

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Rick Heyn,

Appellant,

v.

Case No. 2013-REM-08-0229

Union County Board of Developmental Disabilities,

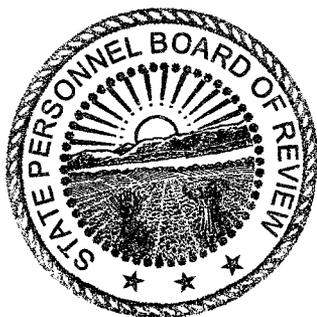
Appellee.

ORDER

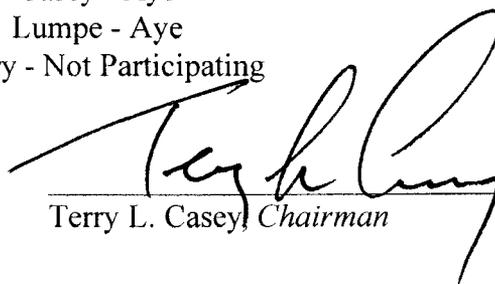
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, 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 August 20, 2013, removing Appellant from the position of Service Consultant is **AFFIRMED**, and the Appellant's appeal is **DENIED**.



Casey - Aye
Lumpe - Aye
Tillery - Not Participating


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, January 09, 2014.


Clerk

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

1/9/14 ec

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

Rick Heyn,

Case No. 2013-REM-08-0229

Appellant

v.

December 2, 2013

Union County Board
of Developmental Disabilities,

Appellee

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On August 20, 2013, the Union County Board of Developmental Disabilities (herein after UCBDD) served an Order of Removal, in accordance with Ohio Revised Code Section 124.34, upon the Appellant, Rick Heyn, a Service Consultant. The order alleged the following:

This will notify you that you are removed from your position of Service Consultant effective August 20, 2013.

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

1. Neglect of duty; "wanton or willful neglect in the performance of assigned duties." Neglect was substantiated in a state conducted investigation of an MUI. (Major unusual incident)
2. Insubordination;"... Refusing to perform assigned work or to comply with written or verbal instructions of your supervisor."

You text messaged an employee while on paid administrative leave regarding a work-related event (your MUI investigation) despite a directive not to.

You failed to follow the instructions of Investigative Agent directing you to report to a client's house to ensure the health and safety of the client.

3. Dishonesty; "failure to be truthful during a pre-disciplinary conference."

Another employee provided a statement to the employer that the reason you could not attend to a client was that you had been drinking. This is in direct conflict with your response at the pre-disciplinary conference.

Thereafter, on August 29, 2013, the Appellant filed a timely appeal from this Order of Removal. The record hearing in this case was held on November 8, 2013, and concluded that same day. The Appellant, Rick Heyn, appeared *pro se* at the record hearing and represented himself. The Appellee, the Union County Board of Developmental Disabilities, was present through its designee, Ms. Kara Brown, the Associate Director for the Union County Board of Developmental Disabilities, and was represented by Brian D. Butcher, Attorney at Law.

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 or 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 on cross examination was Mr. Rick Heyn. The witness testified that he is been employed by the UCBDD for approximate last 5 years as a Service Coordinator/Service Consultant.

When questioned, the witness identified Appellee's Exhibit A as a notice of pre-disciplinary conference given to him on or about August 7, 2013, for a hearing that took place on August 14, 2013, and on August 15, 2013, to answer an additional charge. Further, the witness explained that he was given an appropriate amount of time to response the charges that were before him. Mr. Heyn identified Appellee's Exhibit B as the pre-disciplinary hearing report which found that the charges of neglect of duty, insubordination and dishonesty were all substantiated.

The witness then identified Appellee's Exhibit C as the instant 124.34 order of removal that was issued to him on or about August 20, 2013.

The witness then identified Appellee's Exhibits D, E, F and G as a previously issued written reprimand, a three-day working suspension, a 10 day suspension without pay and a last chance agreement, respectively, all that were issued from February 9, 2011 to January 23, 2012. When questioned, the witness stipulated that he had received all of these previous disciplines.

When questioned, the witness testified that he was charged with neglect of duty because of an Ohio Department of Developmental Disabilities MUI (Maj. unusual incident) Report Investigation. The witness identified Appellee's Exhibit H as a copy of the above investigative report showing that the allegation of neglect was substantiated by the Ohio Department of Developmental Disabilities, to which he did not agree with. When questioned, the witness testified that he was also charged with two counts of insubordination, with the first charge being that he failed to follow instructions of an Investigative Agent directing him to report to a client's house to ensure health and safety of the client, hereinafter known as Ms. JB. The witness explained that with respect to this charge that he received a recommendation to do something with Ms. JB, but did not follow the investigative agent's recommendation, as she was not his supervisor. The witness testified that he had just completed an extensive and exhaustive telephone interview with the client on the day in question, and felt that she was okay. When questioned, the witness testified that with respect to the dishonesty charge that he during the Ms. JB incident he had texted Ms. Clark if she could go over and check on Ms. JB, as he had been drinking, only later at the pre-disciplinary hearing to deny this action. When asked to explain why he did this, Mr. Heyn said he simply did this to give Ms. Clark a hard time. Moreover, with respect to the second charge of insubordination the witness explained that he did continue to text Ms. Clark when he was told not to do so. When asked to explain why he did this, the witness said he was trying to defend himself with respect to the instant charges that are before this Board today.

Appellee's next witness to testify was Ms. Joey Cotter, who explained that she has been employed by the UCBDD since November 2010 as an Investigative Agent and was eventually promoted to Lead Investigative Agent in 2011. When questioned, the witness testified that as part of her duties she investigates MUIs, or major unusual incidents, to ensure the health and welfare of the clients they serve.

Regarding the incident in question which occurred on May 14, 2013, the witness testified she was on-call investigative agent for the major unusual incident hotline that day, wherein she received a phone call from Mr. Heyn around 4:19 p.m. The witness testified that she learned through Mr. Heyn that Ms. JB had been dropped off by transportation at her apartment, with no support care, contrary to her care plan. Ms. Cotter testified that Mr. Heyn understood that Ms. JB was supposed to have 24/7 supervision and further explained that he asked Ms. JB a series of questions regarding her safety, wherein he determined she was okay and let transportation leave. The witness testified when one has 24/7 supervision a support care provider must be with that person at all times, and specifically with Ms. JB that she was under a court order because of her prior criminal activity and suicidal tendencies. When questioned, the witness testified that at that time Mr. Heyn explained that he had made a bad call. Moreover, Ms. Cotter testified that Mr. Heyn told her that he had her phone number and that he would call her, but couldn't get a hold of her. Further, the witness testified that after a series of phone calls, wherein Mr. Heyn couldn't get a hold of Ms. JB's Residential Advisor/Support Care Provider, is when she instructed Mr. Heyn to go over to her residence, to which she explained that he would. The witness testified that she later found out that he in fact did not go over to her residence, but that he had led her to believe that he had.

When asked if the County Board did anything with the investigation into this incident with Mr. Heyn, or whether she played any role in it, testified that this matter was referred out to the State Department of Developmental Disabilities, due to the conflict of interest.

On cross-examination, the witness testified that Mr. Heyn was able to communicate and appeared to be rational, as he knew of Ms. JB's 24/7 supervision plan.

On redirect examination, again the witness testified that Mr. Heyn's voice appeared to be okay, but something was a little awkward, as during the conversation he had mentioned that he "loved" me.

On re-cross examination, the witness testified that Mr. Heyn said that he had assessed Ms. JB, but that was not in his purview.

On re-re-direct examination, the witness testified that was her understanding that Ms. JB told the transportation driver her concerns regarding that no residential provider was at her apartment that evening.

The Appellee's third witness to testify was Ms. Edith Deal, a MUI Registry Supervisor for the Ohio Department of Developmental Disabilities. When questioned, the witness testified that she has had her job for approximately last 13 years and although she supervises investigators, she in fact performed the instant investigation regarding Mr. Rick Heyn. Further, the witness testified that she has performed approximately 50 MUI investigations, such as the one at issue. The witness identified Appellee's Exhibit H as her report on that she issued on July 30, 2013, wherein the allegation of neglect was substantiated. When questioned, the witness testified that she found several instances of neglect regarding the incident at hand wherein Mr. Heyn had a duty to provide services and support as the on-call service coordinator. The first place wherein she found neglect by Mr. Heyn was when he allowed Ms. JB to get off the bus, and basically be alone wherein she said she is to have 24/7 supervision. The second area of neglect regarding Mr. Heyn occurred when Ms. JB was left alone in her apartment with a history of suicidal tendencies and needing 24/7 supervision. Thirdly, the witness testified that in her opinion Mr. Heyn was neglectful when he did not go out to check on her or by sending someone else. Moreover, the witness testified that she also found him to be neglectful when he told her that he couldn't drive on May 13, 2013, the day before the incident which he was also on-call, because he had been drinking, as that was his birthday.

No cross-examination was elicited from the witness.

The Appellee's fourth witness to testify was Ms. Jeri Clark, a Service Consultant with the UCBDD, a co-worker of the Appellant herein. When asked what her role was in respect to the incident hand, stated that she had received a text message from Mr. Heyn around 4:30 p.m. on May 14, 2013. The witness stated that she did not answer the text message right away as she was on her way to go to her son's baseball game, but later found out the next day that he was texting her to see if she could go check on Ms. JB. Furthermore, the witness testified that Mr. Heyn told her that he could go check on her because he had been drinking. The witness

testified that she was interviewed by the state investigator and she later identified her written statement as Appellee's Exhibit J.

When questioned, the witness testified that even after Mr. Heyn was placed on administrative leave he has been texting herself, along with her husband, and making comments like you shouldn't mess with my job. When questioned, the witness testified that she reported this to her supervisor, along with stating that she never responded to his texts.

No cross-examination from the witness was elicited.

The Appellant, Mr. Rick Heyn, began his case-in-chief by calling himself as if on direct examination to the witness stand. The witness then identified Appellee's Exhibit L as a position description for the Service and Support Administration Coordinator's position, the position he held while at UCBDD. When looking at page 2 of Appellee's Exhibit L, under paragraph 5, the witness testified that as part of his duties he is to assure that assessments and service documentation is to be completed and maintain in a timely and accurate manner. In this regard, the witness explained that after he had a telephone conversation with Ms. JB, his assessment was that the customer thought she would be okay for a couple of hours by herself. Additionally, the witness explained that the investigative agent cannot make assessments, as that is not part of their duties. Further, the witness explained that on May 14, 2013, he was off on sick leave, as he had a migraine headache, but that did not alleviate his on-call duties even though he was off on sick leave. Then, the witness testified that Ms. Kara Brown telephoned him about an hour later and explained that a Residential Advisor was then on-site. The witness testified that he asked Ms. JB several questions regarding her health and safety and whether or not she was able to be left alone for a couple of hours, to which she agreed. However, the witness did state that Ms. Cotter disagreed with his decision.

When looking at page 2 of Appellee's Exhibit L, under paragraph 14, the witness testified that as part of his duties he is to assure an immediate response to situations and demonstrate a threat to health and/or safety. The witness stated that during the hour that Ms. JB was left alone she didn't commit suicide, burn the house down, participate in any criminal activity and that there were no negative outcomes. In this regard, the witness explained that she was successful. Moreover, the witness testified that he has been told in the past not to be a direct provider of services, as that is the Residential Advisor's purview. Mr. Heyn stated that for the agency to ask

him to go over to her apartment, he would've been in violation of that rule, because he would be providing direct services at that point. Additionally, when looking at page 2 of Appellee's Exhibit L, under paragraph 12, the witness testified that as part of his duties he is to assure an understanding and informed consent by the individual and/or guardian for the Individual Service Plan, thus making sure Ms. JB understood and was informed of for being left alone was okay for just a couple of hours. Further, when looking at page 2 of Appellee's Exhibit L, under paragraph 13, the witness testified that as part of his duties he is to assist individuals/families to exercise their rights, which he did in allowing Ms. JB to make the choice to be left alone.

With respect to the "gag order" that was in place the witness testified that he thought that that was unconstitutional as limiting his free-speech and in not allowing him to prepare for an adequate defense.

FINDINGS OF FACT

1. The jurisdiction of this Board to conduct this hearing was established by O.R.C. § 124.34.
2. Mr. Heyn was employed by UCBDD as a Service Consultant for the last five years.
3. The Appellant, Rick Heyn, as a Service Consultant, was removed from his position with UCBDD for violating the O.R.C. § 124.34 for neglect of duty, insubordination, and dishonesty.
4. On August 20, 2013, UCBDD delivered to Mr. Heyn an O.R.C. § 124.34 Order of Removal which removed Mr. Heyn from his position effective August 20, 2013.
5. Appellee stipulated to the fact that Appellant's appeal was timely filed.
6. The Appellant, Mr. Heyn, in his five years of service with UCBDD, had received a letter of reprimand, one three day suspension, one ten day suspension, along with signing a last chance agreement, prior to his removal. All of Mr. Heyn's prior disciplines were issued from February 9, 2011 through January 23, 2012, and did not submit any evidence of disparate treatment.

7. The Appellee did prove by a preponderance of the evidence that Mr. Heyn 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. Heyn regarding his required duties of his position as a Service Consultant. The testimony and documentary evidence presented at the record hearing established by a preponderance of the evidence:
 - a. That neglect was substantiated in a state conducted investigation of an MUI (major unusual incident).
 - b. Insubordination was substantiated by the Appellant refusing to perform assigned work and/or failed to comply with written and/or verbal instructions from his supervisor.
 - c. While on paid administrative leave the Appellant text messaged an employee regarding a work-related event (the Appellant's MUI investigation) despite a directive not to contact anyone.
 - d. The evidence revealed that the Appellant failed to follow instructions of an Investigative Agent directing him to report to a client's house to ensure the health and safety of that client.
 - e. The evidence also revealed that the Appellant was not truthful during a pre-disciplinary conference, as another employee had provided a statement to the employer that the reason that you could not attend to the client was that you had been drinking, in direct conflict with his response at the pre-disciplinary hearing conference.

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, insubordination, and dishonesty.

Neglect of Duty

Appellee proved by a preponderance of the evidence that Mr. Heyn 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 his duties as a Service Consultant. Ms. Edith Deal, a MUI Registry Supervisor for the Ohio Department of Developmental Disabilities, a neutral and disinterested party to this action, testified that she found several instances of neglect regarding the incident at hand wherein Mr. Heyn had a duty to provide services and support as the on-call service coordinator. The first place wherein she found neglect by Mr. Heyn was when he allowed Ms. JB to get off the bus, and basically be alone wherein she said she is to have 24/7 supervision. The second area of neglect regarding Mr. Heyn occurred when Ms. JB was left alone in her apartment with a history of suicidal tendencies and needing 24/7 supervision. Thirdly, the witness testified that in her opinion Mr. Heyn was neglectful when he did not go out to check on her or by sending someone else.

While the Appellant explained that he telephone interviewed the client to ensure her safety, and to allow her to make a choice, that did not within itself alleviate Mr. Heyn's responsibility to ensure the client's 24/7 supervision. Moreover, it was understood by the Appellant that the Investigative Agent could not order or instruct him to perform any task, as she was not his supervisor, but that too also did not alleviate his responsibility to ensure the health and safety of the client. When the Appellant failed perform the above noted he did forbear to do a thing that could be done, rising to absence of care or attention in doing given act, amounting to neglect of duty.

Insubordination

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

Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer.
Black's Law Dictionary 801 (Deluxe 6th Ed. 1990).

In the case at hand, insubordination was substantiated by the Appellant refusing to perform assigned work and/or failed to comply with written and/or verbal instructions from his supervisor. While on paid administrative leave the evidence revealed that the Appellant text messaged an employee regarding a work-related event (the Appellant's MUI investigation) despite a directive not to contact anyone.

Although, the evidence revealed that the Appellant failed to follow instructions of an Investigative Agent directing him to report to a client's house to ensure the health and safety of that client, it was not proven by a preponderance of the evidence that the Investigative Agent was actually someone that could order the Appellant to perform something as his supervisor. However, clearly the Appellant should have not been so caught up in the fact that the Investigative Agent was not his supervisor, and attended to the client's interest to ensure the health and safety of that client.

Dishonesty

Further, Ohio Revised Code Chapter 124. nowhere defines "dishonesty". However, Black's Law Dictionary does define "dishonesty" to mean:

Disposition to lie, cheat, deceive or defraud; untrustworthiness, a lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray. (Further citations omitted) Black's Law Dictionary at page 468 (Deluxe 6th edition 1990).

Thus, for the Appellee to establish that an employee violated and/or was guilty of dishonesty, it must demonstrate, by a preponderance of the evidence that the behavior was deceiving, lacked straightforwardness or was untrustworthy.

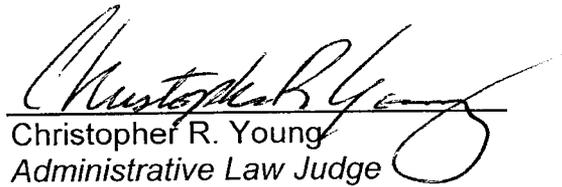
The evidence revealed Ms. Jeri Clark, a Service Consultant with the UCBDD, a co-worker of the Appellant herein, stated that she had received a text message from Mr. Heyn around 4:30 p.m. on May 14, 2013. Ms. Clark stated that she did not answer the text message right away as she was on her way to go to her son's baseball game, but later found out the next day that he was texting her to see if she could go check on Ms. JB, the client. Furthermore, the witness testified that Mr. Heyn told her that he couldn't go check on her because he had been drinking. At the pre-disciplinary conference as exhibited by Appellee's exhibit B, Mr. Heyn stated that he had not been drinking, and stated that was not the reason why he didn't report to the client's house. At the record hearing, Mr. Heyn testified when asked to explain why he did this, Mr. Heyn said he simply did this to give Ms. Clark a hard time, a third explanation of the same event. It should also be noted that the Appellant at the record hearing stated that he as a Service Consultant could not provide direct services, but the evidence was clear that he contacted Ms. Clark, a Service Consultant, a fellow co-worker, to do the same because he was either drunk, or trying to give her a hard time or just being lazy.

Clearly, the evidence revealed that the Appellant was not truthful or lacked straightforwardness during a pre-disciplinary conference, as another employee had provided a statement to the employer that the reason that you could not attend to the client was that you had been drinking, in direct conflict with his response at the pre-disciplinary hearing conference, only to be given a third explanation of the same event at the record hearing.

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. In this case, the Appellant, Mr. Heyn, in his five years of service with UCBDD, had received a letter of reprimand, one three day suspension, one ten day suspension, along with signing a last chance agreement, prior to his removal. All of Mr. Heyn's prior disciplines were issued from February 9, 2011 through January 23, 2012, and did not submit any evidence of disparate treatment. 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 a Service Consultant as expressed to him by his supervisors. 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 August 20, 2013, removing the Appellant from the position of Service Consultant be **AFFIRMED**, and the Appellant's appeal be **DENIED**.


Christopher R. Young
Administrative Law Judge

CRY: