

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

JOHN NEFF,

*Appellant,*

v.

Case No. 10-REM-12-0345

CUYAHOGA COUNTY ENGINEER and  
CUYAHOGA COUNTY BOARD OF COMMISSIONERS,

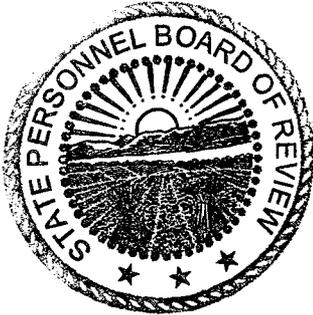
*Appellees,*

**ORDER**

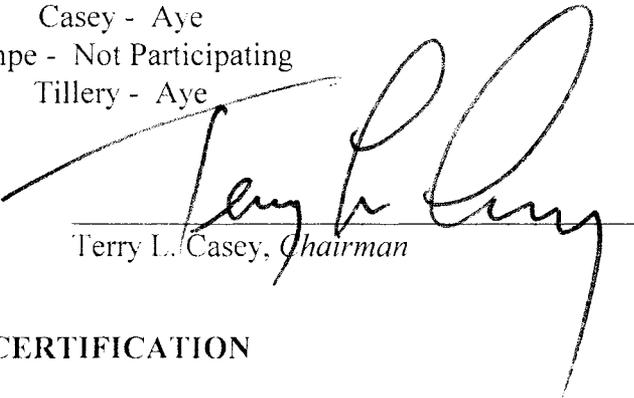
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 the Appellant's removal be **MODIFIED** to a sixty-day suspension.



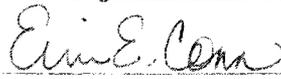
Casey - Aye  
Lumpe - Not Participating  
Tillery - Aye

  
Terry L. Casey, *Chairman*

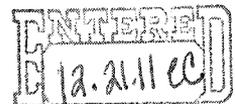
**CERTIFICATION**

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, December 21, 2011.

  
Erin E. Conn  
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**

John Neff,

Case No. 10-REM-12-0345

*Appellant*

v.

September 29, 2011

Cuyahoga County Engineer,

and

Cuyahoga County Board of  
Commissioners,

*Appellee*

Jeannette E. Gunn  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on pursuant to Appellant's timely appeal of his removal from employment with Appellee. A record hearing was held in the instant matter on May 5, 2011. Appellant was present at record hearing and was represented by David T. Ball, attorney at law. Appellee was present through its designee, Sewer Maintenance Administrator Bryan Hitch, and was represented by Dale F. Pelsozy, Assistant Prosecuting Attorney.

**STATEMENT OF THE CASE**

Michael Dever testified that he is presently employed by Appellee as Deputy to the Sanitary Engineer, a position he has held for approximately three years. He indicated that he is responsible for the day to day operations of the Sanitary Engineering Division and noted that in 2010, he was the facility administrator with ultimate responsibility for all of the employees in the division. The witness recalled that in July or August of 2010 Appellant moved from the position of Inflow and Infiltration (I&I) Supervisor in Appellee's Maintenance Department to a construction Supervisor position in order to better utilize his skills.

Mr. Dever testified that in June 2010, based upon conversations with Appellant's supervisor, Bryan Hitch, and other employees, he made the decision to place a GPS unit on Appellant's county-owned vehicle in order to track Appellant's movements during the work day. He stated that GPS data was collected in June and July 2010, and again in September and October 2010.

The witness recalled that Mr. Hitch expressed his frustration about things on Appellant's job sites that were not getting done and alleged that Appellant was not where he was supposed to be during the work day. Mr. Dever noted that, as a supervisor, Appellant was expected to visit job sites to check on his work crews on a daily basis; supervisors are instructed as part of their training to observe crews on a daily basis. He acknowledged that supervisors oversee multiple crews, which requires them to travel to different locations throughout the day, and also need to be in the office at the beginning and end of each work day to make crew assignments and complete paperwork.

Mr. Dever indicated that Appellant typically worked a forty-hour work week and, like all employees, was required to complete a leave sheet if he was going to be out of service. He noted that supervisors start earlier than their crews because they are putting together job assignments, but rotate their hours so that one or two of them are available at the end of the day when workers come back to the office to clean up.

The witness confirmed that disciplinary action was taken against Appellant based on the information gathered from the GPS unit. Mr. Devers noted that Appellant had received a written reprimand in late 2009 for failure to carry out his responsibilities during the course of the work day (Appellee's Exhibit B), and that he had been made aware of the problems with his job performance in his yearly performance review (Appellant's Exhibit 25).

Albert Bouchahine testified that he has been employed by the Cuyahoga County Office of Human Resources as a Personnel Manager for approximately seven years. He confirmed that he conducted Appellant's pre-disciplinary conference on November 4, 2010, and presented a disciplinary recommendation to Appellee, who ultimately made the decision to terminate Appellant's employment.

The witness stated that Appellee alleged that Appellant had violated county policy by being absent from his work site without approval on multiple occasions between June 15 and October 10, 2010. Mr. Bouchahine noted that Appellee's

evidence was gathered from a GPS device placed on Appellant's county-owned vehicle. He recalled that Appellant indicated during the pre-disciplinary conference that he worked long days and from time to time would run errands that he could not otherwise get to; the witness testified that Appellant stated at the pre-hearing that he asked prior permission of Mr. Hitch to do so.

Scott Grant testified that he is employed by Appellee as a foreman with the Sanitary Engineer's department. He indicated that he oversees a four to five-person construction crew and recalled that in 2010 he was supervised by Appellant and Gary Green.

The witness stated that supervisors are expected to be at job sites on a daily basis and testified that Appellant did not come to the sites every day. He noted, however, that Appellant did travel to the job sites once or twice each week – sometimes without prior notice and sometimes when he was requested to do so. Mr. Grant observed that he was able to reach Appellant by telephone a majority of the time but when he could not, he called Mr. Green.

Bryan Hitch testified that he is employed by Appellee as a Sewer Maintenance Administrator and oversees the supervisors of each of the Sanitary Engineer's five divisions. He confirmed that Appellant reported to him from July 2009 until the date of his termination. The witness recalled that Appellant's only discipline prior to his termination was a written reprimand he received in 2009 for not being onsite with his work crews.

Mr. Hitch stated that during the spring and summer of 2010, he heard from work crews and supervisors that Appellant was not coming to job sites on a daily basis. He indicated that he had previous conversations with Appellant about the need to oversee his crews more closely. The witness noted that Appellant's work crews were having problems getting their assignments done in a timely manner and recalled that he also talked to Appellant about being more prompt in completing his office work. Mr. Hitch recalled that he made it clear to all of his supervisors that they were expected to check on their work crews at least once a day, and that they were to make a round in the morning and a round in the afternoon. He further recalled that he had warned them in their supervisor meetings to be sure they were performing their duties. The witness testified that because he was worried about accountability, he went to Mr. Dever with his concerns.

Mr. Hitch testified that the GPS records contained in Exhibit A showed multiple instances where Appellant was at either his home address, his mother's residence, or addresses on North Royalton Road for periods of time ranging from a few minutes to over an hour when there was no legitimate work reason to be there. He noted that Appellant's home and his mother's home are not in an area served by Cuyahoga County, and work crews would not be assigned to work in that area. The witness indicated that on the instances reflected in the GPS data, Appellant did not, to his knowledge, have permission to be at either residence or the North Royalton Road addresses during working hours. He recalled that on two occasions he specifically gave Appellant permission to go off-site during working hours to run an errand; he noted that Appellant turned in a leave slip for only one of those occasions.

Mr. Hitch testified that several of the addresses on North Royalton Road referenced an area surrounding a vacant house approximately half a mile from the Royalton Road bridge project completed by Appellee in October 2010. He indicated that any work performed in that area would have been a spot repair and not a ten-day project.

Mr. Hitch recalled that the GPS units were used to track the whereabouts of four department employees, including Appellant. He noted that when the GPS units were placed on the county vehicles, all supervisors were asked to keep a log to show when they were at lunch. The witness recalled that after July 2010 he decided to have everyone keep a daily log and really pushed to have logs turned in by the end of each week. Mr. Hitch indicated that he had asked Appellant to start turning in a log some time prior to September 14, 2010, but never received any. He observed that none of Appellant's logs received after September 14, 2010, indicate that he was at his home or his mother's home during the times the GPS records reflected that he was there.

The witness indicated that even salaried employees are required to submit paperwork when they work more than an eight or ten hour day. He stated that he thought the department shifted to four ten-hour days in the spring, and that employees were expected to be at work conducting county business for all ten of those hours.

Claudia Martin testified that she is presently employed by Appellee as an Administrative Assistant and is responsible for supervising the Dispatch Office. Ms.

Martin recalled that she worked with Appellant for about five years as his administrative assistant and later as a co-worker.

The witness indicated that she is familiar with the working habits of all of the supervisors in the office and explained that it is common practice to let Mr. Hitch or the other supervisors in the office know if you are going off duty during working hours. She noted that she follows that practice and that Appellant did so as well. Ms. Martin recalled that Appellant talked about needing to check in on his mother on several occasions during the fall or winter of 2010 due to her health issues.

The witness testified that Appellant told her on five or six occasions between June and October 2010 that he needed to go off duty during the work day and she assumed that on at least some of those occasions he needed to check on his mother; she confirmed that she had no authority as a co-worker to approve his going off duty, but explained that she was the "point person" for that type of information because of her involvement with the Dispatch Office. She observed that Appellant did not appear to be trying to hide what he was doing.

Ms. Martin confirmed that an employee who needed to go off duty during working hours would be expected to fill out a leave slip and submit it with payroll. She agreed that a failure to do so would be a violation of policy. She also agreed that it is improper to use a county vehicle for personal use.

Jim Swedyk testified that he has been employed by Appellee for approximately thirty-one years and presently holds the position of Field Supervisor. He indicated that he supervises work crews that response to calls for service from private residences and clean house laterals and sewers.

The witness noted that when a supervisor needs to go off duty during working hours he or she simply lets Mr. Hitch know. He observed that he has done so himself and Mr. Hitch has never denied him the time when he needed it. Mr. Swedyk explained that he typically went off duty during his lunch hour, but confirmed that if an employee took time off to go off duty, he or she would be required to fill out a leave slip to cover the time.

Mr. Swedyk testified that he never had a problem getting in contact with Appellant when he needed him, although he has heard on occasion from other supervisors who were unable to do so. He indicated that he was not aware of any general understanding within the office that Appellant was not available. The

witness agreed that it is part of the supervisor's job to check on work crews to make sure they are doing their jobs properly.

Gary Green testified that he has been employed by Appellee for approximately twenty-three years and presently holds the position of Senior Supervisor. He confirmed that both he and Mr. Hitch supervised Appellant in 2010. The witness noted that at the time of his removal from employment Appellant was working four ten-hour days per week.

Mr. Green recalled that Appellee's transition to ten-hour work days from eight-hour work days involved discussions with supervisors about their daily schedules; he noted that ten-hour days create challenges in having supervisors cover the beginning and end of union employee work days and an on-call supervisor is required to stay late to close up the building at the end of the day. The witness explained that scheduled hours are 7:00 a.m. to 5:00 p.m., but that the on-call supervisor works from 7:00 a.m. to 6:00 p.m. Mr. Green agreed that Appellant occasionally reported for work a few minutes late, as did other employees. The witness noted that in such instances he reminded his employees that the start time was 7:00 a.m.; he observed that he had personally been reminded of that fact by his own supervisor on some occasions.

Mr. Green recalled only one occasion when Appellant asked him to go off duty during the working day, but noted that it would be just as normal for Appellant to ask him as it would be for Appellant to ask Mr. Hitch. He testified that Appellant never asked him for permission to go home for an extended period of time or to go check on his mother. The witness noted that if an employee was off duty for any extended period of time, he or she would have to fill out a leave slip.

Mr. Green testified that when he held the position of Construction Supervisor he did his best to check on his work crews at least once a day. He noted that supervisors have other responsibilities that might require them to be in the office or devote a greater amount of time to one job or another, but that it was expected that they would check on their work crews regularly. The witness testified that Appellant's crews brought it to his attention that Appellant was not checking on them once a day. He indicated that he got calls from Appellant's crews about once a week indicating that they had been unable to reach Appellant.

Appellant testified that he was employed by Appellee for approximately twenty-seven years prior to his termination in 2011.

Appellant acknowledged that Mr. Hitch had discussed with him the necessity of visiting his crews in the field on a regular basis prior to June 2010. He observed that while it was a good idea for a supervisor to observe all of his assigned crews at least once during a given work day, it was not always possible to do so without neglecting his other supervisory responsibilities. Appellant testified that the number of crews he supervised could vary from day to day; on some days he might cover another supervisor's absence by checking on that supervisor's crews in addition to his own.

Appellant noted that he sometimes observes crews from a distance without their knowledge to see how they perform without a supervisor present, and has done so at Mr. Hitch's direction on some occasions. He agreed that part of his responsibility as a supervisor is to train crew members.

Appellant testified that he was at the North Royalton Road locations in late June to perform a dye test to diagnose elevated outflow fecal counts that had been reported; he noted that he ultimately determined that the problem was caused by a broken pipe. Appellant stated that he worked on the problem with Ray McDermott, the plumbing inspector for the City of Brecksville, and that Mr. Hitch was aware that dye testing was also being performed in nearby locations. He recalled that the cleanout for the pipe he was dye testing is located at the top of the hill and he parked near the addresses shown by the GPS data to access that cleanout. Appellant explained that the job took several days and indicated that he provided an explanation of these events at his pre-disciplinary conference. Although he did not recall with certainty, he speculated that he checked the cleanout again in late July and mid-October when he returned to Royalton Road in October to fix a pipe damaged during the bridge replacement project.

Appellant indicated that the June and July 2010 dates showing that he was at his mother's house reflected occasions when he needed to check on his mother due to health concerns. He observed that the duration of his stays varied, based on the amount of assistance she needed on a particular day.

Appellant testified that it was his practice to notify Mr. Hitch or Mr. Green either in person or by telephone when he needed to go off duty to take care of an errand or help his mother. He noted that he was never refused the time by either of them. Appellant observed that it was accepted procedure for supervisors to ask for the flexibility to run personal errands during the work day because of the hours they

put in, over and above their regular work hours. Appellant recalled that the Sanitary Engineer, Mr. Klaiber, instructed employees not to reflect compensatory time or flex time on their time sheets. He explained that supervisors put in additional hours outside the regular forty-hour work week that is shown on their time sheets, and simply take the corresponding amount of time off. Appellant observed that it was "just part of the job" and that Mr. Dever and Mr. Hitch were both aware of and allowed the practice.

Appellant agreed that county policy requires employees to fill out a leave slip if they take time off from work or leave work. He confirmed that he did not fill out leave slips for any of the days reflected in Appellee's Exhibit A. Appellant testified that he did not request sick leave, vacation leave or FMLA leave to assist his mother.

#### **FINDINGS OF FACT**

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

Appellant was employed by Appellee for approximately twenty-seven years. Prior to his termination, the only discipline Appellant had received during his tenure was a written reprimand in late 2009 for failure to carry out his supervisory responsibilities during the course of the work day.

Appellant participated in a pre-disciplinary conference on November 4, 2010, and had an opportunity to respond to allegations that he violated county policy by being absent from his work site without approval on multiple occasions between June 15 and October 10, 2010.

Appellant typically worked an eight-hour work day/forty-hour work week. At the time of his termination, he was working a ten-hour work day/forty-hour work week.

Appellee placed a GPS unit on Appellant's county-owned vehicle in order to track Appellant's location during the work day and collected data in June and July 2010, as well as September and October 2010. Appellant moved from the position

of Inflow and Infiltration (I&I) Supervisor to a Sewer Maintenance Supervisor position in July or August 2010.

To the extent that Appellant's removal was based on data gathered from the GPS device installed on the county-owned vehicle used by Appellant, the pertinent data was reflected in the stipulations submitted as Appellant's Exhibit 2 and incorporated herein. This data reflected multiple instances where Appellant was present with the vehicle issued to him by the County in the very near vicinity of the locations and start times and for the durations stated in the data. The addresses shown correspond to Appellant's home address, Appellant's mother's residence and several adjacent homes located on North Royalton Road.

County policy requires employees to fill out a leave slip if they take time off from work or leave work for a period of time exceeding their regular breaks during the work day. Appellant did not fill out leave slips for any of the days reflected in Appellee's Exhibit A, nor did he request sick leave, vacation leave or FMLA leave in order to assist his mother.

### **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 him, 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. Information contained in the record indicates that Appellant was notified of and had the opportunity to participate in a pre-disciplinary hearing on November 4, 2010, at which time he responded to the allegations made against him. Accordingly, I find that Appellant's due process rights were observed.

Appellant was notified by letter dated December 2, 2010, of his removal from employment. The Order of Removal accompanying the letter stated as grounds for Appellant's removal failure of good behavior, specifically that Appellant violated the county's guidelines for appropriate conduct (falsification of records, failure to comply with a direct order of a supervisor, improper use of a County vehicle, and major theft of office). Appellee asserted in its Pre-Hearing Statement that Appellant was terminated for being out of service during the work day when he was supposed to be performing work for the county. Appellant argues that his supervisor gave him permission to go out of service on some of the instances upon which his removal was based and that he was authorized to take extended lunch breaks as compensatory time on other occasions.

The parties stipulated that Appellant was present with his County vehicle on the dates and times and for the durations listed in the GPS data presented by Appellee. The locations included in the data upon which Appellant's removal was based were Appellant's residence, as reflected by the Amelia Drive and Tollis Parkway addresses in Broadview Heights; Appellant's mother's residence, as reflected by the Turnberry Crossing and Melrose Lane addresses in Broadview Heights; and an area in the 6700 block of Royalton Road in Brecksville.

Upon a review of all of the testimony, I find that Appellant presented sufficient credible testimony to establish that his presence at the Royalton Road addresses in June, July, and October 2010, was directly related to the performance of his job duties. Accordingly, only the dates on which Appellant was recorded at his mother's residence and his own residence during working hours will be considered in evaluating the propriety of the discipline imposed.

Appellant was found to be present at his own residence on twenty-five days from June 15, 2010, through October 13, 2010. Appellant contended that he

typically went off-duty during his lunch break, and the vast majority of the times reflected fell within an 11:00 a.m. to 2:00 p.m. time span. On eighteen of the twenty-five days, Appellant was at his home in excess of a sixty-minute lunch break; on five of those eighteen days he was also tracked to his mother's residence, resulting in his being out of service for one and one-half to two and one-half hours.

Appellant testified that he spoke with Mr. Hitch or Mr. Green either in person or by telephone on the occasions when he went off-duty during the work day and received approval to do so. He further testified that it was an accepted practice for supervisors going off-duty during working hours to notify Mr. Hitch or another supervisor prior to doing so; his testimony was corroborated by Mr. Swedyk and Ms. Martin. Mr. Hitch recalled Appellant asking for permission to go off-duty on only two specific occasions; Mr. Green recalled one occasion.

Appellant also explained in his testimony that it was common for supervisors to balance out time worked that was not recorded on their time sheets with off-duty time during the work day and contended that employees had been specifically instructed by the Sanitary Engineer not to show time worked in excess of their normal work day on their time sheets. Mr. Green testified that he did not recall Appellant ever asking him for approval to be off-duty for an extended time during the work day. I find that Appellant's personal testimony was insufficient to support his claim that office practices allowed supervisors to adjust their work schedules to compensate for time worked but not reflected on their time sheets.

Witness testimony established that County standards require employees to fill out a leave slip if they take time off from work or leave work for a period of time exceeding their regular breaks during the work day. Appellant did not fill out leave slips for any of the occasions on which he was tracked at his own residence or his mother's residence in June, July, September, or October 2010. I find that Appellee's standard of conduct with regard to the use of leave slips for time off work was communicated to Appellant. I further find Appellant's failure to complete leave requests for those days on which he exceeded his sixty-minute lunch break to constitute a violation of Appellee's standard of conduct.

Appellant provided a copy of Appellee's attendance policy, however, minimal testimony regarding applicable provisions was offered. Although Appellee characterized Appellant's conduct in its Order of Removal as falsification of records, failure to comply with a direct order of a supervisor, improper use of a County vehicle, and major theft of office, a review of the policy appears to indicate that

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Appellant's absence from the work site without an approved leave of absence would more accurately be characterized by the policy as a "minor AWOL" incident for which Appellant would be subject to discipline.

As to whether or not an appropriate disciplinary response to such a violation was imposed, I find that removal was excessive in light of the mitigating circumstances demonstrated by Appellant. Credible evidence was introduced into the record to establish that there were a number of long-standing "unwritten" practices existing within the Sanitary Engineer's department; while these practices allow flexibility for responsible employees to adjust their work hours to the jobs that need to be performed, they also create the potential for abuse, whether intentional or unintentional. I further note that Appellant has a long tenure of service with the County, with no significant prior disciplinary history.

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

  
Jeannette E. Gunn  
Administrative Law Judge

JEG: