

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

LYNETTE K. WILSON,

Appellant,

v.

Case No. 11-REM-05-0170

DEPARTMENT OF REHABILITATION AND CORRECTION,
CENTRAL OFFICE,

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, as well as the supplemental briefs filed by the parties following oral argument before the Full Board, the Board hereby adopts the Recommendation of the Administrative Law Judge.

It is noted that respective counsel for the parties appeared before the Full Board on August 22, 2012 for oral argument. As a consequence of that argument, the Full Board requested that counsel provide the Full Board with an additional briefing on the question of disparate treatment/selective enforcement of work rules, as provided in O.A.C. 124-9-11, on which Appellant has proffered evidence before the assigned Administrative Law Judge in this matter. Accordingly, counsel thereafter timely filed their respective briefs on this subject and the record was then closed.

We note that respective counsel did an exemplary job, both during oral argument and in their respective supplemental briefs, of presenting their recitation of facts and pertinent arguments, and they are to be commended, accordingly.

Much of Appellant's argument concerning this point is focused upon the discipline that Corrections Officer (CO) Jason Johnson received following his failure to renew his "Nexus form" to notify the Department of Rehabilitation and Correction (DR and C) that his cousin, who was still under DR and C supervision, had moved into CO Johnson's residence. CO Johnson had previously filed a Nexus form concerning his cousin's then-incarceration with DR and C. CO Johnson was disciplined for an alleged violation of DR and C Rule 46, which DR and C substantiated and for which he was removed from his position. Since any discipline of a CO that rises above the *de minimus* level may be grieved, CO Johnson's union pursued this matter through the grievance process. At some point during that process, a settlement was reached. As a term of the settlement, CO Johnson signed a last chance agreement and was thereafter reinstated to his CO position.

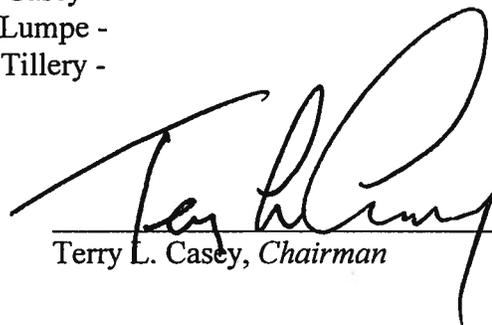
10-10-12

Appellant was also alleged to have violated Rule 46. While both CO Johnson and Appellant were removed, DR and C utilized different sections of the rule to discipline CO Johnson than it did to discipline Appellant. Secondly, CO Johnson and Appellant did not encumber positions with the same classification, since Appellant's position was classified as Human Capital Management Analyst. Thirdly, CO Johnson held a bargaining unit position, while Appellant held an exempt position. Finally, CO Johnson and Appellant do not appear to have shared the same appointing authority. This is because Appellant's position fell under Central Office under the Director, while CO Johnson's position fell under the Warden and it was the Warden who removed CO Johnson. (We note, parenthetically, that the Director may also have appointing authority over positions at the Correctional Institutions but, if so, that authority was not exercised in this case.)

Clearly, based on the record, CO Johnson and Appellant neither shared the same classification nor performed duties that were substantially similar. Further, while both were alleged to have violated Rule 46., the operative sections of the rule with which each was charged are not the same. As well, CO Johnson and Appellant do not share the same collective bargaining status. Finally, each was removed by a different appointing authority. Thus, clearly, the assigned Administrative Law Judge was correct to exclude Appellant's offer of disparate treatment evidence in this matter, pursuant to O.A.C. 124-9-11.

Wherefore, it is hereby **ORDERED** that Appellant's **REMOVAL** from her position of Human Capital Management Analyst be **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.

Casey -
Lumpe -
Tillery -

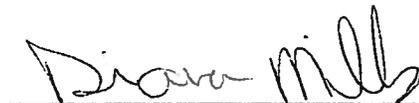


Terry L. Casey, *Chairman*

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, October 10, 2012.



Diana Mills
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**

Lynette K. Wilson,

Case No. 11-REM-05-0170

Appellant,

v.

February 29, 2012

Department of Rehabilitation
and Correction,

BETH A. JEWELL

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 April 25, 2011, removal from employment with Appellee. A record hearing was held on October 19, 2011. Lynette K. Wilson, Appellant, was present at the record hearing and was represented by Daniel H. Klos, Attorney at Law. Appellee was present at record hearing through its designee, Amy Parmi; and was represented by Rory P. Callahan and Philip L. Judy, Assistant Ohio Attorneys General. At the conclusion of the presentation of testimony at record hearing, Appellee's representatives asked to present written post-hearing briefs. Their request was granted, and post-hearing briefs were filed by both parties on January 6, 2012, at which time the record was closed.

On April 25, 2011, Appellee removed Appellant from her position of employment as a Human Capital Management Analyst in the Office of Human Resources at Appellee's Central Office. The Order of Removal explained the reasons for Appellant's removal as follows:

You admittedly engaged in an unauthorized sexual relationship with an individual who was under the supervision of the Department. This is a violation of the SOEC [Standards of Employee Conduct] Rule #46 Unauthorized Relationships-46B: Engaging in any other unauthorized personal or business relationship(s) with any individual currently under the supervision of the Department or any individual within 6 months following

their release from custody or supervision of the Department, or friends or family of same; 46E Committing any sexual act with any individual under the supervision of the Department or any individual within 6 months following their release from custody or supervision of the Department; and #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.

STATEMENT OF THE CASE

Appellee called two witnesses in its case in chief: Appellant, as if on cross; and Investigator D.J. Norris. Appellant testified in her case in chief. Appellee called Amy Parmi as a rebuttal witness. References to witness testimony are indicated parenthetically below. References to Appellant's Exhibits in the record are indicated parenthetically by "Appellant Exh.," followed by the exhibit number(s). References to Appellee's Exhibits in the record are indicated parenthetically by "Appellee Exh.," followed by the exhibit number(s). The testimony and exhibits form the basis for the Findings of Fact set forth below.

FINDINGS OF FACT

Appellant's Employment History

Appellant first became employed by Appellee in December 1999 as a Library Assistant at the Correction Reception Center ("CRC") in Orient. As a Library Assistant, Appellant supervised inmates using the library, monitored inmate workers, and scheduled inmates who wanted to use the library. In July 2003, Appellant became an Inventory Control Specialist in the CRC Business Office. In approximately 2006, Appellant transferred to the CRC Human Resources Office, where she handled payroll, filing, OAKS, interviews, and orientation of new employees. In October 2009, Appellant was promoted to Human Capital Management Analyst and transferred to the Human Resources Office, Compensation Unit at Appellee's Central Office. Appellant processed childbirth

leave and military leave claims, analyzed payroll reports, and handled OAKS issues. Appellant's duties at Central Office did not involve interaction with inmates. Inmate workers are present at Central Office to do cleaning and storeroom duties. Parolees enter and exit Central Office to interact with the Adult Parole Authority and other units; they access Central Office through doors different from those used by employees. In the summer of 2010, Appellant was on disability leave for depression. After she returned from disability leave, she was given different job duties, which consisted of training Account Clerks and resolving payroll problems either independently or by working with DAS.

On October 29, 2009, Appellant signed a written acknowledgment of her receipt of Appellee's Standards of Employee Conduct ("SOEC") effective November 1, 2009. Appellant is familiar with the SOEC. (Appellee Exhs. 4, 5) Under the SOEC, employees are to report relationships with individuals under the supervision of Appellee by completing a Staff Nexus Form. Appellant completed Staff Nexus Forms in October 2004 and November 2009. (Appellee Exhs. 2, 3)

Appellant has suffered from depression since she was 19 years old. Appellant was off work because of depression, stress, and anxiety beginning on July 29, 2010. Following the two-week waiting period, Appellant's disability leave was approved, with an initial return-to-work date of September 7, 2010. Thereafter, her disability leave was extended through September 21, 2010. Appellant attempted to participate in a part-time return-to-work program from September 8 to 22, but she was still taking prescribed sleeping pill and anti-anxiety and antidepressant medications, and because of the combination of the medications and family problems she was experiencing, she was unable to return to full-time work until September 29, 2010. (Wilson testimony; Appellant Exh. 7; Appellee Exh. 6)

Appellee's Investigation of Kendle Mardis

D.J. Norris has been employed by Appellee as an Investigator since March 2003. Mr. Norris is assigned to the Office of Prisons, Enforcement Unit, Security Threat Group. On February 8, 2011, the Enforcement Unit ("EU") and the Columbus Adult Parole Authority conducted a home search of Post Release Control ("PRC") Offender Kendle Mardis. The EU had received information that Mr. Mardis was possibly involved in conveying contraband into the Pickaway Correctional Institution ("PCI") and that Mr. Mardis was a known associate of the Columbus-based Deuc Deuce Bloods Gang. The search of Mr. Mardis' residence resulted in the discovery of a firearm with ammunition. Mr. Mardis was arrested for a parole

violation and taken to the Franklin County Jail. Mr. Norris and another EU member went to the jail to interview Mr. Mardis. Mr. Mardis said he would cooperate with the PCI investigation in exchange for his release from custody. The investigators told Mr. Mardis that they would not recommend his release from custody. (Appellee Exh. 7)

The next day, Mr. Mardis contacted the EU and said he had some information they might be interested in. When they returned to interview Mr. Mardis on February 10, 2011, Mr. Mardis told them he had been dating a Lynette Wilson who had told him she worked at Appellee's Central Office. He said he met her on an online dating website. He claimed he was using Appellant for money and that after finding out she had none, he attempted to break off the relationship but asserted that she continued to pursue him. After the investigators asked for proof, Mr. Mardis gave them Appellant's cell phone number and his two phone numbers. Thereafter, Appellee's Chief Investigator subpoenaed Appellant's Verizon cell phone records. (Norris testimony; Appellee Exh. 7)

Appellant testified that the medications she was taking affected her memory, judgment, and behavior, and that she still does not recall specific dates, but at some time during the summer of 2010 while she was on disability leave, Appellant began a relationship with a man she met through an on-line singles website. The man told her his name was Kendle Cortez. Appellant communicated with the man through the singles website, through text messaging, and by telephone. She met him at his apartment about five times, and she had sex with him there at least once. The man then told her that he was a parolee. When he told her this, Appellant told him she could no longer see him, and she did not see him in person again. For about two months thereafter, the man she knew as Kendle Cortez continued to contact Appellant by telephone, text messages, and email¹, and Appellant contacted him by telephone. Appellant admitted that she understood the rules regarding unauthorized relationships. The Staff Nexus Forms signed by Appellant in 2004 and 2009 state, "I understand that should I become aware of such a relationship I am required to notify my Managing Office/APA Administrator the next business day." (Appellee Exhs. 2, 3) Appellant testified at record hearing that she did not report the relationship because she feared discipline: "I knew if I told that I would still be sitting here right now today." Appellant stated that her job duties were changed when she returned from leave, and that she was disciplined once after she returned from leave for not following call-off procedures, which heightened her fear

¹ Appellant testified that she had deleted the emails and text messages and had tried, but was unable to, recover them.

of discipline.

According to Verizon telephone records subpoenaed by Appellee, Appellant had telephone contact with Mr. Mardis from September 18, 2010 to December 5, 2010. (Appellee Exh. 9) Appellant was shown the telephone records at the record hearing, but testified that the records do not refresh her recollection of the precise dates of the events. A review of the telephone records reveals that Appellant had daily telephone contact with Mr. Mardis from September 18 to September 29, 2010, and telephone contact again on October 1 and 2, 2010. Thereafter, she had no telephone contact with Mr. Mardis until she telephoned him on November 7. The records further indicate that Mr. Mardis telephoned Appellant on November 15 and November 27; Appellant called him once and he called her once on November 28; Appellant called him once on December 4, and he called her once on December 5. December 5, 2010, is the last day of telephone contact indicated in the telephone records.

Appellee's Investigatory Interviews of Appellant

Investigator Norris interviewed Appellant on March 30, 2011. Mr. Norris showed Appellant a picture of Mr. Mardis, and she said she knew him by the name of Kendle Cortez. Appellant admitted that she had had a sexual relationship with Mr. Mardis, and told Mr. Norris that when the man told her he was on parole, she told him they could not see each other anymore and that she did not continue to see him. Appellant told Mr. Norris that she had no further contact with Mr. Mardis and that she did not report the relationship because she had ended it. She admitted that her decision not to report the relationship was poor judgment. The next day, Appellant contacted Mr. Norris via Facebook and requested another interview. She wrote, "I was scared. I didn't know what to do." Mr. Norris interviewed Appellant again on April 1, 2011, at which time Appellant stated as follows:

By the time he did tell me, we had been involved, slept together, things had happened. And at that time I did tell him I couldn't see him anymore, nothing could happen anymore. He continued to send me messages on the personal site telling me that he loved me and all this other stuff. And I was going through a hard time, I was off work for stress leave. I was taking Klonopin and Xanax which are narcotics and I was scared. I didn't know what to do, I didn't know how to go into my boss's office when I came back to work and say, hey, this has

been happening. I was in a hard situation and I didn't know what to do and I made a bad decision....I don't remember dates. Honestly, I don't remember

(Appellee Exh. 10, second transcript, pp. 2-3, 5)

Appellant's Pre-disciplinary Conference, Report, and Removal

Appellee issued a pre-disciplinary conference notice by email on April 15, 2011. In the notice, Appellee alleged that Appellant violated SOEC Rules 46 and 50 by engaging "in an inappropriate relationship with an offender under the supervision of" Appellee. Appellant acknowledged receipt of the notice and chose to proceed with the conference as scheduled on April 18, 2011. (Appellee Exh. 12) Present at the pre-disciplinary conference were Appellant, Investigator Norris, and Hearing Officer Venita White. Appellant did not request a witness. Appellant admitted to having met Mr. Mardis on an online dating website, that they had met in person about 5 or 6 times, that they had sex at least once, that after he told her he was under the supervision of Appellant they did not see each other but did have contact by phone several times for about two months, with the last phone contact being in December 2010. As mitigation, Appellant explained that she was on anti-depressant medications, that she had stopped taking some of them because of how they made her feel, and that coming off these addictive drugs was very hard for her. Appellant stated that she was not in her right state of mind at the time due to her depression and medication. (Appellee Exh. 13)

Amy Parmi, Staff Counsel for Appellee, prepared the Order of Removal in quadruplicate and the Appointing Authority, Director Gary C. Mohr, signed all four orders in her presence. The Order of Removal was hand-delivered to Appellant on April 25, 2011. (Appellee Exh. 14)

ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

Appellee's Burden and Evidence

Appellee must prove that Appellant's due process rights were observed, and Appellee must prove that in administering the discipline, it substantially complied with the procedural requirements of the O.R.C. and O.A.C. 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.

Appellee must prove that Appellant committed one or more of the enumerated infractions listed in R.C. 124.34 and the disciplinary order. For each infraction, Appellee must prove the following:

- a. That Appellee had an established standard of conduct;
- b. That the standard was communicated to Appellant;
- c. That Appellant violated that standard of conduct; and
- d. That the discipline imposed upon Appellant was an appropriate response.

In weighing the appropriateness of the discipline imposed upon Appellant, the SPBR will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, any evidence of mitigating circumstances presented by Appellant, and any evidence of disparate treatment of similarly situated employees presented by Appellant.

Based upon the evidence in the record, and for the reasons that follow, Appellee has sustained its burden of proof, and Appellant's removal should be affirmed.

All due process elements have been satisfied. Prior to implementing discipline, Appellee provided written notice to Appellant of the charges against her. Appellant had an opportunity to be heard at the April 18, 2011 pre-disciplinary conference. Appellant timely appealed her removal to this Board.

Appellee proved that it had an established standard of conduct that was communicated to Appellant. Appellant acknowledged in writing her receipt, in 2009, of Appellee's Standards of Employee Conduct. Appellant admitted at record hearing that she was familiar with the rules and understood the meaning and purpose of the rule concerning unauthorized relationships. The rules Appellant is alleged to have violated provide as follows:

46 Unauthorized Relationships

B. Engaging in any other unauthorized personal or business relationship(s) with any individual currently under the supervision of the Department or any

individual within 6 months following their release from custody or supervision of the Department, or friends or family of same;

E. Committing any sexual act with any individual under the supervision of the Department or any individual within 6 months following their release from custody or supervision of the Department;

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.

Appellee proved at hearing that Appellant violated Rules 46B and 50, but not Rule 46E. Appellant has consistently maintained that she ended the sexual relationship with Mr. Mardis when he told her of his status as a parolee. The record contains no evidence that Appellant committed any sexual acts with Mr. Mardis after he told her that he was on parole. Appellant's argument that an employee must have knowledge of individual's status as "an individual under the supervision of the Department" in order to commit a violation of Rule 46E is persuasive and, indeed, is demonstrated by the language of the Staff Nexus Form (Appellee Exhs. 2, 3). An employee completing the form reports "No Nexus" by confirming the following statement: "I state that, to the best of my knowledge, I have no nexus connection, affiliation, or relationship to any inmate/offender under the supervision of the Ohio Department of Rehabilitation and Correction. I understand that should I become aware of such a relationship I am required to notify my Managing Officer/APA Regional Administrator the next business day."

However, Appellant admitted, and the telephone records confirm, that Appellant remained in telephone contact with Mr. Mardis, whom she knew as Mr. Cortez, for about two months after he told her of his status. It is not possible to determine the precise dates of the relationship. Mr. Mardis did not testify; therefore, evidence of the relationship is limited to the telephone records and Appellant's admissions in the record. Appellant testified that her mental status and medications resulted in memory loss. She cannot recall specific dates. She told Investigator

Norris that she was on disability leave when the relationship began. When he questioned her further about dates, she said "Maybe July, maybe. I don't know for sure." She also told Mr. Norris, after he asked her to "ballpark" when she ended the relationship, "maybe September, October." The vast majority of the telephone contacts took place between September 18 and October 2; followed by no telephone contacts until Appellant placed a call to Mr. Mardis' telephone number on November 7. The most consistent interpretation of the limited evidence presented through Appellant's testimony and the telephone records is that the relationship began in September, when Appellant was on disability leave, and that Mr. Mardis informed her of his status and she broke off the sexual relationship by October 2.

Thus, the evidence establishes that Appellant maintained an unauthorized personal relationship with Mr. Mardis after she became aware of his status, and did not complete a Staff Nexus Form to report the relationship; hence, Appellant violated Rule 46B. Appellant's conduct in continuing and failing to report the relationship also constitutes nonfeasance and failure of good behavior, in violation of Rule 50.

The remaining element is whether Appellant's discipline, removal, is an appropriate response to the violations established. Appellant's record contains no prior discipline for violations of these rules. The disciplinary grid for Rule 46B lists the consequences for a first offense as "2 or R"; for Rule 50, "WR or 1 or R." Removal is, therefore, a possible consequence that has been communicated to employees via the standards of conduct. In determining whether Appellant's removal was an appropriate consequence, the serious nature of Appellant's infraction must be considered. Appellee asserts that Appellant's decision not to report the relationship put her in a position that made her vulnerable to undue influence. As Appellee points out in its post-hearing brief, at 7:

The fact that [Appellant] chose to keep the relationship secret demonstrates the security risk that her conduct created. As Norris testified, Wilson worked in Human Resources and could have access to information that an inmate might try to extort from her or otherwise subject her to undue influence. The reasons [disclosure is required] are readily apparent from the circumstances of this case. Mardis had previously served time in prison, and was on parole at the time of his relationship with Wilson. When the EU searched his residence, a loaded firearm was discovered, in violation of his

probation. Mardis was a known associate of the "Deuce Deuce Bloods" gang. The EU had acted based upon information that Mardis was involved in smuggling contraband into PCI; and during an interview with Norris, Mardis indicated he had information about contraband being smuggled into PCI, but would only provide the information in exchange for his release.

While no evidence exists that Appellant was personally subjected undue influence or coercion as a result of her relationship with Mr. Mardis, Mr. Mardis refused to cooperate with the contraband investigation while incarcerated and obviously attempted to use his relationship with Appellant to obtain his release from jail after he was arrested for violating the terms of his probation. The adverse circumstances created by Appellant's failure to report the unauthorized relationship are evident in this case. Appellee's argument that removal is an appropriate response to Appellant's violation of the rules is persuasive.

Appellant's Defenses

Appellant submits that her mental health status, including the experience of stress, anxiety, depression, memory loss, and panic attacks, should be considered in determining the consequence for her behavior. However, despite the medications Appellant was taking, she had been released to return to work full time and had returned to work full time by the end of September 2010. Notwithstanding her mental health status, Appellant testified that she was aware of the rules of conduct and made the conscious choice not to report the relationship because she feared discipline. Appellant maintained at least some level of contact with Mr. Mardis for at least two months following her awareness that her relationship with him was unauthorized under the rules. Thus, Appellant's mental health status does not mitigate her conduct or the disciplinary consequences she received.

Appellant was permitted to proffer the discipline of Correction Officer ("CO") Jason Johnson which, she asserts, is evidence of disparate treatment that should be considered in evaluating her discipline. CO Johnson was employed at the Corrections Medical Center. His Appointing Authority was Warden A.C. Smith. CO Johnson had completed a nexus form when his cousin was incarcerated. When the cousin was paroled, the Adult Parole Authority approved the cousin to reside with CO Johnson. CO Johnson, however, did not update his nexus form to obtain permission from his Appointing Authority for his cousin to reside with him while the cousin was on parole. The living arrangement was not revealed to the Appointing

Lynette K. Wilson
Case No. 11-REM-05-0170
Page 11

Authority until the EU conducted a home visit/search of the cousin, which was CO Johnson's home. After a search of CO Johnson's home, during which firearms were found in the cousin's living area, CO Johnson's removal was recommended by the Appointing Authority. Through agreement reached between the Appointing Authority, CO Johnson, and CO Johnson's union, CO Johnson's removal was held in abeyance pending successful completion of a last chance agreement. (Appellant's Proffered Exhibit 11)

According to the Ohio Administrative Code, Rule 124-9-11, "Disparate treatment," the discipline of Johnson does not constitute evidence of disparate treatment. Rule 124-9-11 provides in relevant part as follows:

(A) The board may hear evidence of disparate treatment between the appellant and other similarly situated employees of the same appointing authority for the purpose of determining whether work rules or administrative policies are being selectively applied by the appointing authority or to determine whether the discipline of similarly situated employees is uniform.

Under the terms of this administrative rule, this Board cannot accept the evidence of CO Johnson's discipline as disparate treatment. Appellant and CO Johnson are not similarly situated. They do not have the same appointing authority. Further, their positions have different job duties and different supervisors.

A review of all evidence and testimony presented reveals that Appellee has demonstrated by a preponderance of the evidence that just cause existed for Appellant's removal and that Appellant's removal was effectuated in accordance with R.C. 124.34. Therefore, it is respectfully **RECOMMENDED** that the State Personnel Board of Review **AFFIRM** the removal of Appellant.


BETH A. JEWELL
Administrative Law Judge

BAJ: