

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

JAYME MASON,

Appellant,

v.

Case No. 12-REM-04-0069

LOGAN COUNTY BOARD OF COMMISSIONERS,

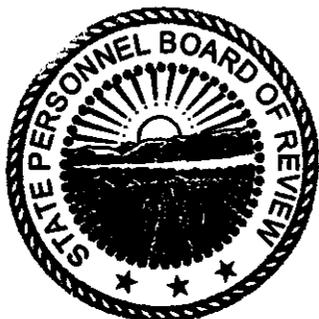
Appellee

ORDER

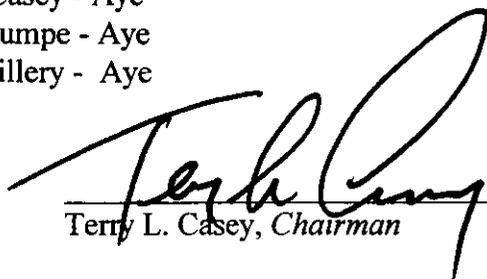
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's removal of Appellant from her STNA position is **AFFIRMED** pursuant to Ohio Revised Code Sections 124.03 and 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, August 09, 2012.




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.

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

JAYME MASON,

Case No. 12-REM-04-0069

Appellant

v.

July 9, 2012

LOGAN COUNTY BOARD OF COMMISSIONERS,

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on due to Appellant, Jayme Mason's, April 18, 2012 timely filing of an appeal with the State Personnel Board of Review (the "Board") in response to receiving a notice *via* a letter that she was terminated from her position as a State Tested Nursing Assistant ("STNA") with the Logan Acres Senior Community Care Center ("Logan Acres"), under the general authority of Appellee, Logan County Board of Commissioners. The notice of termination was effective April 9, 2012. A telephone Pre-Hearing Conference was held on May 15, 2012. On May 22, 2012, Appellee submitted a list of its witnesses for the Record Hearing and a list of its documents to be furnished to Appellant's counsel.

A full Record Hearing was held on June 20, 2012. Present at the Hearing was Appellant, who was represented by Darrell Heckman, Attorney at Law. Appellee was present through its designee, Natalie Gilmore, Logan Acres Administrator, and was represented by William Goslee, Logan County Prosecuting Attorney.

Appellant's removal was instituted by Administrator Natalie Gilmore for alleged insufficient care, incompleteness of assigned duties, and poor work performance. The order of removal was instituted pursuant to R.C. 124.34 because Appellant was a classified employee. Because of her classified status, Appellant may only be terminated for just cause.

Conversely, Appellant contends, her conduct did not rise to the level meriting removal and mitigating circumstances were also present. Appellant therefore asserts that her removal should be modified and her position restored.

R.C. 124.03 generally limits this Board's merit jurisdiction to employees whose positions fall within the classified service. It is uncontested that Appellant was an employee in the classified county service. Accordingly this Board's jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant, Jayme Mason, was terminated from her position as an STNA with Logan Acres effective April 9, 2012. She received notice of termination the same day, and subsequently filed a timely appeal on April 18, 2012. The pertinent removal order cites insufficient care, incompleteness of assigned duties, and poor work performance as the just cause for her removal under R.C. 124.34.

The two incidents that led to the order of removal took place over the course of two days, March 23-24, 2012.

In **the first incident (the "shower incident")**, on March 23, Appellant was bathing a resident in the Logan Acres shower, part of Appellant's regular responsibilities. Logan Acres is a facility that cares for, *inter alia*, the elderly, disabled, and individuals otherwise unable to live in complete independence. Thus, the residents may be taken to and from the showers on a plastic, wheeled chair which contains an opening on the seat and a waste receptacle below, not unlike a conventional toilet.

On this particular occasion, the resident in the care of the Appellant used the receptacle during the shower, and subsequently it contained the contents of the resident's bowel movement. Normally the receptacles are emptied and cleaned after the shower by disposing of the waste into a separate toilet in an adjacent room. It is alleged that Appellant, rather than properly disposing of the waste, simply emptied the contents of the receptacle onto the floor of the shower room, and the resulting mess was discovered and cleaned up by another STNA and housekeeping employee. Appellee contends that this conduct is consistent with poor work performance and completing duty assignments improperly or not according to the job description. In addition, Appellee contends this also exposes the residents to the risk of infection.

The second incident (the “gown incident”) is alleged to have occurred the following day, March 24. In this incident, the Appellant is alleged to have failed to indicate that she had not fully completed morning care for one of her residents. Specifically, it is alleged that Appellant failed to apprise other staff that Appellant did not change this particular resident’s gown during Appellant’s shift and, indeed, claimed that she had changed this resident’s gown during Appellant’s shift.

This failure to change the resident’s gown was made apparent by noticeable stains that were on the gown, recognized as having been there the previous day; thus indicating the gown had yet to be changed. Appellee has characterized this conduct as insufficient care, incompleteness of assigned duties, and poor work performance.

Taken together, these two incidents form the basis for the order of removal.

The standards for employee conduct at Logan Acres are delineated in the employee handbook, and the handbook states that “[t]hese policies have been established by the Board of County Commissioners.” The handbook also contains a disciplinary policy section, which has adopted extensive language from the Ohio Revised Code, specifically Chapter 124.34. The disciplinary policy follows the principles of progressive discipline, including tiered levels of discipline and different classes of offenses.

The alleged conduct of the Appellant falls within Class I offenses, the lowest of three levels of offenses. The handbook describes Class I offenses as those that “are of a relatively minor nature, caused by negligence or are usually unintentional.”

Class I offenses carry with them four levels of discipline, in ascending order of severity: verbal warning, written warning, two-day suspension without pay, and termination. Because these instances were the fourth occasion of Class I misconduct, Appellant had exhausted the tolerance of misconduct contemplated by the disciplinary policy. Accordingly, this Appellant’s alleged misconduct would constitute a fourth instance of a Class I misconduct and would, thus, be a ground for termination.

The factual basis for the alleged misconduct of the Appellant is derived from the written statements of several coworkers and supervisors from the testimony of

the afore-mentioned employees taken at the Record Hearing. Based on Appellee's disciplinary grid, if Appellee can demonstrate by a preponderance of the evidence that the Appellant's conduct conforms to the alleged misconduct, then Appellant's removal may be affirmed.

The Shower Incident

The incident concerning the shower room was described in both written statements entered into evidence and in the testimony of several witnesses. The primary witness of this incident, other than the Appellant, was **Heather Burk**, an STNA who was present with Appellant when Appellant was alleged to have dumped the contents of the shower chair onto the floor.

Ms. Burk averred that, after Appellant gave the resident her shower and returned her to her room, Appellant then brought the shower chair back to the shower room, removed the waste bucket, made a remark that the resident had "gone to the bathroom," and then proceeded to dump the contents of the bucket onto the floor of the shower room without cleaning it up.

Ms. Burk stated that this action caused the contents of the bucket to splatter across the floor and onto the walls of the shower room. Approximately one and one-half hours passed until the shower room was seen by a first shift STNA at the same time Ms. Burk was returning the linen cart to the hallway for the first shift to use at the end of her shift. Ms. Burk was then alerted to the unsanitary situation in the shower room. Ms. Burk then spent approximately 10 to 15 minutes cleaning the floor and thus clocked approximately half an hour of overtime. Ms. Burk then testified that she reported the incident to her supervisor.

The testimony of **Appellant** essentially confirms the account given by Ms. Burk. Appellant testified that she believed that the waste bucket only contained urine and not solid waste. She stated that she did dump the contents of the bucket onto the shower room floor and that Ms. Burk then left. Appellant then stated she went off to attend to other residents because she thought that she had everything cleaned up, including any waste matter left on the shower room floor.

It was not until approximately 7:00 A.M., about one and one-half hours after the incident, that Appellant was made aware that she had not, in fact, cleaned the shower room. Appellant's testimony essentially matches Ms. Burk's account that

Appellant was told by Ms. Burk just before Appellant was about to leave for the day that the shower room had yet to be cleaned from the earlier incident.

Appellant stated, as Ms. Burk did, that Ms. Burk was taking care of the linens while Appellant took care of the trash at the end of their shift, and as Ms. Burk was returning the linen cart to the hallway for the next shift, a day-shift STNA informed Ms. Burk about the condition of the shower room.

Appellant gave no explanation as to why she dumped the waste bucket onto the floor of the shower other than Appellant's statement that she initially thought it only contained urine. Nor did Appellant give an explanation as to why she did not clean the shower room before the end of her shift other than her stated belief that she had already cleaned it up.

Appellant stated that, when the shower ended at approximately 5:30 A.M., she took the resident back to the resident's room on the shower chair, returned the chair to the shower and then proceeded to empty the contents of the waste bucket on the shower floor, and then continued with her normal rounds because she thought she had cleaned it up. When Appellant was about to leave, Ms. Burk approached Appellant as Appellant was getting into her car. Ms. Burk then told Appellant the shower room had not been cleaned and Appellant stated that she had already cleaned it up.

This conduct by Appellant was not only testified to by a witness with personal knowledge of the events, but was also corroborated by the testimony of the Appellant. The state of the shower room was also witnessed by another STNA who was working the shift immediately subsequent to Appellant's. That STNA made a written statement the same day of the incident, March 23, 2012, that corroborates the description of the shower room, including the observation that solid waste was all over the floor and walls. The written statement also corroborates the testimony of Ms. Burk, specifically, that Ms. Burk had apprised this STNA that Appellant had stated to Ms. Burk that Appellant had given the resident a shower and that Appellant had also cleaned up the shower room.

Appellant's conduct clearly falls into the Class I offense cited in her order of removal for poor work performance and completing duty assignments improperly or not according to the job description. Appellant was aware that there is a specified toilet next to the shower room that is to be used for disposing of any bodily waste,

as verified in the testimony of Ms. Burk and of the Appellant, herself.

It is true that Appellant stated she believed that the waste bucket contained only urine. This may have been a reasonable belief based on the testimony of both Ms. Burk and Appellant, which indicated that there was water mixed in the bucket, and that the resident's stool was inconsistent.

Yet, it would have become immediately apparent this was not the case when Appellant dumped the bucket onto the floor. Notwithstanding the fact she did dump the bucket, and her belief that she cleaned it up, Appellant was notified before she left the work site that the shower room had not in fact been cleaned. Appellant has offered no explanation as to why the bucket was dumped on the shower room floor, nor as to why the contents were never cleaned up.

The Gown Incident

The incident that occurred the next day, March 24, 2012, concerned the allegation that Appellant failed to change the gown of a resident and then failed to indicate to the next shift that Appellant had not changed the resident. This allegation is attested to both by written statements entered into evidence and the testimony given during the Record Hearing. Besides the Appellant, two additional witnesses, one of whom gave written and oral testimony, described the incident.

The record reflects that Appellant reported that a particular resident had been given her morning care, including having her clothing changed. This report turned out to be inaccurate, in that, despite the report indicating the care had been given, it had not. (While not part of the allegations contained in the order of removal, apparently this incident was essentially repeated four days later. At that time, this same resident was to have been given her morning care, including a change of clothes, and it was reported by Appellant as having been completed, yet it was apparent that it was, again, not completed.)

In regard to the allegation in the order concerning the behavior on March 24, 2012 regarding Appellant's allegedly stating she changed a gown when she did not, the testimony of Appellant indicates that she was prepared to give the morning care to the resident, including changing her gown. Appellant stated that she then needed to attend to a call light that had been activated by another resident, indicating that that resident needed help.

Appellant testified that she was the only employee in the wing at that time; there were no STNAs, LPNs, or supervisors available to respond to the call; thus she undertook to see to the matter. Apparently this was what caused her not to provide the morning care to the resident she had just been with.

As stated in the testimony of **Alicia Siebeneck**, another Logan Acres STNA, residents at Logan Acres are to have their gowns changed twice daily; she stated that this normally takes place in the morning at the end of the third shift or beginning of the first shift, approximately 7:00 A.M., and at the end of the second shift or beginning of the third shift, approximately 11:00 P.M.

Ms. Siebeneck also stated that these changes can occur at anytime, during any shift, so long as the resident is twice changed. It is generally not an issue when a resident receives his or her gown change so long as it is reported; so that the next shift will know what care the resident has received. Testimony reflected that these reports are informal and that they may be made orally or can be written as notes, so long as they convey the needed information.

The incident in question was testified to by several witnesses who gave either written or oral statements concerning the particular resident Appellant had been working with on March 24, 2012. Ms. Seibeneck, in her first written statement, stated that she and another STNA noticed that the resident was wearing the same gown as the day before, apparently due to a coffee stain that had been there the day before. In addition to this, the resident's towels and wash clothes were still in the room, which indicated to Ms. Siebeneck that the towels and wash clothes had not been used, and thus the resident had not received the requisite care.

The written statement also noted that this was not the first time Appellant had failed to provide adequate care to a resident, stating that there have been instances when residents had not been properly cleansed. As noted above, it is not a *per se* failure to provide adequate care if an STNA does not complete the full amount of care the resident needs. However, the record reflects that, if this care is not fully given, this fact must be reported orally or in writing to the next shift.

Ms. Siebeneck's statement begins by noting Appellant had told her that the resident's morning care was completed, but, as noted above, this was not accurate. Appellant stated in her testimony that she had been summoned by the call light to

help another resident, but failed to report to the next shift that they would need to finish attending to the resident who needed a gown change. Although Appellee characterizes this failure to report as dishonesty, it is quite possible that Appellant merely forgot that she had not completed care; however this would not excuse the failure to properly report the state of care of a resident.

Appellant's conduct with respect to the incident of March 24, 2012 falls within the conduct enumerated in the list of Class I offenses. The actual failure to properly care for the resident by changing her clothes in accordance with Logan Acres guidelines would not, in of itself, fall into a violation. Yet, the failure to accurately report what care the resident needed would.

Appellant was distracted from the resident in order to attend to the call light. Yet, in order to be in compliance with Logan Acres' policy, Appellant either needed to return to the resident to finish her care or to report to the next shift that her resident needed her care finished. The result of this failure can, without difficulty, be characterized as insufficient care, incompleteness of assigned duties, and poor work performance.

Pursuant to Appellee's progressive disciplinary policy, an employee at Logan Acres would need to be found in violation of at least four Class I instances of misconduct before an order of removal will be issued. Furthermore, pursuant to the same disciplinary policy, an employee could also be removed for fewer violations if one of the violations fell into the more serious Class II or Class III offenses. In accordance with the policy, two instances of Class II violations or a single instance of Class III misconduct would be sufficient to remove an employee for cause.

In this instant case, Appellant was removed because the incidents of March 23-24, 2012 constituted a fourth instance of misconduct of any class. In addition, the third instance, the alleged failure to adhere to a previously-issued performance improvement plan, constituted a Class II violation. There is thus no dispute that Appellant has reached the threshold for termination contemplated by the progressive disciplinary policy.

Should two of Appellant's prior disciplines have been considered moot?

Appellant argues that the first two instances of misconduct (namely incidents occurring in Calendar Year 2010 not previously referenced) ought to be considered

moot for purposes of the accumulated discipline. She argues this because these two instances occurred more than a year before Appellant had her next disciplinary issue, namely the alleged failure to adhere to the performance improvement plan.

In her testimony, Logan Acres Administrator Natalie Gilmore elaborated on the concept of mootness. Ms. Gilmore stated that for purposes of the progressive disciplinary policy, past instances of disciplinary policy violations may be rendered moot for future disciplinary considerations, if it is demonstrated that the employee's conduct and performance have sufficiently improved over the levels that formed the original basis for the discipline.

Ms. Gilmore further elaborated that this permissive, and thus discretionary, practice of mooting previous instances of misconduct does not *require* that violations occurring at least a year in the past be rendered moot, especially in light of any indication that the employee has not sufficiently demonstrated an improvement in work performance.

Appellant's basis for arguing that these two Calendar Year 2010 disciplinary policy violations are moot is based on the position evaluation given to Appellant around November 26, 2011. In this evaluation, Appellant received no score which indicated "unsatisfactory" performance in any performance area. In the eight areas in which Appellant was evaluated, she received a score of below average in five areas, and a score of good in the remaining areas. For this evaluation, scores are given on a 1 to 5 basis, with a score of 1 indicating unsatisfactory performance, and a score of 5 indicating outstanding performance. Scores of 2 and 3 are indicative of below average and good performance, respectively.

Appellant argues that, because she received no unsatisfactory ratings on this performance evaluation, this evaluation indicates sufficient performance improvement in order to render previous disciplinary instances moot. This is a tenuous assertion for the reason that Logan Acres put Appellant on a performance improvement plan specifically because of the number of below average scores given on the afore-mentioned evaluation, thus strongly indicating that the employer did not believe Appellant was making sufficient improvements in her performance.

Moreover, this performance improvement plan specifically states that the issue prompting the plan was overall below average work performance. Appellant essentially argues that below average work performance is sufficient to demonstrate

an improvement in form, merely because the performance was not rated as wholly unsatisfactory, *i.e.*, a score of 1.

Even assuming, for the sake of argument, that any rating above unsatisfactory could form the basis for improving work performance, Appellant's ratings were not deemed to be so by the employer, hence Appellee's utilization of this performance improvement plan. In addition, there is no other evaluation of the Appellant's work performance to compare with the performance improvement plan entered into evidence. Therefore, we cannot know if a hypothetical more-recent formal evaluation would, or would not, have represented an improvement.

In consideration of all of these circumstances, it is still within the discretion of the employer regarding whether to moot previous instances of misconduct due to the employee's demonstrated improvement. Here, Logan Acres determined that Appellant's performance had not sufficiently improved and, so, Appellee placed her on a performance improvement plan.

This amply demonstrates that Appellee determined, fairly or not, that Appellant was not sufficiently improving her work performance. Accordingly, it is not surprising that Appellee declined to moot Appellant's earlier instances of alleged misconduct. Ms. Gilmore's testimony further indicates that Appellant's lack of sufficient performance improvement and instances of misconduct could constitute a pattern of performance and conduct that would militate against mooting these incidents from further consideration.

Mitigating Circumstances Argued

Appellant contends that this Board should exercise its discretionary authority to modify the order of removal and reinstate her to her former position due to mitigating circumstances, including her modest levels of education, intelligence, and what Appellant believes are unduly harsh characterizations of her conduct.

Appellant testified that she possessed a high school degree, which is apparently the average education level for most of the STNAs, as stated by Ms. Gilmore. In addition, Appellant apparently possesses the requisite intelligence for the position. Otherwise, it would be difficult to believe that she could have worked as an STNA for more than 26 years, the last four of which were at Logan Acres.

The characterization of the conduct for which she was removed could conceivably be construed as harsh. However, this is difficult to reconcile with the fact that Appellant was fully aware of the standards of work performance and conduct expected of her and was well versed with the duties she had been performing at Logan Acres for four years. Appellant had been apprised of the policies and standards contained in the employee handbook, which she acknowledged by providing her initials each time a change had been made. Without question, then, Appellant was on notice of Logan Acres' standards and policies, as well as any changes to them.

CONCLUSIONS OF LAW

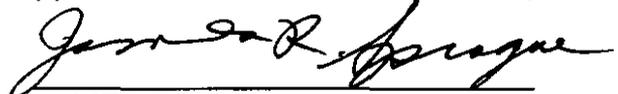
This case presents a question of whether Appellant's conduct was consistent with that described in the order of removal? Based on the findings set forth, above, and for the reasons set forth below, this Board should answer this question in the affirmative and, so, should affirm Appellant's removal.

Pursuant to R.C. 124.34, employees in the classified service may only be removed for just cause. R.C. 124.34 contemplates that just cause for removal is, *inter alia*, ". . . . violation of any policy or work rule of the officer's or employee's appointing authority"

Appellant's conduct violated the rules established by the appointing authority. Further, Appellant's conduct exhausted the tolerance for misconduct contained in the progressive disciplinary policy. Thus, Appellant's removal was appropriate in accordance with just cause. Accordingly, this Board should find that that Appellant's conduct constituted just cause and affirm Appellant's removal.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's **REMOVAL** of Appellant from her STNA position, pursuant to R.C. 124.03 and R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge