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KURTH

FEDERAL MEDIATION AND CONCILIATION SERVICE

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| <p>Lucas County Sheriff's Office ,</p> <p style="text-align: center;">Employer,</p> <p>and</p> <p>UAW, Local 3056,</p> <p style="text-align: center;">Union.</p> | <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> | <p>Case No. 13-02749-6</p> <p>Arbitrator: James M. Klein</p> <p>Grievant: Jacob Kurth</p> <p>Brenda G. Meyer</p> <p>Assistant Lucas County Prosecutor</p> <p>711 Adams Street, Second Floor</p> <p>Toledo, Ohio 43604</p> <p>Phone (419) 213-2053</p> <p>Fax (419) 213-2011</p> <p>bgmeyer@co.lucas.oh.us</p> |
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I. INTRODUCTION

This matter is before the Arbitrator as a result of the discharge of Jacob Kurth. Prior to his termination, Mr. Kurth was employed by the Lucas County Sheriff's Office as a corrections officer. The Lucas County Sheriff's Office maintains that the discharge was for just cause. Set forth below are the facts and arguments in support of the Sheriff's Office's position.

II. ISSUE

The issue in this case is: Was the Grievant discharged for just cause, if not, what is the remedy?

III. FACTS

Mr. Kurth was hired as a corrections officer on February 3, 2006. (Kurth, Tr. 437). At the time he was hired, he like all newly hired corrections officers was provided training in regard to his job duties, the policies and work rules of the Office, as well as, unarmed self-defense training. (Exhibits E-3, E-19 and E-31). Mr. Kurth signed an acknowledgement that he received a copy of the Lucas County Sheriff's Office Rules Manual and that he was responsible to read and understand the rules. (Atkinson, Tr. 59; Exhibit E-20). The termination arose from an altercation on December 31, 2012 when Mr. Kurth was assigned to work the fourth floor. (Kurth, Tr. 437). An Internal Affairs investigation was conducted by Captain Donald Atkinson and Deputy Robert Sarahman, both assigned to the Internal Affairs Division. (Atkinson, Tr. 11 - 12). As a result of the investigation, Captain Atkinson and Deputy Sarahman recommended that charges be filed against Mr. Kurth. (Atkinson, Tr. 56) A detailed report was prepared in support of the recommendation. (Atkinson, Tr. 56; Exhibit E-18). Captain Atkinson and Deputy Sarahman recommended that four charges be filed: Rule No. 5 - Any Just or Reasonable Cause; Rule No. 13 - Truthfulness; Rule No. 37 - Use of Force; and Rule No. 43 - False or Improper Reports. (Exhibit E-18). The specific rules with which Mr. Kurth was charged with violating are contained in the Rules Manual for the Sheriff's Office which Mr. Kurth received as noted above. (Atkinson, Tr. 57, 59; Exhibit E-19, E-20).

The next step in the discipline process is that Mr. Kurth was served a copy of the charges against him. (Atkinson, Tr. 60; Exhibit E-21). Employees have a right to have a hearing before a Review Board, which Mr. Kurth exercised. The Review Board is made up of one union representative, one management representative and one neutral representative. The Review Board determined that the recommend charge for Rule No. 5 - Any Just or Reasonable Cause was not sustained and that charge was dropped from further disciplinary action. (Atkinson, Tr. 60 - 64; Exhibit E-22). After the Review Board hearing, a disciplinary hearing was conducted by a representative of the Sheriff. The hearing for Mr. Kurth was conducted by Major Milan Voska. Major Voska sent written notification to Sheriff John Tharp that he

recommended the termination of Mr. Kurth's employment. Sheriff Tharp wrote on the notice that he concurred. (Atkinson Tr. 63 - 65; Exhibit E-23). On the same date, March 13, 2012, Sheriff Tharp notified Mr. Kurth that his employment was terminated. It is the normal practice at the Sheriff's Office that the recommendation following the disciplinary hearing and the final action by the Sheriff will take place on the same date. (Atkinson, Tr. 64 - 66; Exhibit E-24). Deputy Patrick Mangold, President of UAW, Local 3056 represented Mr. Kurth at his disciplinary hearing. (Atkinson, Tr. 66; Mangold, Tr. 361). On that same date, Local 3056 filed a grievance, which serves as the basis for this arbitration. The grievance was filed by Deputy Patrick Mangold. (Exhibit Jt.-2).

Prior to concluding that charges were warranted, Captain Atkinson and Deputy Sarahman conducted an investigation of the events of December 31, 2012. As part of their investigation, Captain Atkinson and Deputy Sarahman reviewed statements written at the time of the incident, interviewed and obtained statements from officers who were present, but had not previously prepared reports, interviewed Mr. Kurth and watched recordings made by cameras in the area. Many of the facts pertaining to December 31, 2012 are not contested, but many other facts are greatly contested by the parties. It is undisputed that the fourth floor was a difficult floor which housed problem inmates. Many members of gangs were housed on the floor and the inmates were younger. (First, Tr. 230 - 231). There had been a fight in the recreation area earlier in the day involving inmates from this module. (First, Tr. 230; DeVol, Tr. 259, 279). Mr. Kurth was aware of the fight and knew that two inmates involved in the fight were locked down in the module following the fight. (Kurth, Tr. 458 - 459).

Sergeant Mick First was the shift commander the night of the incident. Lieutenant Craig Brownridge was also on duty. (First, Tr. 230, 244). Sergeant First was not contacted by Mr. Kurth or other officers until after the physical altercation occurred. Similarly, the officers did not call for backup until after the physical altercation occurred. (First, Tr. 245; Kurth, Tr. 452; DeVol, Tr. 280, 284 - 285). The inmates in the module were making loud noises, jumping, kicking at the fire door, and pounding on the tables. (DeVol, Tr. 259; Eldred, Tr. 286 - 287; Kurth, Tr. 438). In fact, the inmates on the fourth

floor had been “acting crazy for probably a week. . . .” (Myrice, Tr. 313). The officers in charge of the fourth floor made multiple attempts to quiet the inmates, but were not successful. Corrections Officer John Eldred was in the floor control position which meant that he sat in the booth and one of his duties was to monitor the cameras. CO Eldred told the inmates twice to quiet down, but they did not. He spoke over the “box” which is a loud speaker system. He told them to calm down and they did not. He then gave them a direct order to knock it off and they did not. (Eldred, Tr. 286 - 287, 291; DeVol, Tr. 261; Kurth, Tr. 437). After the inmates failed to respond to CO Eldred’s directives, Corrections Officer DeVol and Mr. Kurth entered the module four times to try to quiet the inmates. CO DeVol and Mr. Kurth entered and exited on three occasions with no altercations. The inmates would initially quiet down, but as soon as they left the module, the inmates would begin again. (DeVol, Tr. 279 - 280; Kurth Tr. 437- 438; 457). There are cameras in the module and CO DeVol and Mr. Kurth are seen entering and exiting the module two times before the altercation. The third time he entered, CO DeVol remained in the module when Mr. Kurth left. (Exhibits E-4 and E-5, cameras 1 and 2).

On the fourth time Mr. Kurth and CO DeVol entered the module, CO DeVol and he told the inmates to lock down. When Mr. Kurth walked in to the module the fourth time, Inmate Francisco Cortez was standing near the television. It is apparent from viewing the camera recording that Mr. Kurth walked right by Inmate Cortez, nearly brushing shoulders with him. (Exhibits E-4 and E-5, cameras 1 and 2. Inmate Cortez did not speak to Mr. Kurth when he walked by and did not appear to make any physical movement. (Kurth, Tr. 459; Exhibits E-4 and E-5, cameras 1 and 2). According to Mr. Kurth, after he walked by Inmate Cortez, Inmate Cortez said “why the fuck to we have to lock down?” Inmate Cortez did not say anything else or make any verbal threats toward Mr. Kurth. (Kurth, Tr. 460). It is at this point that the facts become in dispute and witness statements vary. The physical altercation that ensued will be discussed in further detail later in this Brief. One fact that is not in dispute is that Mr. Kurth was the one who initiated the physical contact.. (Kurth, Tr. 440; First, Tr. 257). In fact, CO DeVol testified that Mr. Kurth “shoved him [Inmate Cortez] a great distance. . . .” (DeVol, Tr. 261) After the

altercation, Mr. Kurth went to St. Vincent Hospital for treatment of his eye and Inmate Cortez received medical treatment in the corrections center medical unit. (First, Tr. 236, 245; Exhibits E-1, E-2 and U-2).

IV. ARGUMENT

Mr. Kurth was charged with three separate charges that formed the basis of his discharge: No. 13 - Truthfulness; No. 37 - Use of Force; and No. 43 - False or Improper Reports. The Truthfulness charge is based primarily on the oral interview with Mr. Kurth conducted by the Internal Affairs Division and the camera recordings of the incident. The Use of Force charge is based primarily on Mr. Kurth's actions, the Use of Force policy, Exhibit E-3, and the camera recordings of the incident. The False or Improper Reports charge is based primarily on the written report that Mr. Kurth filed the night of the incident and the camera recordings of the incident. Each of these charges will be addressed separately, although there will be overlap of facts and evidence pertaining to the charges.

A. Mr. Kurth is guilty of violating Rule 43 - filing a false or improper report.

Rule 43 states:

False of Improper Reports

Any employee who intentionally files a report that is found to be false, improper or incomplete will be considered to be in violation of this rule.

A comparison of the report filed by Mr. Kurth, Exhibit E-2, and the camera recordings can lead to only one conclusion -- that Mr. Kurth intentionally filed a false, improper and incomplete report. In fact, during his testimony Mr. Kurth admitted to not including many details of the incident. Mr. Kurth states in his reports that Inmate Cortez had his hands clenched. During his testimony he testified twice that Inmate Cortez's hands were not clenched. He testified that Inmate Cortez's hands were open when he first saw him. (Kurth, Tr. 454). He also testified that Inmate Cortez's hands were never clenched into fists. (Kurth, Tr. 458). It is evident from watching camera views 1, 2 and 3 that Mr. Kurth rushed toward

Inmate Cortez, pushed him, punched him multiple times and kneed him. Yet all that Mr. Kurth wrote in his report was that he pushed Inmate Cortez to gain distance, CO DeVol and he "took down," Inmate Cortez, handcuffed him and removed him from the module. (Exhibit E-2) On cross examination, Mr. Kurth admitted that he did not include in the report anything about the blows, punches and kicks he inflicted on Inmate Cortez. He testified that he did not think it was important. (Kurth, Tr. 455). He did not include any details about how he subdued him or took him to the ground. He also failed to include in his report that while he was escorting Inmate Cortez from the module, Inmate Cortez ended up hitting the cement floor face first with his hand cuffed behind his back. (Kurth, Tr. 455, 457).

Mr. Kurth, like all employees, is charged with knowing and complying with Sheriff's Office policies. The Use of Force policy, Exhibit E-3, requires that an employee file a report when force is used against an inmate. (Sarahman, Tr. 160 - 161; Exhibit E-3). A portion of the Policy requires:

IV. REPORTING THE USE OF NON-LETHAL FORCE

- A. Whenever a Corrections Officer or deputy sheriff must use an amount of non-lethal force (whether it caused injury or not) in the course of effecting arrest, overcoming resistance, or controlling a dangerous situation, he/she must promptly submit written reports of the incident (General Offense, Critical Incident, and Supplemental Offense reports, at minimum).

- E. Critical Incident Reports must be compiled on the use of non-lethal force when its use results in injury (to an arrestee/inmate, employee, or other person in the immediate area of the incident), or in unusual circumstances, or as otherwise required by command or investigative personnel.

While Mr. Kurth did write a report, it so lacking in relevant details to be rendered meaningless in regard to the review of the use of force. The report did not even include the use of force in it. (Atkinson, Tr. 17; Sarahman, Tr. 160 - 161). Both Mr. Kurth and Inmate Cortez required medical treatment so it is even more critical that a detailed report be filed. The report filed by Mr. Kurth, Exhibit E-2, in no way

sufficiently detailed to satisfy the requirement of the Use of Force Policy. Mr. Kurth, as well as, all employees, is required to follow Sheriff Office policies. (First, Tr. 243).

The Union argued at hearing that no supervisor informed Mr. Kurth that his report was inadequate. What the Union ignores is the fact that Mr. Kurth testified that he turned his report in to Sergeant Melissa Mysinger. (Kurth, Tr. 444). This is the only time during the entire hearing or in any of the exhibits that Sergeant Mysinger's name was mentioned. There is no evidence whatsoever that Sergeant Mysinger had any direct knowledge of the altercation or that she had even viewed the camera recordings. Therefore, there is no evidence that Sergeant Mysinger had any reason to know how incomplete and inaccurate the report was.

When Captain Atkinson and Deputy Sarahman reviewed the report prepared by Mr. Kurth and compared it to the camera views they reviewed, it was evident that the report was incomplete and inaccurate. It did not include any of the force used, including when Mr. Kurth was striking Inmate Cortez. (Atkinson, Tr. 17, 30, 112 - 113; Sarahman, Tr. 160 - 161). In fact, the only strike it included was when Inmate Cortez struck Mr. Kurth after Mr. Kurth forcefully shoved Inmate Cortez. (Exhibit E-2). Captain Atkinson concluded the Mr. Kurth intentionally left vital information out of his report. (Atkinson, Tr. 114). Sheriff John Tharp took office in early January, 2013, shortly after the altercation between Mr. Kurth and Inmate Cortez. Sheriff Tharp testified that he expects reports that are filed to be complete and detailed. (Tharp, Tr. 126).

After a review of Mr. Kurth's statement and the video from the cameras, the only conclusion that can be reached is that Mr. Kurth intentionally filed a report that was false, improper and incomplete in violation of Rule 43. The most logical conclusion for the reason that Mr. Kurth filed such an incomplete report was that he feared that filing a complete and accurate report would result in disciplinary action.

The Union should not be allowed to pursue its grievance in regard to the charge pertaining to violation of Rule 43. During the disciplinary hearing in front of Major Voska, Union President Deputy

Patrick Mangold stated that Mr. Kurth did omit statements in his report and that he is guilty of the Rule 43 violation. (Atkinson, Tr. 66 - 67; Sarahman Tr. 145). Deputy Sarahman prepared a memo to the Sheriff regarding the disciplinary hearing and included Deputy Mangold's statement in the memo. (Sarahman, Tr. 146; Exhibit E-25). Deputy Sarahman verified the accuracy with Captain Atkinson and Major Voska who both signed the memo. (Atkinson, Tr. 66 - 67; Sarahman, Tr. 146; Voska, Tr. 477; Exhibit E-25). The memo was sent to Deputy Mangold and he raised no objection to the content. (Atkinson, Tr. 67). At the hearing Deputy Mangold testified that he did not receive the memo copied to him, and in fact, he did not see it until the day before the arbitration. (Mangold, Tr. 372 - 373). However, on cross examination he did admit that he requested the Internal Affairs file and that Exhibit E-25 was in the file. He did not go to the Internal Affairs officers to tell them that the memo was not accurate. (Mangold, Tr. 382). He also testified that his statement was misunderstood by the administrators. (Mangold, Tr. 372). However, a review of the grievance shows that the grievance is consistent with the statement heard by Deputy Sarahman, Captain Atkinson and Major Voska. (Exhibit Jt.-2) Deputy Mangold filed the grievance and in the body of the grievance is written "Note: Use of Force Truthfulness." (Exhibit Jt.-2). There is no mention of False or Improper Reports. This is entirely consistent with only challenging the charges pertaining to Use of Force and Truthfulness. Thus, the Arbitrator should determine that the issue of whether Mr. Kurth violated Rule 43 - False or Improper Reports is not properly before him for determination.

B. Mr. Kurth is guilty of violating Rule 13 - Truthfulness

Rule 13 - Truthfulness states:

Any employee ordered by the Sheriff or his/her designee to answer questions about his/her conduct, on or off duty, as it relates to the order and discipline of the Lucas County Sheriff's Office, must answer truthfully. Failure to answer or failure to be truthful when answering, is a violation of this rule.

The Union has argued that Mr. Kurth should not have been charged with violating the truthfulness rule because it is a lesser included offense of Rule 43 - False or Improper Reports. However,

there is no basis for this position. It is evident that Rule 43 pertains to written reports, which Mr. Kurth did file. Rule 13 - Truthfulness pertains to answering questions which can certainly be oral questions. Mr. Kurth was interviewed by Captain Atkinson and Deputy Sarahman and they did not believe all of the answers given during the interview were truthful. (Atkinson, Tr. 30, 55, 58, 115; Sarahman, Tr. 165; Exhibits E-29 and E-30. Sheriff Tharp testified that he expects officers to be honest when they are interviewed by Internal Affairs and their supervisors. (Tharp, Tr. 126). Therefore, Rule 13 is not a lesser included offense under Rule 43 and is an appropriate basis for a charge.

The interview of Mr. Kurth took place on February 4, 2013. A recording was made of the interview. (Exhibit E-30). The first few minute of Exhibit E-30 consist of explaining the interview process and Garrity rights. The interview starts at about five minutes and ten seconds into the recording. Present at the interview were Captain Atkinson, Deputy Sarahman, Mr. Kurth and Local 3056 President Patrick Mangold. Mr. Kurth made several statements that Captain Atkinson and Deputy Sarahman believed were untruthful. Deputy Sarahman made notes of the interview, marking the places where he believed that Mr. Kurth was not truthful. (Exhibit E-29). During the interview, Mr. Kurth stated that he was going to leave the module to get a sergeant, but that inmate Cortez got in his way. The statement that Mr. Kurth was leaving the module to get a sergeant was assisted by Deputy Mangold during the interview. (Exhibit E-30). Mr. Kurth stated during the interview that he had to get a sergeant before he could put his hands on an inmate. (Exhibit E-29, E-30). During his testimony at the arbitration, Mr. Kurth stated that he was walking toward cell number one when the encounter with Inmate Cortez occurred, not that he was leaving the module to get a sergeant. (Kurth, Tr. 446).

Mr. Kurth also stated that he was only one to one and one-half feet away from Inmate Cortez when Mr. Kurth initiated physical contact. He further stated during the interview that he only took one step toward Inmate Cortez. (Exhibit E-29, E-30). During the arbitration he testified that he was three to four feet away from Inmate Cortez when he initiated contact. (Kurth, Tr. 449). Even that testimony is inaccurate based upon the video from cameras one and two. (Exhibit E-5). During the interview Mr.

Kurth also stated that Inmate Cortez's hands were raised up and that his hands were clenched. During the arbitration he testified that Inmate Cortez's hands were above his waist, not raised, and that his hands were open, not clenched. (Kurth, Tr. 454, 458; Exhibits E-29, E-30). Again a review of the video from cameras one and two does not support his claims. (Exhibit E-5).

Mr. Kurth denied striking Inmate Cortez in the face when he initially shoved him and stated that he pushed him in the chest. (Exhibits E-29; E-30). Both Captain Atkinson and Deputy Sarahman believed that statement was not true when they reviewed the videos. (Atkinson, Tr. 31; Sarahman Tr. 150, 152, 165; Exhibit E-29). Captain Atkinson noted the fact that Inmate Cortez's head snapped back at impact which would only happen if he was struck in the chin/face area and not the chest. (Atkinson, Tr. 31). Both Captain Atkinson and Deputy Sarahman testified that they saw Mr. Kurth striking inmate Cortez in the head when they viewed the videos. (Atkinson, Tr. 31; Sarahman, Tr. 152). Mr. Kurth denied this during his interview. (Exhibit E-29, E-30). During his interview with the Internal Affairs officers, CO William Myrice stated that he saw Mr. Kurth punch Inmate Cortez in the face. This statement was signed by CO Myrice in the presence of two union representatives. (Exhibit E-8, back side of paper). Mr. Kurth also denied shoving Inmate Cortez while they were exiting the module. He stated that Inmate Cortez simply fell. (Exhibits E-29, E-30). This is inconsistent with the statement of Lieutenant Brownridge who saw Mr. Kurth give Inmate Cortez a "sharp shove forward." (Brownridge, Tr. 133-134, Exhibit E-9). This is also inconsistent with the video of camera three which shows Inmate Cortez moving forcefully forward rather than simply falling. (Exhibit E-5).

In order to determine the truthfulness of statements made by Mr. Kurth during his internal affairs interview, it is necessary to compare the recording of his interview with the he testimony he provided during the arbitration and review the videos. It is evident from the review of these items that not all of the answers provided during the interview were truthful. Even without reviewing the camera videos it is evident that Mr. Kurth was not always truthful. The answers provided during the interview and during the arbitration many times are inconsistent meaning that Mr. Kurth was either being untruthful at the

interview or at the arbitration. It is quite clear when the camera videos are considered that Mr. Kurth was not truthful in his interview. As with his written report, it must be assumed that Mr. Kurth did not give truthful answers regarding what happened out of fear that he would be disciplined for his conduct. Based upon his untruthful and inconsistent answers, the Sheriff's Office has proven that Mr. Kurth violated Rule 13 - Truthfulness.

C. Mr. Kurth is guilty of violating Rule 37 - Use of Force

The rules manual for the Lucas County Sheriff's Office prohibits the improper use of force based upon the Use of Force Policy. Rule 37 states:

VI. USE OF FORCE

37. All employees are expected to adhere to the provisions of the Use of Force Policy. Any employee who violates any provision of the above policy shall be in violation of this rule.

See "Use of Force" Policy issued August 3, 1992 in Policy and Procedure Manual
[superseded by current policy effective 6/1/09]

The Use of Force policy is Exhibit E-3. A great deal of testimony was presented regarding this policy. Four camera views, Exhibit E-5, were also reviewed in great detail during the arbitration in conjunction with the policy. It is the Sheriff's Office's position that the videos and the testimony presented at the arbitration demonstrate that Mr. Kurth did violate the Use of Force Policy, one of the most serious rule violations within the Sheriff's Office, or any law enforcement or corrections office.

The Use of Force Policy is a nineteen page document, several pages of which are not relevant to the facts of this case. In an effort to assist in the efficient review of this policy, Exhibit E-3 was highlighted to show the sections which Captain Atkinson and Deputy Sarahman believed had been violated. Both officers identified throughout their testimony which provisions they believed had been violated. A review of those sections of the Policy is necessary to the determination of this case. These provisions are as follows:

II. POLICY - NON-LETHAL FORCE

It is the policy of the Lucas County Sheriff's Office to limit strictly the use of non-lethal force, to designate and limit instruments of non-lethal force, and to establish reporting procedures for every incident in which non-lethal force is use [sic].

- C. It is the policy of the Lucas County Sheriff's Office to employ non-lethal force, which is the minimum amount of force reasonable and necessary to restrain a subject, to overcome resistance, and to perform the Corrections' Officer's or deputy sheriff's duty to protect the subject from harming himself/herself, the Corrections Officer or deputy sheriff, and bystanders.

2. Non-lethal force is never to be resorted to as a response to verbal abuse or confrontation by an arrestee/inmate, or other person.
3. Force of any kind is never to be used as punishment, or in retaliation for physical attack or verbal abuse by an arrestee/inmate, or other person. Force must always be considered a means to subdue the arrestee/inmate, and to prevent harm to the arrestee/inmate or others in the immediate area. Use of force for any other reason can never be justified. (Emphasis in original)

3. Unarmed self-defense tactics, both in and outside the Security Area of the Lucas County Corrections Center
 - a. Unarmed self-defense tactics may be employed as instrumentalities of non-lethal force, subject to limitations on instruments of non-lethal force herein. Such tactics are limited to those taught in courses sanctioned by the Lucas County Sheriff's Office. **Tactics taught in peace officer academy may differ from those learned in the Corrections Officer Class. Unarmed self-defense tactics to be used in the Lucas County Corrections Center will be limited to those tactics learned in the Corrections Officer Class.** (Emphasis in original)

III. SITUATIONS WHEN NON-LETHAL FORCE IS AUTHORIZED

When a confrontation has escalated such that verbal persuasion is ineffective (i.e., has not succeeded in defusing the situation or in calming the arrestee/inmate or other person, non-lethal force might be appropriate to subdue the offender. Non lethal force may be employed.

- A. In the Security Area of the Lucas County Corrections Center after the following sequence of steps have been taken.
 1. Verbal persuasion - verbal attempts to convince the arrestee/inmate to cooperate.
 2. Verbal warning - if persuasion has failed, warn inmate/arrestee of the consequences of his/her failure to cooperate (principally involving use of force and disciplinary measures).

3. Show of force

- a. Shift Commander present at the scene.
- b. Back-up called to the scene.

4. Shift Commander takes control of the situation.

- a. Physical Force - if a show of force is ineffective or impossible, the Sergeant may order the use of those physical holds designed to take control of the inmate, as taught in the Lucas County Corrections Class.
- b. Back-up complies with the shift commander's order and secures the inmate with the minimum amount of force necessary to subdue the inmate.

- d. Striking Technique - If the inmate's strength and agility are such that the above techniques are ineffective, and only then may the officer resort to striking or kicking. When an officer resorts to strikes or kicks, only those taught in the Lucas County Corrections Class may be employed to bring the inmate under control. Such tactics may never be used to inflict unnecessary injury, but rather only to temporarily disable and shall only be employed when other means have failed.

- e. The following blows or tactics are not to be employed in securing any inmate/prisoner in custody of the Lucas County Sheriff's Office unless an officer's life or the life of another person is clearly in danger:

- 1. Any blows or kicks to the head and face

- f. Retreat - Officers may, if all else has failed, if an escape route is open to them, and if no other persons are or would be open to attack from the offender, retreat from the scene.

The reporting requirements pertaining to the use of force have been addressed previously in this brief and are not included in the above quoted provisions.

This Arbitrator is not entirely unfamiliar with the Use of Force Policy of the Lucas County Sheriff's Office having decided another case between the parties alleging violation of the Use of Force Policy in 2009. That case also involved the discharge of a corrections officer. (Appendix A). In that case this Arbitrator reviewed the Use of Force Policy and noted that it provides "[n]on-lethal force is never to be resorted to as a response to verbal abuse or confrontation by an arrestee/inmate, or other person." (Appendix A, page 17). This Arbitrator also noted: "...the policy establishes that force is a *last*

resort -- something that cannot be a new concept in a corrections facility setting.” (Appendix A, page 17). These requirements are still part of the Use of Force Policy and must be followed.

Arbitrator Harry Graham recently decided a case involving the Lorain County Sheriff's Office involving the use of force. (Appendix B). This case shares many similarities to the case before this Arbitrator, including the fact that the actions were recorded. Arbitrator Graham compared the statements of the grievant to the evidence presented in the video and concluded that the grievant was not being truthful. That is another similarity with the instant case. (Appendix B, page 6). The Union also presented an expert witness on the use of force. Arbitrator Graham considered the opinions of officers within the sheriff's office, including the training officer, against the opinion of the expert witness and concluded that the testimony of the training officer offset the opinion of the expert witness. (Appendix B, page 6). Arbitrator Graham reviewed the video repeatedly at the hearing and also following the hearing and concluded that the force used by the grievant was unjustified and that he acted unreasonably. (Appendix B, page 7). A similar conclusion is warranted in this case.

As noted previously, many of the facts leading up to the altercation between Mr. Kurth and Inmate Cortez are not disputed. The inmates in the module had been causing problems for days prior to the date at issue. Earlier that day, inmates from the module got into a fight in the recreation area. That night, which was New Year's Eve, the inmates from the module were excessively noisy. They were told twice by CO Eldred to quiet down and they did not. CO DeVoi and Mr. Kurth entered the module on three occasions to tell the inmates to quiet down only to have them start in again as soon as they left. CO DeVoi and Mr. Kurth can be seen on the videos from camera one and camera two as they enter and leave the module. (Exhibit E-5, cameras 1 and 2, starting at 1:30). They leave the module and return at 2:14 as seen on cameras 1 and 2. They leave and return again at 2:32 on cameras 1 and 2. After that, CO DeVoi stays and Mr. Kurth leaves and returns at 2:55 according to cameras 1 and 2. After all of the effort, most inmates are still not locking down. Cameras 1 and 2 record the same area from different angles so the times of the recordings are the same.

When Mr. Kurth enters the module for the fourth time, he walks directly past Inmate Cortez and appears to almost bump in to him. There is no sign of an communication between the two of them or any aggressive action by Inmate Cortez at that time. (Exhibit E-5, cameras 1 and 2). Mr. Kurth confirmed in his testimony that Inmate Cortez did not speak to him the first time he walked by him. (Kurth, Tr. 459). Mr. Kurth proceeded past Inmate Cortez to the back corner of the module. CO DeVol was standing to his right against a back wall. (First, Tr. 240). Mr. Kurth and Inmate Cortez were standing about ten to fifteen feet apart when Mr. Kurth started moving in Inmate Cortez's direction. (First, Tr. 240). Mr. Kurth testified that he was moving toward cell one, contrary to the statement provided when interviewed that he was attempting to leave the module. (Kurth, Tr. 446; Exhibit E-30). Mr. Kurth testified that he was three to four feet away when he started moving toward Inmate Cortez and that he only took one step toward him before pushing him. (Kurth, Tr. 440, 449). Even the Union's expert witness disagreed with Mr. Kurth's testimony about the distance and stated there was about four to six feet between Mr. Kurth and the inmate. (Faulkner, Tr. 413). CO DeVol testified that the distance was five to six feet. (DeVol, Tr. 275). Captain Atkinson testified that there was about six to eight feet between Mr. Kurth and Inmate Cortez when Mr. Kurth rushed at the inmate. (Atkinson, Tr. 27). This testimony is much more consistent with the video recordings. (Exhibit E-5, cameras 1 and 2, starting at 3:08). Mr. Kurth's testimony about the distance is not what is seen on the video. He is clearly seen taking more than one step and the steps are large and rapid.

Mr. Kurth stated in his report that he pushed Inmate Cortez to gain distance between them. (Atkinson, Tr. 27, 29; Exhibit E-2). This contention makes no sense since there was a considerable distance between them when Mr. Kurth rushed at Inmate Cortez. Mr. Kurth was not creating distance, but attacking Inmate Cortez. (Atkinson, Tr. 27). Mr. Kurth testified that he was taught to push someone away so he can walk out and get away. (Kurth, Tr. 460). There was no need whatsoever to shove Inmate Cortez if Mr. Kurth's goal was to leave the module. Mr. Kurth simply lost his cool and attacked the inmate when he had other options available. (Atkinson, Tr. 29, First, Tr. 257). One option was to simply

exit the module. Both CO DeVol and Mr. Kurth had the ability to walk to their right around the pillar and exit the module. (Atkinson, Tr. 35; Sarahman, Tr.153; First, Tr. 240 - 241; Faulkner, Tr. 434). If Mr. Kurth had chosen this option, the physical altercation likely would never have happened. Instead, he rushed directly at Inmate Cortez. (Sarahman, Tr. 153). Union witnesses questioned what would have happened if Mr. Kurth had walked around the pillar to exit, speculating that Inmate Cortez might have cut Mr. Kurth off at the door. It will never be known what Inmate Cortez would have done if Mr. Kurth walked around the pillar since Mr. Kurth chose to rush at Inmate Cortez rather than leave the module.

It is undisputed that employees are required to follow the policies of the Sheriff's Office. (First, Tr. 243; Faulkner, Tr. 431). Mr. Kurth even stated during his internal affairs interview that he had to get a sergeant before he put his hands on an inmate. (Exhibit E-30). CO Myrice also testified that they were taught that in training. (Myrice, Tr. 312). With his statement, Mr. Kurth testified that he knew the requirements of the Use of Force Policy. All employees assigned to the fourth floor knew it was a difficult floor. Inmates from the module had already been in a fight earlier that day and had been wound up for days before that. CO Eldred told the inmates twice over the box to quiet down to no avail. CO DeVol and Mr. Kurth told the inmates to quiet down three separate times, also to no avail. This knowledge and experience from that day should have informed the officers that the inmates were not likely to be compliant when ordered to lock down. Yet Mr. Kurth did not contact a supervisor or call for back up before trying to lock the inmates down. CO Danielle Stead testified that because of the prior problems with the inmates, it could be anticipated that there would be difficulty with the inmates. (Stead, Tr. 323). CO Myrice similarly testified that the inmates had been acting crazy for days and if officers were getting resistance it would be a good idea to call for back-up to have more help. (Myrice, Tr. 314 - 315). These facts seem obvious, yet Mr. Kurth failed to call for a sergeant or back-up.

The Use of Force Policy has very specific steps to be followed when inmates are not complying with directions. Non-lethal force cannot be used until after the following steps have been followed. The first step is verbal persuasion. Repeated attempts were made to use this step without success. The second

step is verbal warning. The inmates were also warned repeatedly they would be locked down if they did not comply. This step also failed. The third step is show of force. This includes the shift commander being at the scene and back-up being called to the scene. Neither of these steps was followed. (Exhibit E-3, page 6). Testimony was provided by several witnesses about a zero tolerance policy for the fourth floor allowing officers to lock inmates down without calling the sergeant. (First, Tr. 231 - 232; Kurth, Tr. 438; DeVol, Tr. 260; Myrice, Tr. 311; Stead, Tr. 321 - 322). It is interesting that it was at the arbitration hearing that the claim of a zero tolerance policy and no need to call the sergeant for a lock down was raised for the very first time. Neither Sergeant First nor Mr. Kurth included it in their statements or in Mr. Kurth's interview. (Exhibits E-1, E-2 and E-30). Similarly CO DeVol, CO Eldred and CO Myrice also failed to include it in their statements the night of the altercation. (Exhibits E-6, E-8, E-13). Statements for seven other employees were also obtained and none of them contained any reference to the zero tolerance policy. (Exhibits E-9 - E-12, E-14 - E-17). Both the Administrator of the corrections center, Major Voska, and the Assistant Administrator, Captain Sylvester, testified that they had never heard of zero tolerance for the fourth floor and allowing employees to not follow policy on locking down inmates. (Voska, Tr. 477; Sylvester, Tr. 474 - 475). The only change in regard to the fourth floor occurred after the incident where an additional officer was added to watch the cameras. (Voska, Tr. 477 - 478; Exhibit E-32). Lieutenant Brownridge, the ranking officer on duty that night was similarly in the dark about any zero tolerance policy. He testified that both he and Sergeant First felt that things should not have evolved the way they did. Lt. Brownridge also testified that the officers should have called the sergeant (shift commander) or him and they would have responded. He also testified that when things were getting out of control the officers needed to lock the inmates down and they needed to call the sergeant to do that. (Brownridge, Tr. 142 - 143).

Even if the unknown zero tolerance policy is accepted, the officers only claim it applies to locking inmates down. No witness testified that the zero tolerance policy permitted the use of force without contacting the sergeant. Mr. Kurth himself admitted during his IA interview that he knew the

policy required him contact a sergeant before putting his hands on an inmate. (Exhibits E-29 and E-30). Sergeant First testified that it is the policy to contact a sergeant prior to using force. (First, Tr. 250). CO Myrice also testified that the policy requires contacting a sergeant prior to the use of force. (Myrice, Tr. 312). The testimony is undisputed that the sergeant was not contacted prior to Mr. Kurth making physical contact with Inmate Cortez. As discussed above, Mr. Kurth had choices available to him. One was calling the sergeant prior to the situation evolving. Another was to call for back up prior to the situation evolving. Both are required by the Use of Force Policy (Exhibit E-3, page 6). A third choice was to retreat, also part of the Use of Force Policy. (Exhibit E-3, page 7). This could have been done by simply walking around the pillar. CO DeVol could have exited with him, preventing any risk of harm to CO DeVol. The officers could then have called the sergeant, called for back up and returned with the show of force required by the Use of Force Policy. (Exhibit E-3, page 6).

Instead of complying with the steps of the Use of Force Policy, Mr. Kurth chose to rush at the inmate, hitting him in the chin/face area and snapping his head back. There was a genuine concern for the inmate's safety when he was shoved back with his head snapping back. The corrections center is made of concrete and steel with concrete floors. If the inmate had fallen backwards and hit his head on the floor, he could have been seriously injured. (Atkinson, Tr. 26 - 27, 37) The blow to the head is in direct violation of the Use of Force Policy. (Exhibit E-3, page 6). Not surprisingly, Inmate Cortez responded by punching Mr. Kurth. Mr. Kurth justified his actions by saying that he felt threatened by Inmate Cortez. There are inconsistencies in the Union witnesses' testimony providing a basis for Mr. Kurth's actions. Sergeant First and CO DeVol wrote in their reports that Inmate Cortez lunged at Mr. Kurth. (Exhibits E-1 and E-6). However, Mr. Kurth testified that Inmate Cortez did not lunge at him. (Kurth, Tr. 448). Mr. Kurth testified that he heard someone say "why the fuck do we have to lock down?". He turned around and saw Inmate Cortez coming towards him with his hands up. Mr. Kurth stated that he then took one step and pushed Inmate Cortez. (Kurth, Tr. 440). In viewing the videos of cameras 1 and 2 it is evident that Inmate Cortez's hand were at his side, not raised up. (Exhibit E-5). In their reports

Sergeant First and Mr. Kurth both stated that Inmate Cortez's fists were clenched. (Exhibits E-1 and E-2). However, Mr. Kurth stated during his testimony that Inmate Cortez's fists were never clenched and his hands were open. (Kurth, Tr. 454, 458). Sergeant First also writes in his report that Inmate Cortez threatened Mr. Kurth. (Exhibit E-1). Mr. Kurth testified that Inmate Cortez did not make a verbal threat and only asked why they had to lock down. (Kurth, Tr. 460). It should be noted that CO DeVol was standing in the same section of the module when Inmate Cortez turns to Mr. Kurth and asks why they have to lock down. CO DeVol shows no concern or reaction until after Mr. Kurth rushed at the inmate. It is apparent from CO DeVol's lack of reaction that he did not feel threatened by Inmate Cortez. (Exhibit E-5, cameras 1 and 2).

The Union contended that Inmate Cortez walked around another inmate to try to approach Mr. Kurth. However, a review of the video shows that three inmates were close together and in motion. The inmate that Inmate Cortez allegedly walked around was simply walking between them to get to his cell. The third inmate was standing near Inmate Cortez showing no sign of aggression or concern. (Exhibit E-5, cameras 1 and 2).

Inmate Cortez did take a few small steps in Mr. Kurth's direction. He made no verbal threat. He did not have his hands raised. He had his hands open, not clenched. There was simply not enough of a verbal or physical basis for Mr. Kurth to claim he was threatened and had no choice but to charge Inmate Cortez. Mr. Kurth is clearly the one who caused the physical altercation. This is a direct violation of the Policy prohibiting the use of force in retaliation for physical attack or verbal abuse.

The Union relies upon the portion of the Use of Force Policy addressing quickly evolving physical altercations. Reliance on this provision is not appropriate. This was not a quickly evolving situation. The tensions of the day started earlier in the afternoon with the fight in the recreation area. The inmates continued to be wound up refusing to comply with at least five direct orders to quiet down. As noted above, the inmate did not attack Mr. Kurth, rather Mr. Kurth attacked the inmate. The inmate did

not make any verbal threats. The inmate only took a few steps, he did not have his fists up as if he was ready to fight. Even if the Union's reliance on the quickly evolving situation portion of the Policy is correct, Mr. Kurth still did not follow the policy. The policy directs officers to follow Steps 4C through 4F of the policy. (Exhibit E-3, pages 6 and 7). Section 4C begins: "If the arrestee/inmate attacks, then the following steps shall be taken". Inmate Cortez did not attack. Therefore, this section is not applicable. Even if it is concluded that this section is applicable, Mr. Kurth failed to follow the first step which is to call for back up. Mr. Kurth further violated the policy with repeated blows, including blows to the head. The first blow/shove was to the face/chin area. The Policy prohibits blows to the head or face unless the officer's or another person's life is in danger. (Exhibit E-3, page 6). Additionally, retreat is also a step under the rapidly evolving situation section. As noted above, Mr. Kurth failed to follow this part of the Policy as well.

Both CO DeVol and CO Myrice admitted during their interviews with Internal Affairs officers that they saw Mr. Kurth punch Inmate Cortez. CO DeVol signed a statement that he saw Mr. Kurth strike the inmate three times. He signed this statement with his attorney present. The attorney also signed as a witness to his statement. (Exhibit E-7, back side of page). CO Myrice signed a statement that he saw Mr. Kurth punch the inmate in the face with his fist. CO Myrice was represented by two union representatives at the time he signed his statement. (Exhibit E-8, back side of page). CO Myrice stated that he felt somewhat pressured to write about what happened before he arrived. However, two union representatives were with him. Mr. Mangold interjected that CO Myrice did not see everything and CO Myrice was not forced to write anything he did not see. (Myrice, Tr. 329, 331). Other witnesses stated they felt somewhat pressured in their interviews. For example, CO William Wright testified that he felt pressured in his interview, but that Deputy Mangold who was representing him intervened on his behalf. CO Wright testified that he was not threatened with discipline if he did not write what the internal affairs officers wanted, just that he felt they did not believe him. (Wright, Tr. 338-340, 342-343). CO Joseph Collins is another employee who said he felt pressured. He spoke to Captain Atkinson on the phone and

told him he saw Mr. Kurth push Inmate Cortez while exiting the module. When he wrote his report he wrote that Inmate Cortez fell and did not include the push. Captain Atkinson spoke with Deputy Mangold and Deputy Mangold helped CO Collins write a second report, suggesting that a balance displacement technique was used. (Collins, Tr. 348 - 354; Atkinson, Tr. 47 - 49; Exhibits E-10 and E-11). CO Collins admitted that he told Captain Atkinson on the phone that he saw Mr. Kurth push the inmate and testified that Mr. Kurth shoved the inmate. (Collins, Tr. 347, 357).

All of the employees who were interviewed by the Internal Affairs officers were represented by union representatives, except CO DeVol who was represented by an attorney. Most if not all of the employees who had union representation were represented by Deputy Mangold. It is evident that Deputy Mangold is a passionate representative who would not allow employees to be coerced into making statements they did not believe were accurate. Multiple employees testified that Deputy interjected on their behalf during their interviews. Deputy Mangold's active representation of Mr. Kurth during his interview can be heard on the recording, to the point of correcting Mr. Kurth in his answers. Deputy Mangold's commitment and passion were demonstrated during his testimony at the arbitration. It is inconceivable to believe he would permit the employees to be forced into writing something they did not believe was true. Captain Atkinson testified that it is not unusual for employees to be reluctant to make statements against a co-worker and they are not always forthcoming. (Atkinson, Tr. 456). Both Captain Atkinson and Deputy Sarahman denied pressuring employees to make false statements. (Atkinson, Tr. 465 - 466; Sarahman, Tr. 468). As noted previously, all employees were well represented during any interviews.

After Mr. Kurth initiated the physical altercation with Inmate Cortez, he continued the violations of the Use of Force Policy. At least five strikes with his fist can be seen. Once the inmate is on the ground, Mr. Kurth continues with elbow blows and kicking him with his knee. After he has the inmate cuffed, he lifts him up from his position laying on the ground on his stomach with his hands behind his back by grabbing him and lifting him by his arm. The officers are taught during training to never lift

someone this way. They could be injured. Their arm could be broken, their arm could be pulled out of the socket or their shoulder could be injured. (Gaston, Tr. 209). The appropriate way to get someone up from that position is to have them roll over with one knee bent and then to help them up. (Gaston, 208 - 209). If the person remains uncooperative, then the appropriate course of action is to leave the person on the ground and wait for additional help. (Gaston, Tr. 210 - 211).

Once the inmate is being escorted out of the module and into the lobby, the parties disagree over how the inmate ended up on the floor. However, facts leading up to that are not in dispute. CO DeVol wrote in his report that once the inmate was cuffed and standing up, he was no longer resisting. (Exhibit E-7). It can be seen on the video of camera 3 that Mr. Kurth, CO DeVol and CO Myrice are with the inmate before he leaves the module. Three additional officers arrive while the inmate is still in the module resulting in six officers being with the inmate. None of the other officers can be seen to offer assistance to Mr. Kurth. No one offers to take the inmate from Mr. Kurth or to hold the inmate by the other side. If the inmate was struggling as much as some witnesses testified, it is hard to believe that none of the other five officers would have provided assistance. If the inmate was struggling, Mr. Kurth need only ask for assistance.

Mr. Kurth denies pushing the inmate to the ground. However, two witnesses saw him shove the inmate. Lieutenant Brownridge both testified and wrote in his report that Mr. Kurth gave the inmate a sharp shove forward. (Brownridge, Tr. 133 - 134; Exhibit E-9). CO Collins admitted, although reluctantly that he saw Mr. Kurth push the inmate. (Collins, Tr. 347, 358). He later modified his statement, with Mr. Mangold's assistance, to include that the push was a balance displacement technique. (Collins, Tr. 354; Exhibit E-11). Officers are taught in their training to never use a balance displacement technique if the inmate's hands are cuffed behind their back. (Gaston, Tr. 204 - 205). If in fact that was what Mr. Kurth was attempting to do, it would be a violation of policy. If an inmate is cuffed with his hands behind his back it is the officer's obligation to control the inmate and prevent him from being injured. (Gaston, Tr. 206). If the inmate was truly struggling, Mr. Kurth need only ask any one of the

large number of other officers present for assistance. It is apparent from reviewing the video that the inmate did not simply fall. He does not simply fall to his knees and down. He can be seen propelled forward, unable to break his fall. (Exhibit E-5, camera 3, starting at 4:22).

Samuel Faulkner, the Union's expert witness, testified about the Use of Force Continuum. (Exhibit E-31, page 6-1-23). Mr. Faulkner testified that the inmate's actions are listed on the left and the available response for an officer is listed on the right. His position is that an officer can use one step above the level of action by the inmate. (Faulkner, Tr. 416). However, he was forced to concede that his opinion about using force one level above the inmate's action is not part of the Lucas County Sheriff Office' Use of Force Policy. (Faulkner, Tr. 435). He was also forced to admit that employees are required to follow their department's policies and that he has no ability to determine whether a policy should be followed or not. (Faulkner, Tr. 431). In reviewing the use of force continuum, it is evident that Mr. Kurth's response was excessive. Inmate Cortez's actions are in the Blue zone: not responding to commands; verbal or physical danger clues. Even if we accept Mr. Kurth's position that Inmate Cortez gave physical danger clues, he is still only in the Blue zone. The appropriate responses are found also under the Blue zone. Those options are: balance displacement; escort position; assistance from other officers; verbal, physical commands; officer presence. Mr. Kurth chose an action not included in the Blue zone. He charged at Inmate Cortez pushing a great distance, striking him in the face/chin area. That was not an option available to him in the Blue zone. (Exhibit E-31, page 6-1-23).

The Union has introduced the disciplinary and criminal charge filed against Inmate Cortez in an effort to paint him as the aggressor. (Exhibits U-4 and U-5). That attempt fails. Mr. Kurth also faced disciplinary charges, and in fact had his employment terminated and was also criminally charged. Therefore, the fact that Inmate Cortez faced disciplinary and criminal charges carries no weight in determining appropriate discipline for Mr. Kurth.

The Union has raised that fact that Sergeant Joseph Gorney spoke to a reporter as somehow being relevant to this matter. Even if there was a technical violation of the contract, it in no way impacts whether there was just cause for the termination. The provision of the contract cited is Article IV(G), which states that there shall be no press release until an investigation is completed and the employee is charged or cleared. (Exhibit Jt. 1, page 8). Sergeant Gorney is not part of the Internal Affairs Division. He conducts criminal investigations. He has no access to Internal Affairs records. Sergeant Gorney did not issue a press release. After Mr. Kurth was criminally charged, Sergeant Gorney was contacted by one reporter who already knew Mr. Kurth's name and about the criminal charge. Sergeant Gorney did not initiate contact with any news outlet, but was interviewed by the reporter who contacted him. Sergeant Gorney's role in criminal investigations and the role of the internal affairs officers who conduct internal investigations are completely separate. (Gorney, Tr. 470 - 473; Exhibits E-26 and U-6). Even if Article IV(G) applied to the criminal investigation, there was no violation because the criminal charge was already filed.

V. BURDEN OF PROOF

In his previous arbitration award between the parties, the Arbitrator determined that proof beyond a reasonable doubt was the proper burden of proof because a potential crime was involved. (Appendix A). The Sheriff's Office does not believe that is the appropriate burden of proof in this case. In this case the Sheriff's Office did not rely on the criminal charge as a basis for the discharge. As was discussed during the arbitration, the criminal charge was introduced as a defense to the Union's argument pertaining to Sergeant Gorney speaking to a reporter. The decision to terminate Mr. Kurth's employment was made on March 11, 2013. Mr. Kurth was ultimately convicted of disorderly conduct on April 11, 2013, one month after the termination. Rule No. 1 of the work rules is Law Violation. (Exhibit E-190). Mr. Kurth was not charged with violating this rule.

Arbitrator Martin Fitts also addressed the issue of burden of proof in another case between these parties. Grievant Tina M. Anaya (Hill) was also convicted of a crime, yet Arbitrator Fitts determined that clear and convincing was the appropriate burden of proof. He relied upon the Common Law of the Workplace, (Theodore J. St. Antoine, ed. at p. 178ff) in reaching his conclusion. He quoted Mr. St. Antoine: "When the employee's alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators require a higher quantum of proof, typically expressed a 'clear and convincing evidence'.... .. most hold that the criminal-law standard of 'beyond a reasonable doubt' has no place in an informal dispute resolution mechanism like arbitration." Arbitrator Fitts recognized that the "clear and convincing" standard is already higher than the normally applied "preponderance of the evidence" standard and applied that standard. (Appendix C, page 10). The Sheriff's Office requests that the Arbitrator not apply the proof beyond a reasonable doubt standard, but apply a lesser standard for the burden of proof.

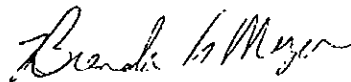
VI. CONCLUSION

This situation arose because of the choice that Mr. Kurth made. Witnesses testified that Mr. Kurth had choices available to him. He did not choose to attempt to leave the module by walking around the pillar. He did not choose to contact a sergeant prior to attempting to lock down inmates who had demonstrated a repeated unwillingness to comply with directions. He did not choose to call for back up to assist with and make a show of force to the non-complying inmates. Instead, he choose to disobey the Use of Force Policy and rush directly at an inmate who only disrespectfully asked why they had to lock down, shoving him nearly across the module and snapping his head back in the process. He then chose to punch the inmate repeatedly with his fist and his elbow and his kick him with his knee, some of which took place after the inmate was already on the ground. His next choice was to escort the inmate out of the module on his own. Mr. Kurth denies shoving the inmate and claims the inmate was struggling. However, there were five other officers right beside them when he was escorting the inmate. None of them saw the need to assist, which would have been done if the inmate was struggling. Further, it is

evident from the video that the inmate did not simply fall, but was propelled by force. If Mr. Kurth had chosen to ask for assistance with the inmate or to turn the inmate over to other officers, the inmate would not have ended up on the cement floor face first with his hands cuffed behind his back unable to break his fall. It is the series of choices made by Mr. Kurth that led to the situation unfolding as it did.

There is no doubt that it was a stressful night on the fourth floor of the corrections center. The inmates were repeatedly and blatantly refusing to comply with the orders given by the officers. Sheriff Tharp recognized that Mr. Kurth was upset with the inmates, but stated "this is what we do." (Tharp, Tr. 127). Employees are expected to maintain professional conduct even in stressful situations. Mr. Kurth failed to do this and committed multiple violations of the Use of Force Policy. A corrections facility cannot continue to employ an individual who has demonstrated an inability to maintain his professional demeanor when simply confronted with non-compliance and profanity. Based upon his conduct in dealing with Inmate Cortez, his failure to file a complete and accurate report and his failure to be truthful during his interview, Mr. Kurth has demonstrated that he cannot comply with the professional standards required of employees of the Lucas County Sheriff's Office. Accordingly, his discharge was for just cause and should be upheld.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Brenda G. Meyer".

Brenda G. Meyer