed to stay in the area but did not need to lay hands on Cernoga. He confirmed that Appellant is physically significantly larger than is Inmate Cernoga.

CO Boyd stated he never saw Appellant lose his cool and do anything improper during the portions of the escort in the Main Hall that he personally observed.

CO Kevin Steele testified on direct that he has considerable experience training staff regarding the Use of Force Continuum and in assisting his union in preparing for various activities involving the Continuum. CO Steele offered that the manner in which Appellant was escorting Inmate Cernoga, that is, by the left forearm and the collar area, is acceptable for an inmate who is resisting.

In viewing the pertinent videos, CO Steele was unable to tell whether Inmate Cernoga was resisting during the third time Appellant placed Cernoga on the wall. He opined that resistance can sometimes be subtle in nature. He also stated that dead weight does not have to mean that the inmate goes to (falls to) the ground and offered that resistance can include pulling in, away, back, walking ahead, or trying to get away.

CO Steele offered that, if Inmate Cernoga had been physically resisting during this third trip to the wall, then the proper response could include a takedown to the ground. He agreed that people are sometimes injured when being taken down.

He also agreed that part of the job is to keep an inmate from hurting himself or herself and sometimes the use of force is appropriate to fulfill that job responsibility. He noted that a use of force can involve a fast, dynamic situation and that situations giving rise to use of force can happen in fewer than one second.

On cross, CO Steele agreed that he had only reviewed a slight piece of Appellant's pre-disciplinary investigation. He agreed he neither witnessed the action in question nor spoke to the witnesses involved.

Appellant offered additional testimony on direct. He noted that, on the evening in question, the inmates present in the Main Hall during Inmate Cernoga's disturbance were black and that a majority of the inmates in Chapel that evening were also black. Thus, he stated, he was concerned that racial tensions between Cernoga and these inmates could rise. He offered this situation could have become even more problematic if it had escalated; due to the temporary staff shortage brought about by half of his staff being in Segregation for their sweep.

He reiterated that he had adequate staff with him to ensure that Cernoga was quickly escorted out of the area. He further declared that hitting his man-down alarm would only have emptied the staff out of the living areas downstairs.

He further reiterated that, as he and Cernoga passed the second gate in the Sally Port, Cernoga resumed yelling at an inmate in front of the Chapel and tensed up. He again offered that, during this third time, he gave Cernoga verbal direction and took him to the wall. Based on Cernoga's resistance, Appellant could have taken him to the ground, he opined.

On cross, he conceded Cernoga was not giving Appellant dead weight at this time but that every time Cernoga started yelling, he would get really tense. He averred that, in his experience, when an inmate stiffens up, to Appellant that is an

indication that the inmate is about to become dead weight, so, to Appellant, Cernoga was dead weight.

He also agreed the Sally Port doors can be closed at any time. He later agreed that all a staffer needs to do to close the Sally Port is to grab one of its doors.

On re-direct, Appellant noted that there is no definition in the Green row of what constitutes dead weight but that Appellant perceived stiffening up to be dead weight. An inmate does not have to fall to the floor to merit a Green row response, Appellant testified.

When an inmate makes his body stiff, to Appellant that indicates the inmate could drop down. His job, he offered, is to keep the inmate from falling down or hurting himself, *et cetera*.

Based upon the testimony presented and evidence admitted and upon the post hearing briefs submitted by the parties, I make the following Findings:

Appellant served with DR and C for 21 years, advancing to the rank of Lieutenant. He had no active discipline of note in the record and does not appear to have been disciplined previously for an excessive use of force.

Appellant was current on his training. This included training on the use of force at a DR and C institution or at any other DR and C .

I find that, on the night in question, Inmate Cernoga, who is white, was creating a disturbance by shouting obscenities and racial slurs at several black inmates. These inmates had just attended Chapel with Appellant and may have been picking on him at that time.

Inmate Cernoga was upset because his mentor, who is black, had apparently shown up late for Chapel. The mentor's not being on time for Chapel may have made it easier for these other inmates to be able to tease Cernoga at Chapel.

An agitated Inmate Cernoga began walking away from the Chapel waving his arm(s) in the air and progressed down Main Hall. Appellant then ordered Cernoga to stay where he was.

A Correction Officer just down Main Hall then detained Cernoga. Appellant cuffed Cernoga with Cernoga's hands behind his back and patted Cernoga down.

Appellant then began to escort Cernoga back down Main Hall and on to Segregation, holding onto Cernoga's collar and arm. Appellant was both much taller and much heavier than Inmate Cernoga. At various times during the escort, Appellant gave Cernoga verbal direction to stop yelling as described, above.

Several times during the short escort through Main Hall, Cernoga yelled at the afore-mentioned inmates. During the first of these outbursts, Appellant "put Cernoga on the wall" and gave Cernoga "verbal direction". Cernoga was then quiet for a short time.

During the second of these outbursts, Appellant again put Cernoga on the wall and gave Cernoga verbal direction and, again, Cernoga was quiet for a short time. The record is mixed as to whether Cernoga exhibited any physical resistance during this short escort through Main Hall.

Appellant and Inmate Cernoga then passed through the Sally Port gates and entered South Hall. Nearly as soon as they had passed the second Sally Port gate, Appellant rapidly swung Inmate Cernoga in a right hand direction with considerable force. First Cernoga's head, and then his shoulder, impacted on the cement wall in front of him.

Inmate Cernoga's upper cheek was cut and drops of Cernoga's blood were left on the wall and floor (cleaned up shortly thereafter by the assigned and trained blood spill team inmate). Cernoga was then taken to Medical for assessment and treatment and then to Segregation. Cernoga's facial lacerations required three Steri-strip bandages to close.

This matter was brought to the attention of MCI management and a use of force investigation was initiated. This resulted in the occurrence of a pre-disciplinary conference, for which Appellant received adequate notice.

At the pre-disciplinary conference, Appellant was provided with an opportunity to hear Appellee's considered evidence and with a limited but sufficient opportunity to offer evidence on his own behalf. Following the pre-disciplinary conference, the Hearing Officer issued a recommendation.

The appointing authority, MCI Warden Jason Bunting, determined that the nature of Appellant's alleged offense was egregious. He further determined that it would be problematic to reduce Appellant to Correction Sergeant or Correction Officer because doing so would place Appellant in closer proximity with offenders.

Accordingly, Warden Bunting concluded that Appellant's removal was required. Warden Bunting then issued and personally delivered a procedurally-

compliant R.C. 124.34 Order of Removal to Appellant, from which Order Appellant timely appealed to this Board.

Based on the extant record, I find that Inmate Cernoga was not physically resisting at the time Appellant put Cernoga on the wall a third time.

It is possible that, at this specific time, Inmate Cernoga was not following Appellant's directions to quit yelling. However, the escort was progressing and Appellant was leading Cernoga away from the four or so inmates to whom Cernoga had been yelling. Further, Appellant and Cernoga had already passed both Sally Port gates and had entered South Hall, a lower-security, and lower-threat, area.

No inmate to whom Cernoga was yelling followed the escort. Neither the inmates nor the staff in the immediate area (*i.e.* at least two Correction Officers and another Lieutenant) appeared to be particularly agitated by or concerned about Cernoga's actions. As Cernoga and Appellant continued to walk away, some of these inmates may have already exited the scene.

Appellant had staffers present if he needed assistance and could have initiated a man-down alarm if he felt the need. However, the minor and transitory nature of this disturbance did not seem to call for initiating a man-down alarm.

I also find that, when placing an inmate on the wall, a natural and foreseeable consequence is that the inmate's head could hit the wall.

Testimony reflects that DR and C will not discipline an employee for a justified, non-excessive use of force, if a resisting inmate is injured during that use of force. Yet, if an inmate is injured during an excessive use of force, the inmate's injury and the severity of same should be considered.

I find that Inmate Cernoga's apparent verbal resistance exhibited at the time Appellant placed Cernoga on the wall the third time would fall within the Blue band of the Use of Force Continuum ("Not Responding to Commands").

Putting an inmate on the wall is not specifically referenced in the Continuum as a use of force. I find that, to the extent that Appellant's actions fell on the Continuum, it would likely have been within the Green band ("Balance Displacement"), but could also have fallen within the Yellow band.

"Staff Member/Inmate Factors" and "Special Circumstances" may be considered when determining whether there are any aggravating factors present that would justify a staffer's using a higher level of force than might ordinarily be required for a particular situation. In this case, I do not find that any aggravating

factor was present that would justify Appellant's use of force at a higher level than the level of resistance exhibited by Inmate Cernoga. Indeed, Cernoga's being in handcuffs, his lower level of size and strength relative to Appellant, and the close proximity of several other security staff all suggest that a lowered, not a heightened, use of force on the Continuum should have been utilized.

Inmate Cernoga's non-physical resistance to verbal direction/oral commands falls within the Blue band. Thus, Appellant's response should have commensurately fallen with the Blue band, not within the higher level of force contained within the Green band or even the Yellow band.

Accordingly, I find that slamming Inmate Cernoga's head into the wall, even if unintended, was an excessive use of force " ... under all the circumstances surrounding the incident". (DR and C Policy 63-UOF-01 Section IV. "Excessive Force")

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellee was justified in removing Appellant, a Correction Lieutenant with 21 years of service with no significant discipline on his record; after Appellant used excessive force when he slammed an inmate's head into a concrete wall and left a bloody laceration on the inmate's face? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer in the affirmative and, so, should affirm Appellant's removal.

As I have found, above, Appellant used excessive force by putting Inmate Cernoga on the wall a third time, cutting open Cernoga's upper cheek and leaving blood drops on the wall and floor of the hallway. As is also noted, above, DR and C Rule 40. prohibits, among other things, the use of excessive force toward any individual under the supervision of DR and C.

Appellee's Disciplinary Grid indicates that a first-offense violation of Rule 40. should result in either a two-day suspension or removal. Self-evidently, Appellant was removed, which is a permissible sanction under the Grid.

Simply put, the evidence does not demonstrate that Appellant needed to put Inmate Cernoga on the wall this third time. Doing so was both the direct and proximate cause of Cernoga's injuries.

Inmate Cernoga was not physically resisting Appellant at this time. Appellant and Cernoga were exiting the scene, which was rapidly de-escalating.

Indeed, Appellant and Cernoga were already past the Sally Port and walking down another well-patrolled hallway. Moreover, if Appellant *had* needed assistance (which he did not since Cernoga was handcuffed, under escort, and not physically resisting), Appellant could have called on any of the several security staff who were very close by for such assistance.

It is true that Inmate Cernoga had for a moment disrupted MCI's operations on Main Hallway that evening. It is also true that Cernoga was yelling incendiary racial slurs and obscenities in Main Hallway.

However, Appellant had the situation well in hand and normal operations had essentially re-commenced in Main Hallway. Thus, it is truly unfortunate that Appellant, a 21-year veteran of DR and C, chose to deviate off this course. Instead, Appellant slammed Inmate Cernoga head-first into a wall in South Hallway; ostensibly because Appellant thought the much smaller and handcuffed Cernoga might be about to physically resist Appellant.

DR and C Rule 50. prohibits any violation of R.C. 124.34 including but not limited to all disciplinary offenses listed in R.C. 124.34. As this Board is also aware, R.C. 124.34 also sets forth any " ...violation of any policy or work rule of the officer's or employee's appointing authority ..." as a disciplinable offense. Since Appellant violated Rule 40., he also violated Rule 50., because he violated a policy or work rule of his appointing authority.

A first-offense violation of Rule 50. on the Disciplinary Grid calls for discipline ranging from a written reprimand to removal. Appellant was removed, which is a permissible sanction under the Grid.

Although Appellant committed an egregious offense and violated Rules 40. and 50., Appellant also had 21 years of service with DR and C and had no significant discipline of note. Therefore, at hearing, Warden Bunting explained why DR and C did not think it could reduce Appellant to a Correction Officer or to a Correction Sergeant.

Warden Bunting opined that reducing Appellant would place Appellant in even closer and more frequent contact with inmates than Appellant had when he was a Lieutenant. This would be particularly problematic, the Warden explained, given the many more opportunities such close contact with inmates would provide for Appellant to lapse into the more extreme behavior he exhibited toward Inmate Cernoga. What is more, Appellant's actions appear to be antithetical to MCI's philosophy and emphasis on respectful treatment for staff and inmates.

Accordingly, Appellant's removal, while severe, is justified given all the facts and circumstances of this case.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's removal from the position of Correction Lieutenant, pursuant to R.C. 124.03 and R.C. 124.34.


James R. Sprague
Administrative Law Judge