

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

Michael Peterson,

Appellant,

v.

Case No. 09-REM-07-0326

Department of Mental Health,
Northcoast Behavioral,

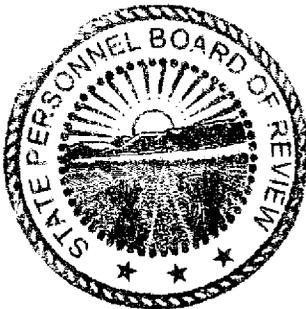
Appellee.

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 **AFFIRMED**, pursuant to O.R.C. § 124.34.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

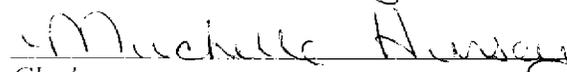


J. Richard Lumpe, *Chairman*

CERTIFICATION

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, August 4, 2010.



Clerk

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

made such a statement (Appellee's Exhibit 7). She indicated that the account representative responded that it was not Sprint Nextel's general practice to advise customers on cell phone policies.

The witness confirmed that she typically places cellular telephones on "pause" when she is notified that an employee is not at work due to leave or other circumstances, but testified that she was never notified when Appellant went out on disability leave in late July/early August 2008.

James Wuliger testified that he is employed by Appellee as the hospital's Chief of Police and has held that position for approximately five years. He indicated that he is responsible for overall security processes and programs at Appellee's facilities, including conducting and overseeing investigations.

The witness confirmed that he has a state-issued cell phone and knows, as an employee, that there are restrictions on its use (Appellee's Exhibit 11). Chief Wuliger testified that the cell phones are to be used for work-related purposes only, with the only exception being for emergency situations. He indicated that although there is no written definition of "emergency" in Appellee's cell phone usage policy, in his opinion, it would not be proper to use the phone for personal calls on a continuous basis over a period of time or when an employee was on leave.

Chief Wuliger recalled that he was contacted by Appellee's Operations Director and requested to investigate Appellant's cell phone usage. He confirmed that he spoke to both Ms. Stephens and to Appellant, and prepared a report of his investigation (Appellee's Exhibit 17), which he submitted to the Human Resources Department.

Wendy Ivory testified that she is presently employed by Appellee as a Human Capital Management Senior Analyst. She noted that she has held that position for approximately six years and is responsible for labor relations, disciplinary processes, grievances, and various other HR processes. Ms. Ivory indicated that she monitors disciplinary actions and coordinates and attends predisciplinary conferences.

The witness confirmed that she is familiar with LCAs and explained that an LCA is typically used to give an employee who is facing serious discipline one more opportunity to correct their behavior and maintain their employment with Appellee. She noted that an LCA can contain one or more conditions with which an employee

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Michael Peterson,

Case No. 09-REM-07-0326

Appellant

v.

May 24, 2010

Department of Mental Health,
Northcoast Behavioral Healthcare

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his removal from employment with Appellee. A record hearing was held in the instant matter on January 14, 2010. Appellant was present at record hearing and was represented by Richard Selby, attorney at law. Appellee was present at record hearing through its designee, Chief James Wuliger, and was represented by Joseph N. Rosenthal and Komlavi Atsou, Assistant Attorneys General.

The R.C. 124.34 Order of Removal issued to Appellant stated as grounds for his removal:

E. #4: dishonesty – Unauthorized use/misuse of goods or other property of the State, department, client, patient; D. #4: Neglect of Duty – Failure to follow policies, procedures, directives of ODMH, hospitals, CSN; Violation of Last Chance Agreement dated June 14, 2007 and extended by period of disability from July 29, 2008 to April 10, 2009.

The parties stipulated to the jurisdiction of the Board to consider the instant matter and to Appellee's compliance with the procedural requirements of R.C. 124.34.

STATEMENT OF THE CASE

Appellant testified that he began his employment with Appellee in 2001 and was employed as a Custodial Work Supervisor at the time of his removal in July 2009. He recalled that his normal hours of work were 7:00 a.m. until 3:30 or 4:30 p.m. and noted that he was required to carry his state-issued cell phone twenty-four hours a day because he was on-call for emergencies at the Cleveland campus.

Appellant acknowledged that he knew his state-issued cell phone was to be used only for work-related purposes (Appellee's Exhibit 5). He noted that the first cell phone issued to him was replaced in 2007 by a telephone that had previously been used by Robert Smart. Appellant testified that he did not recall reviewing any other cell phone policies during the time he was employed and indicated that he first saw the policy contained in Appellee's Exhibit 11 during the summer of 2009, prior to his termination. He stated that a representative of the carrier, Sprint/Nextel, told him that employees were allowed to use their state-issued cell phones to make personal calls.

Appellant confirmed that he met with Chief James Wuliger in late July 2008 to discuss personal usage of his state-issued cell phone (Appellee's Exhibit 4). He stated that he had never been questioned about his cell phone usage prior to the investigation into this matter or otherwise told that his usage was a problem.

Appellant acknowledged that during the billing period May 27, 2008, to June 26, 2008, he made approximately five hundred and twenty non-work-related telephone calls from his state-issued cell phone, and stated that he explained to Chief Wuliger that the calls were related to his son's attempted suicide earlier in May 2008 and to his own health. He stated that although none of the calls were 9-1-1 calls, some of them were emergency calls; Appellant was unable to definitely state how many of them were emergency calls. He also acknowledged that he made personal calls on his state-issued cell phone during the July 27, 2008, to August 26, 2008, billing cycle. Appellant confirmed that he was on disability leave during that time period and was not at work.

Appellant explained that he made personal calls on his state-issued cell phone to arrange for his son's psychological care, to coordinate transportation for his son and to deal with some related custody issues. He stated that he also made personal calls related to his own health issues and noted that his own doctors

needed to call him regarding test results and other matters. Appellant testified he believed that these situations were emergencies.

Appellant identified Appellee's Exhibit 13 as a Last Chance Agreement (LCA) he entered into with Appellee on June 14, 2007, and confirmed that paragraph three of the LCA provided that any violation of the agreement within two years of the signature date would result in removal. He stated that he lives in Solon and has a residential telephone line in his home. Appellant observed that although he offered to repay the cost of the excess telephone calls, Appellee rejected his offer.

Patricia Stephens testified that she is presently employed by Appellee as its Telephone Supervisor, a position she has held for approximately three and one-half years. She indicated that she is responsible for supervising telephone operators at the Cleveland and Northfield campuses, maintaining the phone system and communication devices, and reviewing and approving telephone bills for payment.

The witness noted that Appellee's cellular plan presently covers approximately one hundred sixty employees. She explained that when she reviews telephone bills she generally looks at the overall monthly cost and the usage per line, rather than targeting individual calls. Ms. Stephens testified that the average monthly cellular phone bill is approximately \$35; if she identifies above-average use or additional charges for services that are not normally utilized, she would flag the bill as unusual usage and report it to the employee's supervisor. The witness confirmed that she has forwarded flagged invoices to employees' supervisors on several occasions, but does not follow up to determine what action is taken by them.

Ms. Stephens recalled that the June 30, 2008, cellular phone bill for the telephone assigned to Appellant (Appellee's Exhibit 8) reflected a total of one thousand one hundred thirty one minutes during the billing period, which represents eight hundred thirty one minutes in excess of the three hundred minutes allotted to Appellant's plan. She testified that Appellee was billed \$332.40 for those additional minutes. The witness noted that although she would not normally have flagged Appellant's August 30, 2008, invoice (Appellee's Exhibit 9) for review, it was examined as the result of the problems identified in the June 30, 2008, invoice.

Ms. Stephens recalled that because Appellant indicated that he had been told by a representative of Appellee's cellular telephone carrier, Sprint/Nextel, that it was permissible to make personal calls on his state-issued telephone, she contacted Appellee's account representative to determine whether their trainer had

is required to comply. Ms. Ivory testified that she was familiar with the terms of the LCA entered into by Appellant and Appellee (Appellee's Exhibit 13) and testified that the agreement provided that any breach of its conditions would result in Appellant's removal. She stated that one of the conditions of the LCA was that Appellant not violate any department work rule or policy for the period of two years from the date of the agreement, which was June 14, 2007.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Appellant was employed by Appellee as a Custodial Work Supervisor at the time of his removal in July 2009. Because his job required him to be on-call for campus emergencies, he carried a state-issued cell phone with him.

Appellee's cell phone policy provides that state-issued cell phones are to be used for work-related purposes only, with the only exception being for emergency situations. There is no written definition of "emergency" in Appellee's cell phone usage policy. Appellant was aware that his state-issued cell phone was to be used only for work-related purposes.

During the billing period May 27, 2008, to June 26, 2008, Appellant made approximately five hundred and twenty non-work-related telephone calls from his state-issued cell phone. Appellant exceeded the minutes allowed for his cellular service during the May 27, 2008, to June 26, 2008 billing period by eight hundred thirty one minutes, incurring a cost of \$332.40. Appellant also made personal calls on his state-issued cell phone during the July 27, 2008, to August 26, 2008, billing cycle; Appellant was on disability leave during that time period and was not at work.

Appellant entered into a valid Last Chance Agreement with Appellee on June 14, 2007. The agreement provided that any breach of its conditions would result in Appellant's removal. One of the conditions of the LCA was that Appellant not violate any department work rule or policy within the period of two years from the date of the agreement, which was June 14, 2007.

CONCLUSIONS OF LAW

Appellant was removed from employment with Appellee based upon his alleged violation of a last chance agreement. Ohio Revised Code Section R.C. 124.34(B) provides that where a valid LCA exists, this Board has jurisdiction only to determine whether the employee's conduct violated the agreement; if Appellant's actions were sufficient to violate the LCA, then the removal must be affirmed. As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, that Appellant engaged in the conduct alleged.

The LCA executed by the parties on June 14, 2007, provides in pertinent part that:

"The parties agree that, if within two years from the date of this agreement, the employee violates any Department work rule or policy, or the terms of this agreement, or the EAP participation agreement, such violation will result in the implementation of the removal being held in abeyance."

Testimony and evidence contained in the record indicates that Appellant made approximately five hundred and twenty non-work-related telephone calls from his state-issued cell phone during the period of May 27, 2008, to June 26, 2008. He also made personal calls on his state-issued cell phone during the July 27, 2008, to August 26, 2008, billing cycle. Appellee's cell phone policy provides that state-issued cell phones are to be used for work-related purposes only, with the only exception being for emergency situations.

Appellant argued that the non-work-related calls he made during the two time periods in question fell under the policy's emergency exception, and that his personal usage did not, therefore, constitute a policy violation. Appellant explained that he made calls to arrange for his son's psychological care after he attempted suicide in May 2008, to coordinate transportation for his son, and to deal with some related custody issues. Appellant stated that he also made and received personal calls related to his own health issues. Appellant confirmed that none of the calls he made were 9-1-1 calls; while some may have indeed been urgent, the sheer number of personal calls made during the May 27, 2008, to June 26, 2008, time period (520 calls) undermines the credibility of Appellant's position and establishes that the situations were ongoing over a period of time. As such, I find that the

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circumstances, while serious in nature and certainly disconcerting, did not constitute an emergency.

As previously noted, where a valid last chance agreement exists, this Board's review is limited to a determination as to whether or not Appellant violated the agreement. Based upon the above analysis, I find that Appellant violated Appellee's cell phone policy during the two-year period proscribed by the LCA. Therefore, pursuant to Ohio Revised Code Section 124.34(E), Appellant has no right of appeal to this Board and I respectfully **RECOMMEND** that his removal be affirmed and the instant appeal **DISMISSED**.



Jeannette E. Gunn
Administrative Law Judge

JEG: