

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Michael Gyugo,

Appellant,

v.

Case No. 2013-REM-10-0239

Franklin County Board of Developmental Disabilities,

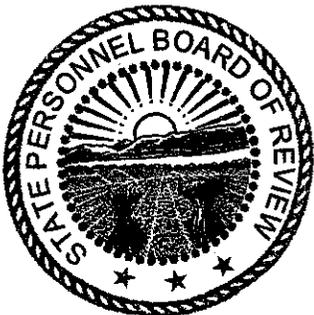
Appellee,

ORDER

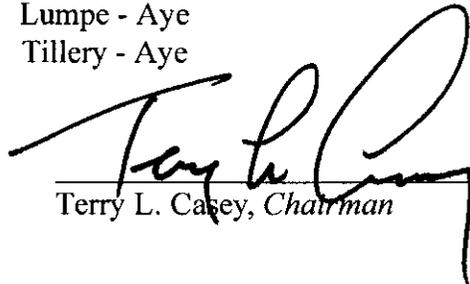
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellant's removal from employment with Appellee is **AFFIRMED**.



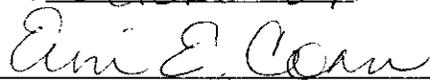
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, October 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**

Michael Gyugo,

Case No. 2013-REM-10-0239

Appellant

v.

August 8, 2014

Franklin County Board of Developmental
Disabilities,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his October 4, 2013, removal from employment with Appellee. The parties stipulated to the operative facts of the appeal and submitted briefs in lieu of a record hearing. Appellant is represented by Mary Jane McFadden, attorney at law, and Appellee is represented by Denise L. DePalma, Franklin County Assistant Prosecuting Attorney.

The parties subsequently supplemented the record by providing Joint Exhibits 1-6, as well as copies of prior versions of Ohio statutes and regulations referenced in their briefs. Appellee submitted Exhibits A-D; Appellant questioned the relevancy of the documents contained in Appellee's exhibits, but not their authenticity.

FINDINGS OF FACT

Based upon the uncontroverted information contained in the record and upon the stipulations entered into by the parties, I make the following findings of fact:

Appellant was removed by Appellee from his position as a Training Specialist on October 4, 2013. As a Training Specialist, Appellant was required to maintain Adult Services certification with the Ohio Department of MR/DD. The R.C. 124.34 Order removing Appellant from employment stated as grounds for his dismissal:

Dishonesty and other failure of good behavior, i.e., you misrepresented your past criminal record on the application for employment and on each of four applications for certification/registration required for your position.

Appellee substantially complied with the procedural requirements of the Ohio Revised Code and Ohio Administrative Code in removing Appellant from employment.

Appellant had a criminal record that was sealed in 1992 pursuant to R.C. 2953.31 and R.C. 2953.32 by an Ohio Court of Common Pleas. The order sealing Appellant's conviction specifically stated that all records pertaining to Appellant's criminal case would be sealed, that the proceedings in the criminal case were deemed "not to have been occurred" [sic], that the conviction was "expunged", and that all records pertaining to the conviction would thereafter be confined to the specific uses and by the officials set forth in R.C. 2953.32 and 2953.35. The charge reflected on the record of Appellant's sealed conviction is for violation of one of the statutes now listed at R.C. 109.572(A)(3)(a); at the time Appellant applied for his position with Appellee, the same statute was listed at what was then numbered R.C. 109.572(A)(1)(a). As of the date of Appellant's discharge, the same statute was listed as a "tier two" offense under OAC 5123:2-2-01(E)(1)(b).

In April of 1995, Appellant applied for a job as a training specialist with the Franklin County Board of Developmental Disabilities (FCBDD or Appellee). Appellant completed an application for employment with Appellee, which contained a question asking, generally, whether he had been convicted of or pleaded guilty to a felony, a crime constituting a misdemeanor of the first degree on the first offense and a felony on subsequent offenses, or a violation of any existing or former Ohio law, law of any other state, or federal law, that was substantially equivalent to the prior noted offenses. The question did not specifically reference convictions that had been sealed or expunged. Appellant answered the question "no," and signed the application, certifying that his answers were complete and true to the best of his knowledge, and confirming his understanding that any false information, omissions or misrepresentations of fact called for in the application might result in his immediate discharge at any time during his employment with Appellee.

Prior to hiring Appellant, Appellee requested that the Ohio Bureau of Criminal Identification and Investigation (BCI&I) provide a criminal background report on Appellant. The criminal background report did not disclose Appellant's sealed conviction.

Appellant was subsequently hired as a Training Specialist/Registered Service Adult Services Worker. After beginning his employment with Appellee, Appellant signed an acknowledgment that he received the FCBDD policy manual. He signed a similar acknowledgment in 2004. Appellee's policy manual provides in Section 8.3 for discipline up to and including termination for violations of Group III offenses. Group III offenses include "giving false information or withholding pertinent information called for in making application for employment," "falsifying ... any county records," "dishonesty or any dishonest action," "failure to maintain certification/registration/licensure required for position," and "conviction of any offense stated in R.C. 5126.28." The policy manual also states that an applicant hired by Appellee, who is subsequently discovered to have made a false statement of material fact on his or her application form or supplements thereto, will be terminated.

During the course of his employment with Appellee, Appellant completed applications for certification/registration to renew his adult services registration in 1996, 2000, 2004, and 2008. Each of these applications contained the question "Have you ever been convicted of a felony or a misdemeanor (other than a minor traffic offense)?" and specifically instructed applicants that they were required to answer the question even if the record of their conviction(s) had been sealed or expunged. The applications for certification/registration completed by Appellant in 2004 and 2008 further instructed applicants to provide information regarding the sealing or expungement of any conviction(s) reported. Appellant answered "no" on each application and signed the applications confirming that the information provided therein was correct to the best of his knowledge. Appellant did not provide any information to Appellee regarding his sealed conviction.

Appellee learned of Appellant's sealed record in 2013, in connection with a criminal record check conducted on all employees. Appellee provided notice and a pre-disciplinary hearing to Appellant and subsequently terminated his employment with FCBDD. Appellant timely filed an appeal of his removal from employment with this Board.

CONCLUSIONS OF LAW

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order.

With regard to the infractions alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant had the opportunity to participate in a pre-disciplinary hearing, and that Appellee substantially complied with the applicable statutory requirements in processing Appellant's removal. Accordingly, I find that Appellant's pre-termination due process rights were observed. The parties stipulated that Appellee substantially complied with applicable procedural requirements in effectuating Appellant termination of employment.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was premised on dishonesty and failure of good behavior, based on his failure to disclose his sealed criminal conviction in his initial application for employment and in the four applications for certification/registration he completed while employed by Appellee.

Appellee argues that Appellant was required to disclose his sealed conviction and that his failure to do so constituted dishonesty and other failure of good behavior. Appellant asserts that Appellant was not required to disclose his sealed conviction and was truthful in his responses because, as the result of his conviction being sealed, Appellant legally had no conviction at the time he completed the applications.

Sealing the record of a conviction does not erase the conviction from an individual's record, it merely restricts access to records of the conviction and limits the circumstances under which the conviction may be considered. The court order sealing Appellant's conviction noted that records pertaining to the conviction were subject to the specific uses and by the officials set forth in R.C. 2953.32 and 2953.35. Generally speaking, an individual seeking employment in Ohio is not required to disclose a sealed conviction, however, an employer is permitted to inquire about sealed convictions if "the question bears a direct and substantial relationship to the position for which the person is being considered." R.C. 2953.33(B).

As noted by Appellee, at all times relevant to the instant appeal, R.C. 5126.28 (now 5123.081(B)) prohibited Appellee from employing anyone with a felony conviction of any statute noted in R.C. 5126.28(B)(1)(a) or "a violation of an existing or former law of this state, any other state, or the United States, if the offense is substantially equivalent to any of the offenses described in paragraph (B)(1) and (B)(2)." Therefore, I find that the general question included on Appellee's application for employment which asked whether an applicant had been convicted of or pleaded guilty to a felony, a crime constituting a misdemeanor of the first degree on the first offense and a felony on subsequent offenses, or a substantially equivalent violation of any existing or former Ohio law, law of any other state, or federal law bore a "direct and substantial relationship" to employment in a position with Appellee and was not improper.

At the time Appellant applied for employment, and at all times subsequent, Appellee was authorized by statute to request a criminal record check from BCI&I of certain criminal convictions pursuant to R.C. 5126.28 or any other law substantially similar to the convictions listed in R.C. 5126.28(B)(1)(a), as well as convictions of a felony or any crime constituting a misdemeanor on the first offense and a felony on subsequent offenses, for any individual applying for employment. BCI&I was authorized to provide such information to Appellee, including information regarding

records sealed under R.C. 2953.32 and. See, R.C. 109.57(A), 109.57(F)(2), 2953.32(D)(8), 5126.28.

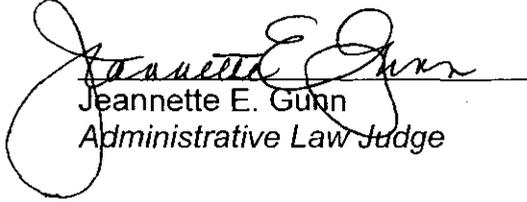
Applying the above rationale, I find that the question which appeared on the applications for certification/registration completed by Appellant in 1996, 2000, 2004 and 2008, which specifically instructed applicants to answer the question, "Have you ever been convicted of a felony or a misdemeanor (other than a minor traffic offense)?" even if the record of their conviction(s) had been sealed or expunged was not improper.

The parties stipulated that Appellant's sealed conviction was a violation of a statute set forth in R.C. 5126.28(B)(1)(a). With regard to his initial employment application, I find that Appellant's assertion that he answered "no" because he believed that he was not required to divulge information about a sealed conviction to be reasonable. Although his response was inaccurate, the general question included on the application form did not specifically reference sealed or expunged records. Appellant's continued reliance on his belief that he was not required to disclose his sealed conviction in response to the question appearing on the 1996, 2000, 2004 and 2008 applications for renewal of his adult services registration, however, was not reasonable. Appellant was provided with a copy of Appellee's policy manual, which clearly prohibited falsification of records and dishonesty. At the very least, the specific language of the question appearing on the applications for certification/registration completed by Appellant should have prompted him to seek confirmation of his understanding of the responsibility to disclose a sealed conviction, however, no information is contained in the record to indicate that he took any action to do so. Upon a full and thorough consideration of the circumstances set forth in the record, I find that Appellant's mistake of law is not sufficient to mitigate the ongoing misrepresentation of his past criminal record to Appellee.

Appellant falsified records by failing to disclose his sealed criminal conviction on the applications for certification/registration for renewal of his adult services registration that he completed in 1996, 2000, 2004 and 2008. His conduct was sufficient to constitute dishonesty and failure of good behavior, and I find that removal from employment was a reasonable disciplinary response in the present case.

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Therefore, I respectfully **RECOMMEND** that Appellant's removal from employment with Appellee be **AFFIRMED**.



Jeannette E. Gunn
Administrative Law Judge