

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

PAMELA R. PERRY,

Appellant.

v.

Case No. 09-REM-08-0390

DEPARTMENT OF ADMINISTRATIVE SERVICES,
OFFICE OF EMPLOYEE SERVICES,

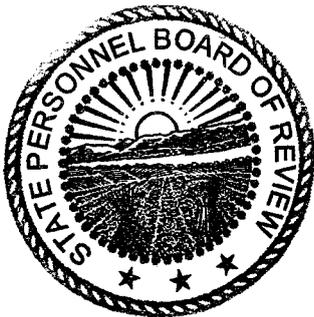
Appellee

ORDER

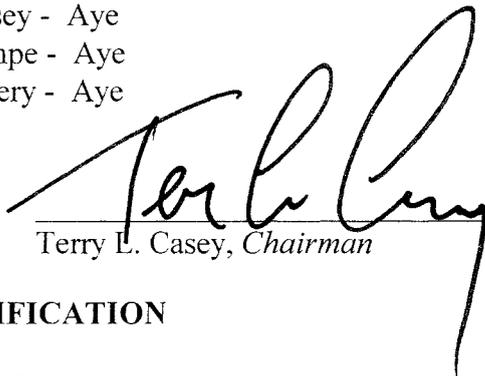
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including 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 thirty-day suspension.



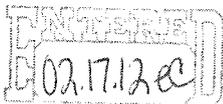
Casey - Aye
Lumpe - Aye
Tillery - Aye


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 constitutes ~~(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, February 17, 2012.




Clerk

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

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

Pamela R. Perry,

Case No. 09-REM-08-0390

Appellant

v.

August 8, 2011

Department of Administrative Services,
Office of Employee Services,

Jeannette E. Gunn

Appellee

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 her August 24, 2009, removal from employment with Appellee. A record hearing was held in the instant matter on September 14, 15, and 16, 2010. Appellant was present at record hearing and was represented by David S. Pennington, attorney at law. Appellee was present at record hearing through its designee, Labor Relations Manager Ray Geis, and was represented by Joseph N. Rosenthal and Rory P. Callahan, Assistant Attorneys General.

The parties stipulated to the jurisdiction of the Board, pursuant to R.C. 124.03(A) and 124.34. Accrual of back pay was tolled pursuant to this Board's April 20, 2010, Notice of Continuance, from April 20 through September 14, 2010.

The R.C. 124.34 Order of Removal provided to Appellant listed as grounds for her removal:

(1) You failed to ensure that COBRA premium checks were processed and/or remitted in a timely manner in accordance with R.C. 113.08 and OAC 113-1-02. This constitutes Neglect of Duty; (2) You represented that you deposited or would deposit premium check(s) for a COBRA enrollee to interested parties including the enrollee but did not do so in accordance with your representation. This constitutes Neglect of Duty and/or Failure of Good Behavior; (3) You knowingly misrepresented to an agency investigator that there was only one delayed or unprocessed COBRA premium check despite your reason

to know that this was probably inaccurate. This constitutes Dishonesty or Failure of Good Behavior; (4) You transmitted approximately 95 social security numbers of COBRA enrollees via e-mail without encryption and without good reason, creating a potential security risk. This constitutes Neglect of Duty and/or Incompetency. By these acts and omissions you have violated R.C. 124.34.

STATEMENT OF THE CASE

Appellant, Pamela Perry, testified that prior to her removal she had been employed by the State of Ohio for approximately twenty-one years, with a long tenure in a customer service capacity. She recalled she was employed in the Department of Taxation from 1988 to 2007, before accepting the Human Capital Management (HCM) Benefits Team Manager position with the Department of Administrative Services (DAS) from which she was ultimately removed.

Appellant testified that amongst many other duties, she was required as HCM Benefits Team Manager to ensure the completion of time sensitive OAKS system entries with downstream effects in Payroll. She testified that her role as a manager also required the supervision of five employees, who administered benefits and processed payments for benefit plans (including COBRA insurance coverage) for former employees and their dependents. COBRA (Consolidated Omnibus Budget Reconciliation Act of 1986) is a federal law that, generally, grants employees the right to keep their group health care coverage for up to eighteen months when they would otherwise lose it after leaving their job.

Appellant testified that "processing" a COBRA payment involved entering the receipt of checks into the COBRA system and then delivering the checks, typically bi-weekly, to the Fiscal Accounting unit for deposit. She acknowledged her role as supervisor of Diana Campbell and Myron Bell, who were responsible for tracking and processing COBRA payments for the older TRAVIS system and new OAKS system respectively.

Appellant testified that after Diana Campbell's sudden retirement in August 2008, she assumed full responsibility for the 187 former employees maintained on the TRAVIS COBRA system. She recalled that she did not assign responsibility for the TRAVIS system to other members of her understaffed and overwhelmed department at that time, but eventually did delegate some portions of the process.

Appellant noted that because Ms. Campbell departed abruptly, she received no training on the TRAVIS system and was unable to train others under her supervision on the process.

Appellant testified that over the course of 2008, her responsibilities as HCM Manager were frequently compounded by the assumption of various other full time roles. She recalled that because her department was short-staffed, and efforts to fill vacant positions of those on leave or retired went largely unaddressed by her supervisors. Appellant estimated that at any given time she was fulfilling the duties of at least two full-time employees – her own and those previously assigned to Diana Campbell.

Appellant recalled that she began to receive customer service mailings and TRAVIS checks originally directed towards Ms. Campbell in September 2008 and was not aware prior to an April 2009 interview with the Inspector General that OAC 113.02 provided for a two day time-frame for handling checks. She stated that in 2008, upon receipt of TRAVIS checks, she followed the standard office practice of locking checks awaiting submission to Payroll in her desk. Appellant recalled alerting staff via email on September 3, 2008, to similarly direct TRAVIS related mail to her instead of Myron Bell, who was only to cover the OAKS system. She testified that she kept the TRAVIS checks she received between August 22 and October 13, 2008, in her desk and did not enter or assign anyone to enter the payments into the TRAVIS system, but expected to have time to learn the process before any issue arose.

Appellant testified that this interim procedure regarding TRAVIS checks continued until October 13, 2008, when she gave an unidentified number of checks to Customer Service Representative Linda Neel to enter into the TRAVIS system. She recalled that she directed Linda Neel towards a general TRAVIS manual for guidance as to how to input COBRA payment information. Appellant also testified that she instructed Ms. Neel to enter any future TRAVIS checks that were received into the TRAVIS system before returning the checks to her. She noted that she retained responsibility for delivering the checks to Mr. Bell, who took the checks to payroll to be deposited.

Appellant testified that although the OAKS system required that an Excel log of payments be submitted to Payroll to address a systemic issue, there was no similar requirement for the TRAVIS system. She stated that to her knowledge no log for the TRAVIS checks existed prior to her assumption of responsibilities in

September 2008, and she kept no log of processed payments after that point. Appellant recalled that Mr. Bell started making a log of the processed payments in December 2008 or January 2009, but noted that she began to deliver checks to him prior to that time.

Appellant testified that between January 2009 and late February 2009, she received email notice that several former employees, specifically Theresa Schaefer and David Pryor, had complained of uncashed COBRA checks. She acknowledged that she received, but was unable to account for the way in which several other emails regarding uncashed COBRA checks of former employees were handled. Appellant testified that despite the fact Mr. Bell primarily administered the OAKS system and was not responsible for issues regarding uncashed checks, she most likely would have forwarded any email inquiries like Schaefer's and Pryor's checks to him for follow up with the Fiscal Accounting department. She recalled that Mr. Bell would generally suggest that he had "taken care of it," and that complaints about delays in check cashing were common, given an occasional 60-90 day delay in the OAKS system. Appellant testified that she did not follow up with Mr. Bell on the complaints, because she had no reason to believe he had not taken care of them.

Appellant acknowledged that she took responsibility for the error regarding Ms. Schaefer's checks in an email dated February 11, 2009, and further testified that the former employee's uncashed checks totaling \$815 were found inadvertently stuck to blueprints in her desk drawer. She acknowledged that she assured Dee Seidenschmidt that checks would be sent to Fiscal Accounting to be deposited, although the deposit was, in fact, still delayed. Appellant testified that she mistakenly assumed that she sent the checks. However, she recalled, instead of depositing them, other urgent projects and time constraints in a part-time close out process overwhelmed her, so that papers covered the recently unearthed checks on her desk until February 23, 2009, when the still un-deposited checks were brought to her attention by David Holbrook and Mitch Bailey, who followed her to deposit them at Payroll.

Appellant recalled being questioned by Brenda Oyer regarding Ms. Schaefer's delayed checks and the typical processing time. She testified that the answers she provided specifically addressed Ms. Schaefer's checks; with regard to other delayed checks, Appellant testified that her answers to interview questions were based upon her interpretation of the word "process," as it related to her department. Appellant explained that, to her, processing a check meant to enter

into the TRAVIS system. She recalled that the checks referenced by Linda Neel had been accordingly "processed" in the TRAVIS system.

Appellant testified that she was not aware of the magnitude of the issue, as she had no reason to believe that Mr. Bell failed to follow up on the emails she forwarded to him regarding customer complaints. She further recalled that she was unaware at the time of the investigation of the existence of 500 undeposited checks later discovered in her supervisor's office.

Appellant explained that she proposed seven days as a typical timeframe for check processing during the investigative interview, based on her assumption of the context of the term "processing." She explained that it typically took her team seven days to get checks received into the respective COBRA systems and then to deliver the checks to Fiscal Accounting. Appellant recalled she had not considered the time it takes to deposit checks into her time frame, because no one in her office deposited checks. Further, she stipulated that the process occasionally took longer than seven days if a check was misdirected or mislabeled, and as such she never intended to establish seven days as a firm processing time.

After the Investigator General report was issued, Ms. Perry testified that her role changed. She recalled that Nancy Kelly requested an update on the status of the TRAVIS system's coverage of former employees and in responding to Ms. Kelly's request, she provided an Excel spreadsheet that contained the standard system identifiers, which are participants' Social Security numbers. Appellant testified that the use of Social Security numbers as identifiers was not only standard practice, but necessary for any dependents in the system; she explained that a list consisting solely of names without any additional identifiers would be nearly impossible to use for locating individual records in the TRAVIS system.

Appellant testified she accessed her state email from her home computer on Monday, July 13, 2009, to provide timely clarification to Ms. Kelly's earlier email. She explained that the text of the email contained succinct answers to the questions posed by Ms. Kelly and the attached spreadsheets contained additional supporting information.

Linda Neel testified that she is presently employed by Appellee as a Customer Service Assistant 2 (CSA 2). She indicated that she began her employment with Appellee in July 2008 and was supervised by Appellant; the witness noted that Diana Campbell retired shortly after she began working in HCM.

Ms. Neel noted that she and the other CSAs were responsible for answering questions related to employee benefits. She recalled that she received calls from COBRA recipients after Ms. Campbell's retirement checking to be sure DAS had received their monthly payments and indicated that she accessed the TRAVIS system to pull up participant records and answer questions.

The witness testified that at some point in September or October 2008 Appellant handed her a stack of checks and asked her to enter them into the TRAVIS system because she was behind in doing so. She stated that Appellant offered her little guidance, but instructed her to ask questions if any arose. Ms. Neel observed that she was not provided with, nor was she aware of, any specific agency wide instructions regarding how to make COBRA entries in the TRAVIS system. The witness testified that she after entered the checks, she returned them to Appellant.

Ms. Neel indicated that per Appellant's instruction she took over the task of entering TRAVIS checks. She recalled that although she first received checks from the Appellant, she ultimately ended up receiving them directly from Martha Fullerman, the clerk. The witness testified that she never took checks to Payroll to be deposited and always returned them to Appellant, with the exception of one instance when Appellant specifically instructed her to take the checks directly to Myron Bell because Appellant was going to be out of the office.

The witness stated that in addition to entering TRAVIS checks she continued to answer telephones, and recalled that she received several angry complaints from customers who stated that their checks were not being cashed in a timely manner. She recalled that the CSAs received instructions to tell callers that Payroll was behind on cashing the checks because of their move from one floor to another. Ms. Neel testified that she forwarded some of the calls and sent emails to Appellant regarding the complaints to ensure that there was a paper trail showing what she had done with them, but did not follow up after that because she assumed Appellant had handled the complaints.

The witness recalled learning about new procedures for handling checks in a March 2009 meeting. Ms. Neel testified that after the meeting, the process required that a log of processed checks be kept, including payer names, amounts, check numbers, dates received, and copies of the checks, with signatures required by all. The witness testified that after the March 2009 meeting, she received checks and spreadsheets from Ms. Fullerman, entered them into TRAVIS, and then took the

checks and log to Myron Bell for deposit; she noted that she continued to follow this process until June 2009, after which time her responsibilities for TRAVIS entries were removed.

Myron Bell testified that he is presently employed by Appellee in the HCM Benefits Unit. He indicated that he has been employed in Appellee's Benefits Unit for approximately fourteen years, and noted that the HCM unit was created when the OAKS system was implemented in 2007. The witness noted that during the time period in question, his focus was on benefits in the OAKS system, which is a separate system for all of State of Ohio employees. He explained that TRAVIS was specific to COBRA benefits only; he stated that he did not have the proper clearance to make changes in TRAVIS and could only look up participant records in the system.

Mr. Bell testified that although he received sporadic training on COBRA entry processes from Diana Campbell prior to her retirement, neither he nor anyone else ever received comprehensive training on the TRAVIS system. He observed that no one was hired after Ms. Campbell's retirement to replace her and recalled that Ms. Campbell's responsibilities were absorbed by Appellant and Ms. Neel.

The witness testified that prior to the March 2009 change in office procedures, he consistently followed the process in which Diana Campbell trained him for submitting checks to Payroll. He noted that upon receipt of checks from the clerk, he first identified whether the payment was directed towards OAKS or TRAVIS. Mr. Bell explained that OAKS and TRAVIS checks were distinguishable in several ways; although both systems provided users with coupons to be sent in with the payment, customers did not consistently label their checks or send in the coupons. The witness testified that the best way to distinguish between checks being sent to the TRAVIS or OAKS system was the presence of a social security number.

The witness testified that he consistently documented and submitted OAKS checks in an Excel spreadsheet prior to submitting them to either Paul Lebica or Minnie Jamison in Payroll for deposit. He noted that he documented and submitted TRAVIS checks in December 2008, which was the first time Appellant had asked him to deposit TRAVIS checks; the only other TRAVIS checks he received from Appellant were the forty to fifty checks she gave him in February 2009.

Mr. Bell testified that he was told by the Payroll Department that they could only accept checks on certain days, which frequently required him to physically hold onto checks for a week or two until Payroll was able to accept them. The witness confirmed that until March 2009 he followed Diana Campbell's practice of locking the checks pending deposit in his desk drawer. He noted that if there was an issue requiring further research, or depending on Payroll's schedule, it would not be uncommon for the deposit of a check to be delayed for a month or more. The witness stated that he was never made aware of any two-day requirement for processing checks as stipulated by OAC 113-1-02.

Mr. Bell testified that he did not recall ever signing off on any comprehensive COBRA procedures, and noted that the preferred process for entering COBRA payments was constantly evolving. He recalled that after March 2009, procedures were put in place which required COBRA payment checks to be sent to payroll for deposit on a daily basis, and to be kept locked in a safe if their deposit was delayed. The witness confirmed that he received either written or emailed instructions on how to handle checks in March 2009, and additional agency-wide procedures for entering COBRA payments were implemented in October 19, 2009. Mr. Bell observed that only the agency director had the authority to implement such procedures, and noted that the October 2009 email acknowledged that a standard process had been lacking prior to that time.

The witness testified that communication in the office was typically carried out either in person or by email. He further testified that because Social Security numbers were used as employee identifiers by the TRAVIS system, it was common practice to send emails regarding this system that contained these identifiers in spreadsheets, especially when communicating with the Fiscal Accounting department and Paul Lebica; Mr. Bell observed that he was not aware of any policy or verbal instructions prohibiting employees from sending such information to co-workers through the State's secured email system. The witness outlined the process for logging onto the State email system, both from home and the office, and noted that users must enter a State ID and password in order to gain access to the system.

Mr. Geis testified that he has been employed by the Department of Administrative Services as a Labor Relations Manager for the past three years, and that part of his role is to oversee administrative investigations and recommend disciplinary actions. He recalled that he conducted an administrative investigation to determine how to address a specific customer complaint regarding uncashed

COBRA checks; the witness explained that the complaint had been made by Theresa Schaefer via Dee Seidenschmidt. Mr. Geis stated that he provided Appellant with a series of questions to which she provided written responses and relied upon Appellant's responses in assessing the scope of the problem. He noted that Appellant indicated that the issue was likely limited to Ms. Schaefer, and that the standard processing time for payments was approximately seven days.

The witness recalled that his administrative investigation and the investigation conducted by the Investigator General ultimately revealed that five hundred TRAVIS checks were missing and undeposited; the checks were discovered in the credenza of Appellant's superior, David Holbrook, in April 2009. Mr. Geis testified that Mr. Holbrook was removed from employment not because the checks were found in his office, but because he was a manager of a floundering program.

Mr. Geis stated that he believed that Appellant affirmatively misrepresented the status of the TRAVIS checks, because although she had been made aware of several complaints regarding unprocessed checks by Ms. Neel she made no report of the problems and took no ameliorative action. He noted that based upon her job description, Appellant had a duty to investigate, address and report the complaints received. The witness indicated that Appellant was also responsible for overseeing the means and methods of COBRA administration and observed that when employees retire their program manager is obligated to ensure that their duties are carried out, either by delegation or by direct assumption of the duties. He testified that after Ms. Campbell's retirement it became Appellant's duty to ensure the successful execution of the TRAVIS processes. Mr. Geis noted that although Appellant may not have had the authority to implement agency-wide procedures, as a manager she could make recommendations to her direct reports with her supervisor's approval.

The witness recalled that he was made aware by Nancy Kelly of Appellant's transmission of sensitive employee data via email. He testified that although the office does permit the transmission of OAKS employee ID numbers freely, sensitive employee information is not to be transmitted over unencrypted email. He observed that employees are always encouraged to assess the IT security risk prior to transmitting sensitive information by first assessing the need for the flow of information. The witness recalled that Nancy Kelly indicated she had no need for the Social Security numbers sent by Appellant. He also testified that any employee, whether in OAKS or TRAVIS, has a less sensitive employee ID that can be utilized.

Mr. Geis testified that his office employs a program of progressive discipline, which calls for increasingly severe steps in a disciplinary process prior to termination, tempered by the egregiousness of a particular offense. He observed that dishonesty, coupled with neglectful mismanagement, would result in a recommendation for discharge.

FINDINGS OF FACT

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

Appellant was employed by Appellee for approximately two years prior to her removal from employment on August 24, 2009, and had approximately twenty-one years of State service. Appellant was appointed to the position of Human Capital Management (HCM) Benefits Team Manager in 2007 and was responsible for the administration of benefits for State employees and their families, including former employees who continued their health insurance benefits coverage through COBRA. Appellant supervised five employees who administered benefits and processed payments for benefit plans (including COBRA coverage). "Processing" a COBRA payment means entering checks received into the computer system and delivering the checks to the Fiscal Accounting unit for deposit.

Appellant supervised Diana Campbell, who tracked and processed COBRA payments to the TRAVIS system, and Myron Bell, who tracked and processed COBRA payments to the OAKS system. After Ms. Campbell's sudden retirement in August 2008, Appellant assumed full responsibility for the 187 former employees covered under the TRAVIS system. Ms. Campbell did not train Appellant or any other employee on the TRAVIS system prior to her retirement.

Appellant began receiving customer service mailings and TRAVIS checks that would have previously been routed to Ms. Campbell in September 2008. She followed what she believed to be the standard practice of locking unprocessed checks in her desk; Appellant kept the TRAVIS checks she received between August 22 and October 12, 2008, in her desk and did not personally enter or assign anyone else to enter the payments into the TRAVIS system during that time period.

On October 13, 2008, Appellant gave the unprocessed TRAVIS checks she had collected, along with a general TRAVIS system manual to Customer Service Assistant Linda Neel, instructing her to enter the checks. She further instructed Ms. Neel to enter any TRAVIS checks received in the future before forwarding them to her; Appellant retained responsibility for delivering the checks to Mr. Bell, who continued to be responsible for taking the checks to Payroll to be deposited.

Appellant was aware that complaints had been received from COBRA participants that their payment checks were not being cashed in a timely manner. In early 2009, Ms. Dee Seidenschmidt forwarded a series of emails she had received from former employee Theresa Schaefer regarding her uncashed COBRA checks totaling approximately \$815; Appellant was aware at this time that Ms. Schaefer's checks had not been processed for several months. Appellant located the uncashed checks and assured Ms. Seidenschmidt that the checks would be deposited, but failed to actually cash the checks until February 23, 2009, when her supervisor personally brought the matter to her attention again.

New procedures for handling checks were implemented in March 2009; after March 2009, individuals who handled checks were required to maintain a log of processed checks that included the payer's name, amount of the check, check number, date received, and a copy of the check. Checks were to be sent to Payroll for deposit on a daily basis and were to be kept locked in a safe. In October 19, 2009, agency-wide procedures for entering COBRA payments were implemented.

After March 2009, Ms. Neel received TRAVIS checks and spreadsheets directly from Martha Fullerman, entered the checks into the TRAVIS system, and then took the checks and log to Myron Bell for deposit; she followed that process until June 2009, after which time she was no longer responsible for TRAVIS entries.

In July 2009, Nancy Kelly requested information from Appellant on the status of the TRAVIS system's coverage of former employees. Appellant accessed her State email through her home computer to respond to Ms. Kelly's inquiries in a timely manner and included spreadsheets in her response that contained participants' standard system identifiers; the TRAVIS system uses employees' Social Security numbers as identifiers. It was common practice among employees to send emails within the State email system regarding the TRAVIS system containing employee identifiers/Social Security numbers in spreadsheets, especially when communicating with the Fiscal Accounting department.

In order to access the State's secured email system, either from an office computer or a remote location, users must log in with a State ID and password. Appellee does permit the transmission of employee ID numbers, however, sensitive employee information should not be transmitted over unencrypted email.

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, 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 of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order.

With regard to the infraction(s) alleged, Appellee must prove for 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 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.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against her, 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 R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Appellant asserted in her Motion to Vacate Order of Removal for Denial of Procedural Due Process that she was denied due process because the offenses for which she was ultimately removed were not the same as those with which she was initially charged.

Information contained in the record indicates that Appellant was notified of and had the opportunity to participate in a pre-disciplinary hearing. Appellee notified Appellant of the pending pre-disciplinary hearing by letter dated July 20, 2009

(Appellee's Exhibit 2), and stated therein that discipline was being contemplated based on a violation of R.C. 124.34, including incompetency, inefficiency, dishonesty, insubordination, neglect of duty, and violation of agency work rules. The letter also listed eight specific charges and/or allegations, noting that they constituted a short synopsis of the facts known at the time and should not be construed as including all of the details of the events giving rise to possible disciplinary action. When the R.C. 124.34 Order of Removal which terminated Appellant's employment was provided to her (Appellee's Exhibit 1), it referenced only four specific charges. A review of the two documents shows that, while the wording utilized in the R.C. 124.34 Order of Removal did not exactly match the language used to describe the corresponding charges in the pre-disciplinary notice, the substance of the allegations provided Appellant with sufficient notice as to the conduct being relied upon to allow her to respond to the charges at her pre-disciplinary hearing. No charges were contained in the R.C. 124.34 Order of Removal which were not referenced in the pre-disciplinary hearing notice.

Accordingly, I find that Appellant had notice of the charges against her and an opportunity to respond to those charges. I further find that Appellant's due process rights were observed and Appellant's Motion to Vacate is hereby **DENIED**. Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in effectuating Appellant's discipline.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. The first charge upon which Appellant's removal was based was that she failed to ensure that COBRA premium checks were processed and/or remitted in a timely manner in accordance with R.C. 113.08 and OAC 113-1-02, and that such failure constituted a neglect of duty.

Appellant confirmed that she held the TRAVIS checks she received between August 22 and October 13, 2008, in her desk without entering them into the system. While a sixty day delay in handling checks would most likely be considered unreasonable as a general business practice, Mr. Bell testified that it was not unusual for checks to be held for as long as thirty days due to questions or Payroll's deposit restrictions. Testimony and evidence contained in the record demonstrated that no clearly defined procedure for processing COBRA payments in the TRAVIS system existed prior to March 2009 (Appellant's Exhibit A); no testimony was offered to indicate that Appellant failed to comply with those procedures once they had been communicated to her. Appellant testified that she had no knowledge of

either R.C. 113.08 or OAC 113-1-02 prior to the issuance of the Inspector General's report of investigation in June 2009 (Appellee's Exhibit 26). That report concluded that Appellee had failed to establish proper procedures and protocols to ensure tracking and timely processing of TRAVIS checks (Appellee's Exhibit 26, page 10). I find that Appellee failed to provide sufficient testimony or evidence to establish that it had an established standard of conduct with regard to either the procedure for processing and/or remitting TRAVIS checks, or the timeline to which employees were expected to adhere prior to March 2009. Therefore, Appellant's removal may not be properly based upon the charge of neglect of duty arising from a failure to timely process and/or remit COBRA premium checks.

The second charge upon which Appellant's removal was based was that she represented that she deposited or would deposit premium check(s) for a COBRA enrollee to interested parties, including the enrollee, but did not do so in accordance with her representation, and that such misrepresentation constituted a neglect of duty and/or failure of good behavior. Evidence and testimony contained in the record indicated that Appellant was contacted on or about January 6, 2009, by Dee Seidenschmidt, Director of Personnel and Benefits for the Ohio Bureau of Workers Compensation, on behalf of Theresa Schaefer regarding uncashed COBRA checks; although Appellant told Ms. Seidenschmidt that the payments would be processed and deposited by Friday, January 9, 2009, they were not processed or deposited by that date. Appellant was again contacted by Ms. Seidenschmidt on January 20, 2009, and assured her that the checks had been processed when they had not. Ms. Seidenschmidt contacted Appellant again on January 29, 2009, and Appellant assured her that Ms. Schaefer's checks would be processed and deposited early the next week; the payments were not processed and deposited during that timeframe. On February 10, 2009, Ms. Seidenschmidt contacted Appellant and Appellant assured her that the checks would be processed and deposited by that Friday, February 13, 2009; Appellant failed to process or deposit the checks. Appellant's supervisor, David Holbrook, also contacted her on February 10, 2009, to inquire as to the delay in handling Ms. Schaefer's checks, instructing her that the matter needed to be taken care of that day. Mr. Holbrook contacted Appellant the next day, February 11, 2009, to reiterate that the matter needed to be resolved no later than the close of business that day. On February 23, 2009, Ms. Seidenschmidt contacted Appellant for the fifth time regarding the uncashed checks; Appellant processed and deposited Ms. Schaefer's checks that day.

As noted previously, Appellee had no written standards regarding the procedure for processing and/or remitting TRAVIS checks, or the timeline to which

employees were expected to adhere in place prior to March 2009. In this instance, however, Appellant was instructed by her supervisor to rectify the ongoing problem within a clearly defined period of time, yet failed to do so. I find that Mr. Holbrook's verbal directive to immediately handle Ms. Schaefer's uncashed checks was sufficient to constitute an established standard of conduct that was communicated to Appellant. Appellant did not process and deposit Ms. Schaefer's checks until twelve calendar days following Mr. Holbrook's instruction to do so, and took action only after receiving another email from Ms. Seidenschmidt. I find that this conduct violated the standard established by Mr. Holbrook's directive and Appellant's discipline may be properly based upon this charge.

The third charge upon which Appellant's removal was based was that Appellant misrepresented to an agency investigator that there was only one delayed or unprocessed COBRA premium check despite having reason to know that this was probably inaccurate; Appellee alleged that this conduct constituted dishonesty or failure of good behavior. Appellee conducted an investigatory interview with Appellant on or about March 4, 2009 (Appellee's Exhibit 25) specifically asking during that interview if the processing of any payments other than Theresa Schaefer's had been delayed, as well as whether there were currently any payments waiting to be processed that were outside the normal time frame. Appellant answered that Ms. Schaefer's checks should have been the only ones with a delay in processing and that there were no other payments outside the normal time frame that were waiting to be processed. She testified that she understood "processed" to mean that a payment had been entered into the system and the check delivered to the Fiscal Accounting unit for deposit and Appellee specified no other definition of the term.

Testimony at record hearing established that Ms. Neel began entering payments at Appellant's direction into the TRAVIS system on a regular basis beginning in October 2008 and continuing through June 2009. Once the payments were entered, Ms. Neel returned the checks to Appellant to be taken to the Fiscal Accounting department. While Appellee produced evidence to establish that Appellant was aware that complaints had been received in January and February that some participant checks received from September through January had not been cashed, it produced no evidence to establish that the alleged delay in cashing those checks was the result of a failure to enter the payments into the TRAVIS system or a failure to submit the checks to Payroll. Appellee produced no testimony or evidence to establish that the processing of any other checks was delayed. Accordingly, I find that Appellee has failed to show by a preponderance of the

evidence that Appellant had a reason to know that the information she provided during her interview was inaccurate. Accordingly, Appellant's removal may not be properly based upon the charge of dishonesty any/or failure of good behavior arising from her alleged misrepresentation to an agency investigator of the number of checks that had been delayed or were unprocessed.

The final charge upon which Appellant's removal was based was that she transmitted approximately ninety-five Social Security numbers of COBRA enrollees via e-mail without encryption and without good reason, creating a potential security risk. Appellee asserted that her actions constituted a neglect of duty and/or incompetency. Testimony and evidence contained in the record indicated that Appellant transmitted the pertinent information in response to Nancy Kelly's request for information from Appellant on the status of the TRAVIS system's coverage of former employees. Appellant sent the requested information through the State email system and Ms. Kelly retrieved the information through the State email system. In order to access the State email system, either from an office computer or from a remote location, a user must log into the system with a State ID and password.

Testimony established that it was common practice to send information containing this type of information between employees using the State's email system. No evidence was presented to indicate that Appellant transmitted sensitive information to an email address outside the State's secure system. Appellee failed to provide testimony or evidence to establish that it had an established standard of conduct regarding the transmission of potentially sensitive information within the State of Ohio's email system, other than Mr. Geis' testimony that employees are encouraged to assess the IT security risk prior to transmitting sensitive information by first assessing the need for the flow of information. I find that Appellee has failed to meet its burden of showing that it had an established standard of conduct with regard to the transmission of sensitive information within the State email system, that the standard was communicated to Appellant or that her conduct violated any such standard. Therefore, Appellant's removal may not be properly based upon the charge of neglect of duty and/or incompetency related to her transmission of Social Security numbers of COBRA employees via State of Ohio email.

Of the four charges contained in the R.C. 124.34 Order of Removal issued to Appellant, I find that Appellee has met its burden of proof with regard to only one of the charges contained in the R.C. 124.34 Order of Removal – neglect of duty and/or failure of good behavior by failing to deposit premium check(s) for a COBRA

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enrollee, as represented to interested parties. While it is clear that the level of customer service provided by Appellant to Ms. Schaefer was unacceptable, upon a review of all of the testimony and evidence presented at record hearing I find that the single charge proven by Appellee is insufficient to support removal as a disciplinary response to Appellant's conduct.

Therefore, I respectfully **RECOMMEND** that Appellant's removal be **MODIFIED** to a thirty-day suspension. Appellant shall receive all back pay and benefits to which she may be entitled as a result of such modification.


Jeannette E. Gunn
Administrative Law Judge

JEG: