

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

Terra N. Thompson,

Appellant,

v.

Case No. 09-REM-06-0307

Cuyahoga County Engineer,

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 removal be **MODIFIED** to a sixty-day (60) suspension, pursuant to O.R.C. §§ 124.03 and 124.34.

Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

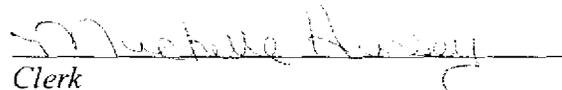


J. Richard Lumpe, *Chairman*

CERTIFICATION

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, July 8, 2010.



Clerk

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

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

TERRA N. THOMPSON,

Case No. 09-REM-06-0307

Appellant,

v.

April 8, 2010

CUYAHOGA COUNTY ENGINEER,

JAMES R. SPRAGUE

Appellee.

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard on March 22, 2010. Present at the hearing was Appellant, who was represented by Marc E. Myers, Attorney at Law. Appellee, Cuyahoga County Engineer ("CCE"), was present through its designee, Shannon Gallagher, Director of Legal and Governmental Affairs, and was represented by Dale F. Pelsozy, Assistant Prosecuting Attorney.

This cause comes on due to Appellant's June 23, 2009 timely filing of an appeal from her removal from the position of Secretary II with Appellee. The pertinent R.C. 124.34 Order of Removal was signed on June 19, 2009, hand-delivered to Appellant on June 19, 2009, and was effective June 22, 2009.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The pertinent particulars of the instant R.C. 124.34 Order of Removal read, as follows:

Terra Thompson ("Ms. Thompson [sic]) committed neglect of duty, insubordination, malfeasance, failure of good behavior, breach of confidentiality, and violated office policies. In particular, on September 26, 2008 and December 11, 2008, you committed passive insubordination as well as a breach of confidentiality by releasing and discussing sensitive confidential information. From December 13, 2007 through April 1, 2009, you engaged in disruptive behavior and/or language thru [sic] the use of the County e-mail system. On December 5, 2008, December 19, 2008, and January 5, 2009, you violated the Policy on Internet, E-Mail and Online Services Use by abusing your internet privileges. Finally, on October 9, 2008, you engaged in disruptive behavior and/or language with a supervisor in this office. Moreover, Ms. Thompson has been disciplined in the past. Specifically, on August 7, 2007 Ms. Thompson's supervisor counseled her, on January 21, 2009, County Engineer Robert C. Klaiber counseled Ms. Thompson and on March 10, 2009, Ms. Thompson's supervisor again counseled her.

At hearing, Appellee called three witnesses. Appellee called Thomas Roche, the Cuyahoga County Engineer's Chief of Staff, Patricia Gouker, retired Cuyahoga County Engineer's Office Human Resources Director, and Brian Driscoll, Cuyahoga County's Chief Highway Design Engineer.

At hearing, Appellant called no witnesses.

Testimony Regarding Allegations

Sometime around late 2008, the CCE received a federal subpoena for its email records.¹ While complying with this subpoena, the CCE discovered an abundance of emails exchanged between Appellant and her co-workers, most notably Leigh Hudson, Human Resources Analyst for the Cuyahoga County Sanitary Engineer, and Kathleen Needham, who worked in the Public Information Section of the Cuyahoga County Engineer's Office.

¹ Both parties agree that the reasons for Appellant's removal are unrelated to the subject matter of the federal investigation.

These emails dated back eighteen months. Many of the emails were personal in nature and discussed gossip about co-workers, county corruption, ways to waste time while at the office, complaints about supervisors, and other non-work-related matters. The amount of emails that did not deal with work-related issues was immense; testimony at hearing revealed that Appellant's supervisors printed over 300 pages of these emails. This figure does not reflect the entire amount of emails the CCE deemed inappropriate.

Included in the emails the CCE discovered was an email dated December 11, 2008 from Appellant to Leigh Hudson. This email's subject was "Evaluation scores" and this email came with an attached spreadsheet. The spreadsheet contained the following information: employee names, supervisor names, and evaluation scores under the heading "2007 Scores." None of the Appellant's supervisors told her to share this document with Ms. Hudson. It is possible to infer that Appellant sent the spreadsheet to Ms. Hudson for purely personal reasons so that Ms. Hudson could see the performance evaluations of other employees. Ms. Hudson did not request the information nor did anyone at hearing testify that she was entitled to the information contained on this spreadsheet for any reason. In fact, both retired Human Resources Director Patricia Gouker and Chief of Staff Thomas Roche testified that there was no reason for Ms. Hudson to have this information.

The CCE contends that Appellant distributed confidential information to Ms. Hudson when she shared this spreadsheet because the performance evaluation numbers in the spreadsheet are from 2008 and are in raw (*i.e.* unrefined) form; as such, the CCE argues, they are confidential.

However, at hearing, Appellant's counsel pointed out that the performance evaluation's heading reads "2007", not 2008, and Ms. Gouker confessed that, if the spreadsheet contained 2007 numbers, such information is not "raw" but public record.

Ms. Gouker was unable to affirmatively state whether the performance evaluation numbers were from 2007 or, conversely, from 2008. All other information contained in the spreadsheet, including employee names and supervisor names, is public record.

In a September 26, 2008 email to Ms. Needham, the Appellant stated that that afternoon, she had to attend a pre-disciplinary hearing with "Cheryl" and Cheryl's

attorney. The email does not contain "Cheryl's" last name. Also, the circumstances of the pre-disciplinary hearing are never discussed.

On December 5, 2008, Appellant sent an email to Ms. Hudson containing a link to an article titled "10 gifts for the cubicle warrior." This article did not contain work-related information. On December 19, 2008, Appellant sent an email to Anne Ferry with a link to an article that did not contain work-related information. On January 5, 2009, Appellant sent an email to Ms. Hudson with a link to an online article discussing corruption problems in Cuyahoga County. This article did not contain work-related information.

Approximately a week before October 9, 2008, Appellant engaged in a heated exchange with CCE Security Chief Frank Gaul (phonetic). The Order of Removal is incorrect that this incident occurred on October 9, 2008 as an email with that date states the incident occurred approximately a week prior.

In this email, Appellant relates that she became so frustrated that she threw keys to the file room into the garbage in front of Mr. Gaul after the two exchanged raised voices. She informed Mr. Gaul that she did not want the keys and left. Neither side presented evidence that Mr. Gaul report this incident to anyone; Appellant's supervisors only became aware of the incident when reviewing Appellant's emails. Mr. Gaul is not the Appellant's supervisor.

At hearing, testimony elicited by Appellee demonstrated that Appellant's keys included a key to an office that contained HIPPA-protected information. During questioning upon cross examination, several of Appellee's witnesses could not confirm or deny that Appellant had put forth several requests before this incident to address the fact that Appellant had no place at work to secure these keys or that she had correspondingly expressed a concern that she had no key to lock and secure the drawer at her work desk.

Lack of Prior Discipline

Appellant's counsel sent a public records request to the CCE requesting any documentation as to any *prior disciplinary action taken against Appellant*. The only document the CCE sent to Appellant's counsel was the Disciplinary Action Form dated May 19, 2009 that resulted in Appellant's eventual removal from the CCE.

No other written documentation of past reprimands or of any other prior discipline was offered at hearing. It should be noted that "counseling" does not qualify as a written reprimand or as any other cognizable discipline recognized by this Board under O.A.C. 124-9-04 (B) ("Prior discipline").

CONCLUSIONS OF LAW

Appellant's proven actions do not amount to dischargeable offenses, given that several seminal allegations in the Order of Removal were not supported either by testimonial or demonstrative evidence at hearing.

In particular, the charges that Appellant shared confidential information are not supported by the evidence. In regard to the spreadsheet, the CCE failed to meet its burden to show that the spreadsheet contained confidential information.

Ms. Gouker was unable to identify whether the performance evaluation spreadsheets were from 2007 or, conversely, from 2008. Further, a review of the spreadsheet certainly suggests that the scores are from 2007, as that is the year described in the heading. If this is the case, both sides agree that such information is not confidential.

In regard to the email mentioning "Cheryl" and a pre-disciplinary conference, Appellant did not discuss enough information in this email as to reveal confidential information. Department guidelines mandate no human resources employee may share payroll, medical or corrective action information without prior approval. In her September 26, 2008 email to Ms. Needham, the Appellant did not divulge enough information regarding the pre-disciplinary hearing to breach confidentiality. Her actions in regard to both alleged breaches of confidentiality do not merit removal.

In regard to the incident with Mr. Gaul, surely Appellant acted wrongfully by engaging in a yelling match with a supervisory employee, throwing important keys in the waste basket, and leaving the keys there.

Black's Law Dictionary defines "insubordination" in part as "a willful or intentional disregard of the lawful and reasonable instruction of the employer." Black's Law Dictionary Deluxe 6th ed. p. 801. Further citations omitted) It is unclear

whether Mr. Gaul would constitute Appellant's "employer" or "supervisor," as was the term used in the Order of Removal, although he would certainly serve as Appellee's agent. Yet, even if Mr. Gaul is considered Appellant's employer, he does not appear to be in Appellant's chain of command.

Perhaps more importantly, Mr. Gaul, who serves as Appellee's Head of Security, apparently did not consider this incident serious enough to rise to the level of a reportable act, given there is no inference in the record that Mr. Gaul reported this confrontation to anyone.

Appellant's actions in this case were clearly wrongful. Nonetheless, the presence of Appellee's Head of Security and his concomitant decision not to inform management lead a neutral body to believe the incident does not justify removal.

To be sure, Appellant abused and misused the County's email system by utilizing it for personal conversations that included gossiping, disparaging superiors, sharing non-work-related websites, making personal plans, and other non-work-related reasons. This conduct occurred on *many* occasions and violates the County's Internet and email policy, which forbids use of the Internet and email system for anything other than county business purposes. Her extreme misuse of the system and constant text messaging also appeared to affect her work product.

Black's Law Dictionary defines "neglect" partly as: "a designed refusal, indifference, or unwillingness to perform one's duty." (Black's Law, supra at p.1032. Further citations omitted.) Clearly, Appellant's excessive Internet, email, and texting use constituted indifference or unwillingness to perform her job duties effectively. Appellant grossly misused the County's system to her employer's detriment and her actions merit a serious level of discipline.

In summary, Appellant's proven offenses, viewed in context with her complete absence of any prior discipline, suggest a harsh penalty but one less severe than removal. Accordingly, it is advised that Appellant receive a sixty-day suspension with the understanding that her proven offenses must not reoccur and that she should rededicate herself to providing Appellee and the taxpayers of Cuyahoga County with a full day's work for a full day's pay.

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RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **MODIFY** Appellant's removal to a sixty-day suspension, pursuant to R.C. 124.03 and R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge

JRS: