

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

Jan Materni,

Appellant,

v.

Case No. 2013-RED-03-0083

Department of Transportation,

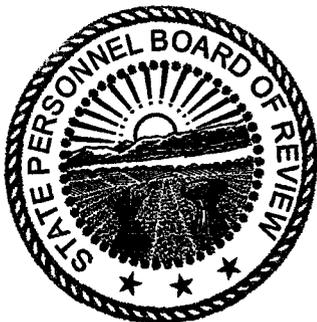
Appellee,

ORDER

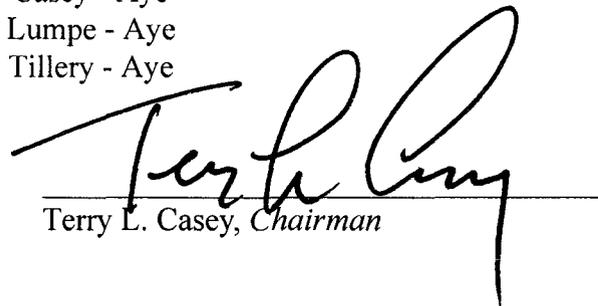
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Findings of the Administrative Law Judge (ALJ) and modifies the Recommendation of the ALJ, for the following reasons. The Board agrees with the ALJ that the extant record does not justify reducing Appellant from a supervisory position. Yet this Board also wishes to impress upon Appellant that the pattern of behavior that Appellant exhibited is unacceptable in a modern governmental office setting. This Board wishes to impress further upon Appellant that, should Appellant engage in any additional offending behavior of a similar nature, then Appellee would likely be justified in dealing most harshly with such continuing offending behavior.

Wherefore, it is hereby **ORDERED** that Appellee's reduction of Appellant be **MODIFIED** to a 60 day suspension, that Appellant be **RETAINED** in her classification of Transportation Manager 1, and that Appellant be **MANDATED** to attend at least 20 hours of supervisory training which includes training on retaliation, pursuant to R.C. 124.03 and R.C. 124.34.



Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

4-9-14

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 09, 2014.



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**

Jan Materni,

Case No. 2013-RED-03-0083

Appellant

v.

November 8, 2013

Department of Transportation

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on June 25, 2013. Present at the hearing was Appellant Jan Materni, represented by Cheryl F. Wolff, Attorney at Law and Appellee Ohio Department of Transportation designee Sarah Johnson, EEO Investigator, represented by Timothy M. Miller and Ryan D. Walters, Assistant Attorneys General.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Materni was reduced in position from Transportation Manager 1 to Highway Technician 2, effective March 24, 2013. The pertinent part of the reduction order states as follows:

The reason for this action is that you have been guilty of Specifically: A violation of 124.34 R.C. by an act of malfeasance for violating ODOT Work Rule 101, Item #2C. Failure to follow policies of the Director, District or offices. Specifically, ODOT's Policy #32-001(P)-Anti-Discrimination, Anti-Harassment, Anti-Retaliation Policy. It was determined that you created a hostile work environment for Mr. Juan Castillo based upon his racial status and engaged in conduct that could be construed as retaliation against Mr. Castillo. Furthermore, you were disciplined for the same behavior in 2012.

STATEMENT OF THE CASE

Appellee's first witness was Todd Audet, District Deputy Director since 2010. He stated he began his employ with Appellee in 1990 as an engineer in training. In 2002 or 2003, he became a Deputy Director, then left Appellee's employ for private industry and returned in 2010. He is in charge of District 2, which is in northwest Ohio. Mr. Audet stated that as Deputy Director, he carries out the direction of the department; enforces policy and procedure and ensures they are met.

Appellee's Exhibit 1 was identified by Mr. Audet as Appellee's work rule regarding discipline. He explained the labor relations office is involved to ensure standardization of the rules. Appellee's Exhibit 3 was identified as Appellee's policy regarding anti-discrimination, anti-harassment and anti-retaliation. Mr. Audet explained the department has a zero tolerance policy for all three of those issues.

Mr. Audet testified he knows Appellant Materni, as she used to be the Transportation Manager 1 in Ottawa County. He explained there was an internal investigation and a pre-disciplinary hearing regarding the allegation that Appellant Materni created a hostile work environment. If discipline is warranted, he reviews the recommendation and in this case, the recommended discipline was termination. Appellee's Exhibit 10 was identified as the findings of the pre-disciplinary hearing. Mr. Audet testified he reviewed the case and took into account Appellant Materni's twenty-six years of service and the fact he was not aware of any prior discipline on her part. He felt she did not have the skill set for management but at the same time he wanted to protect the public's investment in her tenure. Therefore, he recommended to central office that she be reduced.

Appellee's next witness was Appellant Materni, as if on cross examination. She stated she has been employed by Appellee for approximately twenty-seven years, starting out as a Highway Worker. She held the position of Transportation Manager 1 for approximately seven or eight years and supervised approximately sixteen employees. Over the last couple of years, Appellant Materni stated she has been working as a project manager.

Appellant Materni supervised, among others, two employees in the Ottawa county garage by the name of Juan Castillo and Jose (last name unknown). In 2010, she participated in a mediation with Juan over some issues he had with Appellant Materni. Sometime in 2011, Jose came to work for Appellee and

Appellant Materni was his supervisor. On occasion, she would accidentally call Juan by the wrong name, calling him Jose. She testified she did not even realize she was doing it, as Juan did not say anything to her about the mistake until an evaluation meeting, which took place on December 3, 2012. There were two other managers present at the meeting and when the meeting was over, Juan stated he had another issue to discuss. He then told Appellant Materni he did not want her to call him Jose anymore, as he found it to be offensive. Appellant Materni told him she was not doing it on purpose and at that point, she turned to her boss, Steve Durnwall, and told him she has dyslexia and sometimes has trouble with names. She reiterated she did not even know she did it and she asked Juan to please work with her on the problem and he refused. Later in the year, she called Juan at home to come in for overtime and she mistakenly called him Jose. She became aware on January 10, 2013, that Juan had filed a complaint against her for calling him Jose.

Appellant Materni stated she was questioned by Sarah Johnson. She explained to her she was diagnosed in elementary school with dyslexia and eventually, while in college, she learned to adapt. Appellant Materni stated that prior to this incident, she has not contacted a doctor or other professional about the dyslexia. Appellant's Exhibit D was identified as the investigation report which was issued and she stated she received a copy. Appellant Materni testified she is familiar with the work rules and the anti-discrimination policy. She identified Appellant's Exhibit C as the complaint she filed on January 2, 2013. She testified she had no idea at this time that Juan had filed a complaint against her, but stated she figured he was going to, as he had said as much at the December 2012 meeting.

Appellant Materni testified she found all of this to be very stressful and when stressed, she was more apt to call Juan by the wrong name. In looking at attachment C to the investigation report, Appellant Materni stated she wrote this statement. She testified that if Juan had been willing to work with her, no complaint would have been filed. Appellant Materni stated she is not a vindictive or retaliatory person and it has been very frustrating for her that her mind keeps doing this. If Juan would just have corrected her every time she called him by the wrong name, she knows she would eventually stop, as that has been her experience in the past. She stated Juan and Jose often sat beside each other in the lunch room, and in looking at both of them, she just called Juan by the wrong name.

Attachment D to the investigation report is an email from a linguistic doctor at Bowling Green State University which was sent to Appellant Materni. She stated she spoke to this person sometime in June, 2013, after she knew of Juan's complaint. Appellee's Exhibit 9 was identified by Appellant Materni as the pre-disciplinary notice she received and she stated she attended the hearing. Appellant's Exhibit B was identified as a report from a psychologist, Andrew Martin, dated March 6, 2013. Appellant Materni testified he did some testing on her and she took it with her to the pre-disciplinary conference, but it was not accepted by the EEO officer. Appellee's Exhibit 12 was identified as the reduction order and Appellee's Exhibits 13, 14 and 16 were identified as her previous disciplines which consisted of a written reprimand in October, 2011; a written reprimand in December, 2011; a two-day working suspension in March, 2012; and a one-day working suspension in April, 2012.

Appellee's next witness was Juan Castillo, an employee of District 2 for approximately nineteen years. He is currently classified as a Highway Technician 2. For approximately three to four years, he has been supervised by Appellant Materni. He stated he had a professional relationship with Appellant Materni, with it starting out good and is currently shaky, at best. He stated she started to treat him differently than others sometime around 2011, accusing him of coming in late when he wasn't, telling contractors not to work with him, worrying if he was stealing from the state and shunning him. Lately, he has found the situation unbearable.

Mr. Castillo identified Appellee's Exhibit 5 as the complaint he filed on January 2, 2013. He stated Appellant Materni had been calling him Jose quite a bit after he had asked not to and she did it again when she called him for overtime. He testified the calling of him by the wrong name started sometime in mid-2012. Mr. Castillo stated in December, 2010, he complained about Appellant Materni and they went to mediation. He stated however, he could not remember what precipitated the mediation.

In looking at Appellant's Exhibit D, the investigation report, Mr. Castillo testified he has seen it before. He stated he filed another complaint about Appellant Materni and he felt she then filed one in retaliation to his. Mr. Castillo testified that when Appellant Materni started calling him Jose, he felt the same as if he was black and she called him the "n" word. He feels the term "Jose" is very offensive due to his background, much like "nacho" or "taco". He testified that even after he asked her to stop, she did not. He stated Appellant Materni has called him Jose in front of

workers in the lunch room and in front of the union steward. Mr. Castillo testified he asked Appellant Materni to stop after the first or second time it happened and he went to her boss and her boss' boss to have them tell her to stop. He stated one time she told him she was dyslexic and that is the reason she keeps calling him the wrong name.

Mr. Castillo testified he amended his complaint of January 2, 2013 to add that he felt he was being retaliated against when Appellant Materni filed her complaint. He felt that by her own admission, it was retaliation for him not working with her. He testified that one time he was using another employee's calculator with permission and Appellant Materni just went off on him, to the point where he felt she may become violent. She then talked only to the Hispanics about not stealing. With regard to the mediation in 2010, Mr. Castillo testified that afterwards, he stuck his hand out to shake hers and she pulled her hand away quickly. After one to two weeks following the mediation, Appellant Materni began shunning him. She would pat others on the back and tell them great job, while looking at him. He stated she watched him like a hawk. He testified that he interpreted her comment of asking him to work with her to mean let her call him Jose as he couldn't think of anything else that it could mean. He testified he told her many times to stop and that he would never say it was alright. Mr. Castillo also testified there was another employee by the name of Jose, who worked there for three to four years, but is no longer there. He stated Jose used to complain that Appellant Materni called him Juan.

Appellee's next witness was Sarah Johnson, Program Administrator 3 since September 2006. Prior to that time, she was employed by the Department of Youth Services from March, 1999 to September, 2006. Part of her duties include ADA and regulatory compliance as well as investigating complaints. She identified Appellee's Exhibit 5 as the complaint made by Juan. Ms. Johnson testified she investigated both Appellant Materni's complaint and Juan's since they involved the same circumstances. Appellant's Exhibit D was identified by Ms. Johnson as her report and findings. She stated she found probable cause that Appellant Materni violated the policy. Mr. Castillo's complaint of 2011 was very similar to that of 2013 and Appellant Materni was put on notice that Juan did not like being called Jose, but yet she continued to do so. She stated she found Appellant Materni's complaint to be retaliatory.

Ms. Johnson opined that Juan did attempt to work with Appellant Materni by telling her no and correcting her, but the onus is on the supervisor to stop the action. Appellant Materni never requested an accommodation and Ms. Johnson stated Appellee cannot allow an employee to refer to another by a racial remark as part of an accommodation.

On cross examination, Ms. Johnson stated she did not believe Appellant Materni intentionally called Juan by the name of Jose, but that she could not control it. She stated Jose is commonly known as a slur with derogatory meaning. Ms. Johnson also testified that intent does not matter in these instances and that the filing of a complaint of discrimination is a protected activity. She stated she was not presented with any medical documentation to determine if Appellant Materni's defense was even credible.

Appellee's next witness was Trisha Maassel, Labor Relations Officer 3 in District 2 since April, 2011. She stated she handles step 2 grievances and determines if discipline is fair and consistent throughout the district. Ms. Maassel identified Appellee's Exhibit 1 as the disciplinary policy of Appellee. Appellee's Exhibit 11 was identified as the route slip she completes in forwarding the recommendation of Mr. Audet to central office. Ms. Maassel testified she recommended termination due to Appellant Materni having been put on notice of the violation, the fact that she violated the policy and her previous discipline for creating a hostile work environment.

Appellant Materni testified she was told in elementary school and college that there was nothing that could be done for her dyslexia other than to try to teach her study skills. She stated the more stress she is under, the more mistakes she makes. She testified Mr. Castillo was tardy and that was documented in his evaluation, but other than that, all of his evaluations were fair. Appellant Materni stated she has no idea what he was talking about with regard to contractors, as she had nothing to do with contractors and she also does not know what he was talking about with the stealing.

Appellant Materni testified no other employee complained about working with her and she denied ever doing anything that was racially biased. She stated she would never do so, as she remembers what it was like being a woman when she first started to work at Appellee. She opined she would have to be stupid to

continue to intentionally call Juan by the name of Jose, knowing that it would bring her to his hearing. She stated it is very frustrating for her not to be able to stop. Appellant Materni testified she talked to a friend that is Hispanic and was told that he never heard that the name or term Jose was derogatory, that he only knew the name from a Patron Saint in the Catholic church. She stated she has called others by the wrong name, even did so with her own sons and her sisters, so this was not an isolated incident for her.

Appellant Materni explained Appellant's Exhibit A is a linguistics report, as the author is not a psychologist or a sociologist, as those professions play more of a role in dyslexia. She knows that dyslexia does play a part in the spoken word also and along with her ADD, it was explained to her that her brain is ahead of her words. She was also told that if she is making a substitution in her speech, it is likely to recur many times. Appellant Materni testified she told Juan she was diagnosed with a learning disability in elementary school and that her mistake is never purposeful nor intentional. He told her he did not care, that it was her problem, not his.

Appellant Materni testified that in December, 2012, she called Juan to come in for overtime and as they were hanging up, she said "thanks Jose". She stated that as soon as she said it, she knew she made a mistake and she apologized. She testified Juan told her not to worry about it. Appellant Materni also stated she made a mistake when she filed her complaint against Juan, that she should have filed it against Appellee, as she felt she was being harassed and punished over something she had no control over. She testified she never filed for an accommodation and stated she did not file the complaint for retaliation, but did so because she wanted someone to watch out for her disorder.

Dr. Martin is a psychologist who Appellant Materni saw in order to determine if her dyslexia was causing her the stress and severe depression that she was experiencing. She stated she asked the Appellee to postpone the report until after she was able to see Dr. Martin. Appellant's Exhibit B was identified as the report from Dr. Martin and his report essentially states that her ADHD is to blame for many of her problems. Appellant Materni emphatically denied ever using racial slurs and stated this has taken a financial, physical and emotion toll on her. She stated she is the least racial person in the garage.

On cross examination Appellant Materni stated she contacted the EEO office in January, 2013 after her interview to ask them about postponing the report until after her doctor's report. She did not mention going to the doctor during her interview. Appellant Materni testified she wishes she would have thought earlier to call Juan by Mr. Castillo, but only thought of it in hindsight.

FINDINGS OF FACT

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

1. Appellant Materni is a twenty-six year employee of Appellee. She was reduced in her position from a Transportation Manager 1 to a Highway Technician 2, effective March 24, 2013. Her previous discipline consists of a written reprimand for failing to maintain control of her vehicle, October 25, 2011; a written reprimand for failing to follow proper purchasing procedures, December 29, 2011; a two day working suspension for failing to follow policy/fighting with a fellow employee, March 12, 2012; and a one day working suspension for carelessness, May 7, 2012.
2. Appellant Materni, as a Transportation Manager 1, supervised approximately sixteen employees. Two of those employees were Juan Castillo and Jose Lozoya.
3. Appellant Materni and Juan had some prior issues and both agreed to mediate their differences at the time. This was in 2010.
4. Sometime in 2011, Jose began working for Appellee under Appellant Materni's supervision. Approximately mid-year in 2012, Appellant Materni would sometimes call Juan by the wrong name and would call him Jose.
5. Juan filed a complaint of hostile work environment and retaliation against Appellant Materni, stating he found her calling him "Jose" to be racially motivated and stated he found it very offensive to be called Jose, likening it to being called the "N" word if he were a black person. He stated he told Appellant Materni on several occasions that he was really bothered by being called Jose and that it kept happening. Due to Appellant Materni calling him Jose, Juan stated his health was affected.

6. Juan filed an EEO complaint in early January, 2013, after telling Appellant Materni he was going to if she did not stop calling him Jose.
7. Appellant Materni also filed an EEO complaint in early January, 2013, stating she was being discriminated against due to her disability, dyslexia. Appellant Materni never filed any medical documentation with Appellee regarding her disability, nor did she ever request an accommodation.
8. Juan alleged retaliation after Appellant Materni filed her complaint.
9. Appellant Materni stated she was familiar with, and understood, Appellee's work rules and policies.

CONCLUSIONS OF LAW

In order for Appellee's reduction in position and pay of Appellant Materni to be affirmed, Appellee has the burden of proving by a preponderance of the evidence the allegations in the reduction order. Appellee has not fully sustained its burden.

The removal states, in part, "It was determined that you created a hostile work environment for Mr. Juan Castillo based upon his racial status . . .". This allegation is based on the undisputed fact that Appellant Materni did, on occasion, call Juan by the wrong name and called him Jose. There was no evidence presented which established how many times this happened, only the conflicting testimony that when it happened, Juan told Appellant Materni he did not like it and to stop. Appellant Materni, however, testified Juan never told her to stop, nor that it bothered him, until his performance evaluation meeting which took place in early December, 2012. Mr. Castillo testified Appellant Materni began calling him Jose sometime in mid-2012.

Mr. Castillo testified he became very upset every time Appellant Materni called him Jose, stating he found it to be very derogatory. He testified calling him Jose was akin to calling a black man the "N" word. The problem with Mr. Castillo's statement is that there was no evidence presented whatsoever that indicated Appellant Materni's mistake was anything other than a mistake. She had two employees under her, one named Juan and one named Jose. She simply called

them by the wrong name on occasion. It was Mr. Castillo's testimony, in fact, which stated Jose had complained that Appellant Materni called him Juan on occasion. That fact alone should be enough to realize that the name mix-up was just a mix-up and not racially motivated. Mr. Castillo testified it is common knowledge that the term "Jose" is very derogatory to a Hispanic, but in this instance, it was simply the name of another employee. This Administrative Law Judge must agree with Appellant Materni that she has never heard that the name "Jose" is a racial slur. Appellant Materni stated she even questioned several of her Hispanic friends as to whether or not they felt that calling someone "Jose" was a racial slur, which they indicated it was not.

Mr. Castillo's claim would be worthy of more weight if there had not been another employee under Appellant Materni's supervision by the name of Jose. As Appellant Materni stated, in hindsight, it may have helped if she would have called Mr. Castillo by "Mr. Castillo" instead of by Juan. Appellant Materni appeared to be quite sincere in her testimony that she felt discriminated against as a woman early on in her career and that she would not discriminate against anyone else, as she remembers what it felt like. Mr. Castillo's testimony, on the other hand, appeared less credible, as he stated he could not remember what the mediation was about in 2010 and he gave no reason as to why Appellant Materni would be discriminating against him and not others, such as Jose. Again, the fact that Mr. Castillo testified Appellant Materni also on occasion called Jose "Juan", is enough to show that she just simply mixed up the names of two of her employees with no other reason behind the mistake.

Testimony indicated Appellant Materni had been disciplined for the same conduct prior in 2012, but that is not what the evidence established. Her prior discipline was admitted into evidence by Appellee's Exhibits 11 and 15. The discipline which occurred in March, 2012 was for a two-day working suspension for "Failure to follow policies of the Director, Districts or offices" and "fighting/striking a fellow employee on state time". There was no testimony as to the particulars of this suspension and the rule violation only states "WR-101 #2C and #6", whereas the charge in this matter is a violation of Policy "32-001(P)" as well as Work Rule 101, #2C.

Appellee also argued that Appellant Materni never presented any documentation for an accommodation due to her dyslexia. Appellant Materni testified she did not know what type of accommodation could be given to her, as

when she was in elementary school and college, she was told she would just have to learn studying skills to cope and that essentially nothing could be done to help her other than that. She did seek medical opinions in order to explain a reason for mixing up the names of Juan and Jose and requested after her interview in January that Appellee wait for her to receive the report back from Dr. Sheri Wells-Jensen, but Appellee denied her request. It is unknown what good an accommodation request would have been, as Appellee's witness testified an accommodation cannot be given to allow a violation of a law, such as discrimination.

In conclusion, the evidence did not establish that Appellant Materni created a hostile work environment by discriminating against Mr. Castillo by calling him Jose instead of Juan. The evidence established that Appellant Materni's mistake in calling Juan by the wrong name of Jose was simply that – a mistake. Therefore, Appellee has failed to meet their burden of proof with respect to that allegation.

The second allegation regarding Appellant Materni's alleged retaliation by filing a discrimination charge against Mr. Castillo has been proven by the Appellee. Appellant Materni testified herself that she should not have filed her complaint against Mr. Castillo, but should have filed against Appellee, as she felt harassed and punished over something she had no control over. There was no reason for her to file such a charge against Mr. Castillo other than to retaliate against him for threatening to file a charge against her. In fact, Appellant Materni stated in the attachment to her complaint that if Mr. Castillo "would have just worked with her, she would not have filed this complaint". Clearly, her filing of the discrimination complaint was retaliatory in nature. Therefore, Appellee has met its burden with respect to this allegation.

Appellant Materni had been a Transportation Manager for approximately seven or eight years and since 2011, she has been disciplined with two written reprimands, a two-day working suspension and a one-day working suspension. She is a twenty-six year employee who has risen through the ranks of Appellee. For a twenty-six year employee, her disciplinary history is not extensive and the written reprimand of October, 2011, and the one-day working suspension in April, 2012, were not because of any supervisory issues with personnel. Due to the above analysis, Appellant Materni has not been found to have discriminated against Juan Castillo by calling him by the name of another employee, Jose, on several occasions. She has, however, been found to have retaliated against Mr. Castillo for threatening to and filing a discrimination complaint against her. While this infraction

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is noteworthy, her reduction to a Highway Technician 2 is a harsh punishment. Taking into account Appellant Materni's tenure, disciplinary history and Appellee's investment in her employment, it appears Appellee would be better suited to retain Appellant Materni as a Transportation Manager 1 and provide her with additional supervisory training.

Therefore it is my **RECOMMENDATION** that Appellee's reduction of Appellant Materni be **MODIFIED** to a ten (10) day suspension and that she be retained in her classification of Transportation Manager 1 position and that she be mandated to attend at least twenty (20) hours of supervisory training which includes training on retaliation.



Marcie M. Scholl
Marcie M. Scholl
Administrative Law Judge

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