STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Dmitri Liner,

Appellant,

v. Case No. 2013-REM-02-0080

Montgomery County Engineer,

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 the instant order of removal issued to Appellant, effective February 22, 2013, removing the Appellant from the position of Engineer 1 is **AFFIRMED**, and the Appellant's appeal is **DENIED**.

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, May 16, 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

Dmitri Liner	Case No. 2013-REM-02-0080
Appellant	
v.	April 9, 2014
Engineer Montgomery County	
Appellee	Christopher R. Young *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On February 22, 2013, the Appellee, the Montgomery County Engineer served an Order of Removal, in accordance with Ohio Revised Code Section 124.34, upon the Appellant, Mr. Dmitri Liner, an Engineer 1. That order alleged the following:

This will notify you that you are removed from your position of Engineer 1 effective February 22, 2013.

The reason for this action is that you have been guilty of specifically:

> You have received two consecutive unsatisfactory annual performance evaluations (2011 and 2012). You have been assigned three consecutive Performance Improvement Plans (PIP's), and have failed to meet performance goals for show adequate improvement after each 90-day PIP. On October 16-18, 2012 you received a 3-day disciplinary suspension without pay for repeated poor performance. Your performance has been consistently determined to be inefficient and incompetent by multiple senior staff reviewing your work. You have violated the General Rules of Conduct listed in the Montgomery County Engineer's Office Policy and Procedures Manual, Section 3.3, under the category of Neglect of duty and/or failure to perform assigned duties. This order of removal is consistent with the

performance record summarized above and the established disciplinary procedures of the Montgomery County Engineer's Office.

Thereafter, on February 27, 2013, the Appellant filed a timely appeal from this Order of Removal. The record hearing in this case was held on July 15, 2013, and November 20, 2013, and concluded upon the simultaneous filing of post hearing briefs on January 17, 2014. The Appellant, Mr. Dmitri Liner, appeared at the record hearing and was represented by Mr. Jason Matthews, Attorney at Law. The Appellee, the Montgomery County Engineer, was present through its designee, Mr. Paul W. Gruner, the Montgomery County Engineer, and was represented by Mr. Todd Ahearn, an Assistant Prosecuting Attorney.

This hearing was conducted by the State Personnel Board of Review in accordance with Ohio Revised Code Section 124.34, which specifically provides that an employee may file an appeal of any order filed under Ohio Revised Code Section 124.34, within ten (10) days after having received the order with the State Personnel Board of Review. The parties agreed and stipulated to the jurisdiction of this Board, as well as to the timely filing of the appeal.

STATEMENT OF THE CASE

Appellee's first witness to testify was Mr. Michael Dorn, a Senior Engineer or Assistant Operations Engineer for the Montgomery County Engineer's Office stationed at the Little Richmond location. When questioned, the witness testified that he does know Mr. Liner, as he became his supervisor at the beginning of 2012. Mr. Dorn testified that his first-year supervision over Mr. Liner was in 2012, along with stating that was his first-year that he evaluated Mr. Liner, as well. When questioned, the witness explained that he did not participate in Mr. Liner's annual performance valuation prepared for the calendar year 2011 or before. Furthermore, when questioned, the witness explained that it was his understanding that the PIPs were put in place to see if Mr. Liner was able to produce useful plans that demonstrated engineering skills of someone commensurate with Mr. Liner's level of experience. Additionally, it was noted that Mr. Liner was an Engineer 1 at the time that Mr. Dorn became Mr. Liner's supervisor.

Mr. Dorn testified that meetings were held at the initiation of all three of the PIPs involved in this case. When questioned, the witness testified that during the meetings the goals of each of the projects listed on the PIP were discussed and Mr. Liner was given an opportunity to ask questions with respect to each project. The initial meetings included Mr. Liner, Mr. Rick Splawinski, Ms. Kim Beckner and himself. Additionally, the witness testified that during these meetings, discussions were had regarding any deficiencies that were noted regarding Mr. Liner's past performance. Moreover, the witness explained that Mr. Liner was informed during these meetings that he was his supervisor, and that if he had any questions while performing his work, that he was to direct those questions directly to himself. The witness testified that this was done to eliminate Mr. Liner from contacting everyone in the County with questions and to determine what issues Mr. Liner was having and potentially identify what resources Mr. Liner required, which he would in turn be the contact for any resources he needed.

Mr. Dorn then testified that he was not involved with the disciplinary process which occurred at the end of the second PIP, but only after the third PIP. Mr. Dorn identified Appellee's Exhibit 5 as the first PIP that covered from February 23, 2012 through May 23, 2012, a 90 day period of time. The witness explained that during the PIP there were meetings to discuss the projects and the progress thereof, a formal 45 day meeting and a final 90 day meeting. Mr. Dorn then identified Appellee's Exhibit 5 as a 45 day evaluation of the PIP 1 and Appellee's Exhibit 6 as a 90 day evaluation of PIP 1.

Mr. Dorn then identified Appellee's Exhibit 7 as the second PIP that was initiated on June 26, 2012, along with noting the formal 45 day evaluation at the back of said exhibit. Further, the witness identified Appellee's Exhibit 8 as the second PIP's formal 90 day evaluation that took place on October 11, 2012. When questioned, the witness testified that he felt there was a need for a third PIP because he felt Mr. Liner still had deficiencies in his work.

Next, the witness explained Mr. Liner's work performance regarding the Jamaican Road project that was indicated as a priority on both the PIP 1 and PIP 2. The witness explained the project was carried over from one PIP to the next because Engineer's office wanted to see additional plans completed on the project, or a complete set of plans. Mr. Dorn explained that he spent a lot of time with Mr. Liner on designing the headwalls and grading plans for use of the project, which consisted of creation of design of the culvert with right-of-way requirements

requiring a hydraulic structure for creek drainage from one side of the road to the other. The witness testified that Mr. Liner's work product demonstrated grading which did not meet clear zone grading standards and that his design did not comply with ODOT standards for headwalls when installing a round pipe. The witness explained that these ODOT standards are available to Mr. Liner online and based upon the size of the pipe there would be standards for headwalls heights and other measurements.

Mr. Dorn explained that Mr. Liner's proposed grading and alignment on the Jamaican Road project failed to match up with the existing creek, along with having discussed this with Mr. Liner at his forty five (45) day meeting. The witness testified that both he and Mr. Splawinski spent time with Mr. Liner explaining to him how to match up with the existing creek. The witness explained that other problems contained on Mr. Liner's plan on the Jamaican Road project was a failure to include the need to obtain right-of-way from the property owner, designs that required construction outside the existing right-of-way, and the failure to state these aforementioned things on the plans.

Next, Mr. Dorn when referring back to Appellee's Exhibit 5, the second priority on the PIP 1, the Upper Lewisburg Salem Road project, stated that this project simply didn't get done, and that it was just a simple guardrail problem.

The testimony then centered around Appellee's Exhibit 8, the second priority on PIP 2, Diamond Mill Road project, which was for straight replacement of a 24 inch existing pipe requiring hydraulic design. The witness explained that the plans Mr. Liner submitted were sufficient for County crews to work on, but that would not have been sufficient if it were bid out for non-County crews.

Mr. Dorn then testified regarding the third PIP, noted on Appellee's Exhibit 10, which was given to Mr. Liner on or about October 24, 2012. The witness testified at the initial meeting Mr. Liner, Mr. Splawinski, Ms. Kim Beckner and himself were present at that meeting, and Mr. Liner was given time to ask questions regarding the priorities listed on exhibit. Additionally, it was noted that on page 6 of the exhibit it was noted that the employee can provide input, or request assistance or identification of barriers to this performance improvement plan, which Mr. Liner chose not to do. Moreover, Mr. Dorn testified that Mr. Liner was stationed at the Little Richmond office, his office location, in order for Mr. Liner if he had any questions or needs for additional training that he could ask him directly.

When questioned, Mr. Dorn testified with respect to the third priority on the third PIP as noted on Appellee's Exhibit 10, as the Clayton Road project required a complete hydraulic design and construction plans for a capital improvement which was to be submitted out to a contractor. In this regard, the plans that Mr. Liner needed to complete were supposed to be without mistakes, so as to not result in change orders and additional cost overruns. The witness explained that while the 8 by 6 boxes were used instead of 8 by 4 boxes, in the hydraulic design, it was determined that these were generally all right, along with minor changes to the grading. However, the witness testified there were basic drawing errors noted by Mr. Splawinski, his supervisor, and the project was halted after the 45 day meeting. The witness noted that the drawing errors failed to mention structures running into the existing driveway along with having to block the homeowner's only access to his or her property during the construction.

With respect to the Frederick Pike project, noted on Appellee's Exhibit 10 as the second priority on the PIP, the witness testified that this was a culvert pipe replacement project, and to avoid the use of a guardrail, it was expressed to Mr. Liner that there'll be a need use of a clear zone grading. The witness testified Mr. Liner was told to put together designs utilizing both a 4 to1 and a 6 to 1 grading for the project. While Mr. Liner prepared both designs, he would not suggest which will be better for the project, nor the alignment on the waterway worked out correctly. The witness testified that after 90 days, the plan was not completed. Further, the witness explained that it was the expectation from management that Mr. Liner would suggest the proper grading design, utilizing engineering judgment to determine which one would make more sense; however those decisions had been made by others.

With respect to the Shiloh Springs Road project, noted on Appellee's Exhibit 10, as the third priority on the PIP, the witness testified Mr. Liner was to put together a conceptual hydraulic analysis and cost estimate for replacing a failed storm sewer system, involving a 24 inch tile under a golf course and into the parking lot of a nearby restaurant. The witness explained that they wanted a written report with options that could range from doing nothing to doing something major. The witness explained that Mr. Liner produced a report with three options those being; replacement in the same alignment, replacement in a straight alignment or the use of a dry well. Mr. Dorn testified that the option of using a dry well was not viable as one would have to be built it on private property located at the restaurant, taking out

their parking. The witness testified that while the other two options were something that one could consider, it would involve substantial work on the golf course. Further, the witness testified that overall he was disappointed with Mr. Liner' s work and that he did not produce a retaining pond structure as an option, since there had been one there previously been taken out. When asked why he did not consider a retaining pond, Mr. Liner testified that simply would not work.

Next, Mr. Dorn testified that he did not see any improvement in Mr. Liner performance over the course of three PIP's, but instead saw more problems. The witness identified Appellee's Exhibit 11, as Mr. Liner's employee performance evaluation dated December 10, 2012, with a rating of 35 out of 90, indicating unsatisfactory performance. Further, the witness identified Appellee's Exhibit 12, as Mr. Liner's third PIP performance evaluation which you had a rating of 36 out of 90, also in the unsatisfactory range. The witness testified that simply put Mr. Liner's plans were unsatisfactory and that they spend a lot of time correcting his mistakes. Additionally, the witness explained that with many of the culvert projects his mistakes kept repeating and not approving over time. Moreover, when questioned, the witness testified that he did not participate in the pre-disciplinary meeting.

On cross-examination, the witness testified that he began employment with the Montgomery County engineer's office in June 1987, starting with the position of the Engineer 1, then to Engineer 2, to Construction Manager and then to the present position he holds as Senior Engineer. When questioned what is expected between a person holding an Engineer 1 and an Engineer 2, stated that an Engineer 2 passes an engineering test, and would be responsible for more difficult projects, along with providing supervision. When questioned, the witness testified that his only subordinate employee was Mr. Liner at that time, and that Mr. Rick Splawinski made the decision to have him supervise Mr. Liner. Further, the witness testified that Mr. Splawinski is his supervisor, and that he doesn't currently supervise anyone. When questioned, the witness testified that he was not in the meeting placing Mr. Liner under the initial PIP, as he believed that it was Mr. Splawinski and Ms. Kim Beckner decision to put Mr. Liner under a performance improvement plan. Further, the witness testified that he does know the county's policy on performance improvement plans, but that he was not familiar with that prior to the implementation of this instant action. See Appellant's Exhibit M. When questioned, the witness testified that he did not suggest having Mr. Liner get any additional training. Specifically, when questioned, the witness testified that when he would suggest corrections to Mr. Liner, he would do it, but that the changes he made were not

always correct, as Mr. Splawinski would reject those changes. Additionally, when questioned, the witness testified that the Engineer 1's position is an entry-level engineering position, and not necessarily a professional engineer.

On redirect examination, Mr. Dorn testified that Mr. Liner, with respect to his education and training always went to the engineering trainings that were supplied by ODOT and LTAP. Further, the witness noted that Mr. Splawinski gave materials to Mr. Liner denoting design policies and standards.

Appellee second witness to testify was Mr. Rick Splawinski, the Deputy Chief Engineer at the Montgomery County Engineer's Office, a position he's held since July 1, 2011. As a longtime employee of the Montgomery County Engineer's Office the witness explained that he is very familiar with Mr. Dimitri Liner. Next, Mr. Splawinski identified Appellee's Exhibit 4 as Mr. Liner's unsatisfactory performance evaluation given to him in 2011. The witness explained that Mr. Liner came to him complaining that he thought his evaluation rating of 35 was unfair, and that his supervisor was being unfair, so he conducted an investigation into the matter. While Mr. Liner thought his performance should have been denoted at the top of the scale, in all of the categories, all of the employees who worked with Mr. Liner offered very negative feedback, and believed him to be incompetent.

The witness then identified Appellee's Exhibit 6 as the first PIP dated February 23, 2012, and explained that at the initial meeting Ms. Kim Beckner, Mr. Paul Gunner, Mr. Dimitri Liner and he were in attendance, where they all went over the details of the PIP, along with allowing Mr. Liner an opportunity to ask any questions. The witness explained that they went over everything and that Mr. Liner could have requested assistance, if so needed. When questioned, the witness testified that Mr. Liner was told at that time his new supervisor was going to be Mr. Mike Dorn, and that he was to only ask questions to Mr. Dorn. The witness explained the reason for Mr. Liner to only go to Mr. Dorn with respect to questions, was to alleviate his deficiency regarding asking different engineers for advice on how to do things. The witness testified Mr. Liner was noted as asking other engineers for advice, and shifting blame to those engineers if his work product was not correct.

Mr. Splawinski then identified Appellee's Exhibit 16 as a May 7, 2012, memorandum he prepared regarding Mr. Liner's work on the Jamaican Road culvert project. When questioned, the witness testified that he listed 17 different

deficiencies regarding the plans that Mr. Liner submitted. Further, the witness testified that the plans developed by Mr. Liner simply would not work. As noted on the previously identified exhibit, the witness explained simply put that a major design deficiency was the headwalls were located within the clear zone without guard rail protection, something very basic to a design with someone with Mr. Liner's experience. Mr. Splawinski, when questioned, testified that while ODOT standard construction drawings were applicable and available in lieu of using custom designs, Mr. Liner's plan were incorrect and unnecessary because headwalls could've been pulled from the standard design, along with the fact that no construction limits were shown, and no grading was shown, as well.

The witness testified that the work on the Jamaican Road culvert project continued into the second PIP. The witness identified Appellee's Exhibit 18 as a memorandum he wrote on or about June 22, 2012, which outlined how the replacement structures should be designed, and where that information can be obtained to do the things that are needed to correct his previous deficiencies. The witness then identified Appellee's Exhibit 19, as a memorandum he wrote on or about August 13, 2012, where Mr. Liner did not correct the items that had previously been listed for him to correct. The witness testified with respect to the right-of-way acquisition aspect on the plans, Mr. Liner's explanation that it was not necessary, was not accurate as placing something on private property, as even underground piping requires a right-of-way or easement. The witness testified that the first two PIPs for Mr. Liner was rated unsatisfactory and very little, if any improvement was shown, and that he felt there was a need for a third PIP. See Appellee's Exhibit 9. Mr. Splawinski testified that Mr. Liner was told, at a very detailed meeting with him, where they went over the first two PIPs, that he needed to improve his evaluations to satisfactory or higher, and if below average there be another 90 day PIP with progressive discipline, and/or if the rating was unsatisfactory or unacceptable level his employment likely would be terminated.

The witness identified Appellee's Exhibit 10 as the third performance improvement plan that was initiated on October 24, 2012. The witness then went over the three priorities outlined in the PIP. Initially, the first priority, the hydraulic design and construction plans for capital project structure replacement of the Clayton Road culvert was explained by the witness. Mr. Splawinski explained that in PIP 2, this priority was initially outlined and continued and rolled into the third PIP. The witness explained that the plans created by Mr. Liner were poorly designed as the wing wall sizes and orientations were non-standard and did not comply with

ODOT standards. Further, the witness explained that the location of the wing wall would have to result in the closure of a driveway, without extensive shoring, which was not noted on the plan. Additionally, the witness testified that there also major deficiencies included, but were not limited to, the construction limits not being adequately identified to determine needed property acquisitions, plan presentation violating fundamental industry principles, or in profiles not in the same direction as corresponding plan views, and general notes appearing be copied from other projects without appropriate editing. The witness testified that at the 45 day meeting he made a decision to stop Mr. Liner's work on the project.

Mr. Splawinski then identified Appellee's Exhibit 20, as a memorandum dated February 1, 2013, regarding the second priority on the third PIP noted as the Frederick Pike culvert project. When questioned, the witness testified that the outlet work on the plan was adequate, but that the alignment should have been properly oriented to and directly tied into the existing channel. Moreover, the witness testified that the inlet work and the proposed grading were improper for a residential area which was to be maintained by a property owner. The witness noted that Mr. Liner's proposed grading called for a 2 to 1 grading or 45 degree slope which would have been very difficult for a landowner to mow the lawn, and it should have been more along the lines of a 6 to 1 grading.

Next, Mr. Splawinski then discussed the final project on the third PIP, the Shiloh Springs project. The witness testified that the assignment given to Mr. Liner was to develop a conceptual drainage report to solve a drainage problem on the road. On the downside stream was a golf course with a closed drainage system that was either inadequate or had collapsed. On the upside stream side there was a private property owner, where water was backing up and flowing over the road. The witness testified Mr. Liner was asked to submit a conceptual options, solutions and cost estimates. The witness testified Mr. Liner submitted some designs, but he did not review them, as Mr. Bert Kelsey, another senior engineer, reviewed the same. However, Mr. Splawinski explained that the solution recommending dry wells was not an appropriate solution, and had a low probability of working. Further, the witness testified the plans that were developed failed to provide sufficient detail or how much they would cost, as well.

The witness then identified Appellee's Exhibit 13, as a February 11, 2013, memorandum which he authored and gave to the Engineer, Mr. Paul Gruner, recommending the termination of Mr. Liner. The witness testified he made his recommendation at the conclusion of the third PIP, as the engineer's office had conducted a year-long process executing three PIP's to improve the performance of the employee by either identifying strengths could be used to make the employee valuable to the organization, or to identify deficiencies that could be corrected so that the employee's value to the organization could be improved. Neither result was obtained. Further, Mr. Splawinski testified that Mr. Liner's ability and attitude were deficient in comparison to other Engineer 1s, along with stating that Mr. Liner's responses throughout the PIP's that he was not wrong, and that if it is wrong, just tell him what is wrong that he would fix it. The witness testified Mr. Liner's work was not meeting industry standards of what is expected of an Engineer 1.

On cross-examination, the witness testified that he first worked with Mr. Liner in 2007, on a project that he inherited. When questioned, the witness testified that Mr. Liner's work was at that point incorrect and inappropriate. Further, when questioned, the witness explained that the Frederick Pike project was one of the worst that he seen from any engineer during his tenure at the Montgomery County Engineer's Office. Additionally, the witness testified that prior to July 1, 2011 he was not Mr. Liner's supervisor, and that he did recommend Mr. Liner terminated. When questioned, the witness testified that they did not have a PIP plan in place prior to Mr. Liner's situation, and that they started this in 2012. The witness identified Appellant's exhibit M as a page out of the Montgomery County Engineer's personnel manual, section 3:23 which outlined the use of a performance improvement plan, and noted that performance evaluations will be tied into any performance improvement plan. The witness also identified Appellee's Exhibits 11 and 12 as performance evaluations which were utilized in Mr. Liner's performance improvement plan. Additionally, the witness identified Appellee's Exhibit 4 as a performance evaluation of Mr. Liner that indicated a score of 35, requiring a mandatory PIP. The witness stated that Mr. Liner, complained that it was not a fair rating, wherein he conducted an investigation and concluded that it was accurate as most all of Mr. Liner's co-employees stated that he was a bad employee. Furthermore, the witness testified that Mr. Liner simply did not show any improvement over his three performance improvement plans, and that he was simply lacking basic engineering skills. When questioned, the witness testified that he did not make any recommendation as to the training, as there is no specific training specifically on engineering culverts, but that he did attend annual seminars

on updating his engineering skills. The witness then testified that with respect to Appellee's Exhibits 9, 16, 18, 19 and 20, all the noting correspondence between Mike Dorn and him were all given to Mr. Liner, discussed with Mr. Liner, wherein he was given the opportunity to ask questions, and ask for additional resources if he so needed.

Appellee's next witness to testify was Ms. Kim Beckner, the Montgomery County Engineer's Office Human Resource Safety Officer. When questioned, the witness testified that in her position, as part of her job duties, she maintains the daily records in the Human Resource section of the Engineer's Office. The witness identified Appellee's Exhibit 1 as the instant 124.34 order of removal of Mr. Liner, and Appellee's Exhibit 2 as his notice of pre-disciplinary hearing. The witness then identified Appellee's Exhibit 3 as a letter issued to Mr. Liner placing him on paid administrative leave February 13, 2013 through February 22, 2013. The witness identified Appellee's Exhibit 14 as job description Engineer 1, and Appellee's Exhibit 15 as a job description for an Engineer in Training. Ms. Beckner testified that Mr. Liner held the position of an Engineer 1 from 2000 until his termination, and that he did previously hold the position of Engineer in Training approximately 3 to 4 months in 2000.

On cross-examination, the witness testified that she was employed by the Montgomery County Engineer's Office when Mr. Liner was first hired, but that she was not working in the Human Resources section at that time.

Appellee's last witness to testify was Mr. Paul Gruner, the Montgomery County Engineer, a position he's held for approximately last two years, and that he previously held the position Chief Deputy Engineer at the office for approximately two years under the then Montgomery County Engineer, Mr. Joseph Litvin. When questioned, Mr. Gruner testified that he became aware of Mr. Liner's performance problems in 2010, and after a performance evaluation was completed in 2011 by his then supervisor Mark Hartung. As result of the above noted performance evaluation by Mr. Mark Hartung, Mr. Gruner testified that Mr. Liner talked to Mr. Rick Splawinski about the evaluation, who in turn discussed it with him. Further, the witness explained that Mr. Rick Splawinski conducted an investigation into the performance evaluation and concluded that it should stand, who then discussed his findings with Mr. Liner. At this point, Mr. Gruner testified that both he and Mr. Rick Splawinski asked Mr. Liner to give them any project that he solely completed since 2000. The witness explained that the two projects he gave us, were in fact not

completed. The witness, when questioned, explained that this was a good situation in which to utilize a performance improvement plan, so they developed a PIP in 2011 – 2012. Mr. Gruner testified that they wanted Mr. Liner to simply accomplish something. Mr. Gruner stated that we looked over the 45/90 day periods regarding the various performance improvement plans, albeit that he was not hands-on, as he wanted Mr. Liner to accomplish his tasks on his own.

Next, Mr. Gruner testified that he was involved with the results at the end of the second PIP, where there was clearly a lack of improvement on Mr. Liner's part. The witness testified that he initially wanted to issue a three-day suspension, but that he decided that Mr. Liner should be given an opportunity on a third PIP, so a third PIP was implemented. At the end of the third PIP, Mr. Gruner testified that Mr. Rick Splawinski wrote out a recommendation of termination, as he, along with Mr. Rick Splawinski reviewed the evaluation of Mr. Liner's performance, as well as the documentation regarding individual projects, and their lack of completeness. Eventually, a pre-disciplinary hearing was held and Mr. Liner stated that Mr. Rick Splawinski was unfair and had something against him, but when asked to provide examples, Mr. Liner could not reference even one. The witness explained that after the pre-disciplinary hearing conference, he placed Mr. Liner on paid administrative leave, followed by issuing him in order of removal. The witness explained that over the one year of time covering the three PIPs, Mr. Liner showed little to no improvement, and almost substandard performance all along the way, and that there was again no completion of any projects.

Furthermore, when questioned, Mr. Gruner testified that generally speaking prior to his becoming the Engineer in 2011 the culture of the workplace had been that all employees received good evaluations, regardless of their performance, all the time so as to receive pay raises. The witness testified that he did not have any say so in those prior evaluations, and was not involved in creating those inflated expectations.

On cross-examination, Mr. Gruner testified that he is the appointing authority and that he was the actual hearing officer at the pre-disciplinary hearing. Further, when questioned, the witness testified that under the previous administration with Montgomery County Engineer Mr. Joseph Litvin there appeared to be a culture of protectionism of Mr. Liner. Further, when questioned, the witness testified that he did inquire as to whether or not Mr. Liner had a college degree in February 2012, and identified Appellant's Exhibit R as a letter sent to Mr. Liner requesting his

diploma, along with identifying Appellant's Exhibit Q, Mr. Liner's actual diploma showing he had a degree in Water Resources. Moreover, the witness when questioned testified that he had told Mr. Liner that if he needed any training the agency would assist him that regard. However, when questioned, the witness explained that he didn't specifically tell them what training he should take, outside of ODOT training, and the annual Ohio engineering conference covering topics over two days, wherein it was believed that Mr. Liner had attended those every year. Additionally, the witness identified Appellant's Exhibit M as the Montgomery County Engineer's performance improvement plan, but could not be sure of the exact date that that came into existence, but noted it has been revised. The witness testified that Mr. Splawinski and Ms. Beckner drafted the policy initially.

The Appellant, Mr. Dimitri Liner, began his case-in-chief by offering testimony himself. The witness testified that he graduated with a Masters in Civil Engineering from the Ukrainian University of Water Resources. Further, the witness testified that he arrived in America in 1990 and became a US citizen after five years and that English is his second language. Moreover, the witness testified that he previously worked as an Engineer in the Soviet Union and that he had five Engineers under his supervision.

Mr. Liner testified that he began employment with the Montgomery County Engineer's Office in July 2000 as an Engineer in Training, and identified Appellant's Exhibit J, as his resume be submitted at that time. The witness explained that his position of Engineer in Training changed to an Engineer 1s position some time later, but in the interim he earned his Engineering Intern certification. When questioned, the witness explained that he took an examination for engineer in 2001 along with completing a computer assisted design class (CAD) and received a grade of A. However, he testified that he has never sat for his professional engineering license, nor was he required to do the same. The witness identified Appellant's Exhibit I as the job description for Engineer in Training which he received which accurately reflected his job duties. Additionally, the witness testified that in 2003 or so he became an Engineer 1.

Next, Mr. Liner identified Appellants Exhibit F, as a series of e-mails that he sent to Mr. Mike Dorn regarding the Frederick Pike project. The witness explained that he did the project according to the specific requirements outlined in the PIP with specific dates for items to be submitted. Mr. Liner testified that when he would complete an item you would simply send an e-mail to Mr. Dorn telling them that that

item was in his mailbox. The witness testified that after he did that, Mr. Dorn would tell him to go onto the next step. Additionally, the witness testified Mr. Dorn would tell him that he had sent the item on to Mr. Splawinski for his review, as well.

The witness then identified Appellant's Exhibit B as a memorandum from Mr. Dorn to him dated May 30th, 2012, regarding the Jamaican Road Culvert project, and some review comments regarding the project's design from Mr. Splawinski. The witness explained that during the PIP's he and Mr. Dorn didn't specifically work together step-by-step, but only Mr. Dorn would receive my step that I completed, review it and pass it along to Mr. Splawinski. Along this line of questioning, the witness testified that Mr. Dorn never provided feedback to him and that only came from Mr. Splawinski.

With respect to the Frederick Pike project, which took place at the end of 2012 and the beginning of 2013, the witness explained it was a project to replace existing 72 inch corrugated metal pipe, that basically needed an updated grading plan. The witness testified that he used standard ODOT drawings, and that his steps for all of the projects were as follows; 1. Hydraulic calculations, 2. Plan and profile, 3. Cross-sections, 4. Grading, and 5. Right-of-way plan/structural drawings. When questioned, the witness testified that he never got any feedback from Mr. Dorn outside of his hydraulic calculations, but not steps two through five. When questioned about feedback, the witness testified that he witnessed Mr. Splawinski reviewing his work product from Mr. Dorn's mailbox while Mr. Dorn was on vacation, and that all is feedback that he received was negative. The witness testified that he was told that each Engineer has to design by location and within the design manual, and if one cannot do what ODOT provides, one has to use engineering skills and judgment to create a design.

Next, the witness testified regarding the Jamaican Road project, wherein he explained that he did not see anything wrong with his proposed right-of-way despite his design proposal placing a pipe underground on private property with no right-of-way or easement. The witness testified that again he used standard ODOT drawings, going through his five-step process, and agreed, when questioned that he did get feedback, but that was mostly negative. Further, the witness testified that when Mr. Dorn went to the actual job site, he agreed with his design and drawings. On the other hand, the witness testified that the feedback he got on his PIP were all negative. With respect to the Upper Lewisburg-Salem Road project, the witness again explained that he did his five-step process, with stating that if his inlet and

outlet elevations were incorrect, causing water to flow backwards, it was because of drawings from the surveyors were wrong. It should be noted that the witness testified that he told Mr. Dorn that the site plan was wrong, but that testimony seemed disingenuous as why would he have continued to work on the project, knowing the drawings to be incorrect. Moreover, no e-mail or documentation was submitted to bolster this fact. Additionally, with respect to the Clayton Road project the witness testified that he went through the five steps, and that Mr. Dorn only reviewed the hydraulic calculations, and no other step. However, the witness testified that he believed Mr. Splawinski reviewed steps two through five, and that he never had any face-to-face meeting with Mr. Splawinski about his work.

Mr. Liner testified that he was also blamed for carrying over a non-standard orientation into his plans if the survey plot had the wrong orientation. Again, Mr. Liner explained that he informed Mr. Dorn of the error on the survey plot, but didn't continue to carry the error forward into his own designs and plans without any correction.

Mr. Liner testified that he was asked to prepare a list of all the projects that he worked on and created during the 2011 work year, and identified Appellant's Exhibit G, as that list. When questioned, the witness testified the list of projects included only "as-built drawings".

The witness then identified Appellant's Exhibit A as performance evaluations dating from December 2000 through December 2010, wherein his performance was never questioned or deemed unsatisfactory. The witness testified that his previous supervisors Jim Hastings through Mr. Ken Harvey never placed himself on the performance improvement plan, or was he on one under Mr. Joseph Litvin, the previous Montgomery County Engineer. The witness explained that Mr. Litvin retired June 2010 and that Mr. Paul Gruner began as the Montgomery County Engineer in July 2010. The witness identified Appellant's Exhibit D as a written response to the performance evaluation which he received for year 2011. When questioned, the witness testified that Mr. Rick Splawinski never told him that he needed additional training, nor did he ever have any issues with Mr. Splawinski in the past. The witness testified that he initially did not sign his 2011 performance evaluation because he did not agree with the evaluation, but was later then forced to sign it in February 2012. Moreover, the witness testified that once he was on his first PIP, he did not agree with it or sign off on it, as well. The witness then identified Appellant's

Exhibit C as a response he gave to Mr. Gruner at the end of this second PIP 90 day review, and noted that Mr. Gruner never told him to get any additional training.

Mr. Liner then offered testimony regarding the Shiloh Springs project. The witness testified that when working on the project he provided three options: 1. Replace the existing broken pipe, 2. Install two dry wells at the restaurant, and 3. Install a man-hole in the pipe which will drain into an existing pond. The witness testified that he also had provided cost estimates for the three options, but that he would first need approval for a geological study before the project could be completed. Mr. Liner stated that since another engineer had installed a dry well on a separate project, that had a geological survey as to what kind of soil was present in the area, he thought it would work in this instance, along with borrowing similar drawings from that previously completed project. When questioned as to why he did not suggest building a retention pond, the witness testified that he did not understand how the County could force a property owner to install it, if the County was not even considering forcing a property owner to fix a pipe.

On cross-examination, Mr. Liner agreed that his work location was the same location as his supervisor, Mr. Dorn, but that he did not have any meeting or discussions with Mr. Dorn other than the 45 and 90 day reviews, despite the notations on the PIPs of meetings and conversations with Mr. Dorn. The witness then identified Appellee's Exhibit 5, as the first PIP dated February 23, 2012, with respect to the Upper Lewisburg-Salem project explained that his questions were to be directed to his supervisor, Mr. Dorn, along with Mr. Dorn specifically asking that if he had any questions, he was directed to ask Mr. Dorn. With respect to Mr. Liner's previous testimony on direct, Mr. Liner did not acknowledge that Mr. Dorn and spoke to him about his revisions on the project, but was shown a notation that Mr. Dorn provided comments on enlarging right-of-way easements.

With respect to Appellant's Exhibit G, Mr. Liner confirmed that these drawings were drawings created following completion of work by the construction crews, and were not drawings developed to guide construction.

Moreover, regarding the orientations being incorrect on some of the plans, Mr. Liner, when questioned, indicated that he simply followed the survey drawings even if they were wrong, as one cannot change it.

When asked about having no monumental horizontal alignment on the Frederick Pike project, Mr. Liner's only response was that one bases plans on those created by surveyors, and that he copied them. When asked why he did not provide a point of reference on his designs, Mr. Liner nearly disputed information because the critique came from Mr. Splawinski, and not Mr. Dorn, and not that the critique was valid or invalid.

FINDINGS OF FACT

1. The jurisdiction of this Board to conduct this hearing was established by O.R.C. § 124.34.

2. Mr. Dimitri Liner was employed by the Montgomery County Engineer's Office as an Engineer in Training from 2000 until 2003, and as an Engineer 1 for the last 10 years.

3. The Appellant, Mr. Dimitri Liner as an Engineer 1, was removed from his position with the Montgomery County Engineer's Office for violating the O.R.C. § 124.34 for neglect of duty, inefficiency and incompetency

4. On February 22, 2013, the Montgomery County Engineer's Office delivered to Mr. Dimitri Liner an O.R.C. § 124.34 Order of Removal which removed Mr. Liner from his position effective February 22, 2013.

5. Appellee stipulated to the fact that Appellant's appeal was timely filed.

6. The Appellant, Mr. Dimitri Liner, in his ten years of service with the Montgomery County Engineer's Office, had not received any discipline, prior to his removal, although a 3 day suspension had been contemplated at the end of his second PIP, but it was decided to give Mr. Liner one more PIP to show improvement. Further, Mr. Dimitri Liner did not submit any evidence of disparate treatment.

7. The Appellee did prove by a preponderance of the evidence that Mr. Liner received his procedural due process through a pre-disciplinary hearing.

8. The Appellee, by a preponderance of the evidence, established that standards of conduct existed for and were known by Mr. Liner regarding his required duties of his position as an Engineer 1. The testimony and

documentary evidence presented at the record hearing established by a preponderance of the evidence:

a. That three performance improvement plans (PIPs) were created for Mr. Liner following the annual performance evaluation of Mr. Liner which indicated a performance rating of 35 out of 100, indicating unsatisfactory performance, after which Mr. Liner requested an investigation. Mr. Rick Splawinski, the Chief Deputy Engineer, conducted an investigation and aside from Mr. Liner's impression that his performance was outstanding, it was learned through talking to co-employees that Mr. Liner's performance was substandard and generally seen as incompetent.

b. As a result of the investigation the PIPs were enacted to improve Mr. Liner's performance, as there had been a problem with Mr. Liner not accomplishing what was expected of an Engineer 1.

c. The first PIP was initiated on February 23, 2012, wherein a meeting was held to explain the PIP projects with Mr. Liner, to go over all aspects of the PIP, and to allow Mr. Liner to ask questions that he might have, along with allowing Mr. Liner to express any need for any additional training or resources to assist him in the completion of the PIP(s). Similar meetings were held at the beginning of the second and third PIP, as well on June 26, 2012 and October 24, 2012. Further a 45 day and 90 day meeting were held during all three PIP's.

d. The evidence revealed regarding the Jamaican Road replacement project listed in the PIP1 and PIP2, that Mr. Liner's designs would not work, as it created safety concerns due to a lack of guardrails, there was a lack of a proposed horizontal and vertical alignments, it lacked a working set point, failed to follow the standards and failed to address right away easements. The above noted concerns were addressed with Mr. Liner in his meetings but the revision of his plans continued to contain these major problems. Additionally, it was noted that even if a surveyor had made a mistake Mr. Liner just copied it, even knowing it was wrong. Mr. Liner offered an explanation that he couldn't change the surveyors plan, but failed to mention this on the plans that the surveyors plan was wrong.

e. The evidence revealed that on PIP3, Mr. Liner's work product contained deficiencies in all three projects he was assigned during that period. With respect to the Clayton Road project, Mr. Liner failed to follow ODOT standards when designing a plan that would require the complete restricting of driveway access for a private property owner, and the lack of a construction limit sufficient to determine needed property acquisition. It was noted that these items had been critiqued on prior projects during the PIP's, yet continued. With respect to the Frederick Pike project Mr. Liner's designs for a longer culvert to be constructed would've missed the existing channel, along with having a grading of 2:1, instead of a 6:1 grading for a residential lawn area, and lack of monumental horizontal alignments. Again, these deficiencies had been pointed out in the earlier PIP's, yet continued. With respect to the final project on the third PIP, the Shiloh Springs Road project the evidence revealed that Mr. Liner's creation of conceptual ideas and cost estimates to solve a roadway flooding problem failed to provide sufficient information for determining the cost estimates, a listed objective for the project.

f. Further, and most importantly, during the course of Mr. Liner's employment with the Montgomery County Engineer's Office as an Engineer 1 he failed to complete any design which was later constructed through the bidding process to contractors, not one in 10+ years.

g. Neglect of duty was substantiated by the Appellee, as the evidence revealed that Mr. Liner failed to complete his performance improvement plans in a satisfactory way in contemplation of his job duties as an Engineer 1.

h. Inefficiency was substantiated by the Appellee as the evidence revealed that Mr. Liner's performance was inadequate in performance or producing properly a desired effect.

i. Incompetency was substantiated by the Appellee as the evidence revealed that Mr. Liner demonstrated a complete lack of ability to perform the functions of an Engineer 1.

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, and 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 or more of the enumerated infractions listed in O.R.C. § 124.34 and 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 O.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 an opportunity to participate in a pre-disciplinary hearing. The Appellant also had notice of the charges against him and an opportunity to respond to those charges. Accordingly, the undersigned Administrative Law Judge finds 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. Appellee established by a preponderance of the evidence that it had established standards of conduct and that such standards had been communicated to Appellant. According to the O.R.C. § 124.34 Order, Appellant's removal was based upon his neglect of duty, inefficiency and incompetency.

Neglect of Duty

Appellee proved by a preponderance of the evidence that Mr. Liner was guilty of neglect of duty. Ohio Revised Code Chapter 124 does not define "neglect of duty." However, Black's Law Dictionary does define "neglect" to mean:

> . . . to omit, fail, or forbear to do a thing that can be done, or that is required to be done, but it may also import an absence of care or attention in doing or omission of a given act. And it may mean a designed refusal, indifference or unwillingness to perform one's duty. Black's Law Dictionary 1031 (Deluxe 6th Ed. 1990).

For the Appellee to establish that an employee committed neglect of duty, the Appellee must demonstrate that a duty upon the part of the employee existed, the employee knew of that duty, and that knowing of that duty, the employee breached that duty.

As was revealed by the testimony, the Appellee did prove by a preponderance of the evidence that the Appellant was neglectful of his duties. The documentary and testimonial evidence revealed that the Appellant knew of the established standard of conduct with regards to the performance of his job duties pursuant to his position description as an Engineer 1. The evidence revealed, by preponderance thereof, with respect to all three PIP's Mr. Liner failed to do something that was required of him to do so with respect to submitting a satisfactory work product when designing plans as an Engineer 1. As shown above, Mr. Liner continually made the same mistakes over and over again, and showed disregard to mistakes he found in surveyor plans, and simply passed them on without noting the same in his plans, if his testimony were to be believed.

Inefficiency

Appellee proved by a preponderance of the evidence that Mr. Liner was guilty of inefficiency. Ohio Revised Code Chapter 124 does not define "Inefficiency."

However, Black's Law Dictionary does define "efficient" to mean:

> . . . Adequate in performance or producing properly a desired effect.
> Black's Law Dictionary 515 (Deluxe 6th Ed. 1990).

Inefficient means the exact opposite, thus inadequate in performance or producing properly an undesired effect. Again, as was revealed by the testimony and documentary evidence presented, by preponderance thereof, with respect to all three PIP's Mr. Liner failed to do something that was required of him to do so with respect to submitting a satisfactory work product when designing plans as an Engineer 1. While Mr. Liner introduced evidence that his previous 9 years as an Engineer while working under the previous Montgomery County Engineer Mr. Joseph Litvin his performance evaluations were in the satisfactory range, that did not caring much weight when reviewing the separate PIPs, as the management team of Mr. Dorn and Mr. Splawinski gave adequate notice to the Appellant to correct his behavior and produce an adequate set of designs and/or plans as required by an Engineer 1. The evidence revealed that he did not complete one design project in the 3 PIPs that did not need minor to major corrections. Ultimately, Mr. Liner's excuses were unconvincing.

Incompetency

Appellee proved by a preponderance of the evidence that Mr. Liner was guilty of incompetency. Ohio Revised Code Chapter 124 does not define "incompetency." However, Black's Law Dictionary does define "incompetency"to mean:

> Lack of ability, knowledge, legal qualification, or fitness to discharge the required duties or professional obligation. A relative term which may be employed as meaning disqualification, inability or incapacity and it can refer to lack of legal qualifications or fitness to discharge required duty and to show want of physical or intellectual or moral fitness. County Bd. of Ed. of Clarke County v. Oliver, 270 Ala. 107, 116 So.2d 566, 567. Black's Law Dictionary at page 765 (Deluxe 6th Ed. 1990).

As was revealed by the testimony, the Appellee did prove by a preponderance of the evidence that the Appellant was guilty of incompetency. The documentary and testimonial evidence revealed that the Appellant knew he was required to perform the duties of an Engineer 1. The evidence revealed by preponderance that Mr. Liner lack the ability and/or knowledge to carry out the duties required as an Engineer 1. As previously noted, as was explained in the body of the statement of the case, in all three PIPs, there was a consistency of the deficient design techniques, those being; lack of site elevations, improper oriented plans, lack of easement notifications, no authorizations from landowners if encroaching on their property or wrong survey information that was neither mentioned in his plans or brought up to his supervisors prior to the submission of his work. It should be worth noting that prior to the PIPs, it was believed that Mr. Liner would go around to other Engineers in the office and get ideas, and when those ideas were questioned or wrong, Mr. Liner would simply blame those who had aided him. To end the above noted activity, the agency required Mr. Liner to directly ask questions and report to Mr. Dorn, to learn whether or not Mr. Liner was fit to continue his employment.

The question remains of whether the discipline imposed should be sustained. The undersigned Administrative Law Judge recommends that the evidence presented at the record hearing, taking the totality of the circumstances into account, is sufficient to support the removal of the Appellant. It appears to the undersigned Administrative Law Judge that the Appellant was not taking any meaningful steps to comply with his supervisor's directives or better fulfill his duties as an Engineer 1 as expressed to him by his supervisors, especially after having had three performance improvement plans, to show that he can perform his job adequately. Therefore, the undersigned Administrative Law Judge concurs with the Appellee's decision to remove the Appellant.

RECOMMENDATION

Therefore, based upon the above analysis, I respectfully **RECOMMEND** that the instant order of removal issued to Appellant, effective February 22, 2013, removing the Appellant from the position of Engineer 1 be **AFFIRMED**, and the Appellant's appeal be **DENIED.**

Christopher R. Young
Administrative Law Judge