

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

Robert Day,

Appellant,

v.

Case No. 08-SUS-03-0057

Franklin County Sheriff,

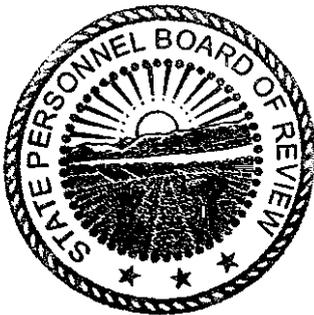
Appellee.

ORDER

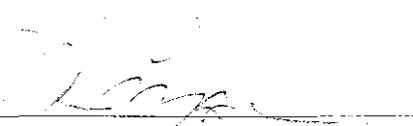
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and 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 Appellee's five day suspension of Appellant be **AFFIRMED**, pursuant to O.R.C. § 124.34.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

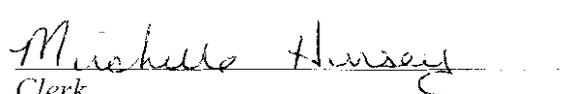


J. Richard Lumpe, *Chairman*

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 constitute (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, November 9, 2009.



Michelle Hunsay
Clerk

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

11-9-09

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

Robert Day

Case No. 08-SUS-03-0057

Appellant

v.

August 13, 2009

Franklin County Sheriff

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on September 2, 2008. Present at the hearing were the Appellant, Robert Day, represented by Daniel H. Klos, Attorney at Law and Appellee Franklin County Sheriff designee Chief Deputy Mark Barrett, represented by Elizabeth C. Stevens and Denise DePalma, Assistant Prosecuting Attorneys.

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

Appellant Day received a five day suspension, effective March 20, 2008. The pertinent part of the suspension order states as follows:

The reason for this action is that you have been guilty of Specifically: For violating regulations 102.26 Neglect or Inattention to Duty, 102.43 Negligence and Poor or Substandard Performance and 102.4 Violation of Rules and Regulations or Directives for failing to call a Code Blue in response to an inmate fight and for moving Inmate Saunders to a visitation booth on the third floor without handcuffs and taking Inmate Reed to the sixth floor without handcuffs before contacting supervision, on January 17, 2008.

Appellant Day filed a timely appeal of his suspension.

STATEMENT OF THE CASE

Appellee's first witness was Patrick F. Garrity, Director of Management Services, which consists of finance, human resources and information technology. Mr. Garrity stated he acted as the Hearing Officer in Appellant Day's pre-disciplinary hearing. He identified Appellee's Exhibit B as the notice of the pre-disciplinary hearing and the rest of the packet that was provided to Appellant Day. Mr. Garrity testified he recommended a five day suspension for Appellant Day based on the progressive discipline policy since Appellant Day had a previous three day suspension. He also stated that discipline is active for two years from the date of an incident. He then identified Appellee's Exhibits D, E and F as documents relating to the previous suspension and reprimands from 2005.

Appellee's Exhibit G was identified by Mr. Garrity as the bargaining unit contract governing deputies, which states in section 7.7 the duration of disciplinary records. Appellee Exhibit C was identified as the Appellee's regulations which Appellant Day allegedly violated.

Upon cross examination Appellant Garrity stated the regulation regarding the failure to call a code blue is that of neglect of duty or inattention to duty. In looking at Appellant's Exhibit 1, an April 15, 2006 memo from Chief Deputy Barrett regarding security-response teams being required to respond to emergencies, Mr. Garrity stated he did not have a hand in preparing this document. He testified a deputy would not have to observe a fight to call a Code Blue and stated a deputy has discretion and judgment which they must exercise as they see fit.

Mr. Garrity identified Appellant's Exhibit 10 as an incident report written by Deputy Snyder. The parties stipulated at this point that the policy of handcuffing inmates is not in writing.

Appellee's next witness was Mark J. Barrett, Chief Deputy for approximately eighteen years and employed by Appellee for approximately thirty-six years. Chief Deputy Barrett stated he is responsible for the Corrections Division which is comprised of two correction facilities, approximately 2,300 inmates, 590 employees and also includes the transportation of inmates to and from the facilities. He stated Appellant Day, at the time of his suspension, was working at the facility located on South Front street, which houses approximately 600 inmates. As a deputy,

Appellant Day was responsible for the safety and security of persons in the facility and for the inmates' property.

Chief Deputy Barrett explained that all deputies begin in corrections. They attend a class and then receive on the job training with a coach. If there is no class taking place when the deputy begins, then the deputy is placed on the job and goes to the Academy for a five to six week training session. He identified Appellee's Exhibit J as three memos which he issued. The memo dated October 24, 2000 was restated on April 15, 2006.

Code Blue was described by Chief Deputy Barrett as any emergency where a response team is needed, stating that it is a kind of "catch-all" emergency code. He stated Code Blue applies to the situations listed on page one of Appellee's Exhibit J, such as fights, disturbances, medical emergencies, fires suicides or suicide attempts and unruly inmates. In the situation Appellant Day was disciplined for, Chief Barrett testified a Code Blue was required, as there was an alleged fight and once Appellant Day determined that a fight took place and further action was needed, a Code Blue was required.

Chief Deputy Barrett testified that even though Appellant Day did not witness the fight, he saw scratches on the inmates and even if everything appeared fine, fights can re-kindle, so it is necessary to call a Code Blue. The reason for that is to prevent injury to staff. Any errors should be on the side of caution. He stated that upon learning that a fight occurred and before opening a cell door, a Code Blue should be called. Chief Deputy Barrett testified there was an apparent indication of a fight, which Appellant Day responded to, and at some point, Deputy Snyder. Appellant Day said he removed the inmates separately and Deputy Snyder stated Appellant Day took care of everything, so he returned to duty.

Chief Deputy Barrett testified that in training, deputies are told that handcuffing of inmates is necessary to protect themselves and must be done when moving an inmate. There is no prohibition to the use of handcuffs, unless there is an unnecessary use of force. He stated it is common to handcuff an inmate who was involved in a fight and especially if the inmate will be removed from the cell.

Appellee's Exhibit K was identified by Chief Deputy Barrett as the grievance filed by Appellant Barrett. He stated there was no grievance hearing held, but on the form, Appellant Day admits that he did not call a Code Blue. Chief Barrett testified that once Appellant Day learned that there was a fight, he had no discretion and he had an obligation to call a Code Blue.

On cross examination Chief Barrett testified he did not conduct an investigation, but reviewed a series of reports. He stated that if both Appellant Day and Deputy Snyder arrived at the incident at the same time, then both deputies had the same obligation to follow the rules. Chief Barrett stated that if an inmate said "I have been in a fight", then there is an obligation with no discretion on the part of the Appellant Day to call a Code Blue. He testified that there is no obligation at that point to determine if a fight actually took place or not.

On redirect examination, Chief Barrett looked at Appellant's Exhibit 9, the statement of inmate Reed, who was a witness to the incident. He was one of the inmates who was moved from his cell without handcuffs. Chief Barrett testified that he saw nothing in this statement indicating that Deputy Snyder should have been disciplined.

Appellant's witness, John Snyder, testified he has been a deputy in corrections for approximately six and one-half years. He stated he is generally familiar with the rules and regulations.

He identified Appellant's Exhibit 10 as his statement and signature, dated January 17, 2008. Deputy Snyder testified he wrote a different statement first and submitted it to Sergeant Perry. Sergeant Perry told him it "was a lie", so Deputy Snyder threw that statement away and wrote this one. When asked what he said in the first report, he testified he wrote that he responded to help Appellant Day. He was notified of a situation by social services or a FEMA deputy. He and Appellant Day were in an office, approximately three to four feet apart and Deputy Snyder testified he did not hear any noises. They both walked back to the inmate area, at the first cell block. He explained there is a vestibule in the middle with two doors. To release an inmate, one has to call the control center to tell them where and when the inmate is coming out. Deputy Snyder testified he went with Appellant Day and they saw two inmates who said they had been in a fight. He explained there are usually eight people in a tank. The majority of the inmates were in bed, asleep. One inmate had red marks near his collar bone area and he said he had been in

fight. Appellant Day called for the door to be opened and he took the inmate into the vestibule. Deputy Snyder testified that he thought that both of the inmates that came out of their cells were handcuffed.

Deputy Snyder testified that it is standard procedure that when an inmate comes out of the cell, they are handcuffed. He stated this is true for any allegation of a fight. He added that an inmate does not get handcuffed to go to visitation or to the gym unless the inmate is noted on their inmate card to be a threat.

Appellant Day and he had both the same responsibilities on the day in question, according to Deputy Snyder. Two inmates said they just got into a fight and needed to be moved. He stated he had his handcuffs with him that day. Deputy Snyder testified he knew Appellant Day was going to place the first inmate in a visitation booth but he did not know what floor Appellant Day was going to take him to. Deputy Snyder testified he had the ability to call a Code Blue and he did not, nor did he mention to Appellant Day to do it. He testified that the reason they did not, was because the situation was not anything that they could not handle themselves. They were both there and no one was fighting and both inmates were coming out willingly. Deputy Snyder testified he did not receive any discipline or counseling for this incident. He also testified that he would report another deputy who was violating the rules and regulations.

On cross examination Deputy Snyder testified he is familiar with the Code Blue policy and he did not have any reason to think that Appellant Day did not know the policy. Deputy Snyder stated Sergeant Perry told him that a Code Blue should have been called and he stated that he is aware now that one should have been called.

On redirect examination Deputy Snyder clarified that Sergeant Perry did not tell him at the time he turned his report in that a Code Blue should have been called. He testified Sergeant Perry did not tell him that until just a few days ago.

FINDINGS OF FACT

The parties stipulated to the following facts:

1. Appellant responded to sounds of undetermined origin coming from Block 3 North Left. When Appellant arrived he was told by inmate Saunders that he had been in a fight with another inmate.
2. Appellant responded to sounds of undetermined origin coming from Block 3 North Left without contacting supervision.
3. Appellant did not call a Code Blue.
4. Appellant escorted one inmate from "the tank" on the third floor to a third floor visitation booth without handcuffs.
5. Appellant escorted another inmate from "the tank" on the third floor to a sixth floor visitation booth without handcuffs.

In addition to the stipulated facts, after reviewing the testimony of the witnesses and the documents entered into evidence, I find the following facts:

6. Appellant Day had a previous three day suspension, with one of the allegations being that he did not call a Code Blue as soon as he should have.

CONCLUSIONS OF LAW

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

Appellant Day stipulated to the allegations, admitting that he did not call a Code Blue and that he did not handcuff either of the inmates when he moved them. Appellant Day did not testify, but in the pre-disciplinary hearing documentation, confirmed by Mr. Garrity's testimony, Appellant Day acknowledged that he should have called a Code Blue. Appellant Day did not present any evidence to rebut his assertion at the pre-disciplinary conference. Obviously, if in hindsight he thought he was wrong and should have called a Code Blue, Appellant Day was aware of the

was wrong and should have called a Code Blue, Appellant Day was aware of the rule or regulation requiring a Code Blue to be called. Section 102.4 of the Rules of Conduct, Appellee's Exhibit C, states that "Personnel will not commit or omit acts which constitute a violation of the rules and regulations, directives or orders of the Office whether stated in this manual or not." Therefore, the evidence has established that Appellant Day's failure to call a Code Blue on the day in question, was a violation of Section 102.4, as stated in the suspension order. His non-action also violated section 102.43 of the Rules of Conduct.

With regard to the non-handcuffing of the inmates, Appellant Day's own witness, Deputy Snyder, testified that it is a standard practice to handcuff an inmate when the inmate is coming out of the cell. He stated that is true for any allegation of a fight. The parties stipulated that the handcuffing policy is not in writing, but in looking at Section 102.4 of the Rules of Conduct, it states that if a person does not perform an act that is required, that omission is a violation of the rule regardless of if it is stated in that manual or not. Since Appellant Day did not testify, there is no testimony from him as to whether or not he knew the inmates should be handcuffed; however, his one and only witness testified it was standard procedure. Also, in the documentation surrounding Appellant Day's previous three day suspension, one of the findings against him was that he allowed "unsecured inmates" to roam freely. Appellant Day was put on notice from his past discipline that an inmate must be handcuffed when he is out of a cell. Therefore, the evidence established that Appellant Day violated Sections 102.4 and 102.43 of the Rules of Conduct.

The next question to be answered is if the imposition of a five day suspension was just given the facts. Appellant Day raised the issue of disparate treatment with regard to Deputy Snyder. Deputy Snyder stated he wrote a report of the incident, dated January 17, 2008 and identified as Appellant's Exhibit 10. That report states as follows:

On Thursday, 17 Jan 08 I was assigned to the third floor. At 1215 I responded to 3 North Left one. Deputy Day had all inmates secured so I returned to my normal duties.

While Deputy Snyder testified he had written a different report which he tore up and threw away because of comments Sergeant Perry made when he turned the first report into him, the only report that Chief Deputy Barrett testified he saw was the above quoted one. In looking at that one, Deputy Snyder states he responded

to a situation and that once he was there, Deputy Day had taken care of the problem. In reading that statement, the appointing authority would have no reason to believe that Appellant Day and Deputy Snyder arrived at the same time. When Deputy Snyder wrote he "responded", that would indicate he was not the person that first saw an incident in a different location from where he originally was. The statement also suggests that when he arrived where Appellant Day was, Appellant Day had already taken care of things.

Chief Barrett testified that if he had been given information that Appellant Day and Deputy Snyder arrived at the incident at the same time, as Deputy Day testified to, then both Appellant Day and Deputy Snyder would have had the same obligation to call a Code Blue and to handcuff the inmates. If indeed Chief Barrett had knowledge of those alleged facts, then disparate treatment would be present since Deputy Snyder did not receive any discipline. However, Appellant Day did not prove that Chief Barrett had any knowledge of a first report or of the facts as testified to by Deputy Snyder.

Appellant Day had a pre-disciplinary conference which he attended, as evidence by Appellee's Exhibit B. That conference was conducted by Mr. Garrity and Mr. Garrity did not make any reference to Appellant Day stating at the hearing that Deputy Snyder was with him from the beginning of the incident. Deputy Snyder did not appear at the pre-disciplinary conference on behalf of Appellant Day and he did not submit a statement contradicting the one Chief Barrett saw. Therefore, there was absolutely no reason for Appellee to have any knowledge that Deputy Snyder had any involvement other than what was in his statement which he turned in and which became part of Appellant Day's file. Therefore, Appellant Day did not prove disparate treatment.

Given Appellant Day's previous three day suspension and the fact that some of the allegations in that incident were similar to the present incident, such as failing to call a Code Blue and failing to handcuff inmates, the Appellee certainly had reason to believe that Appellant Day was on notice that both of those omissions are a violation of the rules of the Appellee. Appellant Day made the exact same error/omission on January 17, 2008 and there has been no showing that Appellee abused its discretion in levying a five day suspension for those violations.

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Therefore, it is my **RECOMMENDATION** that Appellee's five day suspension of Appellant Day be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.

Marcie M. Scholl

Marcie M. Scholl
Administrative Law Judge

:mms