

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Philip Houchins,

Appellant,

v.

Case No. 2012-REM-02-0034

Department of Youth Services Central Office,

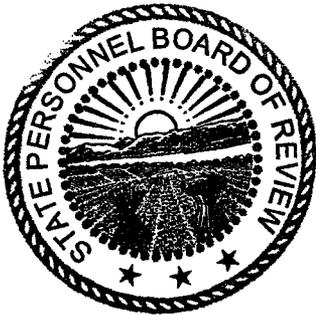
Appellee.

ORDER

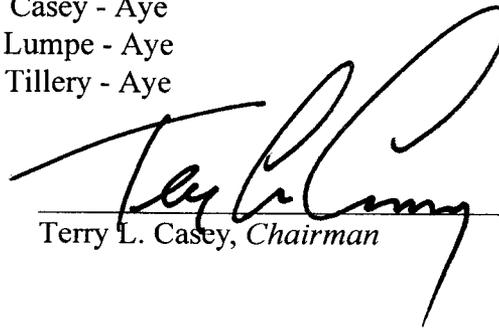
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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, the Board hereby modifies the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's removal be **MODIFIED** to a 60-day suspension and that Appellant be provided additional training on Department of Youth Services' workplace procedures.



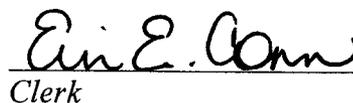
Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

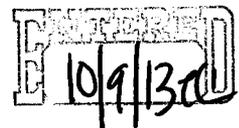
CERTIFICATION

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, October 09, 2013.


Erin E. Conn
Clerk

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



NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE October 16, 2013. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then **YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.**

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2012-REM-02-0034

Transcript Costs: \$225.00 Administrative Costs: \$25.00

Total Deposit Required: * \$250.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: October 24, 2013

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

Philip Houchins,

Case No. 2012-REM-02-0034

Appellant

v.

August 22, 2013

Department of Youth Services,
Central Office

Appellee

Jeannette E. Gunn
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 his removal from employment with Appellee. A record hearing was held in the instant matter on January 14, 2013. Appellant was present at record hearing and was represented by Marc E. Myers, attorney at law. Appellee was present at record hearing through its designee, MIS Bureau Chief Burger Penrod, and was represented by Timothy M. Miller and Matthew J. Karam, Assistant Attorneys General.

The R.C. 124.34 Order provided to Appellant states as the basis for his removal:

On or about the dates of 8/16/11, 8/22/11 and 8/23/11 you failed to properly call-off for your regularly assigned shift.

Your actions are in violation of the following Policy 103.17 Rule(s) effective July 8, 2009, specifically:

Rule 1.02A Call off procedures
Failure to notify a supervisor of absence or follow call-off procedures. Post positions must call-off at least 90 minutes prior to the start of their scheduled shifts and non-post positions must give notification no later than 30 minutes after the start of their scheduled shift.

Rule 5.09A Violation of Ohio Revised Code 124.34 – attendance related
Including, but not limited to such offenses as incompetence, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of the rules of the Director of Administrative Services, any other failure of good behavior, any other acts of misfeasance, malfeasance or nonfeasance in office or conviction of a felony.

STATEMENT OF THE CASE

Appellant testified that immediately prior to his removal from employment with Appellee Department of Youth Services (DYS) he held the position of Business Manager in Appellee's Management Information Services (MIS) Bureau. He noted that his position was classified as Management Analyst Supervisor 2 and estimated that he had occupied that position for approximately 10 years. Appellant indicated that his immediate supervisor was Bureau Chief Burger Penrod.

Appellant stated that he was responsible for oversight of all the Bureau's business aspects; he coordinated the purchase order process, as well as inventory activities. He confirmed that both responsibilities had time constraints and deadlines that needed to be observed and met. Appellant noted that he was partially responsible for renewing software licenses for MIS and was familiar with the procedure and timeframe the task required. He observed that MIS would typically be required to act on software license renewals at least a few months prior to their expiration. Appellant testified that standard procedure dictated that all license renewals went through Mr. Penrod, who was responsible for determining which employee was responsible for which license(s).

Appellant indicated that he was off work on disability leave for an extended period of time over the course of the two years prior to his removal from employment. He noted that he had been hospitalized for several medical issues, including two strokes, stomach ulcers and a pancreatic cyst. Appellant stated that despite the amount of time he had missed from work, he still did his best to keep up

with his responsibilities and had discharged himself from the hospital on at least one occasion in order to report to work.

Appellant confirmed that although he was not on disability leave in August 2011, he was not able to work for a significant amount of time. He testified that Mr. Penrod, assigned his responsibilities to other individuals during that time to ensure that work was completed in a timely manner. Appellant emphasized that license renewal deadlines were never mentioned to him as a pressing concern in light of his continued illness, although Mr. Penrod did tell him on one occasion that he was going to assign a license renewal to another employee in order to accommodate Appellant's continued absence.

Appellant testified that he is familiar with Appellee's general work rules and understood that Appellee's policies require employees to call within thirty minutes of the start of their work shift to notify a supervisor if they are not able to report to work. He noted that his regular office hours were 8:00 a.m. to 4:30 p.m., but he typically worked on a flex schedule. Appellant stated that when he called in, he typically would inform his supervisor that he was not feeling well but would try to come to work if he later became able to do so. He indicated that he was never counseled by his supervisor that he was required to call a second time if it became certain that he would not be able to report to work and no one ever made a suggestion to that effect until the Labor Relations Officer who conducted his pre-disciplinary hearing did so. Appellant emphasized that he was never made aware that the method in which he called off was inappropriate.

Appellant confirmed that he called off work on August 16, 22 and 23, 2011. He testified that when he called his supervisor on August 16, 2011, he indicated that he planned to come to work later that morning. He recalled that he was subsequently admitted to the hospital and was not able to report to work that day, and acknowledged that he failed to call Appellee a second time to let them know that he would not be in.

Appellant noted that he participated in a pre-disciplinary hearing prior to his removal; and verified that he had an opportunity to respond to the charges upon which his removal was based. He recalled that he received a copy of the R.C. 124.34 disciplinary order effectuating his removal on February 4, 2012 and acknowledged that he had previous discipline consisting of a one-day suspension in

December 2010, a three-day suspension in February 2011 and a five-day suspension in June 2011, for attendance related issues.

Burger Penrod testified that he has been employed by Appellee since November 2001 and currently holds the position of MIS Bureau Chief. The witness stated that his duties as Bureau Chief include managing the network operations center, training academy, computer infrastructure, and application development. He noted that he also provides educational support for maintenance for four high schools and internal support for the IT department and regional offices. The witness confirmed that he was Appellant's direct supervisor at the time of Appellant's removal.

Mr. Penrod testified that Appellant's removal was based on his alleged violation of Appellee's call off procedure on August 16, 22, and 23, 2011. He stated that he had given Appellant specific instructions over and above those generally listed in the employee handbook and had explained that Appellant needed to be clear regarding his intention to come in to work. The witness indicated that he gave Appellant these instructions during the course of casual conversation on numerous occasions.

Mr. Penrod explained that the daily decisions he needed to make regarding the allocation of work depended on whether or not employees were at work. He stated that on each of the dates in question he had to reassign Appellant's workload to other employees and noted that reassignment of Appellant's workload had occurred frequently over the past year. The witness confirmed that he was able to reassign time-sensitive tasks so that no deadlines were missed as a result of Appellant's absences and indicated that Appellant's removal was based solely on his failure to follow procedures and not a "neglect of duty."

Mr. Penrod emphasized that he believed there was a difference between "calling in" and "calling off;" he clarified that, in his opinion, "calling in" meant calling to say that you would be late but present, and "calling off" meant calling to say you would not be present. He confirmed that Appellee's policy indicates that an employee in a non-post position (as was Appellant's position) must call off no later than 30 minutes after the start of their shift and acknowledged that the voicemails left by Appellant on each of the dates in question conformed to that policy. He noted, however, that Appellant was unclear as to whether or not he would be at

work. The witness agreed that Appellee's policy does not require an employee to call after their initial contact to update their supervisor as to their status.

Mr. Penrod stated that Appellant submitted a leave request form for August 15 and 16, 2011, along with appropriate supporting medical documentation, and confirmed that he approved Appellant's sick leave request for those dates.

Cassandra Price testified that she is currently employed by Appellee as a Labor Relations Officer 2. She testified that she has been employed by Appellee for approximately twenty-four years and has been a Labor Relations Officer for about six years; she was promoted to her current position a few months ago. Ms. Price confirmed that she was assigned to investigate the allegations brought against Appellant.

The witness recalled that she investigated the allegations made by Appellant's supervisors. She stated that she collected payroll documents, timesheets and statements from Mr. Penrod, Mr. Miller, and Appellant. Ms. Price testified that she determined that Appellant had used sick leave on August 16, and had called off on August 22 and 23, 2011. The witness noted that she had no role in determining whether or not discipline should be imposed as a result of the information she collected in her investigation.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Appellant was removed from his position as Business Manager in Appellee's Management Information Services (MIS) Bureau effective February 10, 2012. Appellant's removal was based on his alleged violation of Appellee's call-off policy.

On each of the dates in question, Appellant contacted his supervisor in a timely manner. With the exception of his initial call, Appellant did not call into the office on any of the days.

Appellant indicated in his August 16, 2011, voicemail message that he planned to come to work later that morning; he was subsequently admitted to the

hospital that day and failed to contact Appellee to report that he would not be in. On August 22 and 23, 2011, Appellant indicated in his voicemail message that he would try to come in.

On or about August 25, 2011, Appellant's supervisor, Burger Penrod, approved sick leave for Appellant's August 16, 2011, absence and vacation leave for Appellant's absence on August 22 and 23, 2011.

No work deadlines were missed as a result of Appellant's absences. Appellant's removal was premised solely on his failure to follow procedures and not on a "neglect of duty."

CONCLUSIONS OF LAW

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order.

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio

App.3d 121. Information contained in the record indicates that Appellant was notified of and had the opportunity to participate in a pre-disciplinary hearing. I find that Appellant had notice of the charges against him and an opportunity to respond to those charges. Accordingly, I find that Appellant's due process rights were observed.

Testimony and evidence contained in the record is sufficient to establish that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant. The R.C. 124.34 Order of Removal filed in this matter indicates that Appellant's removal was based on his alleged violation of Appellee's call off procedures. The rule cited by Appellee as applicable to call offs requires that non-post positions must provide their supervisor with notification of their absence no later than 30 minutes after the start of their scheduled shift. Appellant testified that he was familiar with Appellee's call off policy and Mr. Penrod verified that the voicemail messages left by Appellant complied with the timeline set forth in the policy.

Appellee asserts, however, that the call off policy was violated because the information conveyed in Appellant's notification to his supervisor was deficient. The policy, on its face, does not specify any particular language or phrasing which is required to be used by an employee who is calling off. The record contains conflicting testimony from Mr. Penrod, who stated that he told Appellant on numerous occasions that he needed to be more clear regarding his intentions to come to work, and Appellant, who testified that he was never made aware that the manner in which he called off was inappropriate. I find that the standard contained in Appellee's Rule 1.02A was communicated to Appellant, but that insufficient evidence was introduced to demonstrate by a preponderance that any additional requirements regarding the manner in which Appellant was required to communicate his intention to report (or not report) to work were communicated to Appellant.

In the voicemail message left by Appellant for his supervisor on August 16, 2011, he states:

"Hey, Jim, it's Phil. I'll be in there today, uh, I'm just gonna ... I'll probably run a little late, 'cause I've got some ice on these ankles and try to get the swelling down. But I will be in there this morning, so, uh, if you need me give me a call. Ok, thank you."

No call off notification form was introduced in evidence to memorialize Appellant's August 16, 2011, voicemail message. Appellant states in his voicemail message that he will report to work that morning. He does concede that he did not call his employer a second time on August 16, 2011, to inform him that he had been admitted to the hospital and would not be able to report to work that day.

In the voicemail message left by Appellant for his supervisor on August 22, 2011, he states:

"Hey Jim, it's Phil. Uh, I'm not feeling all that great this morning, uh, I'm going to try my best to make it in today, so uh. Hopefully either I'll be there as soon as possible or I'll give you a call and let you know what's going on. Alright, thanks, Jim."

A call off notification form was introduced into evidence to memorialize this voicemail message; the individual taking the call reported the date of absence as August 22, 2011, and that Appellant "will try to make it in." No audio file of Appellant's voicemail message for August 22, 2011, was introduced, however, a call off notification form for that date reported the date of absence as August 23, 2011, and that Appellant "needs to pick up prescription, will try to make it in." I find that these call off communications differ from Appellant's August 16, 2011, message, in that they do not indicate affirmatively that Appellant will report for work. Appellant indicates merely that there is a possibility he will be able to come in.

Upon review of Appellant's August 16, 2011, voicemail message and in light of his failure to otherwise call off work that day, I find that Appellant did not notify his supervisor that he would be absent from work on that date; Appellee's Rule 1.02A required Appellant to notify Mr. Penrod of his absence, therefore, Appellant's conduct violated Appellee's policy. I further find that the information provided by Appellant on August 22 and 23, 2011, was sufficient to indicate that he would be absent from work on those dates; this conduct does not violate Rule 1.02A, since Appellant notified Mr. Penrod of his absence and did so within the appropriate time period.

Accordingly, the Board may proceed to consider whether or not removal from employment was an appropriate discipline to be imposed upon Appellant for his August 16, 2011 violation of Rule 1.02A. Appellee presented information at record

hearing to demonstrate that Appellant had received prior discipline related to attendance issues, specifically, a one-day, a three-day and a five-day suspension. None of the instances of prior discipline were related to any alleged violation of Appellee's call off procedures; each of the suspensions involved allegations that Appellant had violated leave policies. In the matter at hand, Appellant had sufficient leave balances to cover his absences from work and his use of leave was approved by his supervisor. Testimony established that Appellant had serious health issues and his employer was aware of those issues. I also note that Appellant produced undisputed testimony and evidence to demonstrate that he was unable to report to work on August 16, 2011, because he was admitted to the hospital that day.

While Appellee certainly has an interest in maintaining consistent and efficient business operations, in this instance I find that Appellant has presented sufficient and compelling evidence to support a conclusion that removal was not an appropriate disciplinary response to his failure to comply with Appellee's call off policy on August 16, 2011.

Therefore, based upon the above analysis, I respectfully **RECOMMEND** that Appellant's removal be **MODIFIED** to a written reprimand.


Jeannette E. Gunn
Administrative Law Judge

JEG: