

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

David T. Warner,

Appellant,

v.

Case No. 2012-REM-10-0221

Department of Natural Resources,

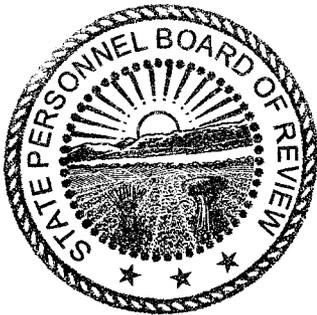
Appellee.

ORDER

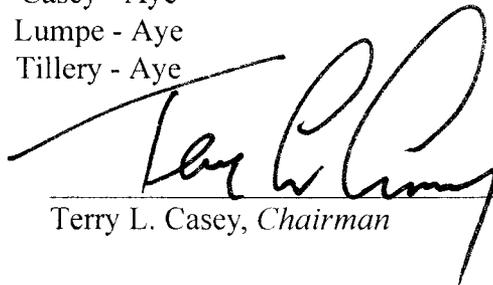
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

The Board has thoroughly examined the entirety of the record. This includes reviewing the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, and receiving and considering the additional analysis that respective counsel offered to the Full Board at the Oral Argument conducted on the record in this matter. Having reviewed same, the Board hereby adopts 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 **REINSTATED** to his Wildlife Officer Supervisor position, effective 60 days following the effective date of Appellant's removal, pursuant to R.C. 124.03 and R.C. 124.34.



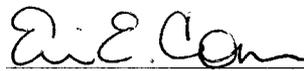
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, November 19, 2013.


Clerk

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

11/19/13cc

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

DAVID T. WARNER,

Case No. 12-REM-10-0221

Appellant

v.

August 7, 2013

DEPARTMENT OF NATURAL RESOURCES,

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard at record hearing on February 14, 2013, and April 15, 2013. Present at the hearing was Appellant, who was represented by Marc E. Myers, Attorney at Law. Appellee, Ohio Department of Natural Resources (ODNR), was present through its designee, Richard Corbin, ODNR Deputy Director (DD) for Human Resources (HR) and Law Enforcement, and was represented by Rory P. Callahan and Amanda L. Scheeser, Assistant Attorneys General. By agreement of the parties, post hearing briefs were timely filed on or before July 15, 2013. This due date took into account a delay in counsels' receiving the transcript in this matter; as a result of the need to prioritize the transcribing of other highly time-sensitive matters ahead of the transcribing of this matter. Once briefs were filed, the instant record was then closed.

This cause comes on due to Appellant's September 28, 2012 timely filing of an appeal from his removal from the position of Wildlife Officer (WO) Supervisor with District 5 of ODNR's Division of Wildlife (Wildlife). Appellant was served with his R.C. 124.34 Order of Removal on September 21, 2013, and the Order was effective on that date.

Jurisdiction of 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

The pertinent language in the instant R.C. 124.34 Order of Removal reads, in pertinent part:

[V]iolating the following provisions of the Ohio Department of Natural Resources (ODNR) Disciplinary Policy:

- B. Dishonesty – 2. Willfully falsifying or removing any official document.
- C. Neglect of Duty – 9. Failure of supervisor to appropriately manage employee(s) or enforce work rules.
- D. Failure of Good Behavior – 7. ... any act that brings discredit to the employer.
- D. Failure of Good behavior – 14 Violation of Revised Code Section 124.34.

You hunted while on duty during deer-gun season in 2008, 2009 and 2010. In addition, you admitted hunted [sic] in uniform and used your state vehicle to travel to the hunt. Further, you concealed the fact that you were hunting on duty by falsifying your time reports for payroll purposes. You also allowed for the falsification of time reports by your subordinate officers, Wright and Roberts, with whom you hunted, by knowingly signing off on their inaccurate time reports.

At hearing, eight witnesses testified.

First to testify was **Appellant, David T. Warner**, who testified on as if on cross examination.

Next to testify for Appellee was **Michele Ward-Tackett**, HR Administrator for ODNR's Division of Wildlife.

Next to testify was for Appellee was **David Lane**, Assistant Division Chief for District Operations for the Division of Wildlife.

Next to testify for Appellee was **Richard Corbin**, ODNR's DD for HR and Law Enforcement, who also served as Appellee's designee at hearing.

First to testify for Appellant was **Appellant, David T. Warner**, who testified on his own behalf on re-direct and on direct examination.

Next to testify for Appellant was **Brian Goldick**, Wildlife's Acting District 5 Manager.

Next to testify for Appellant was **Mike Miller**, Acting Supervisor of District 5, Unit B, and the employee who replaced Appellant after Appellant's removal.

Next to testify for Appellant was **Bill Bullard**, a WO Supervisor in District 1.

Last to testify for Appellant was **Rick Staugh**, who most recently served as a Field Supervisor (WO Supervisor) primarily in District 4 but also in District 5, and who took an early retirement in 2006.

David Warner began his career at ODNR on January 8, 1996. He worked briefly in District 3 as a Wildlife Officer (WO) for a short time and then worked in Greene County in District 5 as a WO from 1996 to 2006. In 2006, Appellant became the WO Supervisor in District 5, Unit B. Unit B is comprised of the following counties: Greene, Butler, Warren, Clinton, Highland, Adams, Brown, Clermont, and Hamilton. One WO is assigned to each county. Therefore, Appellant oversaw nine individuals in his capacity as WO Supervisor of District 5, Unit B. Appellant's supervisor throughout most of his tenure as a WO Supervisor was Todd Haines, District Manager. Mr. Haines was removed from his position, and David Kohler became District Manager but was subsequently removed. At the time of Appellant's removal, Brian Goldick, District 5 Unit A's WO Supervisor, was and currently is Acting District Manager.

On September 21, 2012, Appellant was removed from his position as WO Supervisor. At the time of his removal, Appellant had one written reprimand on file for denting a state vehicle. ODNR removed Appellant for falsifying official documents and failure of a supervisor to appropriately manage employee(s) or enforce work rules. Appellant went hunting in 2008, 2009, and 2010 while reporting to be on duty. In at least one instance, Appellant drove his state vehicle and hunted while partially dressed in his state uniform.

On December 4, 2008, Appellant went hunting with one of his subordinates,

Allan Wright. Appellant's timesheet reflects he was on duty on December 4, and he reported eight hours of regular time worked. Appellant also approved Mr. Wright's timesheet which reflected he was on duty that day when he had been hunting.

On December 3, 2009, Appellant went hunting with two of his subordinates, Allan Wright and Matthew Roberts; his direct supervisor, District Manager Todd Haines; and David Graham, Chief of the Wildlife Division. Appellant drove his state vehicle to his subordinate's home, Allan Wright, and hunted for the day. Appellant's timesheet reflected eight hours of time worked. Appellant approved both Allan Wright's and Matthew Robert's timesheets which reflected time worked on December 3. The record reveals District Manager, Todd Haines, and Chief of Wildlife, Dave Graham, were on leave on December 3, 2009, and did not report time on duty.

However, Appellant's supervisor, Todd Haines, approved Appellant's timesheet which included time reported on the day in which he had gone hunting with Appellant. Appellant testified his supervisor made no mention of an incorrect timesheet nor did he return the timesheet for correction. Appellant testified he patrolled on his way down to the hunt, which would be anywhere from 1.5 to 2 hours. Appellant stated he did not drive straight to the hunt but would take side roads and look for illegal activity. He also worked on his way back from the hunt or when he got home where he would return phone calls and check in with his subordinates. As it pertains to hunting in uniform, Appellant would remove his state uniform shirt and gun belt and leave them in Allan Wright's garage while they were hunting. Appellant testified he did this in case there was an emergency, the officers could readily dress and respond to the call.

On December 2, 2010, Appellant went hunting with two of his subordinates, Allan Wright and Matthew Roberts, and his direct supervisor, District Manager Todd Haines. Appellant's timesheet reflected eight hours of time worked. Appellant approved both Allan Wright's and Matthew Robert's timesheet which reflected time worked on December 2. The record does not reflect whether Mr. Haines was vacation on December 2, 2010, when he went hunting; however, Mr. Haines approved Appellant's timesheet which included eight hours of regular time reported on December 2, the day he had gone hunting with the Appellant. Similar to his activity on December 3, 2009, Appellant testified he patrolled on his way down to the hunt looking for illegal activity. He also worked on his way back from the hunt. Appellant, again, removed his state uniform shirt and gun belt and left them in Allan

Wright's garage while they were hunting in case of emergency.

On May 24 and May 25 of 2007, Appellant attended the Spring Administration Conference at Cantor's Cave. Since Appellant became a supervisor in October of 2006, the conference was his first supervisory conference. At the conference, Division HR Administrator Michele Ward-Tackett addressed some Human Resource related issues to those in attendance. Two slides in the two day conference addressed employees and time worked. One slide addressed "CWD" or "Chronic Worker Disease," an acronym Ms. Ward-Tackett created to describe individuals in the department who "donated time" and did not report it on their timesheets. The other slide bulleted the following statements: Unreported or unofficial compensatory time; Department of labor – FLSA violations; Division liability.

Documentation shows that Appellant also attended a six-hour Employment Law training on January 23, 2008, a six-hour Labor Relations/Contract Administration training on February 12, 2008, and a Budget and Management training on March 5, 2008. Michele Ward-Tackett attended the January 23, 2008 Employment Law training. Five pages of a "large spiral bound notebook" were extracted to show where supervisors were provided with information regarding the Fair Labor Standards Act (FLSA). Two of the five pages were made up of hypothetical situations that covered the standards for overtime in terms of compensation and compensatory time. Ms. Ward-Tackett stated these pages were designed for "break-out sessions" where individuals would get into groups and go over answers. No evidence was provided about the information covered in the Labor Relations/Contract Administration and Budget and Management trainings in 2008.

Policies, Procedures, and Courses of Conduct

Michele Ward-Tackett testified that portions of the training were focused on the FLSA and the importance of staying in compliance with the Act. It was important for individuals to accurately record their time because it was a violation of the FLSA not to compensate an individual for time worked, especially overtime. The issue of inaccurately reporting created a liability for the agency.

The Time and Attendance Reporting System (TARS) was implemented with a numeric coding system which allows employees to track their hours spent

performing certain duties and activities. Eligible activities are then reimbursed with federal monies.

Accurate Time Sheets

While accurately recording time worked was important to the agency, testimony revealed it was a relatively common practice for individuals to inaccurately record their time. David Lane, Assistant Chief of District Operations for the Division of Wildlife, testified to working more hours than he recorded on his TARS. Brian Goldick also testified that between 2008 and 2011 he worked over 80 hours in a pay period and would not report it for the purposes of collecting overtime. Bill Bullard also testified there were times he worked more than 40 hours in a week and did not report it in order "to get the job done."

In addition, an officer named Ken Bebout reported to Mr. Lane. Mr. Bebout submitted timesheets to Mr. Lane with astericks that stated the timesheet was not an accurate reflection of his time. Mr. Lane approved Mr. Bebout's timesheets. Mr. Bebout was not punished for submitting inaccurate timesheets nor was Mr. Lane for not enforcing work rules. Mr. Lane testified he did not have a conversation with Mr. Bebout about the importance of accurately reporting his time.

Flexing

Flex time is available when employees work more than 8 hours in a day or more than 40 hours in a week and are able to take off those additional hours they worked. For example, if an individual worked 12 hours in one day, he or she could work 4 hours the following day, which would average 8 hours a day.

Several individuals confirmed flex time was available. Michele Ward-Tackett testified that the department manages overtime through flexing schedules. She stated that officers had a lot of autonomy to flex their time and there was nothing wrong with that within the 40 hour range. David Lane stated it was a common practice for individuals to flex time if they had worked their hours. Brian Goldick opined that flexing was a common practice and that it was grounded in the "honor system." Mike Miller, the temporary Supervisor for District 5, Unit B (Appellant's former position), stated in regard to flexing your time the way it used to be done was that you would put eight hours on your timesheet regardless of whether you worked more or less, in his words.

“Straight Eights”

“Straight eights” is a concept to which many of the current and former employees of the Division of Wildlife attested. “Straight eights” involves recording eight hours on one’s timesheet regardless of the number of hours worked in a day. If an individual worked 12 hours one day, he would still record 8 hours on his timesheet, and if he worked 4 hours the next, he would record 8 hours of time worked. Mike Miller testified straight eights was a common practice in District One. Mr. Miller stated the method of using “straight eights” was communicated by supervisors, district managers, and law supervisors on a regular basis. Bill Bullard testified that “before 2012 ... things were okay as long as you came up to 40 hours a week.” Mr. Bullard stated that the concept of 40 hour became more prevalent than straight eights. Brian Goldick stated that straight eights is what they were taught from day one in the Academy. “No matter what you worked that day you wrote down straight eights and that’s what you put on your timesheet.”

In 2012, Deputy Director Corbin, Deputy Director Gephart, and Assistant Chief Rowan held mandatory meetings in the districts to address expectations and accountability and they specifically addressed timekeeping and accurately filling out timesheets. Prior to the meeting in 2012, Brian Goldick, Mike Miller, and Bill Bullard all testified it was never communicated that straight eights was an improper procedure or that it was prohibited.

ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

Appellee’s Burden and Evidence

Appellee must prove that Appellant’s due process rights were observed, and Appellee must prove that in administering the discipline, it substantially complied with the procedural requirements of the O.R.C. and O.A.C. Due process requires that a classified civil servant who may receive sufficiently severe discipline must receive oral or written notice of the charges against the employee, an explanation of the employer’s evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34.

Appellee must prove that Appellant committed one or more of the enumerated infractions listed in R.C. 124.34 and the disciplinary order.

For each infraction, Appellee must prove the following:

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

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

On its face, this case appears to be straightforward and fairly clear, a Wildlife Officer Supervisor for the Ohio Department of Natural Resources went hunting while reporting to be on duty. Appellee suggests Appellant was trying to conceal his hunting activities by falsifying his timesheet and the timesheets of his subordinates. The record and Exhibits do not suggest Appellant was trying to be dishonest or conceal any information.

Appellant urges that he was maintaining a straight eights method of timekeeping and flexing his time for the days in which he went hunting. He testified that without question, he worked at least 40 hours in those weeks.

Based upon the evidence in the record, and for the reasons that follow, Appellee has only sustained its burden of proof on one allegation, and, as such, Appellant should be reinstated to his position with a lengthy suspension.

Appellee did not satisfy all due process elements. Appellee did not prove that it had an established standard of conduct that was communicated to Appellant and that Appellant violated the established standard of conduct.

Evidence presented establishes there was a long-standing practice to use flex time as well as the concept of "straight eights." Moreover, even though "straight eights" was not a written timekeeping procedure, testimony revealed it was an established course of conduct within the Department.

Appellant attended several trainings, including the annual supervisory conference in 2007 and Employment Law training in 2008. While Appellee provided the training documents the HR Administrator completed during the same training session, three pages of the six hour session addressed FLSA and working overtime. Working overtime is not the central issue in this case nor is the fact that Appellant earned overtime during the weeks he hunted on duty.

While Appellee addressed “donating” time in the 2007 meeting that Appellant attended, there is not sufficient evidence to establish that using “straight eights” and/or flexing time was considered a dishonest or inappropriate practice.

Appellee’s questions of current and former employees focused on whether those employees would hunt while on duty. These questions are not an accurate depiction of the issue at hand. The issues at bar are whether Appellant knew that straight eights were improper or inappropriate and whether he knew it was prohibited to use the “straight eights” method of timekeeping while flexing his time.

This situation is further complicated by officers are using straight eights and flexing time. As Brian Goldick testified, officers flexed time based on the honor system. Appellant testified he patrolled on his way to and from hunts and flexed his time while hunting. Nothing in the record indicates that Appellant worked fewer than 80 hours for any of the pertinent pay periods at issue in this appeal. Moreover, if flexing was based on the honor system and using straight eights was an accepted practice, it would be difficult, if not, impossible for Appellant to prove otherwise.

There is an inherent conflict in using the “straight eights” method of timekeeping while flexing time. Although it seems improper to not accurately record one’s time worked, testimony establishes that, across the board, employees did not accurately record their time during the time frame when Appellant’s hunted while on duty. Although subsequent action does not negate Appellant’s actions, it does establish that there was inconsistency in the Department’s timekeeping measures. It further establishes the time of the violation, there was no established standard of conduct.

Mitigating Factors

Appellant was removed from his position for falsifying official documents as well as for failing to appropriately manage employee(s) or enforce work rules. The

following testimony presented at hearing is particularly enlightening:

- Todd Haines, Appellant's supervisor, was present with Appellant in 2009 and 2010 for the hunting trips and approved Appellant's timesheet for those weeks Appellant was hunting.
- David Lane testified to working more hours than he reported on his timesheet.
- David Lane testified to approving one of his subordinate's timesheets that explicitly indicated the time reflected on the timesheet was an inaccurate reflection of the subordinate's time worked.
- Brian Goldick testified to working more hours than he reported on his timesheet.
- Bill Bullard testified to working more than 40 hours in a week but his timesheet did not reflect the additional hours.

All of the individuals listed above could arguably be said to have violated one (or more) of the two following ODNR Disciplinary Polices: 1). B. Dishonesty – 2. Willfully falsifying or removing any official document or 2). C. Neglect of Duty – 9. Failure of supervisor to appropriately manage employee(s) or enforce work rules.

David Lane, Brian Goldick, and Bill Bullard arguably violated the Dishonesty Policy. Todd Haines arguably violated the Neglect of Duty Policy when he approved Appellant's timesheet. David Lane, Assistant Chief of District Operations for the Division of Wildlife, approved his subordinate's timesheet that explicitly stated the time reported was not accurate. Therefore, he also arguably allowed the falsification of time reports by knowingly signing off on inaccurate time reports. Based on the Appellant's Order of Removal, it would follow, then, the aforementioned violations could also result in a violation for Failure of Good Behavior. There is nothing in the record to indicate any of these individuals were disciplined for their violations of arguably falsifying official documents, or in the case of David Lane and Todd Haines, for arguably failing to appropriately manage employee(s) or enforce work rules.

This is not to cast aspersions on any of these employees, who appeared to be dedicated state workers with a passion for their respective jobs. It is to simply illustrate Appellee's lack of uniform enforcement of an asserted division-wide work rule.

In addition to the fact that Appellee failed to uniformly apply the rules to all employees, there are other mitigating factors. Appellant worked at the agency for more than 16 years with only one other disciplinary action on his record, denting a state vehicle. ODNR's Disciplinary Guidelines provides that "disciplinary actions should be imposed with the intent of giving the employee the opportunity to correct his/her behavior." Appellant received the most severe disciplinary action for each of the violations. Based on the evidence provided, Appellee did not have an established course of conduct in regard to accurately recording that was communicated employees. However, Appellant's actions unquestionably brought discredit to the employer pursuant to Disciplinary Policy D. 7. – Failure of Good Behavior, and therefore, I respectfully recommend that Appellant serve a 60 day suspension and be reinstated to his position.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **MODIFY** Appellant's **REMOVAL** from his position of Wildlife Officer Supervisor with the Ohio Department of Natural Resources' Division of Wildlife to a **SUSPENSION** and **REINSTATE** Appellant to a Wildlife Officer Supervisor position, effective 60 days following the date of Appellant's removal, pursuant to R.C. 124.03 and R.C. 124.34.


JAMES R. SPRAGUE
Administrative Law Judge

JRS: