

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Velinda Braithwaite,

Appellant,

v.

Case No. 10-REM-05-0124

Department of Youth Services
Indian River Juvenile Correctional Facility,

Appellee.

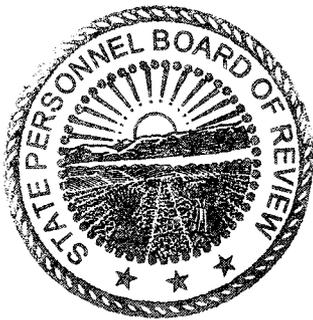
ORDER

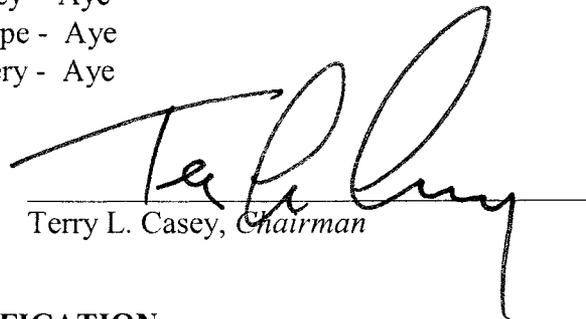
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellant's order of removal, effective April 28, 2010, be **AFFIRMED**, since the evidence revealed that the Appellant violated her last chance agreement, pursuant to O.R.C. § 124.34

Casey - Aye
Lumpe - Aye
Tillery - Aye

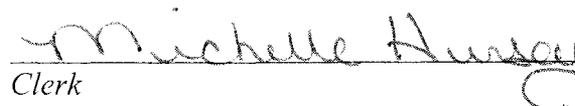



Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto 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, April 5, 2011.


Clerk

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

4.5.11MH

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

Velinda Braithwaite,

Case No. 10-REM-05-0124

Appellant

v.

January 28, 2010

Indian River Juv. Corr. Facility,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On or about April 28, 2010, the Ohio Department of Youth Services, Indian River Juvenile Correction Facility, Appellee herein, served an Order of Removal, in accordance with Ohio Revised Code Section 124.34, upon the Velinda Braithwaite, an Operations Manager, and Appellant herein. That order alleged the following:

This will notify you that you are removed from your position of Operations Manager effective April 28, 2010.

The reason for this action is that you have been guilty of specifically: Neglect of duty, violation of any policy or work rule of the officer's or employees appointing authority.

You are currently under a Last Chance Agreement for any violation of Work Rules Policy 103.17 in its entirety. This Last Chance Agreement was violated on January 8, 2010, when you failed to implement a Planned Use of Force.

Your actions are in violation of the ODYS Work Rules Policy 103.17, effective July 8, 2009, Specifically Rules: 5.01P-Failure to follow policies and procedures: 301.05 Management of Youth Resistance and rule 5.09P -Violation of Ohio Revised Code 124.34 - performance related: including, but not limited to such a defense 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 office or conviction of a felony.

Thereafter, on May 3, 2010, a timely appeal from this order was filed by the Appellant. The record hearing in this case was held on September 29, 2010 and September 30, 2010, and the record was closed on December 13, 2010, after the filing of both the Appellee's and Appellant's post hearing briefs. The Appellant, the Velinda Braithwaite, appeared at the record hearing and was represented by Kenneth Boggs, Attorney at law. The Appellee, the Ohio Department of Youth Services, Indian River Juvenile Correction Facility, was present through its designee, Ms. Amy Ast, the Bureau Chief for Facilities Operations and Central Office, and was represented by Nicole S. Moss and Komlavi Atsou, Assistant Attorneys General.

This hearing was conducted by the State Personnel Board of Review in accordance with Ohio Revised Code Section 124.34, which specifically provides that an employee may file an appeal of any order filed under Ohio Revised Code Section 124.34, within ten (10) days after having received the same with the State Personnel Board of Review.

STATEMENT OF THE CASE

The Appellee's first witness was Mr. Chris Freeman who is currently employed as a Deputy Superintendent of Direct Services and had been so since September 12, 2010, but who had been previously employed as the Operations Administrator dating back to 2005, wherein he oversaw the daily activities of the Operations Managers, including the supervision of the Appellant herein. The witness, when questioned, identified Appellee's exhibit P as a Youth Resistance Grid which is used to determine when it is appropriate to use force in response to a youth's behavior, which ranges from no immediate threat to imminent threat, falling under policy number 301.05.01 with an effective date of October 1, 2009. The witness testified that he has had training on this grid, as well as the Appellant herein. The witness then identified Appellee's exhibit J as an Use of Force Incident Review Form, that he signed off on January 11, 2010, for an incident that occurred on January 8, 2010, involving the Appellant and a youth, that he gave his recommendation to the then Deputy Director of Direct Services that this matter needed to have further

investigation. When questioned, the witness testified that it would be the Deputy Director of Direct Services' responsibility then to make a recommendation to the Superintendent. Moreover, the witness testified after identifying Appellee's Exhibit N, policy number 301.05 regarding Managing Youth Resistance, that the use of force shall be limited to exceptional circumstances when all other appropriate proactive, nonphysical behavioral management techniques have been exhausted and have failed. Within this context, the witness testified that as an Operations Administrative Review five things will be analyzed as follows: was there a need to use force, was the force justified (after review of the video and/or was it excessive), was there a perceived threat, was the force tempered once there was control of the youth and was the injury consistent with the use of force. Again, the witness, upon questioning explained that in this situation that the "handcuffing" of the youth was a use of force.

The witness explained that he is also familiar with "planned interventions", as staff often talks about what can be done to prevent uses of force. Mr. Freeman identified Appellee's exhibit U as a power-point training presentation on the planned use of force policy, including, but not limited to, the section on "act like a vet" which are the steps to be taken prior to using a Planned Use of Force in matters that occur on or after November 10, 2009. When referring to page 19 of said exhibit regarding a planned intervention, one is to first assess the situation, contained the situation, give time and distance a chance to work, employ verbal strategies, exhaust all other options, and then use a tempered force, if needed. As such, the witness testified that it is the unit manager and/or operations manager, as in this case, are the individuals who are to implement and oversee these plans are carried forth. The witness testified that he was Ms. Braithwaite's supervisor and that she was removed for violating her Last Chance Agreement.

In explaining the situation that occurred, Mr. Freeman testified that the youth in question was on "suicide watch", and that the staff had given him a couple of towels when he had showered off, and that he was refusing to give them back. The staff had then contacted Ms. Braithwaite, the operations manager on duty that morning, to see if she could explain to the youth to give the towels back. The witness explained that Ms. Braithwaite employed various verbal strategies, as far as he could tell, from watching the video, but that the youth refused to comply. The witness testified at that point a "planned use of force" should have been applied, but was not. Further, the witness explained that Ms. Braithwaite should have removed herself from direct contact with the youth at that point, as well, as she was at that

time the Incident Commander for all critical incidents affecting the institution. Moreover, the witness testified that when looking at the Youth Resistance Grid in this case the youth was not presenting any threat, and that the Appellant had received training two months prior to the incident in question on how to handle this type of situation.

On cross-examination, the witness identified Appellee's exhibit Z, as a video of the incident in question of the Appellant's involvement in this case. Further, the witness explained that the video clips that make up the incident in question do not contain any audio. Moreover, Mr. Freeman stated that he knew that the youth in question was on suicide watch and was under the psychiatric care of a couple of institutional doctors, as well. When questioned about the youth receiving towels while on suicide watch prior to Ms. Braithwaite entering the picture, the witness explained that the juvenile corrections officers should not have given the youth more than one towel. Moreover, the witness could not recall whether or not Ms. Braithwaite had any kind of rapport with the youth in question as a reason for Mr. Franklin having summoned her to retrieve the towels from the youth. The witness testified that he did review Ms. Braithwaite's statement and the youth's medical report wherein the youth sustained only minor injuries and/or abrasions, as result of the use of force by the Appellant.

Upon re-identifying Appellee's exhibit Z, the witness explained that Ms. Braithwaite walks into the wet cell where the youth is located and gets one of the towels and that's she searches for the other towel and the youth is not confronting her in any way at this time. The witness testified that Ms. Braithwaite continues to ask the youth for the other towel and at one point tries to take the other towel physically and applies handcuffs to one of his wrists. Further, the witness testified that it was his opinion that the youth was not complying as he was not wanting to give up the other towel, and at that point she should have implemented a planned use of force, which she didn't, which brings us to the issue at point in this matter. Moreover, the witness testified that he did not review any doctors orders regarding the youth in question when recommending this incident for further investigation, nor was there any specific policy regarding having towels while on suicide watch prior or on the date in question, as well. The witness when questioned testified that an Operations Manager can use restraints, but that they are supposed to do this in contemplation or with a planned use of force. This was not done, however in this matter.

On redirect examination, the witness testified that a planned use of force can be as short as three minutes to one hour and that Ms. Braithwaite should've done this within 15 to 10 minutes after the youth became noncompliant, and removed herself from the situation. Further, the witness explained that his investigation did not reveal any plan by Ms. Braithwaite to implement or utilize a planned use of force. Moreover, a doctor's instructions do not relieve anyone, let alone Ms. Braithwaite who is the Incident Commander at the institution, the necessity of implementing a planned use of force. The witness identified Appellee's exhibit I, as a memorandum that was sent to Ms. Braithwaite, as an Operations Manager, on February 4, 2008, stating that any time a youth refuses to be strip searched or placed in his room under a precautionary status the following must occur: most notably a planned intervention must be utilized, a video camera must be present, along with that no time will youth be held down and forced to be applied to remove his clothing, no exceptions. Mr. Freeman testified that the youth in this situation was not posing any threat and that he was just wearing a towel around his waist at that time, was under observation, and that Ms. Braithwaite and others had plenty of time to implement a planned use of force to remove the towel.

Appellee's next witness to testify was Ms. Velinda Braithwaite who was called as if on cross-examination. Ms. Braithwaite testified that she started employment with the Department of Rehabilitation and Corrections on April 29, 1985, and that she was promoted to her current position of Operations Manager in November 2006. The witness identified Appellee's exhibit A as her position description, and agreed, when questioned, the duties listed thereon are accurate, including but not limited to, serving as the Incident Commander for all critical incidents affecting institution on behalf of and/in the absence of the Superintendent, Deputy Superintendent and Juvenile Correctional Operations Administrator. Further, the witness identified Appellee's exhibit B as a last chance agreement which she signed on or about June 25, 2009, which was to remain in full force and effect for two years from of the date of January 9, 2009, wherein was noted that if there was any violation DYS' work rules in their entirety, the appropriate discipline shall be termination of her position.

When questioned, the witness testified that she was aware of receiving training on DYS' (1) Planned Use of Force Policy, effective October 1, 2009; see Appellee's exhibit Q; (2) Use of Force Policy, effective October 1, 2009; see Appellee's exhibit O; (3) Managing Youth Resistance Policy, revised October 1, 2009; see Appellee's exhibit N; (4) Management of Resistant Youth, Physical

Responses and Documentation, Restraints and Seclusion in May 2009; see Appellee's exhibit K and (5) General Work Rules, revised July 8, 2009; see Appellee's exhibit T. Moreover, Ms. Braithwaite when questioned also admitted that she had received eight hours of Planned Intervention Training for Supervisors and signed an acknowledgment form on November 10, 2009, see Appellee's exhibit L, wherein her testimony revealed, "I know what he planned use of force is. I know when to implement a plan to use of force...." Furthermore, Ms. Braithwaite also explained that she was familiar with the Use of Force Policy in that she understood that, "a physical response shall be used as a last resort on an inmate and only be used in instances of self-defense from assault by youth, protection of others, prevention of self injury, and to prevent escape."

The witness then reviewed Appellee's exhibit Z, as a video clip of the situation that took place on January 8, 2010 in the youth's cell. The witness testified that on the day question she was called to come into the unit to assist Mr. Franklin regarding the youth who wouldn't give up an extra towel, but she was not sure that he had two or more towels at that time. The witness explained that she did not respond right away as she was in her office answering call-offs and responding to phone calls. However, the witness explained some 25 minutes later or so she entered the youth's suicide cell and she began utilizing verbal strategies to have the youth give up the towel(s). The witness explained that the youth was not resistant, nor a threat, and since the youth was not directing any anger toward her and only being manipulative and not disrespectful, not cursing or using profanity, she thought she could talk to him and obtain the towels. At a point later on in the video clip, Ms. Braithwaite became aware that the youth in question had another towel around his waist under his suicide gown. Further, as can be seen by the video clip, Ms. Braithwaite agreed when questioned that she tugged on the towel and struggled with the youth, eventually utilizing handcuffs on the youth without utilizing a planned use of force.

The witness when questioned agreed that according to the Planned Use of Force Policy, when a situation does not call for an immediate enforcement, as opposed to when the youth is affirmatively physically violently engaged and poses an immediate danger towards self or others, a Planned Use of Force must be implemented prior to the use of force against a youth.

The witness testified that a Planned Use of Force consists of the following steps, which every incident commander must follow: (1) activate an electronic

recording equipment to capture "advanced verbal strategies and all other non-physical alternatives implemented by the responding staff members."; (2) appoint a staff member to operate the recording equipment.; (3) exhaust all non-physical alternatives which may include utilizing advanced verbal strategies, verbal persuasion, contact in a staff member can be used as a rapport with and requesting their assistance. ;(4) promote the use of time and distance to de-escalate the youth.; (5) plan the total physical response, coordinate staff actions and remained in command on site during the tactical operation of the planned physical response.; (6) consult with at least one other staff member to ensure all alternative non-physical options have been exhausted.; (7) described for the camera the justification for the physical response; identify the youth involved by name and the ODYS number, and the youth behavior(s) that validate the need for the physical response.; (8) identify each staff member to be involved in the physical response and the specific role of each staff member in the planned response.; and (9) notify medical staff can inquire about the youth's medical conditions. See Appellee's exhibit Q, section IV (C). Moreover, the witness agreed that the previously Planned Intervention Training for Supervisors conducted on November 10, 2009, emphasized the responsibility of the Incident Commanders to assess the situation, to contain the situation, to use time and distance, to utilize verbal strategies, and to exhaust all other options prior to authorizing the use of force. See Appellee's exhibit U.

Moreover, the testimony revealed, by the Appellant's own admission, that when she applied handcuffs to the youth's right wrist that such an action constituted a use of force.

Ms. Braithwaite also identified Appellee's exhibits C and D as her notice of pre-disciplinary hearing and pre-disciplinary meeting sign in form, respectively. The witness also identified Appellee's exhibits F and G as the instant 124.34 order of removal effective May 28, 2010, and the notice of appeal filed with this Board on May 3, 2010, respectively.

Appellee's final witness was Ms. Amy Ast, the Ohio Department of Youth Services' Bureau Chief of Facility Operations in the Central Office, a position which she has held since 2008. Further, the witness testified that she has been employed within the Ohio Department of Youth Services since 1996 where she started as a Juvenile Corrections Officer, held various positions including a position of Superintendent at Scioto Juvenile Correctional Facility and the position of Policy Coordinator with the Department of Youth Services. With regard to her current

position, the witness testified that she still develops policy and reviews cases involving physical responses of personnel with youth under their care. Ms. Ast testified that she puts together the disciplinary packet and reviews any notes and investigates the matters at hand to aide the Deputy Director. Along this line of questioning, the witness testified that she in fact reviewed Ms. Braithwaite's case. The witness identified Appellee's exhibit B as the Last Chance Agreement that was signed by both, Ms. Braithwaite and Thomas Strickrath, the Director, whereby Ms. Braithwaite agreed if she violated the last chance agreement she would be terminated from her position.

The witness then testified with regards to the Planned Intervention Training for Supervisors, a program she developed from August 2009 to October 2009 and started training on the same in November 2009. See Appellee's exhibit U. The witness explained that the planned intervention training was in the form of a PowerPoint training session and that she assisted in the training module, as she was one of the instructors on the training, along with verifying that Ms. Braithwaite attended the training session in November 2009, as well. The witness then reviewed Appellee's exhibit Z, as a series of video clips that were put together in contemplation of this case. The witness testified that it appeared as though Ms. Braithwaite's verbal strategies were not being successful, and that once she had assessed the scene and the youth's unwillingness to give up the towel, she as the Operations Manager should have sought additional help. The witness reiterated that the agency has been training staff not to engage in force without exhausting all means before any force is utilized, because of the previous lawsuit that had been filed against the Department. Furthermore, the witness testified that the taking of the towel could have escalated the situation, as youth are very unpredictable, especially a youth on suicide watch, and that she should have used time and distance in this situation to assess what was going on. Moreover, the witness commented that when Ms. Braithwaite was grabbing for the towel, that within itself is not a trained technique and it could've been a potential for injury for the youth and her, as well as she as the supervisor was not modeling the proper thing to do in front of her subordinates. Additionally, the witness testified that she is familiar with the youth in question and that he has assaulted other staff many times at the agency, as well. Further, the witness testified that when Ms. Braithwaite had her hand still on the towel prior to her handcuffing the youth, she was not deescalating the situation, but escalating the situation. Ms. Ast commented that an "immediate response" would occur when there maybe a fight between to youths, and a "planned response" would be when there is no immediate threat, as in this case when the youth was not going

to harm himself and he was still under observation just sitting on his bed. Moreover, the witness testified that she did not see the youth voluntarily wanting to be handcuffed, nor did she see Ms. Braithwaite turn to anyone to aide her, as she as supervisor can not be the camera operator and the person in charge, when she is directly dealing with the youth. Upon further questioning, the witness testified that it is common practice to give towels to use when youths are taking showers, as they are afforded the basic essentials, but is not permissible for the youth to keep the towels. In summary, the witness testified that Ms. Braithwaite violated departmental rule 301.05, as she failed to properly model the situation as a supervisor, failed to exhaust all the training strategies that she had been taught, and failed to only use force as a last resort, along with becoming physically involved with a youth when she was the acting Incident Commander, along with not implementing a planned use of force.

On cross-examination, Ms. Ast agreed, when questioned, that not every time a call comes in with the control center requesting an Operations Manager to be present in the unit that it requires a planned use of force to take place. Further, the witness testified that it is not an uncommon practice to cuff the youth who are not compliant. However, the witness testified that when one uses time and distance and verbal strategies and if it's determined that force is to be utilized, then one has to have a good record and documentation to justify it, as that is the focus of having received the training that Ms. Braithwaite had. Moreover, the witness agreed when questioned that Ms. Braithwaite is not trained solely to only be a verbal strategist, but that she is trained to assess a situation, and to assemble a team to get the job done, as she is the supervisor.

The Appellant began her case-in-chief by having been called as if on direct examination. The witness testified that she began employment with the Ohio Department of Youth Services, in 1985 as a juvenile corrections officer/youth specialist and had no disciplinary action taken against her when serving in the above stated position. However, the witness stated that she was promoted in 2006 to an Operations Manager's position, and identified Appellee's exhibit A as an accurate depiction of her job description and Appellee's exhibit B as a last chance agreement which she signed on June 25, 2009, out of an incident that occurred on January 9, 2009. The witness explained that as a result of slapping the youth in her care she had been informed that she would be removed if she had not signed the above reference last chance agreement. Again, the witness agreed when questioned that she had been trained on all the matters which she previously testify

to, but that they didn't specifically cover how to handle the situation which she found herself in on January 8, 2010. However, the witness did agree that at the training sessions which she had, most specifically with regard to the planned use of force training, she was, as well as everyone at the training, allowed to ask questions.

The witness then retold her story with regards to the incident in question, while explaining that the youth was placed on suicide watch and that he was only allowed to have a gown and/or a blanket, no other items, no exceptions. Along this line of questioning, the witness agreed that she was informed of the suicide prevention youth policy, as well. However, to the contrary to her previous testimony, the witness explained that she gave the youth in question the right to take a shower earlier that morning and that she knew he was going to use a towel to dry off.

The witness then identified Appellee's exhibit I, as an e-mail dated February 4, 2008 which she received regarding strip searches of youth at the agency. The witness testified that prior to February 2008 if a youth was noncompliant and on suicide watch, and that if the youth would not undress they would forcibly undress the youth, and as result the above noted e-mail that was issued by Mr. Chris Freeman, the then Operations Administrator, a planned intervention policy was put in place, and at no time were staff to forcibly allowed to remove a youth's clothing. The witness explained that she did not consider the towel clothing when trying to remove the towel from the youth in question. Further, the witness explained that she had been instructed to place youth in cuffs, if noncompliant without using a planned use of force on mental health patients, and that she's been doing that since 2008. However, on the other hand, the witness testified she had never been on any mental health unit before and had never been trained regarding any way to handle mental health youth, and specifically stated that Appellee's exhibits K, L and M didn't cover anything with regards to mental health youth.

Moreover, the witness testified with respect to handcuffing noncompliant youth under special management plans, after the incident question arose what exactly are the procedures of follow, described the process was being revamped and that the policy was not detailed. Further, the witness testified that if she misinterpreted Appellee's exhibit I everyone was, as past practices was what it was, and that they were being allowed to do what they were doing. But on the other hand, the witness testified that the department had just implemented the planned use of force in October 2009 and that they were trained regarding this planned use of force in November 2009. Further, the witness agreed that under a planned intervention that

she as a supervisor was there to direct staff what to do. When questioned, the witness testified that she did not ask Juvenile Corrections Officers Franklin or Scales to enter the room, to aide her in the situation and/or the incident in question.

On re-cross examination the witness explained that she understood all of the new policies that were place beginning in October 2009. Again, the witness reiterated her story that the entire time seemed to take just a couple minutes, but that she did exhaust all verbal strategies within that time. Moreover, according to her incident report noted as Appellee's exhibit W, the witness testified that her report which she typed there were 10 other co-workers at the institution, with six being witnesses of the incident, and that her report did not mention anyone else even attempting to apply verbal strategies to the youth in question, nor did any other individual assist in the incident, as well. When questioned about what the criteria here has to be present before the witness would cuff a youth, she simply stated that if the youth wouldn't give up the towel, at that point, he was noncompliant, affording her the right to cuff him. Additionally, when questioned, the witness agreed that she did what she felt was right, even though her recent training may have contradicted past practices at the institution.

FINDINGS OF FACT

The Appellant, Velinda Braithwaite, as an Operations Manager, was removed from employment with the Ohio Department of Youth Services, Indian River Juvenile Correction Facility, for Neglect of Duty and for violating a Last Chance Agreement for any violation of Work Rules Policy 103.17 in its entirety. The Last Chance Agreement was violated on January 8, 2010, when the Appellant failed to implement a Planned Use of Force.

The Appellant, Velinda Braithwaite, was served an Ohio Revised Code Section 124.34 Order of Removal on or about April 28, 2010, and was removed from employment effective April 28, 2010.

The testimony and documentary evidence presented at the record hearing established by a preponderance of the evidence that the Appellant, as an Operations Manager, was the on-site Incident Commander on January 8, 2010, or the supervisor in charge when the incident occurred, and that a planned use of

force was not implemented when the Appellant utilized force on the youth in question by applying handcuffs, while not having her staff perform the same, thus being neglectful in her duties.

- a. The evidence revealed that the Appellant was aware of a standard of conduct as she had received training on DYS' (1) Planned Use of Force Policy, effective October 1, 2009; see Appellee's exhibit Q; (2) Use of Force Policy, effective October 1, 2009; see Appellee's exhibit O; (3) Managing Youth Resistance Policy, revised October 1, 2009; see Appellee's exhibit N; (4) Management of Resistant Youth, Physical Responses and Documentation, Restraints and Seclusion in May 2009; see Appellee's exhibit K and (5) General Work Rules, revised July 8, 2009; see Appellee's exhibit T. Moreover, Ms. Braithwaite when questioned also admitted that she had received eight hours of Planned Intervention Training for Supervisors and signed an acknowledgment form on November 10, 2009, see Appellee's exhibit L. In addition, the Appellant's testimony revealed that, "I know what he planned use of force is. I know when to implement a plan to use of force...." as well.
- b. The Appellee did prove, by a preponderance of the evidence, that the Appellant was guilty of being neglectful in hers duty when she failed to implement a planned use of force, as the evidence clearly indicated that she had the time to do so, prior to utilizing force on the youth in question.
- c. The Appellee did prove, by a preponderance of the evidence, that the Appellant was guilty of being neglectful in hers duty when she failed to provide the proper supervision to direct her subordinate employees to remove the towel(s) from the youth's cell and/or implement the planned use of force, as she was trained to perform.
- d. The evidence revealed that no incident reports made any mention of any other Juvenile Corrections Officer utilizing verbal strategies to coax the youth into giving up the towel(s).

The Appellee, by a preponderance of the evidence, established a standard of conduct required by the Appellant, Velinda Braithwaite, as an Operations Manager,

had knowledge of the proper procedures and regulations utilized by the Ohio Department of Youth Services, Indian River Juvenile Correction Facility

The Appellant, Velinda Braithwaite, while serving 21 years as a Juvenile Corrections Officer up until 2006, had no previous discipline, the Appellant had in 2009, while serving as an Operations Manager, an infraction that almost cost her job, wherein she voluntarily signed a Last Chance Agreement agreeing to be removed for any further work rule infractions.

The Appellee did prove by a preponderance of the evidence that Ms. Braithwaite received all of her procedural due process rights through a pre-disciplinary hearing notice and hearing.

The Jurisdiction of this Board to conduct this hearing was established by Ohio Revised Code Section 124.34.

CONCLUSIONS OF LAW

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, and that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one or more of the enumerated infractions listed in O.R.C. § 124.34 and the disciplinary order.

With regard to the infractions alleged, Appellee must prove in most cases that each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In most cases coming before the Board the weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant. However, in the case at hand, the issue of weighing the appropriateness

of the discipline with the type of the infraction(s) is not present, as the Appellant had signed a Last Chance Agreement pursuant to O.R.C section 124.34(E)

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by O.R.C. § 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant was notified of and had an opportunity to participate in a pre-disciplinary hearing. The Appellant also had notice of the charges against her and an opportunity to respond to those charges. Accordingly, the undersigned Administrative Law Judge finds that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellee established by a preponderance of the evidence that it had established standards of conduct and that such standards had been communicated to Appellant. According to the O.R.C. § 124.34 Order, Appellant's removal was based upon her neglect of duty and for violating her Last Chance Agreement.

O.R.C. § 124.34(E) defines a "last chance agreement" to mean an agreement signed by both an appointing authority and an officer or employee of the appointing authority that describes the type of behavior or circumstances that, if it occurs, will automatically lead to removal of the officer or employee without the right of appeal to the state personnel board of review or the appropriate commission. However, in an appeal of a removal order based upon a violation of a last chance agreement, the board, commission, or trial board may only determine if the employee violated the agreement and thus affirm or disaffirm the judgment of the appointing authority. Thus, the undersigned concludes that this Board is without jurisdiction to modify the appointing authority's decision from a removal to a lesser penalty, such as a suspension or reduction, but only to determine if the agreement was violated or not, and either affirm the removal or not.

Neglect of Duty

Appellee proved by a preponderance of the evidence that Ms. Braithwaite was guilty of neglect of duty. Ohio Revised Code Chapter 124 does not define “neglect of duty.” However, Black’s Law Dictionary does define “neglect” to mean:

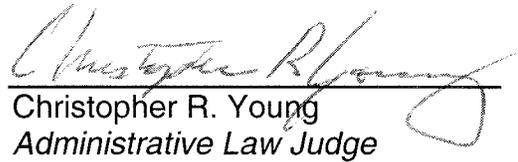
. . . to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in doing or omission of a given act. And it may mean a designed refusal, indifference or unwillingness to perform one’s duty. Black’s Law Dictionary 1031 (Deluxe 6th Ed. 1990).

For the Appellee to establish that an employee committed neglect of duty, the Appellee must demonstrate that a duty upon the part of the employee existed, the employee knew of that duty, and that knowing of that duty, the employee breached that duty.

As was revealed by the testimony, the Appellee did prove by a preponderance of the evidence that the Appellant was neglectful of her duties. The documentary and testimonial evidence revealed that the Appellant knew of the established standard of conduct with regards utilizing and implementing planned uses of force. Further, the evidence revealed that the Appellant as an Operations Manager was the on-site Incident Commander on January 8, 2010, or the supervisor in charge, when the incident occurred, and that a planned use of force was not implemented when the Appellant utilized force on the youth in question by applying handcuffs, while not having her staff perform the same. Moreover, the evidence revealed that the youth in this situation did not pose or was any threat and that he was just wearing a towel around his waist at that time, was under observation, and that Ms. Braithwaite and others had plenty of time to implement a planned use of force to remove the towel. Thus, the Appellant was neglectful in her duty by failing to implement a planned use of force as she was trained to perform, in this situation.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the instant order of removal issued to the Appellant, effective April 28, 2010, be **AFFIRMED** and that the Appellant's appeal be **DENIED**, as the evidence revealed that the Appellant violated her last chance agreement.


Christopher R. Young
Administrative Law Judge

CRY: