

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

RICK L. FITHEN,

Appellant,

v.

Case No. 12-REM-02-0027

HIGHLAND COUNTY ENGINEER,

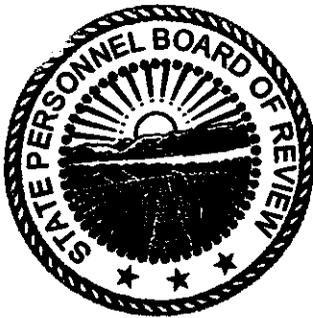
Appellee

ORDER

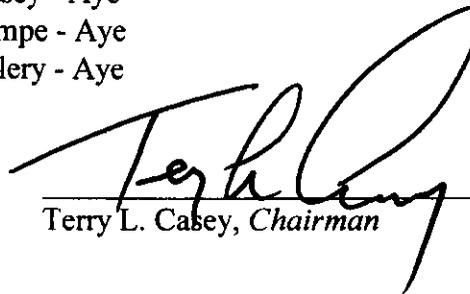
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 the removal of Appellant Fithen, effective January 27, 2012, is **AFFIRMED** pursuant to Section 124.34 of the Ohio Revised Code.



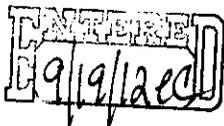
Casey - Aye
Lumpe - Aye
Tillery - Aye

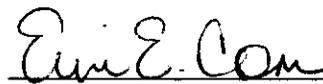

Terry L. Casey, *Chairman*

CERTIFICATION

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes (the original/a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, September 19, 2012.




Erin E. Con
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**

Rick L. Fithen,

Case No. 12-REM-02-0027

Appellant

v.

August 15, 2012

Highland County Engineer,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On January 26, 2012, the Highland County Engineer's Office (HCE) served an Order of Removal, in accordance with Ohio Revised Code section 124.34, upon the Appellant, Mr. Rick Fithen, a Highway Worker 1. That order alleged the following:

This will notify you that you are removed from your position of Highway Worker 1 effective January 27, 2012.

The reason for this action is that you have been guilty of . . . Insubordinate (dishonest); Failure of Good Behavior; Conduct Unbecoming; Inefficiency and Neglect of Duty; Failure to follow snowplow territory policy on multiple instances; including but not limited to January 2, 3, 13, 18 & 21, 2012; Tampering with County Engineer GPS snow equipment.

Thereafter, on February 1, 2012, the Appellant, Mr. Rick Fithen, filed a timely appeal from this order. Further, prior to going onto the record hearing, the jurisdiction of this Board was established and stipulated. The record hearing in this case began on April 9, 2012, and concluded the same day. Present at the hearing were Appellant, Mr. Rick L. Fithen, appearing *pro se* and the Appellee, the Highland County Engineer, was represented by Mr. Benjamin Albrecht and Mr. Matthew Whitman, Attorneys at Law.

This hearing was conducted by the State Personnel Board of Review in accordance with the Ohio Revised Code Section 124.34, which specifically provides that an employee may file an appeal of any order filed under Ohio Revised Code Section 124.34, within ten (10) days after having been notified of such with the State Personnel Board of Review.

STATEMENT OF THE CASE

Counsel for Appellee, the Highland County Engineer (HCE), began by laying out the background of the case in his opening statement. Appellant Fithen was a Highway Worker 1 with the HCE. The HCE is required to have a snow removal policy and snow removal routes. Snowplow drivers have territories which they are required to remain in and maintain during their respective shifts. Mr. Fithen as a Highway Worker 1 with the HCE was a snowplow driver who was assigned a snow removal route in one such territory.

About 3—4 years ago, the HCE's office put Global Positioning Satellite (GPS) units in each of the snowplow trucks. All employees were aware of this fact. A couple years ago, a supervisor approached the HCE with concerns about Mr. Fithen's routes because his snowplow would occasionally disappear on the GPS tracking system. There was concern that Mr. Fithen was blocking his snowplow's GPS signal. As a result, the primary GPS antenna was disconnected on Mr. Fithen's snowplow and a second antenna was installed inside the dashboard. Thereafter, it became apparent that Mr. Fithen was taking longer breaks than permitted, was leaving his territory, and was pulling off his route and just sitting in his snowplow.

On January 11, 2012, the HCE had a meeting with all snowplow drivers in which he reiterated the county's snowplow policy. Following the meeting, the HCE continued to track Mr. Fithen's snowplow and saw that there were still problems.

A soda can that had been cut in half was found placed over the GPS's antenna on the roof of Mr. Fithen's snowplow. An investigatory interview occurred in which Mr. Fithen provided statements that were contrary to the signals from the GPS unit—he denied ever leaving his territory and taking breaks that were too long. Although Mr. Fithen did say that he placed the can over the GPS's antenna when he deemed it necessary and appropriate. The following day, Mr. Fithen changed his position. He said he was advised to admit to things that he did not do in order to be

agreeable with the HCE, but he had received bad advice. Mr. Fithen then denied covering the GPS's antenna with a soda can. However, he still remained adamant that he never left his route and that he did not take long breaks. The HCE found Mr. Fithen guilty of misconduct as set forth in Ohio Revised Code 124.34 and terminated Mr. Fithen on January 27, 2012.

Appellant kept his opening statement brief. He stated that he was the victim of discrimination because his actions were no more than that of any other employee at the HCE's office.

The first witness to testify was Appellant Fithen, as on cross-examination. Mr. Fithen testified that he was aware that the HCE's office has a snow removal policy, and he was present at the meeting on January 11, 2012 regarding the county's snow removal policy. Mr. Dean Otworth is the HCE, and he spoke at that meeting. Mr. Fithen stated that he had the opportunity to ask questions at the meeting but remained quiet. Mr. Fithen was shown Appellee's Exhibit 1, which is a memorandum that reiterates the county's snow removal policy. This memorandum was distributed to all employees at the January 11th meeting, including Appellant.

Appellant testified that on January 12, 2012, Mr. Jerry Miller was his supervisor, and he called Mr. Miller every time he took a break. Appellant was next shown Appellee's Exhibit 4, which lists the approximate times and locations of his stops during the 2012 snow season.

Appellant was shown a soda can that had been cut in half. When asked if it was the can that he placed over the GPS's antenna, he stated that he never placed a can over the antenna. Appellant testified that there was a soda can in his truck for years, and he put it in the cup holder and then put his water in the can because it was a tighter fit than just the cup holder by itself. Appellant said that he stored the can in the cubbyhole by the sun visor. When asked why he does not just leave the can in the cup holder, Appellant said that a second can of soda will not fit in the cup holder when the can is in one of the empty cup holders. Appellant also said another driver used the truck on his off-days, and he could not say what that other driver used the soda can for.

Appellant was asked about the investigatory interview with Mr. Dean Otworth on January 24, 2012. Appellant remembered stating that he placed the can over the GPS's antenna on his truck. He said his statements on the 24th were untruthful

because he was told by another individual that if he pled guilty to everything, then he would just get a slap on the wrist or a day's suspension, but he would not be fired. However, Appellant felt that he received bad advice, and at the pre-disciplinary hearing the following day, he recanted his statement that he placed the can over the GPS's antenna. At the pre-disciplinary hearing, he said that the can had not been on the antenna for two or three years. He did not want to be fired for something he did not do. Now, Appellant states that he never used the can to cover the GPS's antenna.

Appellant testified that the information contained in Appellee's Exhibit 4 about his break times is inaccurate because they are about twice the length of his actual break times. Appellant said he has seen others taking breaks in his territory. He also testified that everyone plows roads outside their assigned territories on occasion, including himself. This is because sometimes a driver has to go across another's territory in order to get to his own. Appellant is aware that a can of soda will block a GPS's signal. He said he has never seen other employees place cans on their GPS's antennas.

Mr. Dean Otworth was the next witness to testify. Mr. Otworth has been the Highland County Engineer for approximately twenty years. As such, he is responsible for the county's road system, which includes the engineering maintenance. As the HCE, he also acts as technical advisor for the township trustees.

Mr. Otworth explained that Highland County has nine territories that are handled by two snowplow crews who are managed by two supervisors. Mr. Otworth was shown Appellee's Exhibit 8 and testified that Appellant always drove truck # 22. Mr. Otworth also testified that a prior supervisor who is no longer employed by the county, Mr. Lowell, brought it to his attention that Appellant occasionally disappeared from the GPS's signal. Mr. Lowell found half a soda can in Appellant's truck. Jerry Miller took over as supervisor after Mr. Lowell left the HCE.

Mr. Otworth testified that GPS was first installed in two trucks in 2006. In about March 2007, GPS was installed in the remaining ten trucks. Concerns about Appellant and his GPS began 3—4 years ago. Mr. Otworth was not sure what exactly was going on with Appellant and his GPS, which is why action was not taken against Appellant until 2012. They were not sure where Appellant was going and what he was doing.

The HCE's office installed a second antenna under the dashboard of Appellant's truck in December 2010 and disconnected the antenna of the first GPS unit. The original GPS unit on the top of the truck would have looked like it still worked to a by-stander. They only did this for truck # 22 because they did not have concerns about any of the other drivers. Appellant's truck was the only one that was not giving GPS location updates, and all GPS units were set up to give location updates every minute. Appellant was out for personal medical reasons during the winter of 2011, so Appellee was not able to monitor him until 2012.

Mr. Otworth was presented with a memorandum that he distributed to all snowplow drivers on January 11, 2012, which is contained in Appellee's Exhibit 1. The signatures of all employees present showing that they received a copy of the memorandum are contained in Appellee's Exhibit 2. Appellant's signature is contained therein. Mr. Otworth testified that he also held a meeting with all employees in which he restated pertinent aspects of the HCE's policy manual, particularly emphasizing the office's policy on breaks and lunches. Normally, on non-snow days, employees get a morning break at 9:00 a.m. and an afternoon break at either 2:00 or 2:30 p.m. But on snow days, employees must first cover their territory before taking a break. Mr. Otworth testified that no one asked any questions at the meeting, and Appellant was present.

Mr. Otworth said that an employee can generally cover a territory in two truckloads, and it generally takes 2.5—3 hours to empty one truckload. He stated that it only takes a few minutes to reload a truck. Generally, a driver should call his supervisor when he leaves his truck and when he gets back into his truck. Supervisors begin to pay attention to drivers who appear to be taking long breaks.

After the January 11th meeting, Mr. Otworth continued to have concerns about Appellant. He was concerned that Appellant was not completing his route before taking breaks and that he took an excessive number of breaks in an excessive amount of time without notifying his supervisor. Mr. Otworth said he was monitoring Appellant through the GPS, and he was checking with Appellant's supervisor to see if Mr. Fithen contacted his supervisor when he took breaks. Mr. Otworth testified that the only time Mr. Fithen notified his supervisor that he was going on break was once on January 21, 2012.

Mr. Otworth testified that Appellant's supervisor, Mr. Jerry Miller, and the Deputy Engineer, Mr. Chris Fauber, tested the GPS unit on Appellant's truck. They placed a soda can over the GPS's antenna and drove the truck, communicating with each other by 2-way radio. They then removed the can and compared the readings.

Appellee's Exhibit 4 contains a printout of Appellant's GPS records. Mr. Otworth testified that he reviewed the GPS records of every employee, and Mr. Fithen was the only employee that he was concerned about. Mr. Fithen's breaks were 2.5—3 times longer than the other employees'.

Mr. Jerry Miller and Mr. Chris Fauber inspected Appellant's truck prior to giving Appellant notice of an investigatory hearing. It was after a snow route had been completed, and they found an empty soda can on top of the GPS's antenna on the roof of the truck. The can was the bottom one-third of an empty Pepsi can. Appellee's Exhibit 6 contains a picture that was taken with Mr. Fauber's cell phone prior to removing the can.

Mr. Otworth testified that he held an investigatory interview with Appellant on January 24, 2012. Appellant was afforded an opportunity to have an attorney but did not have one present. At the investigatory interview, Appellant admitted to placing the soda can on the GPS's antenna. Appellee's Exhibit 9 contains a transcript and audio recording of the investigatory interview.

Appellee's Exhibit 10 contains a notice of the pre-disciplinary meeting that was held on January 25th, as well as a transcript from the meeting. At the meeting, Appellant denied placing the soda can on the GPS's antenna. He said that prior to the investigatory interview, his wife told him to admit to everything. But he since realized that was bad advice. He said, "As far as I know that thing [the can] has not been on that antenna for two or three years." He did not make any admissions about the length of his breaks; he never made an admission for taking longer than a thirty minute break or going out of his territory and then taking a break.

Mr. Otworth stated that he found Appellant to be dishonest when he interviewed him. Mr. Otworth thought Appellant did not tell the truth about the can, his breaks, or his routes. He stated that if he cannot trust an employee, he must terminate that employee. Appellee's Exhibit 11 contains a removal order for Appellant.

Mr. Otworth testified that he has not looked for other cans on other trucks, but the GPS units on the other trucks have not stopped working for periods of time and then suddenly started working again like the GPS unit on Appellant's truck. Gary Martin also drives truck # 22, and when asked whether Mr. Martin may be responsible for the can on the truck, Mr. Otworth answered in the negative. Mr. Otworth said they had one incident with Mr. Martin, and Mr. Martin's supervisor asked him to check his antenna. He did, and found a can covering the antenna. When he removed the can, Mr. Martin's truck again gave off a GPS signal. Mr. Otworth then asked Mr. Martin about the incident, and Mr. Martin said a can had been left on the antenna from the previous shift. Appellant would have driven truck # 22 on the previous shift.

Appellee's Exhibit 13 contains excerpts from the HCE's Policies and Procedures Manual. Section 3:11 governs county property and states, "Any unauthorized or improper use of Highland County property by employees may result in disciplinary measures being taken against the violating employee, up to and including termination, depending on the seriousness of the offense." Appendix 5 is entitled "Weekday Snow Duty Guidelines." These guidelines state that lunch shall not exceed one half hour, and "[e]mployees must notify the supervisor when they begin and end their lunch period." All employees receive a copy of Appendix 5.

Appellee's Exhibit 12 is a letter from November 29, 2010 that explains and documents the dismissal of Bonnie Setty. Ms. Setty was a supervisor in the Tax Map office, and she was terminated because of insubordination and dishonesty.

On cross-examination, Mr. Otworth stated that he was not aware of truck # 22's GPS going offline during the winter of 2011 when Appellant was absent for personal medical reasons.

Mr. Otworth testified that he never saw Appellant place a can on the GPS's antenna, and he never had a witness say that Appellant placed a can on the GPS's antenna. However, Mr. Otworth stated that a can was found on top of truck # 22 twice. He does not know where the truck was located the first time, but the truck was parked in the county parking spot in the truck barn at the second instance.

Mr. Jerry Miller was the next witness to testify as on direct examination. Mr. Miller has been a Maintenance Coordinator with the HCE for a little over a year. He supervises one snow route—crew 2. Since Appellant is a member in crew 2, Mr.

Miller supervises Appellant. As a supervisor during snow removal, Mr. Miller monitors the trucks GPS's signals and makes sure that the trucks finish their routes. He also answers phone calls and monitors the drivers when they come into the office.

Appellee's Exhibit 5 contains a calendar in which Mr. Miller took personal notes. On certain days, it says "Rick Truck 22." Mr. Miller testified that this was a note to himself that Appellant was sitting in his truck a little longer than he should. For example, on January 13th, Appellant said he took a thirty minute lunch, but the GPS said his lunch was one hour and eleven minutes. Mr. Miller testified that employees generally take a half-hour lunch but may go over by 5—10 minutes. Mr. Miller said he never asked Appellant why he was sitting for so long in his truck. When asked if Mr. Miller ever saw Appellant while he was out on his route, Mr. Miller answered in the affirmative: he saw Appellant sitting at the Hollowtown Church for about an hour on January 2d. Mr. Miller stated that he has reviewed the GPS records of other crew members, but Appellant is the only employee with whom he has any concerns. Mr. Miller testified that an employee will generally call in and say that he will be out of his truck for a few minutes when going on break, but Mr. Miller only remembers Appellant calling in one time, which was on January 21st.

When Mr. Miller was shown the picture in Appellee's Exhibit 6, he identified it as the soda can that Mr. Chris Fauber found on the top of truck # 22. Mr. Miller testified that Mr. Fauber took this picture, and Appellant was the last person who would have driven this truck. Mr. Miller stated that he is not aware of anyone else who placed a can on his GPS's antenna. Mr. Miller also said that he has driven a snow route for Highland County, but he has never heard others talk of putting cans on their antennas. Direct examination ended with Mr. Miller stating that he was not involved in the investigation of Appellant or in the decision to terminate him.

On cross-examination, Mr. Miller testified that he only saw a can on top of truck # 22 once when the truck was in the county's truck barn. He said he did not see Appellant place the can on the truck, and he never heard anyone identify Appellant as the individual who placed the can on the truck.

Upon questioning from the Administrative Law Judge, Mr. Miller stated that someone would not be able to see whether a can is on top of a snowplow truck while standing on the ground; he would have to stand on a step in order to see on top of the truck.

Mr. Christopher Fauber was the next witness to testify, as on direct examination. Mr. Fauber has been the Highland County Deputy Engineer for approximately ten years. In his position he assists Mr. Dean Otworth, the HCE, as instructed.

Mr. Fauber testified that Appellee's Exhibit 6 contains a picture that he took with his cell phone of the soda can on truck # 22. He said he took it the Monday before Appellant received the pre-disciplinary notice, and Jerry Miller was with him at the time. He said he did not see anyone put the can there, but Appellant was likely the last person who drove the truck.

Mr. Fauber said he reviewed the records of the other employees, and he does not have concerns about their breaks. He also has not heard of anyone else using a soda can to cover the antenna on his GPS's unit.

Mr. Fauber said he was involved in the disciplinary matters against Appellant because he was a witness. Dean Otworth asked for his recommendation, and he recommended that they terminate Appellant. He said that based on the evidence, Appellant did not seem truthful when answering the questions that Mr. Otworth asked, and Mr. Fauber thinks it is important to have trustworthy employees who are honest.

On cross-examination, Mr. Fauber testified that the only time he saw a can on truck # 22 was the day that he took a picture of it, but he said he has heard of other times. He also acknowledged that others do have access to Appellant's truck.

Mr. Fauber testified that Appellant was asked a series of questions that they already had the answers to based on GPS data, but Appellant's answers were not even close to matching up with the GPS data.

On re-direct examination, Mr. Fauber testified that he has no reason to doubt the accuracy of the GPS. He said they tested the GPS once by using a soda can on a different truck than truck # 22. He said Jerry Miller drove the truck, and when the can was placed over the GPS's antenna, the truck stayed where it was on the tracking system. But when the can was removed, the truck suddenly appeared at the new location.

On re-cross examination, Mr. Fauber stated that there has never been an issue with the GPS working correctly when there is heavy snow or ice on the truck.

Mr. Dean Otworth next took the stand for a second time, as called on cross examination by Appellant. Mr. Otworth said he has fired two employees, including Appellant, since taking his position.

Mr. Otworth testified that Appellant did not first receive a verbal warning for covering the GPS's antenna with a soda can. When asked what prior discipline Appellant received, Mr. Otworth said he was accused of sleeping during snowplow duty by John Kitter, a prior supervisor. But this would have been about ten years ago, and Mr. Otworth cannot remember the outcome of this accusation. Mr. Otworth also remembered one other instance when Appellant was written up for not using safety equipment, and he knows Appellant has been warned several times for not wearing his seatbelt. Mr. Otworth then said that in the sixteen years that Appellant has been employed by the HCE, this is the only serious charge that Appellant has faced.

Mr. Otworth testified that he is unaware of any other employee who has been disciplined for taking excessive breaks.

When questioned by Appellee, Mr. Otworth testified that Appellant's discipline was commensurate with the level of misconduct involved, which is permitted by the HCE's disciplinary policy. Mr. Otworth also said that he is unaware of anyone in the HCE's office who has committed similar misconduct as Appellant.

Mr. Bill Faul was the next witness to testify, called by Appellant. Mr. Faul is a Highway Superintendent with the HCE, which involves supervising crew members when not on snow duty. When on snow duty, another supervisor supervises half of the crew members. Mr. Faul has been a Highway Superintendent for eighteen years.

When asked if anyone has ever called in to complain about Appellant's territory not being taken care of, Mr. Faul answered in the negative.

Mr. Faul testified that Appellant shared truck # 22 with Gary Martin, whose full-time job is as an Engineer. Mr. Faul stated that approximately 50—60% of the time, Mr. Martin is too busy at his regular job to snowplow, so Appellant covers for

him.

Mr. Faul admitted that every driver may have taken an unscheduled or prolonged break at one time or another, but he is not aware of any specific instance in which a driver did so. Mr. Faul stated that drivers may briefly be in another's territory, but it would only be while driving to their own territories. Most of the time, drivers would not be out of their territories.

When questioned by Appellee, Mr. Faul testified that Appellant is not in his crew. Mr. Faul said that when employees take breaks, they will call him on the radio to tell him that they will not be in their trucks.

Mr. Faul testified that he is not aware of anyone on his snow crew that has tampered with a GPS's antenna. When the Administrative Law Judge asked how it would make him feel if he found out someone had tampered with the GPS, Mr. Faul said he would be upset because the GPS is government property, and it is meant to protect the drivers and give the supervisors information about the trucks.

Mr. Faul was then questioned again by Appellant, and he testified that not all territories have places to eat in them, so a driver may have to leave his territory to eat. He said that no more than two of the territories may be this way.

Next, Mr. Faul was presented with Appellant's Exhibit K—1, which contains records of truck # 21. Mr. Faul was asked about the hour and 45 minute break that truck # 21 took on January 3, 2012. Mr. Faul testified that although he cannot remember the exact date, he remembers the driver of truck # 21 having lots of issues with his truck at about that time, so that was probably the day he had those issues.

Mr. Faul stated that the general policy is for a driver to complete his route completely before taking his first break.

Appellant next recalled Mr. Jerry Miller to the witness stand. Mr. Miller was shown Appellant's Exhibit K—3 and asked if he knew why truck # 18 only drove 142 miles on January 2, 2012 in an eight-hour shift. Mr. Miller testified that he remembers that snowplow breaking down that day in Leesburg.

When asked what the rule regarding breaks is during snow duty, Mr. Miller testified that drivers are expected to complete their routes before taking breaks.

Mr. Miller stated that when looking at the total distance travelled by a driver in any given shift, one must factor in the number of miles that a driver must travel from the office to the beginning of his route. Some drivers must travel farther than others just to get to the start of their routes.

Appellee next questioned Mr. Miller, and Mr. Miller testified that he had no concerns about anyone other than Appellant tampering with the GPS equipment.

Appellant then questioned Mr. Miller again, and Mr. Miller stated that he remembers Appellant driving for Gary Martin quite often so that Mr. Martin could stay in the office and perform his other duties as Engineer.

In Appellee's closing argument, Appellee stated that the HCE's office had a series of policies and procedures regarding snow removal, its equipment, and work hours. All drivers received copies of the policy. There was also an all-hands meeting where the policy was discussed, with emphasis placed on completing routes, notifying supervisors of breaks, and adhering to the break times. No employees asked questions at this all-hands meeting.

Due to concerns stemming from Appellant tampering with his GPS unit, a second GPS antenna was inserted into Appellant's truck, and the first antenna was disconnected. This second antenna provided data showing that Appellant was not performing his snow removal duties according to the county's policy. He was taking extended breaks, taking breaks out of his territory, and not notifying his supervisor when he was taking breaks.

Appellant was called into an investigatory interview, and he indicated that he used a soda can to cover the GPS's antenna on the roof of his truck, but he denied taking breaks that were too long, breaking out of his territory, and failing to notify his supervisor when he was taking breaks. The next day Appellant said it was 2—3 years since he used a soda can to cover the GPS's antenna, and he continued to deny all other allegations against him. However, prior to the investigatory interview, the HCE's office inspected Appellant's truck and found a can covering the GPS's antenna on the roof of his truck.

The HCE's office removed Appellant from employment with the HCE. Appellee argued that no disparate treatment took place, and there are no other employees in a similar position to which one can compare Appellant. The county has no similar concerns with any other employees. Highland County asserts that Appellant's termination was for just cause and requests that Appellant's appeal be denied and this Board affirms his termination.

In Appellant's closing argument, he asserted that this is a case of employment discrimination. Appellant stated that he has logged more time in snow duty and logged more miles than the other employees. He stated that other employees go out of their territories and take extended breaks. Appellant believes that the county is hearing employees talk about forming a union and thinks Appellant is responsible. Appellant said that the county is taking its anger out on him.

FINDINGS OF FACT

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

1. Appellant, Rick L. Fithen, was a Highway Worker 1 with the Highland County Engineer (HCE). The HCE is required to have a snow removal policy and snow removal routes. Snowplow drivers have territories in which they are required to remain. Appellant was a snowplow driver who was assigned a snow removal route in one such territory.
2. Between 2006 and 2007, the HCE's office put GPS units in each of the snowplow trucks. Approximately 3—4 years ago, the HCE's office noticed that Mr. Fithen's snowplow would occasionally disappear off the GPS tracking system. As a result, the primary GPS antenna was disconnected on Mr. Fithen's snowplow and a second antenna was installed inside the dashboard.
3. Covering a GPS's antenna with a soda can, will block the GPS's signal.

4. On January 11, 2012, the HCE had a meeting with all snowplow drivers in which he reiterated the county's snow removal policy. Appellant was present at the meeting. Appellant did not ask any questions.
5. Appellant drove truck # 22.
6. Appellant shared truck # 22 with Gary Martin. Mr. Martin's regular job is as an Engineer with the HCE. Appellant would often fill-in for Mr. Martin and cover his snowplow shifts.
7. Appellant is the only snowplow driver about which the HCE had any concerns.
8. After truck # 22 had completed a snow route, and prior to giving Appellant notice of an investigatory interview, the bottom one-third of an empty Pepsi can was found covering the GPS's antenna on truck # 22.
9. An investigatory interview occurred on January 24, 2012 in which Appellant provided statements that were contrary to the signals from the GPS unit. He denied ever leaving his territory and taking breaks that were too long. But Appellant did admit to placing a soda can over the GPS's antenna when he deemed it necessary and appropriate.
10. At the pre-disciplinary meeting on January 25, 2012, Appellant said he was untruthful at the prior day's investigatory interview. He then denied covering the GPS's antenna with a soda can. He still remained adamant that he never left his route and that he did not take long breaks.
11. No one has ever seen Appellant place a can over the GPS's antenna on truck # 22.
12. Appellant Fithen was removed from his position of Highway Worker 1, effective January 27, 2012.

13. The HCE found Appellant guilty of misconduct as set forth in Ohio Revised Code 124.34. Specifically, the removal order stated, "The reason for this action is that you have been guilty of . . . Insubordinate (dishonest); Failure of Good Behavior; Conduct Unbecoming; Inefficiency and Neglect of Duty; Failure to follow snowplow territory policy on multiple instances, including but not limited to January 2, 3, 13, 18 & 21, 2012; Tampering with County Engineer GPS snow equipment."
14. The HCE removed Appellant from his position of Highway Worker 1, effective January 27, 2012.

CONCLUSIONS OF LAW

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

Appellant disputes Appellee's accusations and the underlying facts that led to Appellee's accusations. But the overwhelming weight of the evidence supports Appellee's accusations.

A GPS unit was initially installed in Appellant's snowplow truck approximately 3—4 years ago. Approximately two years ago, the Highland County Engineer's office noticed that Appellant's snowplow would occasionally disappear off the GPS tracking system. As a result, the primary GPS antenna was disconnected on Appellant's truck # 22, and a second antenna was installed inside the dashboard.

Appellant was absent from work during the winter of 2011 for personal medical reasons, and Appellee testified that there were no issues with the GPS system tracking truck # 22 that winter. This lends credence to the fact that the other employee who occasionally drove truck # 22, Gary Martin, was not the individual disobeying the HBE's snow removal policy.

Appellant was aware of the HCE's snow removal policy. Appellant was present at the January 11, 2012 meeting in which the HCE reiterated the county's

snow removal policy. Appellant also signed his name showing that he received a copy of the snow duty memorandum distributed at the meeting, which emphasized the policy.

Appellant operated truck # 22 during the winter of 2012. He was not aware that the GPS's antenna on the roof of the truck had been disconnected and a new antenna had been installed in the dashboard of the truck.

Since a soda can was found covering the antenna on the roof of truck # 22 after the truck returned from a snowplow route and before Appellant received notice of an investigatory interview, the evidence suggests that Appellant was covering the antenna with the can, thinking that the can was blocking the GPS's signals. Unbeknownst to Appellant, the antenna on the roof of the truck had been disconnected, and an antenna in the dashboard was still sending signals.

Section 3:11 governs county property and states, "Any unauthorized or improper use of Highland County property by employees may result in disciplinary measures being taken against the violating employee, up to and including termination, depending on the seriousness of the offense." Placing a can over the GPS's antenna in the attempt to block the GPS's signal would be an "unauthorized or improper use of Highland County property" warranting disciplinary measures "up to and including termination."

The GPS data from the winter of 2012 shows that Appellant took excessive lunch breaks. Appendix 5 is entitled "Weekday Snow Duty Guidelines." These guidelines state that lunch shall not exceed one half hour, and "employees must notify the supervisor when they begin and end their lunch period." All employees received a copy of Appendix 5. Therefore, Appellant was aware that his lunch breaks were too long.

The GPS data from the winter of 2012 shows that Appellant took excessive breaks. Section 2:09 of the HCE Policies and Procedures Manual states that "employees are provided with two (2) rest periods of fifteen (15) minutes in length" each workday. Testimony revealed that on snow days, drivers are expected to first cover their route before taking a break. The GPS data shows that Appellant took breaks that were longer than fifteen minutes, and Appellant likely took at least one break before covering his route.

The GPS data from the winter of 2012 shows that Appellant left his assigned territory on multiple occasions. Some testimony suggests that one or two territories might not have anywhere to eat in them, so drivers may have to leave their territories for food. But Appellant failed to present any evidence showing that he was assigned to such a territory. Some testimony also suggested that perhaps some drivers have to cross through other territories in order to get to their own. But again, Appellant failed to present any evidence that showed he was assigned to such a territory. The testimony also supports a conclusion that Appellant failed to notify his supervisor of when he was going on breaks, as required by the HCE's policy.

Appellant self-admittedly lied during his investigatory interview on January 24, 2012. Although he claims to have later told the truth at the pre-disciplinary meeting on January 25th, his prior day's lies gave the HCE cause to view Appellant as dishonest.

The overwhelming weight of the evidence suggests that Appellee had cause for terminating Appellant Fithen's employment as a Highway Worker 1 with the Highland County Engineer for insubordination (dishonest), failure of good behavior, conduct unbecoming, inefficiency and neglect of duty, for failing to follow snowplow territory policy, and for tampering with County Engineer GPS snow equipment.

RECOMMENDATION

Since Appellee has met its burden of proving the allegations in the removal order and did not abuse its discretion, it is my **RECOMMENDATION** that the removal of Appellant Fithen, effective January 27, 2012, be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.


Christopher R. Young
Administrative Law Judge

CRY:

