

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

STEVEN CLOSE,

Appellant,

v.

Case No. 11-REM-09-0323

DEPARTMENT OF AGRICULTURE,

Appellee

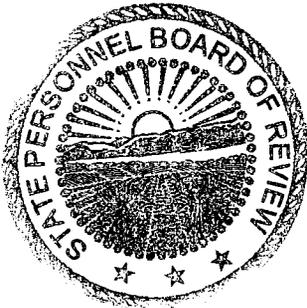
ORDER

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 from employment with Appellee be **AFFIRMED**, pursuant to O.R.C. § 124.34.

Casey - Aye
Lumpe - Aye
Tillery - Aye

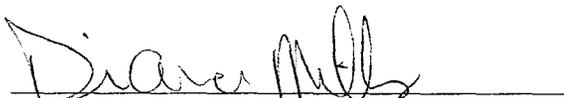



TERRY L. CASEY, CHAIRMAN

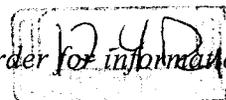
CERTIFICATION

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, December 4, 2012.


Clerk

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



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

Steven Close

Case No. 11-REM-09-0323

Appellant

v.

September 6, 2012

Department of Agriculture

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 23, 2012. Present at the hearing were the Appellant, Steven Close, represented by Thomas D. White, Attorney at Law, and Appellee Department of Agriculture designee Rick Corbin, former Human Resources Director, represented by Philip L. Judy and Julie B. Smith, Assistant Attorneys General.

The subject matter jurisdiction of the Board was established pursuant to section 124.34 of the Ohio Revised Code.

Appellant Close was removed from his position of Veterinary Administrator 2, effective September 14, 2011. The pertinent part of the Order of Removal states as follows:

The reason for this action is that you have been guilty of Inefficiency, Insubordination, neglect of duty, and violation of policy or work rule of the appointing authority. You engaged in a year-long pattern of behavior in conflict with the efficient operation of the Ohio Department of Agriculture Division of Meat Inspection, specifically, you have been openly disrespectful to Chief Michael Hockman, withdrawn from actively engaging in daily business activities, refused to attend meetings, walked out of meetings, openly expressed your hatred for the position of assistant chief, openly criticized your subordinate staff and Dr. Hockman, created an unpleasant work environment for staff, slept at your desk, misused your business

computer, directly refused to perform assignments, and you were insubordinate in response to two (2) direct orders.

Appellant Close filed a timely appeal of his removal.

STATEMENT OF THE CASE

Appellee's first witness was Appellant Close, as if on cross examination. He stated he first became employed with Appellee in 1989 and became the Assistant Chief of Meat Inspection in 2006. He took a medical leave of absence in 2009 and returned to his position as Assistant Chief in May, 2010. He was removed from that position in September, 2011.

In his position as Assistant Chief, Appellant Close testified he supervised the veterinarians in the eleven districts, organized and conducted the training for field veterinarians and attended meetings and conferences. On occasion, he would conduct final inspections if needed in order to understand the pathology. Appellee's Exhibit 1 was identified as a position description for his position, but Appellant Close testified he did not recognize it as it had changed since he became Assistant Chief. He explained that his position was the second ranking office below that of the Chief of Meat Inspection, Dr. Hockman.

Appellant Close identified Appellee's Exhibit 4 as his signature evidencing that he received and read the employee handbook. Appellee's Exhibit 5 was identified as the policies section of the employee handbook which indicates that an employee is to: work a 40 hour week; alert a supervisor when leaving the office, sign in and out; and only use computers for work related activity.

Appellee's Exhibit 6 was identified as Appellee's Standards of Employee Conduct. Appellant Close stated he did not recognize this exhibit but he was aware of the policies which provide that computers are only to be used for official purposes and that harassment and intimidation of employees is not permitted. The Standards also contain a disciplinary grid outlining that a Code F23 violation is a violation of O.R.C. 124.34 (incompetency, inefficiency, dishonesty, insubordination, neglect of duty, or acts of misfeasance, malfeasance, or nonfeasance). According to the grid, such a violation could lead to termination after the first offense.

Appellee's Exhibit 12 was identified by Appellant Close as the removal order he received on September 13, 2011. Appellee's Exhibit 11 was identified by Appellant Close as the termination letter he received. Appellee's Exhibit 10 was identified by Appellant Close as the first removal order he received which was rescinded because of a procedural error. He acknowledged that he received back pay due to this rescission.

Appellee's Exhibit 8 was identified by Appellant Close as a notice for a pre-disciplinary hearing which he received on June 16, 2011. Appellee's Exhibit 9 was identified as a summary of the pre-disciplinary hearing conducted on June 22, 2011. Appellant Close testified he does not remember the pre-disciplinary hearing occurring but he does remember having a conversation with Rick Corbin, who was head of the Human Resources department, where Mr. Corbin suggested having an independent medical examination (which Appellant Close refused) and discussing issues of sleeping at his desk and using the computer for personal purposes.

Appellee's Exhibit 7 was identified as a report completed by Gary Hill after he conducted an investigation on Appellant Close. In response to one of the questions during Hill's report, Appellant Close stated he could not count on anything that Dr. Hockman, the Chief of Meat Inspection, said. Appellant Close testified that upon his return to his position his computer had been changed and that Dr. Hockman offered to help him learn the new system. Appellant Close stated he became irritated with Dr. Hockman because Dr. Hockman continued to show him the wrong way to do things and he ultimately told Dr. Hockman he did not need his help.

When asked about walking out of meetings, Appellant Close testified he had not walked out of any meeting while it was in progress and that he always waited to leave until after the meetings were over and everyone was talking. He also testified he never dozed off in a meeting or refused to attend a meeting. He does admit to taking naps in his office but not every day. Appellant Close testified he does not remember being openly disrespectful to Dr. Hockman in front of other employees. He also stated he told others he was miserable in his job.

Appellee's Exhibit 7.11 was identified as a report that was generated on Appellant Close's computer usage for the week before he was put on administrative leave. This report identifies over forty different non-work related sites that had been accessed in the one week time span. Appellant Close testified he had been on

some of the websites but that he does not remember being on all of them. He confirmed he was on Yahoo daily for the news and sometimes watched America's Funniest Home Videos.

Appellee's Exhibit 7.3 was identified as Appellant Close's response to a direct order about where he was on May 27, 2011. Appellant Close testified he received a phone call on that day informing him that one of his inspectors was having difficulty with one of the plant owners, Mr. Blystone. Appellant Close testified he decided to go and personally talk to the plant owner. He stated he never actually talked to the plant owner because he could not find the plant. He then returned to work three hours after he left. In response to the direct order to answer where he went, he was vague with his answers and did not give specific details. Appellant Close testified he did not tell Dr. Hockman specifically where he was because approximately one week prior to that date, he talked with Mr. Blystone and made an agreement with him that he would not involve any inspectors or the department in his dealings with him. He acknowledged that he was the ranking official in the office that day and because of that, Appellant Close stated he could not tell Dr. Hockman that he was leaving the office since he was not there to tell.

Appellee's Exhibit 7.2 was identified as a second written direct order to Appellant Close to give details about where he went on May 27, 2011. Dr. Close testified that he only answered one of the four questions due to his promise to the plant owner, Mr. Blystone.

Appellee's next witness was Dr. W. Michael Hockman, Chief of Meat Inspection since 2005 and Appellant Close's supervisor. Dr. Hockman retired on June 30, 2009 and was asked to return temporarily to the Chief's position in April 2010. He was later offered the position on a permanent basis and he accepted it. He explained that his duties consist of overseeing the administration of the meat inspection program, consisting of approximately 100 to 105 employees. Eight of the employees are veterinarians and there are five Central Office staff members. The program is tasked with administering federal law for meat and poultry inspectors. They license 210 establishments and inspect 70 plants on an every two-week basis.

Dr. Hockman testified that prior to 2010, Appellant Close's performance had been excellent. He had an excellent grasp of the subject matter, was very open and conversational and was very well loved by all the employees. Upon his return from medical leave, however, his performance had some problems. Dr. Hockman

testified that Appellant Close fell asleep in his office daily, that he did not want to interface with others, that he was forgetful about meetings and would walk out of meetings, that he did not always want to handle phone calls about plant issues, that his written work product needed improvement and that he used his computer for non-work related activities.

Dr. Hockman first started noticing problems with Appellant Close's performance within a few weeks of Appellant Close's return. Dr. Hockman tried counseling Appellant Close on an ongoing basis for some of the problems and to help him with some of the changes which had been implemented in Appellant Close's absence but Appellant Close was not receptive and would get visibly angry. He testified he discussed the problems with the Human Resources Director and the Director of the Department. The Department Director told him to be patient with Appellant Close and to keep a journal of the problems he was observing in Appellant Close's performance. Appellee's Exhibit 7.1 was identified by Dr. Hockman as the journal he kept.

Appellee's Exhibit 9 was identified by Dr. Hockman as a request sent out to employees who had interacted with Appellant Close since his return to work, asking for information about any issues they have had with Appellant Close. The responses indicated Appellant Close did not seem to be engaged in his work, had a negative attitude, became confused about policies when answering questions and that generally, he was not the best resource.

Dr. Hockman testified that on May 12, 2011, there was a meeting between himself, Rick Corbin, and Appellant Close to discuss the performance problems. According to Dr. Hockman Appellant Close was very angry at this meeting and stated he did not see anything wrong with his performance. Appellant Close voiced some dissatisfaction that Dr. Hockman was in the Chief's position, stating the position was promised to him upon his return. No noticeable changes occurred in Appellant Close's performance after this meeting.

Dr. Hockman testified that on May 27, 2011, he was not in the office but received a phone call from one of the agricultural managers. He told him Appellant Close had left the office without telling anyone where he was going. Dr. Hockman testified that in the past he informed Appellant Close that he needs to sign in and out when he leaves the floor. He testified that Appellant Close had not received this well at first but eventually complied with the policy. Upon his return to the office a

few days later, Dr. Hockman testified he asked Appellant Close where he went on the 27th and Appellant Close told him it was none of his business. Dr. Hockman then talked to Rick Corbin about it and he and Corbin both asked Appellant Close again where he was. He told them both off the record and as part of the official investigation that it was none of their business.

On cross examination, Dr. Hockman testified that when he returned as Chief on a temporary basis there was an interview process to find a permanent replacement and that Appellant Close had interviewed. The Director of the Department of Agriculture was the person who hired Dr. Hockman into the Chief's position on a permanent basis.

Dr. Hockman testified he noticed instances where Appellant Close had memory loss, difficulty learning new things, and personality changes. He acknowledged he was familiar with Appellant Close's personnel file and he testified that there was no record of any sort of disciplinary action in Appellant Close's file prior to his administrative leave and termination. He testified that annual reviews should have been performed on Appellant Close but he could not remember the last time he did an annual review for Appellant Close. Dr. Hockman did not recognize the computer usage report and testified that he did not order it.

Appellee's next witness was Gary Hill, Chief of the Enforcement Division for approximately five and a half years. He is an internal affairs investigator. He testified he conducted an investigation of Appellant Close which consisted of a phone interview with Appellant Close as well as a request for a computer analysis of his computer. Mr. Hill identified Appellee's Exhibit 7 and its subparts as his report of the investigation. He testified that once he finished his investigation he forwarded all of the information he had collected to Rick Corbin.

Appellee's next witness was Donna Clifton, an administrative assistant during the time that Appellant Close returned to work. Ms. Clifton testified her office was directly across from Appellant Close's and that she witnessed him sleeping in his office daily. She stated she could hear him watching America's Funniest Videos on his computer almost daily, also. Ms. Clifton testified Appellant Close was very bitter and was not the same person he had been before he was sick. She testified Appellant Close told her he was resentful that Dr. Hockman was there as the Chief and that he came back with the belief that he would be taking over the Chief's position. On May 27, 2011, Ms. Clifton testified she saw Appellant

Close leave the office without telling anyone where he was going or signing out and that she and her coworkers were worried about him. She testified they tried to call him but he did not answer and that he returned several hours later.

On cross examination Ms. Clifton testified Appellant Close was not mean to other employees as he only had a problem with Dr. Hockman. She also agreed it was normal for employees to use their work computers for personal use as long as it did not interfere with the job. On redirect examination, Ms. Clifton testified people were avoiding Appellant Close because he was a very negative person to be around.

Appellee's next witness was Richard Corbin, Human Resources Director at the time of Appellant Close's termination. He stated he has known Appellant Close since 2006. Mr. Corbin testified Dr. Hockman had come to him with frustrations about Appellant Close's performance. He stated he felt more information was needed before a performance plan could be put in place, so he sent out the request to other employees regarding their interactions with Appellant Close. After receiving the responses, Mr. Corbin decided it was best to have a meeting with Appellant Close to discuss his performance. He testified that at this meeting, Appellant Close told him no one had brought any concerns to him about his performance prior to this meeting. Mr. Corbin testified Appellant Close did not cooperate during the meeting and only wanted to discuss how he should have gotten the Chief's position.

Mr. Corbin testified that after the May 27, 2011, incident, he had another meeting with Dr. Hockman and Appellant Close to inquire of Appellant Close where he had been that day. He testified Appellant Close would not disclose where he had been. He conducted a formal investigatory interview with Appellant Close and once again he refused to disclose where he had been. Mr. Corbin then gave Appellant Close two direct orders to disclose where he had been on May 27, 2011. After Appellant Close once again did comply with the direct orders, he requested Gary Hill to conduct an investigation. After receiving the report from Mr. Hill, Mr. Corbin scheduled a pre-disciplinary hearing to give Appellant Close an opportunity to respond to the charges, which he did not. Mr. Corbin then recommended to the Director that Appellant Close be removed due to the totality of the circumstances.

On cross examination Mr. Corbin testified it is important to document discipline and he acknowledged that there is no disciplinary documentation in Appellant Close's personnel file.

Appellant Close testified that since his cancer treatment he suffers from short term memory loss. He stated he did not notice any changes in his personality but admitted he might become upset faster than he did prior to treatment. Appellant Close stated he interviewed for the Chief's position and that he had been accepted as the new Chief. The problem was that he was still on medical leave and did not know when he could return. Dr. Hockman then returned as the temporary Chief and told Appellant Close that it would only be for a few weeks until he could return and take over. Appellant Close testified that he found out through a journal that Dr. Hockman had been offered the permanent Chief position. This news upset Appellant Close because he felt Dr. Hockman had lied to him.

Appellant's next witness was Michael Link, Jr., an Agricultural Inspection Manger since 2009. He testified he remembers Appellant Close leaving on May 27, 2011 and stated he tried calling Appellant Close four times to find out where he was, but was never able to reach him. He stated he was worried about him. Mr. Link testified he even called Appellant Close's wife at home and she stated she did not know where he was. After leaving the office for the day, Mr. Link stated Appellant Close's daughter called him and told him Appellant Close was safe and back in his office.

On cross examination Mr. Link testified the longer Appellant Close was back in the position of Assistant Chief, the more resentful he became. He testified Appellant Close was not the same person that he was prior to the cancer.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. Appellant Close was employed at the Department of Agriculture as the Assistant Chief of Meat Inspection at the time of his removal in September 2011. He had been employed by the Appellee since 1989.
2. As the Assistant Chief of Meat Inspection, Appellant Close was the supervisor of the field veterinarians for the different districts. He also organized and conducted training for field veterinarians and attended meetings and conferences.

3. Appellant Close received and was aware of the policies of the Appellee.
4. Appellant Close took a leave of absence in 2009 for cancer treatment and returned to his position in May, 2010.
5. Upon Appellant Close's return to his position his supervisor began to notice performance problems. Appellant Close was disrespectful to his supervisor, Dr. Hockman; misused his computer; refused to answer for his whereabouts; fell asleep frequently in his office; walked out of meetings early; had a negative attitude and openly criticized the department.
6. Appellant Close had timely notice of a pre-disciplinary hearing, attended the hearing, and had the chance to respond to the charges.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Close to be affirmed, Appellee had the burden of proving by a preponderance of the evidence that the allegations contained in the order of removal were true. Appellee has met its burden.

The evidence established through the testimony of several witnesses that prior to Appellant Close leaving on his medical leave of absence, he was well-liked, positive and helpful. Unfortunately, when he returned to work, he was none of those things. Appellant Close argued that he should have been given some accommodations, but as Appellee correctly pointed out, he was returned to work with no restrictions by his doctors; therefore, this is not a case about whether or not he was properly accommodated, but is instead, a disciplinary removal case.

When Appellant Close returned to work, he made it known that he had expected to be named chief of the division instead of Dr. Hockman and that he was bitter about it. While it is not known whether or not Appellant Close was actually promised the position of Chief upon his return, the fact is that he was not the chief and should have accepted that fact without disrespecting Dr. Hockman and voicing his opinion throughout the division. The employees polled on Appellant Close's demeanor and helpfulness repeatedly said they were sorry they had to report anything negative about him, as prior to going out on medical leave, he was very much respected and well-liked. However, the employees did report that his attitude had become negative, his memory was not the same, he was not willing to be very helpful to them and he did not seem happy to be at work.

Appellant Close was seen by several people sleeping in his office frequently and also viewing non-work related videos and other websites during office hours. While the Appellee's policy provides for minimal personal use of the computer, the evidence established that Appellant Close was using his work computer for non-work related activities more than minimally. He also admitted to walking out of meetings while everyone was still in the room talking and he left the office on May 27, 2011, while he was in charge of the division, without telling anyone he was leaving or where he was gone. When specifically asked as to where he was that day for his several hour absence, he refused to answer the question with complete truthfulness. Appellant Close testified that he did not want to answer, as he had promised the plant manager of a plant under the regulatory auspices of the Appellee, that he would not involve inspectors or the department in his dealings with him. This is a problem, as Appellant Close had an obligation as an employee of the Appellee to involve whomever needed to be involved to carry out their statutory duties and he also had an obligation to be forthright and truthful with his employer. All of the actions discussed above constitute neglect of duty, insubordination and inefficiency on the part of Appellant Close.

Appellant Close argued that because the Director, when first being apprised of Appellant Close's performance problems, told Dr. Hockman to take no action but to begin documenting what he was seeing, was wrong and thus was the reason there was no progressive discipline. As is stated in Appellee's policy and was testified to, not every disciplinary violation has to be subject to progressive discipline, as there are some actions which are so egregious that they are subject to immediate removal. It can also be argued that the Director was giving Appellant Close a chance to adjust to returning to work from his leave of absence without imposing any penalties on him during his adjustment period. When no improvement was seen in Appellant Close's behavior, then action was taken.

Inasmuch as Appellee has proved by a preponderance of the evidence the allegations in the removal order, it is my **RECOMMENATION** that the removal of Appellant Close be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.

:mms



Marcie M. Scholl
Administrative Law Judge