

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

Melissa Amos-James,

*Appellant,*

v.

Case No. 2012-REM-12-0261

Wood County Board of Developmental Disabilities,

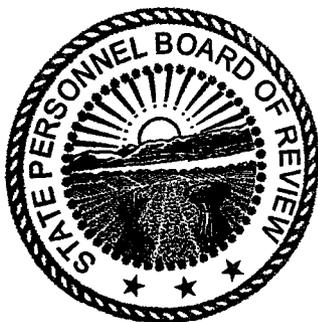
*Appellee,*

**ORDER**

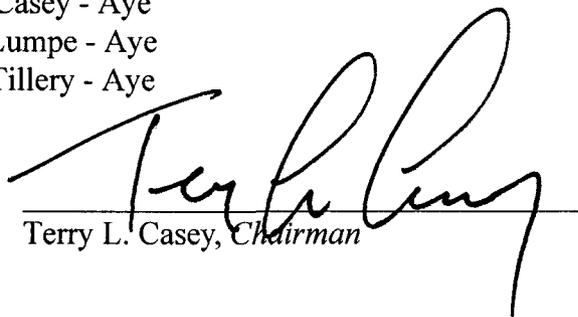
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, the Board hereby adopts the Recommendation of the Administrative Law Judge. The Board notes that no Objections to the Report and Recommendation were filed.

Wherefore, it is hereby **ORDERED** that Appellant's removal is **DISAFFIRMED**.



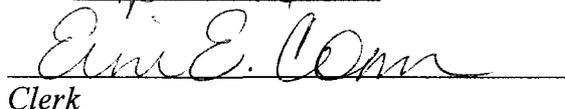
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
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, April 16, 2014.

  
Erin E. Connor  
Clerk

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

4-16-14

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

Melissa Amos-James,

Case No. 2012-REM-12-0261

*Appellant*

v.

January 9, 2014

Wood County Board of  
Developmental Disabilities

*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 her December 11, 2012, removal from employment with Appellee. A record hearing was held in the instant matter on April 29, 2013. Appellant was present at record hearing and was represented by Beau Harvey, attorney at law. Appellee was present at record hearing through its designee, Superintendent Melanie Stretchbery, and was represented by Assistant Wood County Prosecuting Attorney Linda F. Holmes. The Board's jurisdiction was established pursuant to R.C. 124.03(A) and 124.34.

The Order of Removal provided to Appellant listed as the basis for her removal:

... Enrollee Abuse/Neglect, Failure to Follow Work Rule, Incompetency, as well as Malfeasance, Misfeasance and Nonfeasance for incidents occurring on or about December 1, 2012.

**STATEMENT OF THE CASE**

Erin Courtney testified that she is employed by Appellee Wood County Board of Developmental Disabilities (Wood Lane or the Board) as a Classroom Aide for the Intermediate Classroom at Wood Lane School. She indicated that she has been employed as a full time staff member since August 2012.

Ms. Courtney recalled that on December 1, 2012, Wood Lane hosted a respite care event activity, for which she coordinated activities and staffing. She explained that Appellee hosts special respite care activities for students and their siblings on non-school day Saturdays approximately four times each year. The witness noted that when she recruits staff to work at respite care events she assesses the needs of the students who will be attending and examines their behavior plans; she firsts asks for volunteers from among current employees, and then fills any additional staffing needs with other interested individuals. Ms. Courtney acknowledged that she does not conduct any type of specific training for event volunteers and did not review training records for the employees who volunteered for the December 1, 2012, event.

The witness stated that there were twenty-one participants at the December 1, 2012, event – ten students and eleven siblings. She indicated that she had sufficient staff available to assign at least one volunteer to each student and passed out event schedules to the volunteers so they knew what was happening throughout the day. Ms. Courtney confirmed that participants ate lunch during the activity; nursing staff were assigned to assist individuals who required tube feeding or medication. The witness noted that because Appellee's staff nurse, Kim Vaughan, was not present at the December 1, 2012, event, nursing responsibilities were delegated by her to the Nursing Supervisor from Owens Community College (OCC) and her nursing students, who attended the event. She observed that Appellee's policies and procedures, which permit only certified individuals to perform such duties, apply during respite care activities because they take place at Appellee's facility and Appellee is responsible for the safety of the participants.

Ms. Courtney recalled that she was working at the December 1, 2012, event. She stated that she had approved both Appellant and her teenage daughter as volunteers for the event and they had been assigned to work in the same room with client Dawson, a young man who requires tube feeding. The witness acknowledged that she did not know what type of training Appellant or her daughter had, if any, and was not previously aware that they knew Dawson's family and had cared for him in his home.

Ms. Courtney testified that on December 1, 2012, Dawson was scheduled to be fed at noon. She noted that nursing staff had been delegated to perform the

feeding, but when nursing staff had not done so by noon, Appellant's daughter fed Dawson. The witness recalled that she was made aware of Appellant's daughter's actions around 1:00 p.m. by the Nursing Supervisor. Ms. Courtney stated that she reported the matter to her supervisor and completed an Unusual Incident Report; the witness noted that when she told Dawson's mother what had happened when she came to pick him up at the end of the day, she had no objections to Appellant's daughter having performed the feeding.

Ms. Courtney confirmed that Appellant's daughter is not employed by Appellee. She agreed that an individual who was not employed by Appellee would most likely be unaware of Appellee's policies and procedures. The witness noted that although volunteer training is now mandatory, she did not know whether Appellant or Appellant's daughter had ever participated in volunteer training prior to December 1, 2012.

Jennifer Jenny testified that she has been employed by Appellee for approximately seven years. She recalled that she was assigned to supervise Dawson's classroom during the December 1, 2012, respite care event, and noted that there were five students in the classroom that day, along with several other staff members and volunteers, Appellant, and Appellant's daughter. The witness stated that she accompanied three of the students to the swimming pool around 11:00 a.m. leaving Dawson, another student, Laverne Brooks (a bus driver employed by Appellee), Appellant, Appellant's daughter, and several other volunteers in the classroom. Ms. Jenny noted that before she left the room, she told the individuals remaining behind that a nursing student would be coming to the room to feed Dawson.

Ms. Jenny acknowledged that none of the volunteers were specifically assigned to care for Dawson that day and Appellant was not exclusively "in charge" of him. She confirmed that, to her knowledge, none of the individuals who remained in the classroom with the students been trained for the respite care event.

Ms. Jenny recalled that Ms. Courtney informed her after lunch that Appellant's daughter had performed Dawson's tube feeding that afternoon. The witness testified that Appellant's daughter did not ask her permission to feed Dawson. She stated that she assisted Ms. Courtney in completing an Unusual Incident Report but had no involvement in Appellant's discipline.

Melanie Stretchbery testified that she is presently employed by Appellee as superintendent of the Wood County Board of Developmental Disabilities (Wood Lane) and has held that position since 2008. She confirmed that board policies apply to all programming provided by the Board, including respite care services. Ms. Stretchbery indicated that only trained and certified Board employees are permitted to give or apply medication and perform delegated nursing tasks for individuals who receive services from the Board.

The witness stated that bus drivers and lifeguards cannot be certified by Appellee to perform delegated nursing tasks because their primary responsibilities require that they focus solely on those duties. She noted that Appellee purposely limits the number of employees who are certified to dispense medication or perform nursing tasks and instructs employees that they are not to perform tasks for which they are not trained. Ms. Stretchbery confirmed that all new employees participate in a general orientation and training when they are hired, and indicated that Appellant participated in general orientation and training when she was hired as a bus driver in 2001.

Ms. Stretchbery recalled that Appellant attended and participated in a pre-disciplinary conference on December 7, 2012. She testified that she made the determination to remove Appellant from employment with Appellee because she believed that, as a veteran employee, Appellant was aware of what she and others were permitted to do or not do. The witness acknowledged that there was no documentation to show that either Appellant or her daughter had received respite care training, or that event volunteers had been told what they could or could not do; she agreed that Appellant was not acting in a supervisory capacity on December 1, 2012, and was not in charge of volunteers at the event.

Appellant testified that she was employed by Appellee as bus driver from 2001 until the date of her termination. She stated that the only time either she or her daughter had participated in a respite care event provided by Appellee was December 1, 2012. Appellant recalled that she and her daughter were assigned to a room with Jennifer Jenny, several students (including Dawson) and other volunteers; she indicated that when Ms. Jenny took some of the students and volunteers to the pool, she and her daughter remained in the classroom with Dawson, another student, and several other volunteers.

Appellant explained that she overheard Ms. Jenny say earlier that day that Dawson needed to be fed by noon. She confirmed that she and her family members are personally acquainted with Dawson's family and stated that she has provided care for Dawson in the past. Appellant indicated that when Dawson had not been fed by noon, her daughter asked if she could feed him. She testified that because she did not know whether or not her daughter was allowed to feed him, she instructed her daughter to find Ms. Jenny to ask permission.

Appellant recalled that her daughter left the room to find Ms. Jenny and when she returned, she got the feeding tube from its location and fed Dawson. She noted that she did not know who was or was not allowed to feed Dawson while he was at the school, either on a normal school day or at the respite care event. Appellant stated that her contact with school staff was typically limited to loading and unloading the bus, and she had not received any training for the respite care event.

### **FINDINGS OF FACT**

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

Appellant and her daughter attended Appellee's December 1, 2012, respite care event as volunteers. Appellant was employed by Appellee as a bus driver on December 1, 2012; her daughter was not employed by Appellee. No training was provided to either Appellant or her daughter as part of their volunteer participation in the respite care event, but both were approved as volunteers by Ms. Courtney.

On December 1, 2012, Appellant and her daughter worked in a classroom with Ms. Jenny, five students and several other staff and volunteers. Prior to the lunch break, Ms. Jenny took several students and volunteers to the pool area, leaving Appellant, her daughter, several volunteers, Dawson and another student in the classroom. Dawson is a nine-year old boy who requires feeding through a gastrostomy tube (a G tube).

During the respite care event, Appellant's daughter performed Dawson's tube feeding. Appellee's policies and procedures provide that only individuals who have

properly certified by Appellee may perform tube feedings. Neither Appellant nor her daughter is certified by Appellee to perform tube feedings.

### **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. Appellant had notice of the charges against her and an opportunity to respond to those charges. Accordingly, I find that Appellant's due process rights were observed. I further find that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based on her alleged abuse/neglect of an enrollee, failure to follow a work rule, incompetency, malfeasance, misfeasance and nonfeasance for the incidents which occurred on December 1, 2012. As previously noted, Appellee must prove for each of these alleged infractions that it had an established standard of conduct, that the standard was communicated to Appellant, and that Appellant's actions violated that standard.

Appellee failed to produce evidence to define "enrollee abuse/neglect" as the term was referenced in the R.C. 124.34 Order of Removal provided to Appellant. Accordingly, I find that Appellant has not demonstrated that it had an established standard of conduct which Appellant's actions may have violated, or that a standard was communicated to Appellant, and the charge may therefore not properly form a basis for Appellant's subsequent discipline.

Appellee successfully demonstrated that it had an established standard of conduct dictating which individuals were authorized to perform nursing tasks and to whom those nursing tasks could be delegated. Tube feedings are defined by Appellee's policies and procedures as a nursing task that may be delegated by a nurse to a properly trained employee of Appellee. Appellee's policies and procedures define an employee as an employee, a person under contract with Appellee, or a volunteer who is not licensed as a health care professional and acting within their scope of practice. The parties do not dispute that neither Appellant nor her daughter were certified by Appellee to perform tube feedings.

Appellee failed, however, to produce sufficient evidence to support a finding that this standard of conduct had been communicated to Appellant or to her daughter. No evidence was presented to establish that Appellant or her daughter had been made aware of Appellee's policies and procedures regarding the performance of nursing tasks, or that they had received any training with regard to these policies as part of Appellee's respite care program. Therefore, I find that Appellee has failed to sufficiently establish that it communicated the relevant standard of conduct to Appellant and the charge of "failure to follow a work rule" may not properly form a basis for her subsequent discipline.

Even assuming, *arguendo*, that Appellant was aware that tube feeding was considered by Appellee to be a nursing task, and that Appellant was also aware that

only certified individuals were permitted to perform such tasks, the parties agree that Appellant was not the individual who performed Dawson's tube feeding. Appellant is not the individual who engaged in the prohibited action, therefore, her conduct did not violate the standard.

Appellee argued at record hearing that Appellant's daughter should have been supervised more diligently while she was volunteering at the December 1, 2012, respite care event, however, it failed to introduce sufficient evidence to establish that such responsibility fell upon Appellant as a result of her employee status. Testimony clearly established that Appellant had no responsibility to supervise volunteers at the respite care event.

Appellee also asserted that, as a parent, Appellant had a responsibility to supervise her daughter while they were participating in the respite care event. Although Ohio recognizes a common law doctrine of negligent supervision, pursuant to which a parent has a duty to exercise reasonable care to prevent a child from intentionally harming others, see *Cashman v. Reiter's Stop and Shop* (1985), 29 Ohio App. 3d 142, this theory applies to tort actions, rather than to proceedings before this Board. This Board's jurisdiction extends to actions arising from the employee-employer relationship. Were this Board to determine, however, that a negligent supervision standard applied in this matter, I note that Appellee's argument was not that Appellant's daughter intentionally harmed Dawson by her actions, but only that her actions violated Appellee's policies and procedures. No allegations were made and no evidence admitted to demonstrate that Dawson was harmed.

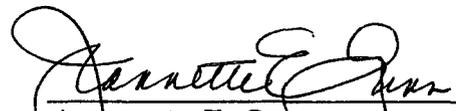
Incompetency, malfeasance, misfeasance and nonfeasance, were the remaining charges cited in the R.C. 124.34 Order of Removal provided to Appellant and are included within the provisions of that statute as grounds for discipline of classified employees. Insufficient evidence was presented to support any of these charges. Incompetency presumes a lack of ability, knowledge, fitness or legal qualification to discharge a required duty or professional obligation; malfeasance is the commission of a wrongful or unlawful act; misfeasance is the improper performance of a lawful act; and nonfeasance is the omission of an act which should have been done. Appellee did not demonstrate that Appellant had any required duty or professional obligation that she failed to correctly discharge or that she personally committed any wrongful or unlawful act with regard to the events of

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December 1, 2012. Therefore, I find that these charges may not properly form the basis of Appellant's discipline.

The concerns expressed by Appellee are valid, however, Appellant is not the individual who failed to provide the level of care that should have been delivered by Appellee to the participants in its December 1, 2012, respite care event. Because Appellee has failed to demonstrate by a preponderance of the evidence that it communicated an established standard of conduct to Appellant or that her actions constituted a violation of an established standard of conduct, I find that the charges upon which Appellant's removal was based are wholly unsupported.

Therefore, I respectfully **RECOMMEND** that Appellant's removal be **DISAFFIRMED**.

  
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Jeannette E. Gunn  
Administrative Law Judge