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

JEFFREY A. JACKSON,

*Appellant,*

v. Case No. 11-REM-03-0069

MONTGOMERY COUNTY BOARD OF COMMISSIONERS,

*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 from his position of Nurse Supervisor with the Montgomery County Board of Commissioners' Stillwater Center, is **AFFIRMED** pursuant to Ohio Revised Code Sections 124.03 and 124.34 and further pursuant to this Board's July 26, 2011 Order of Remand in the instant case.

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, August 22, 2012.

ENTERED 8/22/12

*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**

JEFFREY A. JACKSON, Case No. 11-REM-03-0069

*Appellant*

v. May 2, 2012

MONTGOMERY COUNTY BOARD OF COMMISSIONERS,

*Appellee*

JAMES R. SPRAGUE
*Administrative Law Judge*

## REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on March 7, 2012. Present at the hearing was Appellant, who was represented by Jonathan A. Good, Attorney at Law. Appellee, Montgomery County Board of Commissioners, was present through its designee, Michelle Pierce-Mobley, and was represented by Julie A. Droessler, Assistant Prosecuting Attorney.

This cause came on due to Appellant's February 24, 2011 filing of an appeal from his removal as a Nurse Supervisor with Appellee's Stillwater Center (Stillwater Center or the Center), which removal was effective February 11, 2011 and notice of which was received *via* Federal Express on February 9, 2011.

*As set forth in this Board's July 26, 2011 Order of Remand in this case, this Board determined that Appellant's appeal was timely filed with the State Personnel Board of Review and, accordingly, remanded this case for consideration of the merits of Appellant's removal.*

Further, pursuant to a continuance request filed by Appellant, potential back pay in this matter was held in abeyance for the time period of October 14, 2011 to March 7, 2012.

All post hearing briefs in this matter were filed on or before April 26, 2012 and the record was thereafter closed.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34, as applied in this Board's Order of Remand in this case.

## CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The **R.C. 124.34 Order of Removal** that is the basis of this case reads, in pertinent part:

> The reason for this action is that you have been guilty of ... Failure of good behavior; Neglect of Duty; **Specifically:** This serves as notice of your removal – A pre-disciplinary meeting was held on January 14, 2011 to discuss allegations of your verbal abuse towards a resident. You engaged in gross misconduct with a resident by using methods considered as inappropriate for redirecting behavior, resulting in verbal abuse of a resident. These charges were investigated by the Montgomery County Board of Developmental Disabilities Department of Safety and Protection. The Board substantiated that a Client/Resident's Rights Violation had occurred. We find that you did not treat the resident with respect, courtesy nor with full recognition of their dignity and individuality. Your behavior is wholly unacceptable and thus cannot be tolerated. You were also issued a 10-day suspension effective September 30, 2010 for neglect of duty and failure of good behavior. Therefore, your removal is fully warranted by the above and promotes the efficiency of this department.

As noted, above, effective September 30, 2010, Appellant had also received a 10-day suspension. The **R.C. 124.34 Order of Suspension** regarding that discipline reads, in pertinent part:

> The reason for this action is that you have been guilty of ... Failure of good behavior & neglect of duty **Specifically:** A pre-disciplinary meeting was held on September 8, 2010, to discuss your failure to follow standing house orders, conduct unbecoming of a Supervisor and violation of the Confidentiality Policy.

> You failed to follow standing house orders on three separate occasions. You unilaterally assumed responsibility for residents without assignment and without authorization. You have violated Stillwater Policy #30003 by your failure to ensure the security of individual, identifiable health information.

At hearing, four witnesses testified.

**Carol O'Neill** serves as Manager of Clinical Quality and Training for the Stillwater Center and, in 2010, served as Appellant's supervisor. **Amanda Burke** serves as a Licensed Practical Nurse (LPN) at the Stillwater Center and was one of Appellant's subordinates at the time of Appellant's removal. She was also present on December 14, 2010 and was a witness to the events in question on that date. **Michelle Pierce-Mobley** serves as the Director of the Stillwater Center. Prior to so serving, she served as the Center's Manager of Administrative Services and Facilities. She also served as Appellee's designee at hearing. **Jeffrey A. Jackson, Appellant**, served at the Center beginning July 15, 2008 in his Nurse Supervisor position until the time of his removal. Appellant continuously maintained his Registered Nurse (RN) registration and credentials throughout that time period. He continues to maintain those credentials and is still active in Nursing at this time.

A synthesis of the testimony presented and evidence admitted follows.

Appellant served as a Nurse Supervisor for the Stillwater Center. The Center is a habilitation facility and nursing home for from 98 to 100 residents of Montgomery County who have very severe and profound intellectual disabilities, are physically challenged and/or have severe medical needs.

Appellant worked at the Center from July 18, 2008 until his removal effective February 11, 2011. Appellant supervised a shift at the Center and supervised LPNs in their care of its residents, as well as provided some direct care to those residents.

Some of the residents were at a level of intellectual development whereby they could develop relationships with the staff. Yet, that level of development would at times necessitate extra cognizance of the potential reaction of the residents to various stimuli, including in a conversational setting.

R.C. 5123.62 is entitled "Rights of persons with a developmental disability.". R.C. 5123.62 lays out the general obligation of care providers at such facilities regarding treating all residents with respect and with a full appreciation of the dignity and individuality of each resident.

R.C. 5123.62 is supplemented by the "Stillwater Center Rights of People with Mental Retardation & Developmental Disabilities" (Center's Rights of People policy). The Rights of People policy not only establishes a reporting opportunity but also establishes a structure for reporting perceived violations of the Rights of People policy.

Testimonial and written evidence establish that Appellant received the requisite timely training and refresher courses regarding both R.C. 5123.62 and the Center's Rights of People policy.

On December 14, 2010, while acting in his supervisory capacity and while examining a boil on the face of "Resident R", Appellant is alleged to have leaned over to Resident R's ear and stated, "Shut the Fuck up." in a voice loud enough to be heard at the administrative station across the room.

Witness testimony at hearing was offered to substantiate this accusation.

At hearing, Appellant testified that he made the statement, "Wouldn't it be nice if he'd shut the F up." while at the administrative station in the company of several staffers, including some of Appellant's subordinates.

Appellant further averred that this group was out of earshot of Resident R, that the general atmosphere at the station was jovial and joking, and that Appellant's statement was offered in that vein and was not intended to be hurtful.

Sooner thereafter, but not at that time, one or more of those present reported Appellant's alleged statement and the circumstances surrounding same to another member of the Center's management. Various administrative actions then commenced. These included initiating a Major Unusual Incident report. Additionally, the matter was reported to the Montgomery County Board of Developmental Disabilities for an investigation conducted by its Department of Safety and Protection.

While no "verbal abuse" could be substantiated concerning Appellant's alleged statement to Resident R, a finding was made that Appellant had committed a "Client/Resident's Rights Violation". As a result, on February 3, 2011, Stillwater Center Director Michelle Pierce-Mobley made a recommendation to Montgomery County Director of Human Resources Stephanie Echols that Appellant be removed. Shortly thereafter, the Montgomery County Board of Commissioners acted on that recommendation and removed Appellant. The pertinent components of Appellant's R.C. 124.34 Order of Removal are set forth, above.

Testimony reflected that Resident R was capable of establishing relationships with staff. Yet, it could also be gleaned from testimony that Resident R would perhaps react more negatively and could be more adversely affected than might another, higher functioning, individual exposed to Appellant's alleged loud oral pronouncement at close quarters.

Testimony was presented that Appellant was also acutely aware of the seriousness with which the Center took allegations either of either verbal abuse or of a Client/Resident's Rights Violation. Indeed, not long before the incident in question in this appeal, two LPNs respectively received 10-day suspensions and were placed on Last Chance Agreements for such violations.

The record reflects that Appellant also received a 10-day suspension effective September 30, 2010 (please see the pertinent language of this same R.C. 124.34 Order of Suspension set forth, above). That R.C. 124.34 Order of Suspension alleges that on three occasions Appellant failed to follow standing house orders, assumed responsibility for a resident without authorization, and failed to secure confidential health data. The order finds that Appellant committed a failure of good behavior and neglect of duty. Appellant did not appeal that 10-day suspension to this Board. Thus, we cannot, now, assess the merits of that R.C. 124.34 Order of Suspension.

At hearing, Director Pierce-Mobley indicated that, in the instant case, she had not recommended that Appellant be given a 10-day suspension and placed on a Last Change Agreement (please recall she recommended removal). She stated this was the case due to three factors.

First, she indicated, Appellant did not exhibit a change in his alleged errant behavior; thus, his prior discipline of a 10-day suspension was not working, she

opined. Secondly, she averred, the Center has an obligation to protect its residents. Thirdly, she offered, Appellant's alleged offense here was committed on December 14, 2010, in close time proximity to the alleged offenses that led to Appellant's afore-mentioned September 30, 2010 10-day suspension.

Appellant offered that he should have been given the same chance to have only a 10-day suspension and a Last Change Agreement as was given to the two LPNs, who had committed not dissimilar acts to those Appellant was alleged to have committed. Appellant thus raised a disparate treatment argument concerning his removal in relation to the discipline for these two LPNs.

The undersigned respectfully suggests Appellant's argument is misplaced for three reasons.

First, these two LPNs were line employees, while Appellant was a supervisory employee. Secondly, the discipline of these two employees fell under the pertinent collective bargaining agreement, while Appellant's discipline and appeal rights fell under the statutory scheme and administrative procedures applicable to exempt employees. Thirdly, these two employees held LPN credentials, while Appellant held an RN credential and was administratively and statutorily tasked with supervising employees having LPN credentials. Thus, the argument that work rules regarding verbal abuse and Client/Resident's Rights Violations apply equally to Appellant and these two LPNs appears to lack substantial merit.

We also note that Appellee included certain language in its R.C. 124.34 Order of Removal regarding verbal abuse. Yet, it is noted that neither the Department of Safety and Protection nor Appellant's Pre-Disciplinary Hearing Officer found *verbal abuse* to have occurred regarding Appellant's statement to or about Resident R.

Further, at hearing, both Michelle Pierce-Mobley and Carol O'Neill confirmed that no verbal abuse was found to have occurred regarding Appellant's actions on December 14, 2010. Finally, a narrow reading of the allegation contained in the instant R.C. 124.34 Order of Removal seems to merely reference "verbal abuse" concerning the lead-up to Appellant's removal. Accordingly, the undersigned concludes that no allegation of verbal abuse has been submitted to this Board for review. Thus, the undersigned expressly makes no ruling on whether or not Appellant committed verbal abuse on December 14, 2010.

Based on the testimony presented and evidence admitted at hearing and upon the post-hearing briefs submitted by the parties, I make the following Findings.

First, I note that I incorporate herein, by reference, any finding set forth, above, whether express or implied.

Next, I find that reliable, probative, and substantial evidence was presented by Appellee to prove its allegation that Appellant not only stated "Shut the Fuck up." to Resident R, but also uttered that statement while essentially next to Resident R's ear, and I so find.

Further, I find that Resident R was at a level of functioning that he likely had the potential to understand Appellant's utterance and, indeed, the level of emotion that Appellant placed behind his remark.

Additionally, since there was credible evidence that Resident R could develop relationships with staff, Appellee's hypothesis that Resident R could have been emotionally affected by Appellant's utterance seems meritorious.

I also find, as noted, above, that Appellant was on notice regarding the requirements and restrictions contained both in R.C. 5123.62 and in the "Stillwater Center Rights of People with Mental Retardation & Developmental Disabilities".

Appellant was also aware that two of the Center's LPNs had received 10-day suspensions and Last Chance Agreements for not dissimilar infractions, only a few months before he committed his own infraction on December 14, 2010.

I reiterate that Appellant's argument, that he should have been offered the same option as was offered to these two LPNs, appears to lack merit, for the reasons stated, above. Finally, I reiterate that because Appellant could have appealed his previous 10-day suspension to this Board, but chose not to do so, this Board should not at this juncture attempt to review the merits of that suspension.

## CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant committed a failure of good behavior and neglected his duty when he loudly uttered a harsh vulgarity in the ear of Resident R on December 14, 2010, while examining a boil on that resident? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the affirmative and, so, should affirm Appellant's removal from his position of Nurse Supervisor at the Montgomery County Stillwater Center.

While R.C. 124.34 does not define "failure of good behavior", Black's Law Dictionary does so define that term and states:

> As enumerated in statute as ground for removal of a civil service employee, means behavior that is contrary to recognized standards of propriety and morality, misconduct or wrong conduct. *State ex rel. Ashbaugh v. Bahr*, 68 Ohio App. 308, 40 N.E.2d 677, 680, 682. (*Black's Law Dictionary, Deluxe Sixth Ed.*, p. 594)

In the instant appeal, Appellant's behavior and action are clearly outside the bounds of recognized acceptable behavior, as set forth, for example, in both R.C. 5123.62 and in the Center's Rights of People precepts, for which Appellant was expressly on notice. Thus, Appellant's utterance to Resident R constitutes a failure of good behavior.

Black's Law Dictionary indicates that "neglect":

> May mean to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in the doing or omission of a given act ... An omission to do or perform some work, duty, or act. Failure to perform or discharge a duty, covering positive official misdoing or official misconduct as well as negligence. (citations omitted) (*Black's Law Dictionary, Deluxe Sixth Ed.*, p. 1032)

In the instant appeal, Appellant failed to do a thing which was required to be done, namely adhere to R.C. 5123.62 and to the Center's Rights of People precepts. Further, one can also credibly state that Appellant failed to discharge a duty the seriousness of which omission constituted official misconduct. Accordingly,

I find that Appellant neglected his duty by his act and omission on December 14, 2010 in the immediate presence of Resident R.

I have found that Appellant both committed a **failure of good behavior** and **neglected his duty** on December 14, 2010. Further, Appellant received a 10-day suspension effective September 30, 2010 for these same two statutorily-identified offenses only a few months earlier. Accordingly, I find that Appellee was justified in removing Appellant from his position of Nurse Supervisor with the Stillwater Center.

## RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's **REMOVAL** from his position of Nurse Supervisor with the Montgomery County Board of Commissioners' Stillwater Center, pursuant to R.C. 124.03 and R.C. 124.34 and further pursuant to this Board's July 26, 2011 Order of Remand in the instant case.

JAMES R. SPRAGUE
*Administrative Law Judge*

JRS: