

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

Demarlo Rozier,

*Appellant,*

v.

Case No. 2016-RED-05-0096

Department of Youth Services,

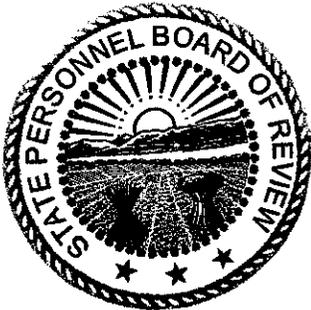
*Appellee,*

**ORDER**

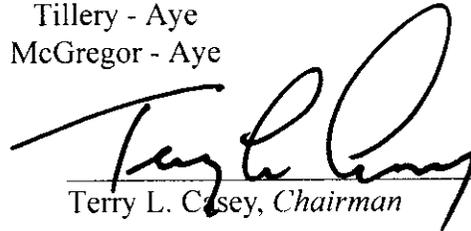
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that the instant 124.34 Order of Demotion is **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



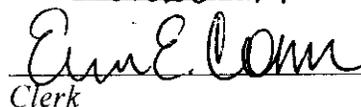
Casey - Aye  
Tillery - Aye  
McGregor - Aye

  
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, October 19, 2016.

  
Erin E. Conn  
*Clerk*

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

## NOTICE

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

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

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

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE October 26, 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: 2016-RED-05-0096

Transcript Costs: \$447.00 Administrative Costs: \$25.00

Total Deposit Required: \* \$472.00

Notice of Appeal and Deposit Must  
Be Received by SPBR on or Before: November 3, 2016

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

Demarlo Rozier,

Case No. 2016-RED-05-0096

*Appellant*

v.

September 13, 2016

Ohio Dept. of Youth Services,

Raymond M. Geis

*Appellee.*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

The record hearing in this matter occurred on September 8, 2016. Appellant, Demarlo Rozier ("Rozier"), appeared *pro se*. Appellee, Ohio Dept. of Youth Services ("DYS"), was represented by Assistant Attorneys General Robert Fekete and Abigail Ledman. Amy Ast, Bureau Chief of Training and Facilities was DYS' designee.

Witnesses testified in the following order:

Rozier (as if on cross), Phillip Born, DYS Investigator, Amy Ast, Bureau Chief, Ginene Trim, Deputy Director. Rozier then testified on his own behalf.

At issue is whether Rozier violated one or more DYS work rules in the course of his attempt to place a spit mask on a non-compliant youth.<sup>1</sup>

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<sup>1</sup> The 124.34 Order states in pertinent part: Per the findings of Administrative Investigation #1001160043, it was determined that your actions on or about the date of March 8, 2015 are a violation of departmental work rules, specifically (Continue on Page 2) Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation Page 2- Demarlo Rozier. Your actions are in violation of the following Policy 103.17 Rule(s) effective July 8, 2009, specifically Rule 5.01P Rule 5.09P Rule 5.12P Rule 6.02P Rule 6.05 P Failure to follow policies and procedures (Specifically: DYS Policy 301.05 - Managing Youth Resistance and 301.05.01- Use of Force) Violation of Ohio Revised Code 124.34 - performance related to including, but not limited to such offenses as incompetence, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of the rules of the Director of Administrative Services, any other failure of good behavior, any other acts of misfeasance, malfeasance or nonfeasance in office or conviction of a felony. Actions that could harm or potentially harm an employee, youth, or a member of the general public: Use of excessive force- with injury Physical response beyond what was necessary to control/stabilize the situation Use of prohibited physical response Techniques or practices that unduly risk serious harm or needless pain to the youth. May not be used unless in an emergency defense situation to prevent an act which could result in death or severe bodily injury to oneself or to others. The intentional, knowing or reckless use of the

DYS determined that Rozier used excessive force, *inter alia*, during the incident. DYS demoted Rozier from Operations Manager ("OM") to Youth Specialist as a result. The event leading to demotion occurred at Indian River Juvenile Correctional Facility ("IRJCF") on March 8, 2016.

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

Specifically, DYS alleges that Rozier chipped off the youth's front tooth when Rozier purportedly slammed the youth's head into the floor. At the time, Rozier was trying to put a spit mask over the head of the youth.

During this attempt, the youth was faced lying down on the floor being held down by about 5 other staff. This physically large and strong youth was in handcuffs and leg shackles at the time. The youth was yelling and wriggling. Another OM ("Warmath") handed a spit mask to Rozier ostensibly so that Rozier could apply the mask on the youth.

The youth verbalized that he did not want the mask on him. The mask is used so that when the youth is lifted up to his feet, he will not be able to project mucous and saliva on the staff. Rozier and Warmath knew the youth had two spitting incidences at other institutions. Rozier applied the mask quickly. Contemporaneously, the youth cried out, very apparently in pain, accusing Rozier of breaking his tooth.

Video of the incident is obstructed by Rozier's posterior so that one cannot see the actual placement of the mask over the youth's head. The tooth was not recovered at the scene. No one knows where it is.

As a result, there is an issue of fact as to whether Rozier caused the injury. There is also an issue of fact as to whether Rozier violated DYS policy by failing to use the least amount of force necessary under the circumstances to reasonably achieve compliance by the youth.

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following techniques: restricting respiration in any way, such as applying a chokehold or pressure to a youth's back or chest or placing a youth in a position that is capable of causing positional asphyxia; using any method that is capable of causing loss of consciousness or harm to the neck; pinning down with knees to torso, head or neck; slapping, punching, kicking or hitting; using pressure point pain compliance and joint manipulation techniques other than those approved and trained by ODYS; modifying mechanical restraint equipment or applying any cuffing technique that connects handcuffs behind the back to leg shackles; dragging or lifting of the youth by the hair or ear or by any type of mechanical restraint; applying any type of physical response to a youth's wrist, once the youth is placed in handcuffs; using other youth or untrained staff to assist with the restraint; securing a youth to another youth or to a fixed object, other than an agency approved restraint bed.

For its part, DYS offers the following circumstantial evidence in support of its determination that Rozier injured the youth and used excessive force:

- A. Video shows Rozier holding both arms perpendicular to the floor and DYS claims there is a downward movement of Rozier's arms. Rozier is on his knees in very close proximity to the youth.
- B. A thud or thump can be heard tending to indicate the youth's head hit the floor.
- C. The youth immediately complains about his chipped tooth. This is the first time the youth complains about his teeth.

I viewed the video approximately 30 times post hearing at counter 40 through 55 seconds, using stereo headphones and a high resolution monitor. At 40 seconds Rozier is seen kneeling on his right knee and unsuccessfully attempting to apply the mask. At 45 seconds, Rozier rapidly drops his second knee to the floor and extends his foot outward, away from the wall. A thump is heard at this exact moment.

Contrary to DYS' assertion, it is not readily apparent to me what causes the thump sound. It could be Rozier's knee, the youth's head or another source. The youth's head is a few inches from the wall. An "oooh" moan is heard at 46 seconds. A louder moan is heard at 46-47 seconds. More moans are heard at 50, 51, 52 and 53 seconds. By 55 seconds, the youth is yelling that Rozier "broke my fucking teeth." and repeating this message loudly many times.

By this time it appears to me that the youth's head must be on the floor because I cannot see Rozier's arms fluctuate. This is consistent with resting on something solid. Though I cannot see the youth, it appears Rozier is still affixing the mask at this point, otherwise I assume Rozier would have gotten up by now. To me this tends to show the youth's head was pinned against the floor.

Rozier offers the following circumstantial evidence to cast doubt upon DYS' determination that he caused the youth's tooth to chip:

1. The youth exchanged punches with another youth immediately prior to the restraint. The injury could have occurred during this fight.
2. Alternatively, the youth's act of wriggling his head was self-injurious and Rozier's efforts were not excessive under these circumstances. But for the youth's continued and unauthorized resistance, no injury would have occurred.

3. The OM supervising the scene requested Rozier to place the mask through that OM's handing the mask to Rozier. Through this act, the OM incident commander effectively determined that the benefits of protecting staff from the youth's saliva trumped the risk of injury in that moment, and Rozier was privileged to carry out the placement.
4. The Nurse's intake report recorded the youth as saying "Staff grabbed me and drove me into the ground, breaking my tooth." About an hour later, the youth explained during an investigatory interview that only Rozier broke his tooth. Rozier maintains the statement closest to the time of the incident is more credible and should be interpreted to give him the benefit of doubt.
5. No witnesses reported seeing Rozier slam the youth's head into the floor.

DYS rejects Rozier's assertion #3 on two grounds. One, Rozier never stopped being an OM and was still subject to applying his judgment as an OM in conformance with DHS rules at all times. Two, Rozier should have foreseen the substantial risk of injury to the youth -at the very latest when the youth successfully initially resisted the masking.

In DHS' view, Rozier should have aborted his attempt to place the mask when met with resistance, and, instead, should have reverted to giving "*time and distance*" to the situation. "*Time and Distance*" is the policy whose underlying philosophy accepts the premise that, when a youth is openly agitated, waiting and backing off will deescalate the situation and tend to avoid injury in contrast to the inherent risk of upping the use of force. This DHS practice or *modus operandi* is embodied within DHS Policy 301.05 Managing Youth Resistance.

In accordance with this policy, if *time and distance* did not work, then at that point Rozier could have collaborated with OM Warmath to plan a use of force that was better designed to limit the risk of injury. After all, the youth was already restrained. He was not able to get up and escape being in handcuffs and leg irons.

Rozier states he was just trying to do his job and things happen very quickly. There is no formal policy on when and how to apply the spit mask when a youth is in the *prone* (face down) position. Rozier states he did the best he could to place the mask.

DYS rejects Rozier's #4 assertion above that the youth is not credible regarding the source of injury because the youth's two statements can reasonably be read together in a way that is not contradictory. The initial statement that staff broke his tooth can also refer to Rozier. The youth's second statement was more

comprehensive where he was subject to questioning. The youth's initial statement was gathered during medical triage and was incomplete and lacked detail, in DYS' view.

Finally, as to point #5, DYS notes that staff accounts of the restraint merely indicate that they did not see Rozier slam the youth's head into the floor. DYS stresses the witness accounts fall short of denying that it happened.<sup>2</sup>

### CONCLUSIONS OF LAW

The record establishes that there is no specific protocol on how to apply a spit mask for a youth in the prone (face down) position. However, it is well settled that the mere absence of a specific policy will not defeat the duty of ordinary care owed by an employee to his or her employer regarding the execution of the employee's duties.

DYS notes that a major job duty of the OM is to protect the youth. DYS proved that its general policy of time and distance is embodied within its Use of Force and Managing Youth Resistance policies to promote youth welfare.

It is undisputed that the youth was immobilized. Testimony established that there was a legitimate need to have the spit mask in place prior to bringing the youth up to his feet for escort. It is also undisputed that the youth resisted application of the spit mask both verbally and physically.

The spit mask is applied as a precaution to prevent mucous/saliva projection. Because the youth was face down, the precautionary need would not arise significantly until the youth was again placed in a standing position.

DYS is correct that Rozier should have attempted time and distance first upon meeting with resistance from the youth when attempting to place the mask. Rozier was verbally on notice that the youth would resist in this regard.

That the youth was wriggling his head would apprise an ordinary employee that placement would be difficult and therefore was more likely to result in injury. The youth's neck and head were both prone to injury; due to the youth's proximity to the floor and the amount of force that would be necessary to immobilize the youth's head while he was moving it.

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<sup>2</sup> Statements and interviews of staff witnesses are contained at Bates No. DYS 000018-000049 of Appellee's Exhibit 3.

At this point, Rozier had a duty to abort and revert to verbal strategies, and/or a planned use of force under DYS policies.

Yet, DYS may be remiss for not having a procedure or equipment in place to minimize injury in these cases. Having a soft towel, foam cushion or pillow nearby to cushion the youth's head from the floor seems common sense to help avoid injury in these cases.

Notably absent was any testimony that protective padding was available at the OM office or anywhere else. Unfortunately, without the availability and use of this additional type of equipment, it seems almost inescapable that this situation will repeat itself. Thus, it is my hope that DYS will design a specific procedure and train upon it to minimize risk in these cases.

Nevertheless, Rozier's good intentions and decisive action does not absolve him from his duty to observe the general requirements of DYS policy. Once Rozier undertook to place the mask, he had a duty to do it in such a way as to avoid harm to the youth or, barring that, to abort the undertaking and further assess the situation. In this case, application of time and distance would have at least given the opportunity to devise a better way to get the mask on without injury.

I find that Rozier violated DYS policy when he continued to apply the mask even when he should have known that the youth's continued resistance to the application of the mask substantially increased the risk of injury. Additionally, I find that it is more likely than not Rozier caused the youth's tooth to be chipped for the reasons, below.

Contact with a hard floor surface is more likely to produce a chip than is fisticuffs. Punches with bare fists are more likely to loosen teeth or knock them out than to chip them. In contrast, teeth are widely known to break or crack from contact with hard surfaces.

Thump noise aside, the youth's head was very near the floor, he was wriggling his head to frustrate Rozier, and Rozier was not able to place the mask without increasing the amount of force he used to immobilize the head. On this basis, it is more likely than not the youth's injury occurred to during the placement of the mask.

The next issue is whether demotion is the appropriate discipline. Rozier has approximately 10.5 years of service. At the time of this incident, Rozier had a verbal reprimand for an unrelated performance based offense. DYS Rule 6.02 P "Use of Force with Injury" prohibits unnecessary force and contains a penalty enhancement when there is an injury associated with the use of force.

My findings above support that Rozier violated this rule by applying force that was not immediately necessary and which resulted in injury to the youth. It is unnecessary to review the other rules contained in the 124.34 order as I rule that they are either lesser included offenses or duplicative offenses arising out of the same transaction.

DYS Policy 103.17 General Work Rules employs use of a disciplinary grid. The grid incorporates the principles of progressive discipline by factoring prior discipline with the seriousness of the current offense to arrive at the correct range of discipline.

In this instance, the range of discipline is 5 days to termination for committing a level 6 performance related infraction with either no prior discipline or a prior verbal reprimand. This Board does not recognize verbal reprimands and so I will consider Rozier to be without prior discipline. Under the DYS Policy 103.17, demotion is considered a more severe discipline than a 5 day suspension but less severe than termination.

DYS 103.17 Work Rules state that managers are held to a higher standard than other employees. Deputy Director Ginene Trim testified that she must have her supervisors model correct observance of DYS policies in order effectively lead staff. Hence, there is a greater need for supervisory leadership to follow rules regarding use of force to foster compliance by rank and file employees.

Rozier never stopped being an OM during the incident. Though I find he was not the incident commander, neither is he is similarly situated to a rank and file Youth Specialist. Rozier would still have to honor DYS policies and model them at the level of a supervisor for the benefit of the Youth Specialists.

For this reason, Trim's decision to demote is not excessive. Overall, Rozier's record is good. Rozier's intentions during his intervention were not malicious. Rozier's conduct was appropriate until the point that he should have known the youth would resist placement of the mask. The supervisory OM class must model time and distance above all if DYS is to establish and maintain a culture of non-violence.

Though a major suspension may seem appropriate instead of a demotion, I do not feel it is appropriate in this case to substitute our judgment over that of Deputy Director Trim and Director Reed. In this case, reasonable minds can differ over the most appropriate type of major discipline warranted due to the potential liability issues involved with youth injury and staff negligence.

Moreover, Trim testified that if Rozier improves his modeling of time and distance skills, he could be considered for promotion in the future. Trim's firm but

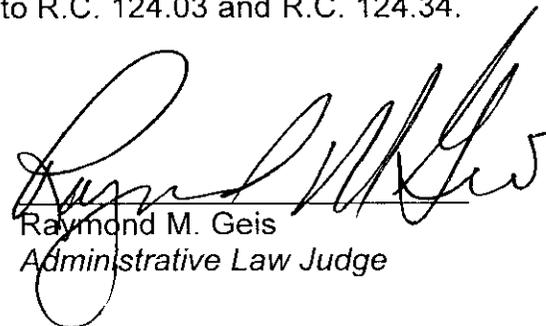
redemptive approach gives hope to Rozier that he can eventually be restored but only if he models time and distance with proficiency.

Finally, in determining that Rozier more likely than not caused the youth's injury I relied on the application of reliable circumstantial evidence in the record and the logic of common sense. *If the Board is not persuaded by my rationale, and this would affect their decision about the proper discipline,* I invite the Board to remand this case back to me with the following instructions:

- i. Order DYS to produce the video showing the fight between the youth and another youth immediately preceding the incident, if available.
- ii. Determine whether or not the fight caused the tooth injury.
- iii. Determine whether any adjustment to the discipline is appropriate based on i and ii.

#### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the instant 124.34 Order of Demotion for Rozier be **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



Raymond M. Geis  
Administrative Law Judge