

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Marianna Lehr,

Appellant,

v.

Case No. 10-REM-09-0258

Department of Rehabilitation and Correction,
Richland Correctional Institution,

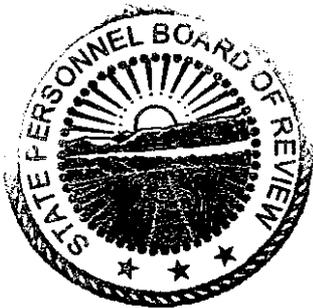
Appellee.

ORDER

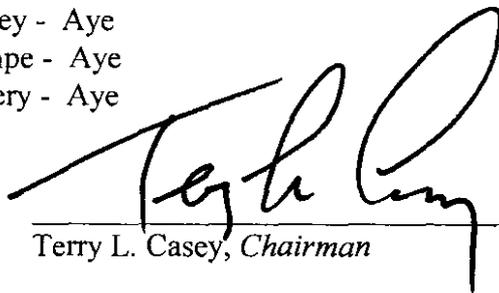
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 suspension, pursuant to O.R.C. § 124.34.



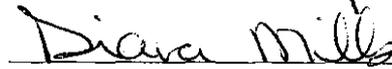
Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

CERTIFICATION

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto 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, September 1, 2011.


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**

Marianna Lehr,

Case No. 10-REM-09-0258

Appellant

v.

May 26, 2011

Department of Rehabilitation & Correction,
Richland Correctional Institution,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on for consideration pursuant to Appellant's appeal of her termination from employment. A record hearing in the instant matter was held on December 6, 2010. Appellant was present at the record hearing and was represented by Wayne Zacour, attorney at law. Appellee was present at record hearing through its designee, Labor Relations Officer Charles Scruggs, Jr., and was represented by Komlavi Atsou and Timothy A. Lecklider, Assistant Attorneys General.

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

Rule #5F – Damage, loss, or misuse of State owned or leased computers, hardware/software, e-mail, internet access/usage.

Rule #33 – Misuse of State or Federal funds.

Rule #45 – Without express authorization, giving preferential treatment to any individual under the supervision of the Department, or any individual within six (6) months following their release from custody or supervision of the Department.

Rule #45A- The offering, receiving, or giving of favor. Misfeasance, malfeasance, or nonfeasance in office.

Rule #50 – Any violation of ORC 124.34 – and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative

Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office.

Prior to the record hearing, the parties entered into the following stipulations:

- 1) Appellant purchased shoes for four inmates: Inmate Radowenchuk, Tellis, McFarland and Ponce.
- 2) The inmates paid for the shoes that were ordered by Appellant.
- 3) Appellant used state equipment to make the purchases.
- 4) The State Personnel Board of Review has jurisdiction to consider this case pursuant to R.C. 124.03 and 124.34.
- 5) Appellee procedurally complied with the requirements of the pre-disciplinary process and service of the R.C. 124.34 Order of Removal upon Appellant.
- 6) The transcript prepared from the audio recording of Appellant's interview is a true and accurate copy.

STATEMENT OF THE CASE

Appellant testified that she was employed by Appellee as a Commissary Manager at Richland Correctional Institution (RCI) immediately prior to her removal from employment. She indicated that she had been employed by Appellee for approximately fifteen years and had held positions at several institutions during her tenure with Appellee. Appellant identified Appellee's Exhibit U as a copy of her position description and confirmed that she was required to be familiar with commissary policies and procedures and was responsible for ensuring that the inmates and staff she supervised were also familiar with them.

Appellant testified that she knew which vendors were approved for use by the commissary. She noted that the commissary stopped selling shoes approximately three years prior to her discipline, because there was not enough room to stock them.

Appellant identified Appellee's Exhibit B as a copy of Appellee's Standards of Employee Conduct. She acknowledged that she had received a copy of the Standards and knew that she was responsible for reading and following it (Appellee's Exhibit C).

Appellant reviewed Appellee's Exhibit D (Offender Personal Property) and noted that the policy was effective October 2009. She agreed that the policy states that offenders may receive personal property only from approved sources, and also states that they may only order from an agency-approved vendor catalog. Appellant agreed that the policy also prohibits one offender from making or facilitating a purchase on behalf of another offender. She noted that the policy provides that all purchases between offenders and vendors are a business transaction strictly between the two parties.

Appellant confirmed that the chart in Section D of Appellee's Exhibit D indicates that inmates can only have one pair of tennis shoes. She agreed that the policy provides that inmate packages may only be held for seventy-two hours, and acknowledged that she kept the shoes she had ordered for Inmate Ponce in her office for a longer period of time.

Appellant stated that she was not aware of the policy contained in Appellee's Exhibit D prior to the incidents which formed the basis for her discipline, and that the policy was not available to her. She testified that she did not intend to violate the policy. Appellant noted that Appellee has many policies and procedures and that they are constantly being revised. She observed that she receives several notifications each day regarding policy changes or revisions. Appellant noted that during her six years as Commissary Manager at RCI, no one from the institution had ever instructed her on Appellee's policies and procedures or discussed any policy changes or revisions with her.

Appellant noted that she ordered the inmates' shoes through the commissary because she had ordered shoes in the past and believed that it was a normal function of her job. She explained that she collected payment for the shoes through the commissary's point of sale system and charged the commissary's standard twenty-three percent markup for items sold. Appellant identified Exhibits G and I as documents related to her purchase of shoes for Inmate Tellis from the Access Catalog Company. She identified Exhibits N and P as documents related to her purchase of shoes from Walkenhorst's for Inmates Radowenchuk and McFarland; Appellant noted that she originally purchased one pair of shoes for Inmate Ponce,

but when he was unable to pay for them she sold them to Inmate McFarland rather than sending them back to the vendor. She stated that she was not aware of any policy that prohibited her from ordering items from Walkenhorst's, and explained that she had ordered commissary items from that vendor in the past.

Appellant noted that she had never been disciplined during her tenure with Appellee. She observed that she now understands that her actions violated the Offender Personal Property policy, but believes that her discipline was too harsh because she had never been made aware of the policy and was open and cooperative with institution employees regarding the matter.

Mr. Charles Broome testified that he is presently employed by Appellee at RCI as a Business Administrator 3 and has held that position for approximately ten years. He noted that he has been employed by Appellee for a total of twenty-three years.

The witness indicated that he is responsible for supervising supervisory employees in several areas, including the commissary. Mr. Broome confirmed that he was Appellant's immediate supervisor. He noted that the commissary is a small sundry store within the institution, operated for the use of the inmates, and that three State employees work in the store along with approximately eighteen inmates.

Mr. Broome explained that as Commissary Manager, Appellant was responsible for ordering all of the resale items and forwarding the paperwork for those purchases to him after the merchandise had been received. He noted that he received the information regarding the shoes Appellant purchased in this manner, which led to his review of the transactions; the witness recalled that he informed the Warden, who instructed him to begin the investigation process. Mr. Broome testified that even though he considered Appellant to be a dedicated, tireless employee of the State of Ohio, he was still required to report what appeared to be a policy violation.

The witness testified that he expected Appellant to be familiar with the policies that applied to the commissary, and noted that Appellee expects its employees to know the policies that pertain to their areas. He confirmed that all departmental and institutional policies are available to employees through Appellee's computer network.

Mr. Broome explained that he understood Appellant's removal was based upon her ordering shoes for inmates who worked in the commissary. He noted that it is not appropriate to sell items in the commissary that are not available to the general inmate population, as it would be considered preferential treatment. The witness noted that Appellee's training from the first day of employment emphasizes that staff must be firm, fair, and consistent, and that doing something for only one inmate jeopardizes both the employee and the inmate. He stated that he is not aware of any policy exception that would have allowed Appellant to purchase the shoes for resale to offenders.

The witness observed that inmates are permitted to have only one pair of state-provided shoes and one pair of personal shoes. He noted that offenders are restricted as to which vendors they can order items from and the number of packages they can receive per year. Mr. Broome stated that while Appellant may or may not have been aware of the exact number of packages an inmate could receive per year, he would have expected her to be generally aware of the package program. He confirmed that he did not specifically review policies regarding the program with Appellant.

Mr. Broome confirmed that although Walkenhorst's is one of the vendors that the commissary does business with, it is not an approved vendor from which offenders can order directly. He noted that offenders can order shoes through Access Secure Pack, but that Walkenhorst's is not an approved vendor for inmate shoes.

Mr. Charles Scruggs, Jr. testified that he is presently employed by Appellee at the Richland Correctional Institution as Labor Relations Officer. He noted that he has held that classification for approximately ten years and has worked at Richland Correctional since 2001. The witness explained that he is responsible for interpreting and applying the provisions of labor contracts, as well as administering the disciplinary process for bargaining unit and exempt employees and recommending discipline to the Warden.

Mr. Scruggs recalled that he reviewed all of the information contained in the investigative report before making a recommendation to the Warden for discipline in Appellant's case. He confirmed that he also reviewed Appellee's Employee Standards of Conduct. The witness noted that the Standards allow for a range of disciplinary action, depending upon the severity of the offense.

FINDINGS OF FACT

Based upon the stipulations entered into by the parties, as well as the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Appellant was employed by Appellee as Commissary Manager at RCI, and had held that position for approximately six years at the time of her removal. Prior to her removal, Appellant had no history of disciplinary action.

Utilizing the normal procedure employed for purchasing commissary items for resale, Appellant purchased three pairs of tennis shoes for inmates who worked in the RCI commissary. One pair of shoes was purchased from Access and two pair were purchased from Walkenhorst's. Access is an approved vendor from which inmates may purchase shoes, but Walkenhorst's is not. Inmates Tellis, Radowenchuk and McFarland purchased the shoes through the commissary point of sale system and paid the standard twenty-three percent commissary mark-up. State equipment was utilized to facilitate the purchases.

Appellee procedurally complied with the requirements of the pre-disciplinary process and service of the R.C. 124.34 Order of Removal upon Appellant.

Appellant received no specific training on the policies and procedures related to the inmate package program. Appellant was responsible for knowing the policies that applied to the commissary area. All of Appellee's departmental and institutional policies are available to employees through Appellee's computer network.

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. The standard of proof required by this Board, a "preponderance of the evidence," means that Appellee must produce evidence

which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to the Appellant, that the 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 infractions, 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 the 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. In this instance, Appellant stipulated that Appellee procedurally complied with the requirements of the pre-disciplinary process and with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in effectuating Appellant's removal.

Testimony and evidence was presented at record hearing regarding Appellant's knowledge of Appellee's Offender Personal Property policy and her alleged violation of that policy. I find that violation of the Offender Personal Property policy was not a charge included in the R.C. 124.34 Order issued to Appellant, and her discipline may not be properly based upon it.

Testimony and evidence was also presented at record hearing regarding Appellant's knowledge of Appellee's Standards of Employee Conduct and her alleged violation of Rule #5F (damage, loss, or misuse of State owned or leased computers, hardware/software, e-mail, internet access/usage); Rule #33 (misuse of State or Federal funds); and Rule #45/45A (giving preferential treatment to any individual under the supervision of the Department without express authorization; offering, receiving, or giving of favor). Appellant was also charged with violation of Appellee's "catch all" rule, Rule #50, which simply echoes the language found in Ohio Revised Code Section 124.34. I find that Appellee presented sufficient

testimony and evidence to support a conclusion that it had established standards of conduct with regard to the rules cited, and that those standards were communicated to the Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant stipulated that she utilized State equipment to place the shoe orders, noting that she believed she was doing so as a normal function of her position as Commissary Manager. Appellant testified that she processed the orders as regular commissary transactions and the inmates paid for the shoes, including the standard commissary mark-up, through the point of sale system. Mr. Broome explained that although Appellant handled the sales as a normal commissary transaction, it was inappropriate for her to sell items that were not available to the general inmate population, and that such conduct would be considered preferential treatment. I find that Appellee has presented sufficient evidence to establish, by a preponderance of the evidence, that Appellant's conduct violated Appellee's Standards of Employee Conduct Rules #5F and #45/45A. I find that insufficient evidence was presented to support a conclusion that Appellant's conduct violated Appellee's Rule #33.

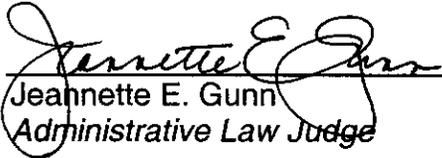
Appellant presented as circumstances mitigating the harshness of the discipline imposed, her lack of disciplinary history, her lack of intent to violate Appellee's Rules, her lack of specific training on policies and policy changes, and her honesty and cooperation in the investigation of the matter. Appellant's supervisor also noted that he considered Appellant to be a dedicated employee. Appellee's disciplinary grid provides for a wide range of discipline for first offenses involving violations of Rules #5F and #45/45A – from a written reprimand to removal. Based upon an examination of the totality of the circumstances and upon consideration of all of the evidence and testimony presented, I conclude that removal was too harsh a discipline for the offense proven.

Appellant's actions throughout the incident and the disciplinary process demonstrated no intent to act in a dishonest or devious manner. Her conduct, however, did constitute a policy violation that could have had serious repercussions. As Appellant's supervisor noted, Appellee's training stresses that doing something for only one inmate jeopardizes both the employee and the inmate.

Therefore, based upon the above analysis, I respectfully **RECOMMEND** that Appellant's removal be **MODIFIED** to a sixty-day suspension. As a result of such

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modification, Appellant shall receive any applicable back pay and benefits to which she may be entitled as the result of such modification.


Jeannette E. Gunn
Administrative Law Judge

JEG: