

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Delbert Bumgardner,

Appellant,

v.

Case No. 2015-REM-12-0234

Department of Rehabilitation & Correction,

Appellee,

ORDER

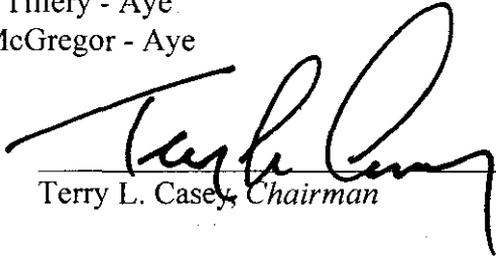
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 the removal of Appellant Bumgardner is **AFFIRMED**, pursuant to section 124.34 of the Ohio Revised Code.



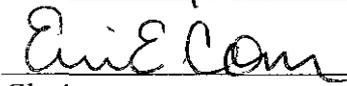
Casey - Aye
Tillery - Aye
McGregor - Aye


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 14, 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 21, 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-12-0234

Transcript Costs: \$511.50 Administrative Costs: \$25.00

Total Deposit Required: * \$536.50

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: July 29, 2016

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

Delbert Bumgardner

Case No. 2015-REM-12-0234

Appellant

v.

May 25, 2016

Belmont Correctional Institution
Department of Rehabilitation & Correction

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for record hearing on March 29 and 30, 2016. Present at the hearing were Appellant Delbert Bumgardner, represented by James J. Leo, Attorney at Law and Appellee designee Eric Lyle, Correctional Warden Assistant, represented by Tracy M. Nave, Principal Assistant Attorney General and Amy Ruth Ita, Senior Assistant Attorney General.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Bumgardner was removed from his position of Lieutenant, effective December 11, 2015. The pertinent part of the removal order states as follows:

Violation of the Standards of Employee Conduct Rules 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. 49. Sexual conduct or contact, while on state time, with a person not under the supervision of the Department, regardless of consent and 50. Any violation of ORC 124.34 – and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or

the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any others acts of misfeasance, malfeasance, or nonfeasance in office. As a result of an investigation conducted into allegations of sexual harassment and EEO concerns, it was discovered you have touched female employees in a sexual and inappropriate manner and engaged in unwanted conduct and behavior. Your actions were improper and unwelcome and demonstrated a failure of good behavior.

Appellant Bumgardner filed a timely appeal of his removal.

STATEMENT OF THE CASE

Appellant Bumgardner testified, as if on cross examination, that he began his employ with Appellee in 1995. He stated he was promoted from Correction Officer to Lieutenant in 2015. He identified Appellee's Exhibit 6 as the Sexual Harassment Policy, dated February 13, 2015. Appellee's Exhibit 7 was identified by Appellant Bumgardner as his January 9, 2013, signed receipt of the Standards of Employee Conduct and the Standards.

Appellant Bumgardner testified he knows Correction Officers Clark, Brown, Swallie and Herbert, as he worked with all of those women when he was a Correction Officer. He stated they all laughed and joked together and got along. He confirmed that as a Lieutenant, those four women would be expected to follow his orders. Appellant Bumgardner testified he did pull Ms. Herbert to his knees; placed his fingers into Ms. Brown's pocket, but not in a sexual manner; and tickled her with a pen by running the pen across her shoulders horizontally. He testified neither of the women complained or told him to stop.

Appellee's next witness was Melissa Swallie, a Correction Officer for approximately sixteen and one-half years. In October, 2015, she became a Mail Clerk/Screenener. As a Correction Officer, Ms. Swallie testified she supervised inmates and upheld the safety and security of the institution. As a Relief Officer, Ms. Swallie explained she worked at different locations on a daily basis. She testified she worked with Appellant Bumgardner, first as a Correction Officer then as her supervisor when he became Lieutenant.

Ms. Swallie testified she had a good working relationship with Appellant Bumgardner and they got along well. She considered him a friend, but that all changed when he was promoted to Lieutenant. She testified Appellant Bumgardner's demeanor changed with his promotion as he began touching women inappropriately. Ms. Swallie testified she was sitting in the Control Center doing paperwork and she felt Appellant Bumgardner run his hand up her side in a tickling motion and his hand touched her breasts. She stated she jerked to the side and closed her arm down. Ms. Swallie testified she was surprised and shocked as she had felt that Appellant Bumgardner was a friend of hers and she did not know when the time came that he felt he could cross that line. She stated almost the exact same thing happened at a later date, but she could not remember the exact dates.

In between the two incidents, Ms. Swallie testified she told Appellant Bumgardner that he was now a "white shirt" and he needed to stop talking and joking around. He told her that was him and how he is and he is going to continue. Ms. Swallie testified she was working in IHS one day during the 6:00A.M. count and there were four inmates in the rear and Appellant Bumgardner told her "I would like to be in your rear". She told him he did not need to say that and he replied that was just the way he is. Ms. Swallie testified she did not tell anyone what happened but there were two other females in the Control Center one day after all of these incidents and one of the other women said that the Lieutenant needs to stop. Ms. Swallie asked her what she meant and the other woman replied that Appellant Bumgardner had pinched her on the buttocks. The other female in the room stated that Appellant Bumgardner had put his hands in her pants pocket. Ms. Swallie stated she did not say anything to them about what had happened to her.

Ms. Swallie testified that she had been appointed as the women's co-coordinator on an EEO committee so she talked with her co-chair, who told her she really needed to report these incidents. She stated it was hard for her to write someone up, as they all felt like a close-knit family, but she talked with the Deputy Warden and filed an incident report on September 16, 2015, which she identified as Appellee's Exhibit 4, page 61. She testified she had spent some time with Appellant Bumgardner outside of work, as they would get together as a group and play cards. She stated she has hugged Appellant Bumgardner before but stated that "there is a line you don't cross" and he crossed it.

On cross examination Ms. Swallie testified she feels like she has been scrutinized by her co-workers since filing the report regarding Appellant Bumgardner. She stated she has made jokes of a sexual nature at work. Ms. Swallie stated there were others in the Control Center when the incidents happened and she does not remember saying anything to Appellant Bumgardner that day. Ms. Swallie identified Appellant's Exhibit G as a question and answer interview she had with Deputy Warden Scott and shortly after that is when she filed her report. She testified that while she did not say specifically in the report that Appellant Bumgardner touched her breasts, she stated he touched her inappropriately.

Appellee's next witness was Bobbi Clark, a Correction Officer since June, 1995. She stated she was hired in with Appellant Bumgardner and has socialized with him outside of work, such as going to dinner with he and his wife and participating in group outings. Ms. Clark testified she and Appellant Bumgardner had a friendly working relationship and he did not touch her at work until he became a Lieutenant.

Ms. Clark stated she does not know exact dates, but one day she was standing in the doorway at roll call and Appellant Bumgardner took his thumb and ran it across the cheeks of her buttocks. She testified this happened on more than one occasion and it shocked and upset her. Both time she elbowed him and he grabbed his stomach and said "oh my hernia". Ms. Clark testified this happened two or three times and there were people in front of them, but no one behind them.

Ms. Clark testified she was in the Control Center another time and Appellant Bumgardner came up from behind her and rubbed her side up and down and rubbed her breasts. She was shocked and cursed at him. She stated Appellant Bumgardner turned red and stated "you know what I'm like". Another time Ms. Clark was sitting at the window in the Control Center while Appellant Bumgardner was taking count and he was in a chair with his hands behind his head, and as she walked by him, he took his hand and grabbed her buttocks. She told him he "has lost his fucking mind – you are a married man". He replied "I told her last night to get the fuck out".

Ms. Clark testified she tried to just blow some of this off as accidental, but she was angry and she told people about the incidents. She stated they happened over a few months, as it was not an everyday occurrence. Ms. Clark testified that when Appellant Bumgardner ran his hand down her sides and she told him he could

not do that, he went over to the phone and called an outside line and said "Bobbi won't let me see her boobies". Ms. Clark testified she heard a female voice on the other end of the phone laughing. She stated she did not know what to think and wondered why anyone would do that. Ms. Clark testified she did not expect that kind of behavior out of Appellant Bumgardner as he had always been a perfect gentleman but he changed after becoming a Lieutenant, as he became more brazen.

Appellant Bumgardner was Ms. Clark's boss and she did not report his behavior as she hoped it would stop. She stated prior to him becoming a Lieutenant, Appellant Bumgardner never touched her inappropriately. She testified she saw him touch Ms. Brown by rubbing his hands down her sides and tried to tickle her. She stated she did not ask Ms. Brown about it as it was not her place to do so. After the last time Appellant Bumgardner grabbed her buttocks, she talked to Ms. Brown and Ms. Swaille when they were in the Control Center one day. One of them asked the other two if they had been having problems with Appellant Bumgardner touching them. She asked them if they were going to do anything about it and no one said anything so she figured it was going to be forgotten. A few days later, Ms. Clark testified she was called into a meeting about the situation. She stated that this whole situation has been a headache and has been aggravating, humiliating and it hurts.

On cross examination Ms. Clark stated she does not know what time of the year that the incidents took place. She stated that in her interviews, she answered only what she was asked and could have said more if she had been asked. Ms. Clark testified that she is very angry and hurt as Appellant Bumgardner was her friend. She stated this all should have stopped when she told him to stop.

Appellee's next witness was Michelle Herbert, a Correction Officer for approximately ten years. She testified she worked with Appellant Bumgardner for a few months when they were both Correction Officers and then she was supervised by him when he became a Lieutenant.

Ms. Herbert testified that in August, 2015, she was in Receiving and Discharge running the barber shop on a Saturday. People were in and out all day and Appellant Bumgardner came down to the barbershop and she was sitting at the desk. Appellant Bumgardner sat down and she got up and he stood up and grabbed her duty belt and pulled her toward him. She told him to knock it off.

Another time, Ms. Herbert testified she was in the Control Center and she was in a chair and Appellant Bumgardner pulled her backwards. He had his hand or arms across her chest and up against her breast, as he almost pulled her chair back into his. She testified there was also a time when he poked her in her genital area with a red pen and another time in the chow hall, while she was at the podium, he pulled her toward him and rubbed his hand up against her buttocks. Ms. Herbert stated there were a few times when Appellant Bumgardner slid his hands down her back. She testified she cannot remember if he said anything to her during these incidents, as she has tried to forget them as they are not anything she wants to remember. She stated these incidents did not make her feel good and she feels embarrassed. Ms. Herbert testified she tries to avoid Appellant Bumgardner.

When asked why she did not report these incidents, Ms. Herbert stated this was supposed to be a family facility and she does not feel good going around telling people what happened. She stated she talked to a supervisor about the incidents without saying it was Appellant Bumgardner that she was talking about. Ms. Herbert testified she does not want people looking at her, so she just tried to avoid him as best she could.

On cross examination Ms. Herbert testified she clowns around and tells jokes to people as they all try to be a family. She testified she does not remember Appellant Bumgardner putting her on his knee. Ms. Herbert stated she was in the Control Center one day with Ms. Clark and Appellant Bumgardner and she saw Ms. Clark move away from him with a funny or bothered look on her face, but that is all she saw.

Appellee's next witness was Verna Brown, a Correction Officer for approximately twenty years. She explained that the pepper spray or mace is kept in the Control Center and there used to be a cabinet that held all the pepper spray.

Ms. Brown testified she knows Appellant Bumgardner as she worked with him for approximately twenty years and she considered him to be a friend. She stated that a few months after he became a Lieutenant, he got an entitlement attitude and did some inappropriate things. Ms. Brown testified that numerous times when she and Appellant Bumgardner were in the Control Center, he was doing the count and he would tickle her down her side. Another time he was in a chair and she was sitting facing the opposite way. Appellant Bumgardner reached over and poked her or tickled her down her sides and he laughed. She testified this

happened eight or ten times and made her feel extremely uncomfortable. She moved away from him and told him to knock it off and tried to joke it away. Ms. Brown testified Appellant Bumgardner did not do this when he was a Correction Officer. She stated she poked him back in the side one time after he poked her with a ruler.

Ms. Brown testified that one time she was standing at the old pepper case and Appellant Bumgardner came up behind her and put his hands in her pockets. She was filling out paperwork on top of the case so she was not close to him. He came up from behind and put both of his arms around her and both of his hands in her pockets, with his stomach pressing up against her back. She testified she felt extremely uncomfortable and turned sideways and moved away from him. Ms. Brown testified she has no idea what she did that would make Appellant Bumgardner think that was an ok thing to do. She stated he just laughed and made a joke. After that, she testified he touched and tickled her on approximately four more occasions. She testified that she did not want to make waves as she wanted to keep her job and make it as easy as possible. Ms. Brown stated her plan was to bid on another job that would take her out of the Control Center.

Ms. Brown opined that it is a man's world at the institution and one does not do a whole lot of talking. She testified she witnessed Appellant Bumgardner tickle Bobbi Jo and saw her jump. She stated she feels embarrassed and alienated from her co-workers.

On cross examination Ms. Brown testified she should have reported the incidents earlier but she did not want to make waves. She stated she told Appellant Bumgardner several times to knock it off. She admitted that she has joked around with co-workers and has engaged in horseplay with them and told some jokes of a sexual nature. Ms. Brown testified that Appellant Bumgardner put both of his hands in her pockets to the bottom of the pockets and it was not just his finger.

Appellee's final witness was Warden Michele Miller. She testified she has been the Warden at Belmont since 2004. As such, she is responsible for the overall operation of the Institution.

Warden Miller testified she was told by Deputy Warden Scott in approximately September, 2015, about the allegations involving Appellant Bumgardner. She then moved Appellant Bumgardner to a different shift and then

put him on administrative leave. Warden Miller identified the pre-disciplinary documents she reviewed, Appellee's Exhibit 3, and testified that she has a zero tolerance policy for sexual harassment or unwelcome physical contact. She stated Appellant Bumgardner violated three work rules and his actions were egregious in that he created unwelcome physical contact with four Correction Officers, whom she found to be credible in their testimony. She testified all of the four women were in good standing at the institution and were not up for promotion against Appellant Bumgardner. Warden Miller stated all supervisors are held to a higher standard and an employee holding a Lieutenant position cannot violate the rules. She identified Appellee's Exhibit 6 as the sexual harassment policy for the department.

On cross examination Warden Miller testified Appellant Bumgardner did not have any prior discipline. She stated she did not talk to any of the four Correction Officers as she only reviewed their question and answer sessions with the investigator.

Appellant's first witness was Theresa Bumgardner, Appellant Bumgardner's wife of twenty-seven years. Mrs. Bumgardner testified she and her husband had dinner with Ms. Clark in approximately March, 2015 and attended a picnic with the other employees. She testified her husband never called her while he was at work and said "She won't let me touch or see her boobies".

Appellant Bumgardner testified he has been employed by Appellee for approximately twenty-one years in July. He was temporarily assigned to a Lieutenant position in February, 2015 and shortly thereafter was permanently placed into the position.

Appellant Bumgardner testified he never said to Ms. Swallie that "he wanted to be in her rear" and he denied touching her inappropriately or making suggestive comments to her. He stated he had a "joking relationship" with her and in reference to all four women who testified against him, he stated "they all gave as good as they took". He denied touching Ms. Clark on her breasts or buttocks, but did admit that he stuck a finger in Ms. Brown's pocket and put Ms. Herbert on his knees, but he did not think of these things in a sexual way. Appellant Bumgardner later testified that he put his right hand into Ms. Brown's pocket, mid-way to the second set of knuckles. He also admitted he ran a pen across Ms. Brown's back and down a little. With regard to Ms. Herbert, Appellant Bumgardner said he was being stupid by putting her on his knee and he denied grabbing her buttocks. He also denied

making any lewd comment to her or touching her in any way while they were in the barbershop area. He stated Officer Turner was in the barber chair in the next room, approximately ten to twelve feet away. He also denied touching her in the chow hall and stated that is a heavily populated area.

Appellant Bumgardner testified Ms. Clark did hit him where his hernia was when he was still a Correction Officer. He stated he knows now that the horseplay and joking around was entirely wrong and if he could apologize and take it all back, he would.

On cross examination Appellant Bumgardner stated he knows that touching someone in the workplace is not proper and that a Lieutenant is an example for lesser ranks and is held to a higher standard. He opined that the person who has been touched has to determine if it was inappropriate and if so, an incident report has to be written.

Appellant Bumgardner testified he asked if he could bring witnesses to his pre-disciplinary conference and he was denied the opportunity to do so.

FINDINGS OF FACT

After reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. At the time of his removal on December 11, 2015, Appellant Bumgardner was employed as a Lieutenant. He had approximately twenty-one (21) years of service with Appellee and had no prior discipline.
2. Appellant Bumgardner had received and was familiar with the Standards of Conduct and the Sexual Harassment Policy and as a Lieutenant, he was responsible for enforcing the policies.
3. As a Lieutenant, Appellant Bumgardner was responsible for supervising Correction Officers, including Correction Officers Swallie, Clark, Herbert and Brown. All of them had worked together prior to Appellant Bumgardner being promoted to Lieutenant.

4. Appellant Bumgardner, after becoming a Lieutenant, on at least two occasions, ran his hand up Ms. Brown's side in a tickling motion and touched her breast doing so. He commented to her one day that he "would like to be in her rear". Ms. Brown told Appellant Bumgardner he needed to stop talking and joking around now that he was a "white shirt" but he replied that is "just the way he is".
5. Appellant Bumgardner, after becoming a Lieutenant, on two or three occasions, ran his thumb across Ms. Clark's buttocks. He also approached her from behind in the Control Center and rubbed her side up and down, touching her breasts. Another time, Appellant Bumgardner grabbed Ms. Clark's buttocks as she walked by him. Ms. Clark told him to stop, elbowed him to get him away from her and cursed at him. In response, Appellant Bumgardner told her "you know what I am like".
6. Appellant Bumgardner, after becoming a Lieutenant, grabbed Ms. Herbert's duty belt and pulled her toward him. This was in August, 2015. On other occasions, he took the chair she was sitting in and pulled her backwards by putting his hands or arms across her chest and up against her breasts, he poked her in her genital area with a pen, and while she was at a podium, he pulled her toward him and rubbed his hand up against her buttocks. Ms. Herbert told him to knock it off and when he did not stop, she tried her best to avoid him.
7. Appellant Bumgardner, after becoming a Lieutenant, on numerous occasions, tickled Ms. Brown down her side. On one occasion, while Ms. Brown was standing in the Control Center, Appellant Bumgardner came up from behind her and put both of his arms around her and then put both of his hands in her pockets, all the way down to the bottom of the pocket, with his stomach pressing up against her back. Ms. Brown told Appellant Bumgardner several times to "knock it off" and moved away from him. He laughed and made jokes in response.
8. Appellant Bumgardner was given and attended a pre-disciplinary hearing where he was made aware of the charges against him and given an opportunity to respond to the charges.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Bumgardner to be upheld, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the removal order. Appellee has met its burden.

Appellee's Sexual Harassment Policy defines Hostile Work Environment Sexual Harassment as:

Severe and pervasive conduct that has the purpose or effect to interfere with an individual's work performance, or creates an intimidating or hostile environment. Examples of behaviors that violate this policy include, but are not limited to: suggestive comments, sexual jokes, gestures, slurs or innuendoes, display of sexually suggestive objects or pictures, unwanted touching, rubbing, patting or pinching, blatant or subtle forms of pressure for sexual activity, explicit descriptions of the harasser's own sexual experiences, staring or leering upon a particular area of the body and unsolicited or unwelcome flirtations and advances of propositions.

The evidence established that Appellant Bumgardner exhibited the majority of the above examples, such as "suggestive comments, sexual jokes, gestures, unwanted touching, rubbing, patting or pinching and unsolicited or unwelcome flirtations and advances of propositions." His actions pretty much covered the gamut of the definition. Why his demeanor changed once he became a Lieutenant is anyone's guess, but the evidence established that it did change, and not for the better.

Appellant Bumgardner admitted to having a joking relationship with all four women who testified they were the subject of his unwanted touching. Not only did he admit to having a joking relationship, he relied on it as a defense and when asked by each of the women to stop his unwanted touching, he defended his actions by telling them "that is the way I am". Several times in his defense, he used the phrase that "they gave as good as they got", meaning that he and the women all used to joke around together. While that may be true, Appellant Bumgardner did not testify that any of the women ever touched him in places he did not want to be touched or that they harassed him in any way. He did not testify that any of them were his supervisor. The fact that they joked around some with him, does not

excuse his behavior toward them. While his actions would not have been appropriate when he was a Correction Officer, they most certainly were not appropriate when Appellant Bumgardner assumed the Lieutenant's position. Employees fail to realize and may not be trained on the fact that once one steps into a supervisory capacity, the relationships one had with others as peers is gone and must be replaced by a supervisor/subordinate relationship with clear boundaries.

Appellant Bumgardner admitted to grabbing Ms. Herbert and pulling her back to his knees and running a pen across Ms. Brown's back and "down a little". He testified that he placed his fingers into Ms. Brown's pocket, then stated he stuck "a finger" in her pocket, and finally, he later testified that he "put his right hand into her pocket, mid-way to the second set of knuckles". Appellant Bumgardner's testimony was not credible. He did not look at any of the four women during their testimony, he contradicted his own testimony and had a vested self-interest in not appearing to engage in sexual harassment. All of the four women who testified against Appellant Bumgardner were credible witnesses. They were all reluctant to bring their allegations forth and even on the witness stand, one could tell that bringing these charges was not something that was easily done or that they were anxious to do.

Appellant Bumgardner argued that the women did not file an incident report timely and that somehow should excuse his behavior. It was clear from the testimony of the four women, all of whom are long time employees, that they are used to working with men and knew that if they filed a report, they were going to be scrutinized and ridiculed by the other males in the institution, so they were reluctant to file a report. It was not until they all talked and realized that Appellant Bumgardner was sexually harassing them and that it had gotten to the point where telling him to stop was having no effect, that one of them decided to file a report and bring his actions to light.

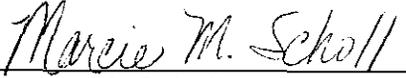
Another argument by Appellant Bumgardner was that these were incidents that lasted only a brief time and that each person must decide for themselves whether or not any touching is appropriate or not. Appellant Bumgardner was a Lieutenant who was charged with enforcing the rules and policies. To say that an incident only lasted a brief time shows that he either did not understand the policies or chose to ignore them. The point is that there should have been no incident of touching at all and it is the action itself which is determinative of a violation of the policy. Even assuming for the moment that it is up to the person to determine if a touch is or is not appropriate, each women telling him to stop or to knock it off

should have been a pretty good hint that they had determined that his touching of them was inappropriate.

Appellant Bumgardner also argued that his pre-disciplinary conference was flawed as he asked to present witnesses and was denied that request. The case of *Cleveland Brd. of Educ. v. Loudermill*, 470 US 532 (1985), only requires that an employee be notified of the charges against him or her and have an opportunity to respond to those charges and then be provided with an opportunity to appeal to an administrative board to conduct a *de novo* review of the discipline received. This is exactly what happened. Appellant Bumgardner was not deprived of any due process rights in his pre-disciplinary conference.

While it is unfortunate that such a long term employee with a clean disciplinary history has to lose his job, Appellant Bumgardner engaged in egregious conduct that is not and cannot be tolerated in the workplace. The Warden testified that there is a zero tolerance policy for sexual harassment and the evidence established that Appellant Bumgardner did not exhibit just one instance of sexual harassment but he sexually harassed four different women on numerous occasions. The women expressed their concern about how they would be treated if he were to return to work and the thought of returning him to work in the reduced rank of Correction Officer is an option. However, he would then be working alongside the women that he harassed and given their concern about his return, it did not appear to be a good option. He certainly cannot return as a Lieutenant, as Appellant Bumgardner has shown he is not capable of properly supervising or of enforcing and upholding the rules and policies of the Appellee. This Board has no authority to transfer him to another appointing authority, so the only viable option is his removal from employment. There was no evidence of an abuse of discretion on the part of the appointing authority in removing Appellant Bumgardner and therefore this Board will not substitute its judgment for that of the appointing authority.

Therefore, I respectfully **RECOMMEND** that the removal of Appellant Bumgardner be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge