

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

Abell Fuller,

Appellant,

v.

Case No. 2013-RMD-06-0145

Department of Transportation,

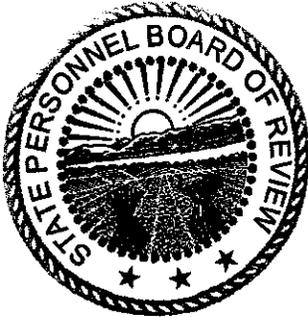
Appellee,

ORDER

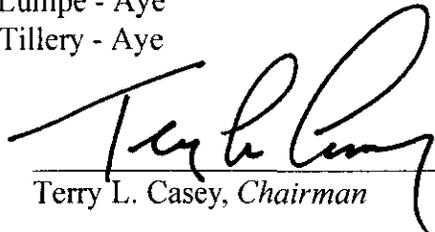
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's removal of Appellant Fuller is **AFFIRMED**.



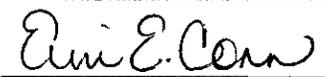
Casey - Aye
Lumpe - Aye
Tillery - Aye


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, March 25, 2015.


Ami E. Conn
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**

Abell Fuller

Case No. 2013-RMD-06-0145

Appellant

v.

February 5, 2015

Department of Transportation

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

A record hearing in this matter was held on November 12, 13, and 14, 2013 and January 29 and 30, 2014. It was agreed by the parties that the record would be held open until May 12, 2014, for the submission of closing briefs. On May 13, 2014, the parties notified this Administrative Law Judge that Appellant Fuller had waived his right to file a closing brief and Appellee then agreed to also waive filing a post-hearing brief. Therefore, the record closed on May 13, 2014.

Appellant Fuller was removed from his position of Administrative Officer 3, effective September 23, 2011. The pertinent part of the removal order states as follows:

The reason for this action is that you have been guilty of specifically: ORC 124.34 dishonesty and misfeasance and ODOT Directive WR-101 Item 2C: Failure to follow policies of the Director, District, or Offices: Item 5: Misuse of leave time, including sick leave: Item 18: Falsifying any document related to employment, including electronic documents: and Item 28: Engaging in activities for personal profit during paid working hours, including break times, in particular to wit:

You engaged in operational activities pertaining to your personal transportation company while on state time including using a subordinate probationary employee to drive for your personal company while on sick leave. In addition, you personally drove for

your company while on sick leave and appeared in court on behalf of your company while on administrative leave.

Appellant Fuller filed a timely appeal of his removal. The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

STATEMENT OF THE CASE

Appellee's first witness was Appellant Fuller, as if on cross examination. Appellant Fuller testified he had been employed with Appellee for approximately thirty years at the time of his removal. He held several positions throughout his tenure, with the most recent being Administrative Officer 3. His duties consisted of planning the activities of Hamilton County in District 8 for the year, month and day, maintaining inventory, evaluating employees, overseeing payroll and disciplining employees. Appellant Fuller explained District 8 is comprised of seven (7) counties with four (4) facilities and the main garage is located in Carthage.

Appellee's Exhibit 1 was identified by Appellant Fuller as a position description for an Administrative Officer 3 but stated it was not an accurate description of his duties, as he never supervised engineers and was never over Clermont County. He stated his shift was from 7:00 a.m. to 3:30 p.m. and he directly supervised a Transportation Manager, Auto Mechanics 1 and 2 and a Storekeeper. His supervisor was Larry Wiseman. Appellant Fuller identified Appellee's Exhibit 2 as a table of organization for Hamilton County. He testified Sean Flannery was the Transportation Manager 1 he supervised and stated they worked together in Butler County when Appellant Fuller was the acting superintendent and Mr. Flannery was a highway worker. Appellant Fuller served on an interview panel with two others who made the selection of Mr. Flannery for promotion to Hamilton County in approximately July, 2009.

Appellant Fuller identified Appellee's Exhibit 5C as containing the posting for Transportation Manager 1 (TM1) position which Mr. Flannery was hired into. The duties of a TM1 consist of being the "go to" person for the highway workers. The TM1 is out on site overseeing the work of the highway workers, looking for road hazards, evaluating the workers, and recommending leave time and discipline. The TM1 is not required to have a commercial driver's license (CDL). Appellant Fuller testified Mr. Flannery served a probationary period and it was Appellant Fuller who

was responsible for evaluating him and recommending Mr. Flannery for passing or failing. He testified he passed Mr. Flannery on his probationary period.

Appellant Fuller testified he is the owner of Fuller Transportation, known as Fuller Transportation Services or FTS. He stated the business has been around since approximately 2006 or 2007. Appellee's Exhibit 5B was identified by Appellant Fuller as a screen shot from the website for FTS.

Appellant Fuller testified that Appellee had issued him a cell phone for a period of time but it was then taken away. In 2009, he stated he did not have a cell phone issued by Appellee as most of the time he would call on a two-way radio in the state vehicle he used when out on a job site. He testified he did carry his own personal cell phone.

In 2009, Appellant Fuller testified, FTS did not own a semi-truck but instead rented them from Penske. He explained that his business delivered material for other companies and the delivery required a semi-truck. On September 2, 2009, Appellant Fuller testified, he was telling his supervisor he was going to deliver a load for FTS to Stanton, N. Dakota. The load was supposed to arrive there on a Saturday and he rented two trucks from Penske, which he picked up in Willoughby on a Wednesday, and was going to use his leave time for Thursday and Friday. At that point, Mr. Flannery told Appellant Fuller he had a cousin who could take the load for him. Mr. Flannery called his cousin but could not reach him. Mr. Flannery then told Appellant Fuller he could take the load himself. Appellant Fuller asked him how he knew how to drive a semi and Mr. Flannery told him he had driven for other companies. Appellant Fuller told him he could take the load but because Mr. Flannery was scheduled to work overtime that night, Appellant Fuller asked another employee, Ray Issac, to come in and work. Mr. Issac agreed. Mr. Flannery had already requested Friday off, so he needed to request Thursday off.

Appellant Fuller told Mr. Flannery his expenses for the load would be covered and Mr. Flannery told him he wanted to take his wife. Appellant Fuller testified he gave Mr. Flannery \$200 up front to cover the cost of the fuel and food. Mr. Flannery picked up the semi-truck the evening of September 2, 2009 in Sharonville. When he left with the load, FTS had nothing arranged to bring back another load as the hope was that Mr. Flannery could get another load to drop off somewhere close to Ohio on September 5, 2009. On that date, Mr. Flannery called FTS and said he was in N. Dakota and unloaded. He could not drive back that day, as there is a

restriction that a truck driver cannot drive over eleven (11) hours in a day and Mr. Flannery would go over that time if he drove back. Appellant Fuller testified he did not tell Mr. Flannery to stay or go as he gave him no instructions. On September 6, 2009, Appellant Fuller testified his office manager, Mary, called him and told him she had a load for Mr. Flannery to bring back.

On September 7, 2009, Mr. Flannery drove from Fargo, N. Dakota to St. Cloud, Minnesota and then to Mobridge, S. Dakota. Appellant Fuller testified he did not tell Mr. Flannery he had to bring a load back, as he would have saved money if the truck was returned right away as it cost \$120 per day for the rental plus the fuel and mileage costs. Mr. Flannery told Mary he would wait until Monday and look for a load. Appellant Fuller testified he told Mr. Flannery if he wanted to stay, go ahead, but did not tell him not to return home. Appellant Fuller stated he knew Mr. Flannery would need to use leave time. The truck was returned by Mr. Flannery on September 11 or 12, 2009, when he delivered it to Appellant Fuller at the Franklin Truck stop and then Appellant Fuller drove it to Pennsylvania. Appellant Fuller testified Mr. Flannery did not have any conversation with him about additional costs, as he felt FTS did not owe him any more money due to the fact that Mr. Flannery received "com checks" from the broker of the load he drove. He explained these checks are needed to get fuel and only the driver can call the broker and ask for one. Appellant Fuller explained that FTS is not a broker, as they are the carrier. The broker is the one responsible for the load.

Appellant Fuller testified that on September 23, 2009, Mr. Flannery asked him for time off as Mary called Mr. Flannery and asked if he was available to pick up a load from Newport to Louisville on September 25 and 26, 2009. Appellant Fuller testified he told Mr. Flannery it would be fine as long as he had the proper leave time. Appellant Fuller testified he would not have approved sick leave for Mr. Flannery for those two days.

Between the first and second loads that Mr. Flannery took for FTS, he and Appellant Fuller had a conversation after hours about going into partnership together and they talked about it approximately five or six times. Appellant Fuller testified Mr. Flannery wanted to be involved in the business and said he knew a company that could keep them busy. He was going to check it out and report back. Appellant Fuller stated he never directly asked Mr. Flannery to be his partner in the business but it never happened, as FTS did not survive. Appellant Fuller stated Mr. Flannery received com checks for the expenses of the truck and everything else

was credited to his part of the ownership since he did not have the cash to make an investment. He stated he was not concerned about going into business with a subordinate as he never saw anything in writing to prohibit it. In looking at Appellee's Exhibit 4, Appellant Fuller confirmed he attended Ethics and Fraud training on July 7, 2009.

Appellant Fuller identified Appellee's Exhibit 5R as his request for leave (RFL) for sick leave on August 4, 2009. The time sheet for that pay period shows he took off all week and he stated it does not make sense to take sick leave in the middle of the week. Appellant Fuller testified someone other than himself, changed his RFL. The driver's daily logs attached to the exhibit for August 4 and 5, 2009, shows he rented a truck and drove to deliver a load. Appellant Fuller testified this load was pre-planned and he knew he had to take time off all week. He stated he knows he is not to use sick leave for driving a load.

Appellant Fuller identified Appellee's 5T as a record of calls made from his cell phone during work hours. He testified he would call Penske on behalf of ODOT for questions related to specifications or if a certain piece of equipment would work. He stated there were people there with special knowledge to ask about equipment that ODOT may purchase. Appellant Fuller testified he used both his own cell and his office phone to make calls on behalf of ODOT. Appellant Fuller went through a list of companies that calls were made to from his cell phone during work hours and during the time he was on administrative leave. He testified some of the calls were made on behalf of ODOT, some were made on behalf of FTS and some he did not know who the company was. Appellant Fuller testified it was his belief that Mr. Flannery had a state cell phone, as he stated he called Mr. Flannery on it many times. He admitted to calling Mr. Flannery on September 25, 2009 and stated he could have been calling him about his leave time. He also stated Mr. Flannery had a pay-as-you-go phone and he called him on that phone on September 10, 2009 when he was on his flex time or at lunch. Appellant Fuller admitted he talked to Mr. Flannery on September 8 and 9, 2009. He also stated he would call FTS on his lunch hour, during his flex time or during his breaks. Appellant Fuller testified the policy regarding personal calls on state time was that you could do so if it was an emergency, or checking on an elderly or sick person. He stated he knew he could not call FTS for business reasons on state time.

Appellant Fuller identified certain phone numbers as belonging to his mother and his son's mother, both of whom he testified never worked for FTS. He

explained that Mr. Hardy was a longtime friend and contractor for FTS and he called him from time to time, but only on lunch and during flex time. Mary Fuller is Appellant Fuller's sister, who worked for FTS and Appellant Fuller testified he called her on behalf of ODOT, as she wanted to know about job postings. Debra Bell worked for FTS and Appellant Fuller testified the calls made to her were not ODOT related. George McNeil is his brother-in-law and the calls made to him were not FTS related, although he did do some work for FTS, but Appellant Fuller stated he did not know exactly what he did for FTS. Appellant Fuller testified that if he missed a call on his cell phone, then the message somehow went to a text message. He admitted that he made calls for FTS maybe one or two times during state work time, but he always intended to make the calls during breaks, lunch or flex time.

Appellee's Exhibit 5E was identified as the March 4, 2010, letter placing him on paid administrative leave, which told him to be available during normal working hours. Appellee's Exhibit 5U was identified as documents showing Appellant Fuller made a court appearance on behalf of FTS on September 29, 2010, while he was on administrative leave. Appellant Fuller testified he did not know what he could or could not do during his administrative leave. He stated he called and told his boss he was at court for four hours and the next he knew, he did not get paid for those hours.

Appellant Fuller testified he never told Mr. Flannery to keep his mouth shut about FTS, although he did call him on his way home that first time they agreed for Mr. Flannery to drive for him and told him to keep it under his hat, as he did not want anyone from ODOT to know his business existed.

Appellee's Exhibits 6 and 7 were identified by Appellant Fuller as the pre-disciplinary notice he received and the recommendation of the hearing officer. He stated he could not remember if he attended the hearing or not, as it was held on December 20, 2010. Appellant Fuller testified he does not remember seeing Appellee's Exhibit 8, an order of removal dated December 30, 2010, as he remembers Mr. Best calling him and telling him he was removed. Appellee's Exhibit 9 was identified as a letter rescinding the removal order, but Appellant Fuller testified he does not remember seeing this document previously. Appellee's Exhibit 10 was identified as the removal order dated September 23, 2011.

Appellee's Exhibit 3 was identified by Appellant Fuller as work rule 101. He stated he was given the work rules from the 1980's, which were hung on the bulletin

board and never changed. Appellee's Exhibits 11, 12, 13, and 14 were identified as previous disciplines which Appellant Fuller testified he did not recall. The first was a written reprimand, dated January 2006; the second, a three day suspension dated August, 2006; the third, a written reprimand dated June 2007; and fourth, a three day suspension dated November 2008.

Appellee's next witness was Ray H. Issac, an employee of ODOT for approximately twenty-four years. For the past eight and a half years, he has worked as a Transportation Manager 1 in Hamilton County. As such, he finds work for the crew, approves leave and does daily logs from the crew. He stated a commercial driver license is required for all Highway Workers, mechanics and store clerks.

Mr. Issac explained that an employee completes an RFL or the employee could ask a supervisor to do it. In that case, the supervisor would log on with a password and user name and then enter the RFL. The supervisor logs in under his or her own name and then goes to the employee's name and enters the information. In looking at Appellee's Exhibit 5F, Mr. Issac testified he is the recommender on this RFL.

Mr. Issac testified he knew Mr. Flannery when he worked in Miami Town as a mechanic then he became a TM1. He stated on September 2, 2009, he was on his way home and he got a call asking if he wanted to work the night shift that night as Mr. Flannery had something come up. Mr. Issac testified he did not ask what, he just wanted the overtime money. Appellant Fuller was Mr. Issac's supervisor at the time. He stated he had been told Appellant Fuller owned FTS, but personally, he did not know anything about it. He was also told Mr. Flannery drove a truck for Appellant Fuller, as he heard that from Eric Young and Sherry Green. He stated this was approximately three years ago and the rumor was that Appellant Fuller owed Mr. Flannery \$3,000. Mr. Issac testified he called Barbara Taylor, a TM1 in Carthage, and asked her what she knew and she told him she had not heard anything but would check around. She later told him she asked Appellant Fuller and he told her not to worry about it.

Appellee's Exhibit 5I was identified by Mr. Issac as his interview he had with Les Reel.

On cross examination Mr. Issac testified he does not receive personal calls on his state cell phone, but stated he does receive personal calls during work hours

from his family. He testified the only rule he tells his employees is not to use the cell phone in the vehicles or on the road. Mr. Issac also stated Appellant Fuller and Sherry Haney-Green did not get along. She is the person who told him about FTS.

Mr. Issac explained that if someone was an alternate for someone else on an RFL, then the alternate's name would show up on the system instead of the non-alternate's. He stated usually the submitter inputs the leave time. He also stated that only the county manager is the approver, so only Appellant Fuller. Mr. Issac was limited to being a recommender.

Appellee's next witness was Sherry Renee Haney, an employee with ODOT since December, 1993. She stated she began her employ at District 8 and currently works at Carthage as an Account Clerk 2, doing purchasing, payroll, entering RFL's and timesheets and clerical duties. She explained that under the RFL system, an employee would turn in a leave paper to the supervisor who would sign it and then she input it into the system. The system had a unique user name and password. She was able to enter leave for all employees in the county. After she entered the information, it had to be recommended by the supervisor and then approved. The county manager was the only one who had approval authority. Ms. Haney stated she had no ability to recommend or approve any employee's leave time. She also testified she never had Appellant Fuller's user name or password.

In looking at Appellee's Exhibit 5R, Ms. Haney explained the submission date is the date it is entered into the system by her or someone else. The start and end date is the date of the leave. She testified there was not great communication in Hamilton County, which made her job difficult. Page 2 was identified as a timesheet that was used to submit payroll. Her signature appears on the page as does Larry Wiseman, who signed for Appellant Fuller. Ms. Haney stated this would typically be filled out on a daily basis, along with the daily work assignments or the 502's, as they were referred to. She did the timesheets weekly by posts, grouped all the 502's and then completed the timesheets. She stated it was hard to do when she did not get the 502's.

Ms. Haney testified Appellant Fuller was on leave time frequently around the time period of Appellee's Exhibit 5F. That meant she had to figure out why she did not have a form. On page 6, she stated she was instructed by Appellant Fuller to enter this leave for Mr. Flannery. Ms. Haney testified this happened on several occasions for Mr. Flannery around this time period. Appellee's Exhibit 5A was

identified by Ms. Haney as an email from her to Andrea Watts. She stated she was concerned that the working environment was rough, as she was put in a bad position and she did not like it. She tried to address the situation within the district, but they did nothing. Ms. Haney testified it was found that Mr. Flannery was working for Appellant Fuller and leave was being used to do so. She identified Appellee's Exhibit 5H as her interview with Les Reel. She stated she had no involvement in Appellant Fuller's disciplinary process.

On cross examination Ms. Haney testified Appellant Fuller told her to put Mr. Flannery on sick or vacation leave as he had some personal things going on. She stated she and Appellant Fuller had a good relationship for the first few years, but then it deteriorated. In looking at Appellee's Exhibit 5H, Ms. Haney testified it was her signature on the document. She stated Mr. Flannery told her he thought he was doing a good thing by helping out Appellant Fuller but he did not want it on his back anymore and his wife was getting tired of it, but he was afraid of losing his job. Ms. Haney testified Barb Taylor could have completed some of Appellee's Exhibit 5R. She explained three different forms are cross referenced to fill out the form and that there could be a mistake on the form, but it would be highly unlikely. The first week is done in her handwriting and the 502 is missing, but the RFL is there and shows sick leave was taken by Appellant Fuller.

Appellee's next witness was Shawn Flannery, an employee of ODOT since May, 2002. Since October 2012, he has been in Athens County, District 10 as a Transportation Administrator. In July 2009, he stated he was a TM1 in Hamilton County and had to serve a probationary period of six months. If he did not pass his probationary period, then he would have been demoted.

Mr. Flannery identified Appellee's Exhibit 5C as the posting for the TM1 position in Hamilton County. A CDL was required for the position. He stated he was interviewed by three people, with Appellant Fuller being one of them. Appellant Fuller ended up being his supervisor and was the one to complete his performance evaluations. He stated he also worked with Appellant Fuller when he was in Butler County. Mr. Flannery explained Appellant Fuller filled out his goals and documentation on his performance evaluations, which Mr. Flannery successfully completed. He stated Appellant Fuller was also the person who determined who would work overtime.

Mr. Flannery testified when he became a TM1, he knew Appellant Fuller had a side carpentry business, as he did work for him when he was an auto mechanic. After he became a TM1, Appellant Fuller asked him on September 2, 2009, in the lunchroom if there was anyone he knew who could take a load for him. Mr. Flannery told him his cousin could but he didn't know if he was available. Mr. Flannery testified he then told Appellant Fuller he had his CDL and Appellant Fuller told him he was the one he was thinking of. Mr. Flannery stated he was supposed to work overtime that evening but Appellant Fuller told him he would handle that, so Appellant Fuller called Mr. Issac and told him he needed him to work overtime.

Mr. Flannery testified he knew he was taking a load for FTS and that he was to deliver the load to Stanton, N. Dakota by Friday at noon and FTS would work to get him a back haul. He was to get \$250 cash to do so and would be reimbursed his expenses when he came back. Appellant Fuller gave him \$200 up front. He was scheduled to work Thursday and Friday. He was told by Appellant Fuller not to tell anyone. Mr. Flannery testified that after he took the load, Appellant Fuller told him he was setting up a company and Mr. Flannery told him he could give him some insight. On September 2, 2009, after the conversation with Appellant Fuller, Mr. Flannery called his wife and she arranged for childcare and they went and got the Penske truck. They planned on being back on Sunday and they left on Wednesday night. Mr. Flannery testified it took approximately twenty to twenty-four hours driving time to get to N. Dakota and they arrived on Friday, September 4, 2009, in the morning. He took a vacation day on September 3, 2009 and told Appellant Fuller he would take vacation that day. Mr. Flannery made his delivery, called Appellant Fuller and found out the back haul he was going to make had been cancelled. He was told to go to the truck stop and wait. Mr. Flannery called FTS back on Saturday morning and was told there was still no back haul and he was told to wait until Tuesday. Mr. Flannery testified he was told this by Appellant Fuller. Mr. Flannery was scheduled to work on Tuesday but he did not want to jeopardize his full-time job by coming back since Appellant Fuller was his boss. He stated he was concerned he would upset Appellant Fuller if he returned. On Saturday, Sunday and Monday, he was in Fargo. Either Monday or Tuesday, Appellant Fuller told him had a back haul he was working on, so he drove to St. Cloud, Minnesota and spent the night there. Then he got a call and was told there was a back haul in N. Dakota, so he drove back there.

Appellee's Exhibit 5D were identified by Mr. Flannery as his driver logs, showing he arrived in St. Cloud on Monday. He testified Appellant Fuller told him

not to be concerned about losing his holiday pay, as he would take care of it. Mr. Flannery testified he picked up a load of railroad ties in N. Dakota on Tuesday and then it took him most of the night to get them to Mobridge, S. Dakota. He called Barbara Taylor on Wednesday morning and told her he would not be in that day, as that is what Appellant Fuller told him to do. Mr. Flannery testified his wife broke down in Minnesota and was upset they were not home yet. They started back home on Wednesday afternoon and were headed back when Appellant Fuller called him in the afternoon and told him he had a back haul in Gary, Nebraska. Since Appellant Fuller had made arrangements for it, Mr. Flannery drove to Nebraska. He testified by this time, he had spent a lot of his own money. He explained that a com check is money through an account set up by the company and the broker so a truck driver can get money at a truck stop. Mr. Flannery testified he did get one com check on the trip and he thinks it was in Nebraska, but he did not remember how much it was, but knows it was not enough to cover his expenses. He went to Nebraska on Thursday and had to take another vacation day as he had been scheduled to work at ODOT on that day also. He stated he did not recall how he put his leave request in. Mr. Flannery left Nebraska and drove to Ohio, where he met Appellant Fuller on Saturday morning and then Appellant Fuller took the load on to Pennsylvania. Mr. Flannery testified he also had to take a vacation day on Friday.

Mr. Flannery testified he never received the other \$50 from Appellant Fuller to equal the \$250 they had agreed on. He stated he kept his receipts in order to be reimbursed but Appellant Fuller never paid him. His wife wanted him to sue Appellant Fuller or FTS to get the money back, but with Appellant Fuller being his supervisor, he did not feel it was right. Mr. Flannery testified that when he talked to Appellant Fuller, it was usually between 7:00 and 7:30 a.m. and when he called into FTS, he spoke with a woman but he did not know her name.

Later in September, 2009, Mr. Flannery testified he took another load for FTS from Newport, Kentucky to Bowling Green to Louisville to West Chester and then delivered the truck to Appellant Fuller, who went somewhere else. Mr. Flannery identified Appellee's Exhibit 5D as more driver log sheets, dated September 24, 2009. He explained Appellant Fuller approached him on September 23, 2009 in Mechanicsburg and asked him if he would take a load for him. Mr. Flannery testified he said yes. He was scheduled to work for the next two days, but he took sick leave for both of the days. Mr. Flannery testified at the time, he did not think about using sick leave, but later he became concerned. He told Appellant Fuller he

was out of cost saving days but he could use sick leave and Appellant Fuller told him that would be o.k. Appellant Fuller told Mr. Flannery things were tight at FTS and he could not pay him yet, but Mr. Flannery testified he was hopeful that if he took this load, Appellant Fuller would pay him. He stated the load was all set and all he had to do was pick up the truck and trailer. He had no other financial arrangements made with Appellant Fuller. The only out of pocket money he had as a result of this trip was for his food and he did not think Appellant Fuller was going to pay him for his food. Mr. Flannery testified he left on September 24, 2009, and he was running behind as there was an issue with BEI (trailer rental company) and Appellant Fuller called him around noon to see why the pick up was not yet done. He finally got there around 1:00 or 1:30 p.m. and he turned the truck over to Appellant Fuller around midnight. Mr. Flannery testified he called into ODOT both mornings to use sick leave and he talked to Barbara Taylor.

Mr. Flannery testified that after the first trip, Appellant Fuller said he wanted to get a dedicated run set up. They talked about that between 7:00 and 7:30 a.m. at work. He stated when Les Reel showed up at the garage one day, he got concerned with his sick leave usage. Mr. Flannery testified he ended up getting a three day suspension for misuse of sick leave.

Mr. Flannery testified one day he was talking to his wife about his concern over not getting paid from Appellant Fuller and Sherry Haney and Troy Baker overheard his conversation. The next day, Appellant Fuller called him and told him he heard he was running his mouth about money and work and he was pretty upset and raised his voice. Mr. Flannery testified that after this, his overtime work declined. He stated he was interviewed by and talked to Les Reel approximately three times. He gave him Appellee's Exhibit 5D2, which were his daily logs and also gave him copies of his receipts and bank statements.

On cross examination Mr. Flannery testified his overtime declined in December and January. He did concede that this could have been due to his attendance in management-training classes. After the conversation with his wife, Ms. Haney asked him what he knew about FTS and he told her his wife wanted him to sue Appellant Fuller and FTS but he wanted no part of it. Mr. Flannery knew Ms. Haney did not like Appellant Fuller and he was not surprised when she told him she was conducting her own investigation of Appellant Fuller.

In looking at Appellee's Exhibit 5D, Mr. Flannery testified he completed this log incorrectly in order to give himself more driving time to get to his destination. He also had to put incorrect information on the driver's log and that is the reason some of his receipts do not match up to the logs. He stated he did not get paid for the second load he took, but the only money he invested was for his dinner.

When he was in Gary, Nebraska, Mr. Flannery testified, he called FTS to set up getting a com check. He did not call the broker as FTS did that for him. He stated it is possible that Appellant Fuller thought the com checks were going to him for his expenses. Mr. Flannery testified he does not remember giving any receipts to Appellant Fuller, although he thinks he did. He could not explain why the com checks were not included in the documents with the receipts.

Mr. Flannery testified he did have a class on fraud and ethics and the only thing he believed to be unethical was using leave time when he should have been working. He stated he took the load because he needed the money and he did not think about the ethics of the situation at that point. Mr. Flannery testified he was never an employee of FTS, just a contractor on the first load and a volunteer for the second load. He testified that for the second load, he called into ODOT himself and requested sick leave, but Appellant Fuller did approve it. Mr. Flannery testified that at no time did Appellant Fuller ever threaten him with the loss of his job and he never told Appellant Fuller his wife was upset.

For the time periods that he was gone, Mr. Flannery testified he did not know who actually entered his leave time. He also testified, upon further questioning, it could have been one of the ladies on the phone at FTS who told him to wait until Tuesday before coming back.

Appellee's next witness was Michael Brown, an employee of ODOT for approximately thirty years. From January 2009 until December 2010, he was a Deputy Director 5 for District 8, which meant he was the head of Business and Human Resources. He oversaw personnel, IT, facilities, accounting and supervised a Labor Relations Officer, Carl Best. He stated Mr. Best conducted the pre-disciplinary hearings and grievances as well as consulted with Central Office. Mr. Brown testified he knows Appellant Fuller as he has worked with him for approximately twenty-eight years.

Mr. Brown explained the process for disciplining an exempt employee. He identified Appellee's Exhibit 3 as work rule 101, which was in effect in 2010. He stated the violations committed by Appellant Fuller were 2C, which is charged when a policy is broken; number 5, misuse of sick leave; number 18, falsifying a document; and number 28, engaging in activities in personal business for profit. He also explained the RFL system and stated he was an approver in the system and had district wide access. Mr. Brown testified every employee had a user name and password and any alternate used their own user name and password and the entry would show up with the alternate's name.

Appellee's Exhibit 7 was identified as the Hearing Officer's Report, dated December 23, 2010, and just cause was found. The District recommended termination. Appellee's Exhibit 8 was identified as the removal order of Appellant Fuller, dated December 30, 2010. Mr. Brown testified he did not have any part in recommending discipline for Appellant Fuller. He also stated that if an employee thought someone else was using his or her user name and password, then that employee would have a duty to report it to IT.

Appellee's next witness was Lester R. Reel, an employee of ODOT from December 1999 to February 2012. He stated he worked with the Ohio Highway Patrol from 1973 to 1999. Mr. Reel explained an incident report is created anytime an allegation was brought to his attention. He then did an initial review and if needed, he would do a full-blown investigation. That would consist of witness interviews, compiling records and sometimes surveillance. There was also an Inspector General in ODOT and that person could join in on Mr. Reel's investigation or conduct one of their own.

Mr. Reel testified he has known Appellant Fuller for a long time through his employment and that he conducted at least two investigations involving Appellant Fuller. Appellee's Exhibit 5 was identified as his summary report of his investigation, which he generated at the end of December 2010. Appellee's Exhibit 5A was identified as Ms. Haney's complaint regarding Appellant Fuller, which was the initiating document of the investigation. Mr. Reel testified in his first interview with Mr. Flannery, he found him to be very nervous and not forthcoming. Mr. Reel then identified various documents included in his investigation. He testified that an employee is not expected to conduct personal business during lunch, as lunch is paid and is part of an eight hour shift. Mr. Reel testified he looked at all of the cell phone records for Appellant Fuller to determine the calls made by him that were

associated with FTS. He found that most of the times Appellant Fuller conducted FTS business, he was not on state time. He also stated that he was not able to prove that all of the calls were made by Appellant Fuller, as he could have given his phone to others to use during the day. There is nothing in writing that requires managers to carry a phone, but they must be reachable twenty-four hours a day. Appellee's Exhibits 5R and S were identified by Mr. Reel as documents relating to sick leave abuse by Appellant Fuller on August 4 and 18, 2009. Mr. Reel testified ODOT was contacted by a customer of FTS who stated he believed Appellant Fuller conducted personal business on state time and that he also had a court hearing coming up. Mr. Reel stated he sent someone to court who saw Appellant Fuller in court while he was on administrative leave. He identified Appellee's Exhibit 5U as documents evidencing that fact. Appellee's Exhibit 5V was identified by Mr. Reel as the interview he conducted with Appellant Fuller on November 17, 2010.

Appellant's first witness was Mary Fuller, manager of Fuller Transportation from the end of 2007 until approximately 2010. Ms. Fuller stated she is the older sister of Appellant Fuller and while she was manager at FTS, she dispatched loads to different cities and states and communicated with the drivers. She stated there were three drivers that she could remember – Appellant Fuller, Shawn Flannery and Arlan Fuller. Ms. Fuller testified she could not remember if Mr. Flannery was an employee or an independent contractor. She stated she talked to Mr. Flannery several times about loads and return loads and he called the office several times. She thought this was in August, 2009.

Ms. Fuller testified Mr. Flannery drove for FTS several times. When she talked to Mr. Flannery, Appellant Fuller was not there. She stated that there have been instances when a driver comes back without a load. Both the office and the driver can look for loads on the internet. Most of the time, the office secured the loads for the drivers. Ms. Fuller testified she does not remember if Appellant Fuller's telephone number was listed on the website for FTS. She stated she did call Appellant Fuller's phone for both personal and business reasons, but that she tried to make sure she called him before or after work or at lunch. Ms. Fuller stated she does not text. She also stated there were times when she had Appellant Fuller's phone. If he left it at the office or when there were phone problems, FTS would use Appellant Fuller's phone. Ms. Fuller stated she had Appellant Fuller's phone for a few weeks one time, but she does not remember when that was. She added that Appellant Fuller gave his phone to Mr. Hardy for awhile when Mr. Hardy drove for them.

Ms. Fuller explained that com checks are received from truck stops and prior to a driver leaving, the com checks have to be set up. Once on the road, the driver would call the office and tell them com checks were going to be used and then the driver would get one from the truck stop. Ms. Fuller testified this is always set up before a driver leaves and the checks are used mostly for fuel and oil. The money comes from the company FTS is working for or from the contractor on the load.

On cross examination Ms. Fuller explained there were two phone lines at FTS, one for the café and one for the transportation services and both numbers were different than Appellant Fuller's phone number. She stated Mr. Flannery called the number of the transportation services when he called. Ms. Fuller testified FTS was the entity that paid for the semi-trucks used to transport the loads. She stated that since it costs money for the trucks, it is not good for a driver to sit out for a long time without a load.

Ms. Fuller testified that when FTS had Appellant Fuller's phone, Appellant Fuller still went to work, even though he did not have a phone. She stated she did not have a cell phone back then and when the electricity went out, all the phones went out.

With regard to com checks, Ms. Fuller testified the company that has the load that needs to be delivered is the one responsible for paying the com checks and she stated she does not know if com checks can be requested after a load has been delivered. She explained a driver is responsible for paying for his or her own food and she believes the money a driver was given in a com check is deducted from the driver's pay, although she stated she cannot remember if that is true or not.

Ms. Fuller stated that as far as she knew, Appellant Fuller worked at ODOT from 6:30 or 7:00 a.m. until 3:30 p.m. and lunch was around 11:00 a.m.

On redirect examination Ms. Fuller testified there were times when she called Appellant Fuller and she had to leave a message. She also stated she is not sure if a driver had to call FTS first before receiving a com check. Ms. Fuller testified the costs to FTS were the costs of gas, time and rental fees. If a vehicle broke down, then the entity who owned the rental vehicle was responsible for fixing the vehicle.

Appellant's next witness was Barbara Taylor, an employee with Appellee from 1986 to November, 2012. She stated she was a Transportation Manager 1 when she left Appellee and Appellant Fuller was her supervisor. Ms. Taylor testified she briefly had a state owned cell phone, for approximately three to four months, and she was not sure what the cell phone policy was as she does not remember if she was told of a policy or not. She stated everyone had cell phones and she used her personal cell phone for state business. She felt as long as she was not in the public eye or was on break or at lunch, she could use her personal cell phone. Ms. Taylor testified that as far as she could remember, Appellant Fuller never communicated a cell phone policy to her.

Ms. Taylor explained that to request leave time, an RFL was filled out with the date, number of hours and the type of leave requested. That was turned into the supervisor who then signed it and it was then entered into the system. She stated sometimes an employee could call in and request leave. There was an hour-for-hour rule and advance notice was needed to use personal, vacation or sick leave for a doctor's appointment. She stated an employee would have to ask in advance the number of hours asked off. The supervisor had discretion to approve leave if it was not requested within the hour-for-hour rule. Ms. Taylor testified she took leave like this and Appellant Fuller approved it. In looking at Appellant's Exhibit 28, Ms. Taylor identified it as a computer print of an RFL. She stated she would see this if there was a discrepancy regarding hours or something of that sort. By the time this type of document would be generated, the leave had already been taken. She stated this exhibit is not the form the employee fills out. The "Approver" is the person who finally approves the leave and most of the time that was Appellant Fuller.

Ms. Taylor testified she could go into the computer under someone else's name if permission had been given to her. She stated she could approve leave in Appellant Fuller's absence and she believed the district had to give her the computer authorization to do so. She would go in as "Barbara Taylor" but had the authority to approve for Appellant Fuller and she was fairly certain the approval would show up under her name. Ms. Taylor testified she did not think the computer printout could be changed after it had been printed, as it was already in the system at that point. The paper form could be changed and then another entry would be made in the RFL system, so the end result would be two paper RFLs.

In looking at Appellant's Exhibits 28 and 29, Ms. Taylor testified they appeared to be identical except for Ms. Sherry Haney-Green's name. She could not explain why there was a difference in the name and she is not aware of any way to get back into the system to change the documents. Ms. Taylor stated Ms. Haney was the timekeeper and as such, she was responsible for payroll, pay cards and invoices and for entering the RFLs into the computer. The employee filled out the RFL, gave it to Ms. Taylor, who then gave it to Ms. Haney to enter into the computer. Ms. Taylor testified she did not have the authority to change anything on the form unless she first talked to her supervisor. If an employee did not have enough leave time, then Ms. Taylor could tell Ms. Haney not to enter it in the system or to put it in as some other leave time. She stated Ms. Haney had the ability to change something but not the authority to do so on her own as there were checks and balances built into the system. Ms. Taylor testified she did not recall Appellant Fuller putting in any RFL's and she did not recall anyone signing as a "recommender". When Appellant Fuller was absent, she used her own judgment in approving leave time. She stated flex time was used at a supervisor's discretion.

Ms. Taylor testified she asked Appellant Fuller about Mr. Flannery working for him, but she stated she does not think Appellant Fuller answered her and she did not have any further conversation with him about it. She stated Appellant Fuller worked beyond his shift practically every day, but she had no knowledge as to if he claimed overtime or not. The scheduled lunch break was from 11:00 to 11:30 a.m. every day, but Appellant Fuller took lunch at different times, as he had a very busy job. Ms. Taylor testified she never observed Appellant Fuller mistreating Mr. Flannery. She stated she heard Ms. Haney refer to Appellant Fuller as "butt hole" or "idiot", as she did not care for him. Ms. Taylor testified she did not receive any training on owning a business, using cell phones or off-hours relationships with employees. She stated she was not aware of Appellant Fuller's business until after he left Appellee.

On cross examination Ms. Taylor agreed it was her responsibility to make employees aware of policies. She stated that in the case of an extenuating circumstance, she could deviate from the hour-to-hour policy, as her subordinates would call her and ask for time off. When the employee returned to work, the paper work would then be completed. She stated she was an alternate for Appellant Fuller in approving leave time.

Ms. Taylor testified Appellant Fuller would generally be in the office long enough to do paperwork as most of the time, he was on the road. She would see him in the morning and would be in direct contact with him for about three hours a day. She stated employees were not supposed to share their passwords with others. She also stated Appellant Fuller could enter his own leave time but she did not know if he could have Ms. Haney do it for him or not. Ms. Haney used the RFLs and computer printouts to generate the time sheets.

Ms. Taylor explained the form 502 was a daily account of who was there, the hours they worked and what they did. They were then turned into Ms. Haney to be entered into the system. The 502 forms were completed by the transportation managers and they had to make sure they were correct before they were turned into Ms. Haney. Ms. Taylor stated she was not sure if Appellant Fuller completed 502 forms or not.

On redirect examination Ms. Taylor stated she did not remember how she went into the system as an alternate and stated that the system could have shown the name of the person that she was an alternate for. Ms. Taylor testified that if she could not reach Appellant Fuller on his office phone, then she would call his cell phone. Ms. Taylor then changed her earlier testimony and stated that she believes there was a way to override the RFL computer form. She also testified she was no longer sure that Appellant Fuller could put in his own leave time in the system and she testified she never observed Appellant Fuller doing outside business while on state time.

Appellant Fuller testified he had been employed by Appellee for approximately twenty-nine years and 3 months at the time of his termination. He owned FTS, which he began in 2006 as a passenger service provider. In February, 2008, he opened a restaurant and in August, 2009, he started the load pick-up business. He stated he has been driving semi's for approximately twenty years and has now purchased his own semi. Appellant Fuller testified he kept his private business separate from ODOT, as he did not want the two to mix.

He stated his working hours at Appellee were from 7:00 a.m. to 3:30 p.m. and lunch was scheduled at 11:00 a.m., but he only went to lunch at that time approximately twenty percent of the time, as he was working and would take lunch anywhere between noon and 2:00 p.m. the rest of the time. He stated he worked between forty and fifty hours a week at Appellee. Appellant Fuller testified he did

make business calls for FTS during his lunch hour and would try to make those calls only during his lunch and breaks, but stated there were probably a few times when he did make FTS calls during his work hours.

Appellant Fuller testified he did not ask Mr. Flannery to work for him at FTS. He stated Mr. Flannery offered his cousin up for the job and when he could not reach his cousin, Mr. Flannery volunteered to do it himself and Appellant Fuller asked him if had experience driving a semi. Appellant Fuller stated that as far as he knew, all Transportation Managers have a commercial driver license.

Appellant Fuller testified he did not pressure Mr. Flannery into driving for him. When he volunteered for the trip, no money was discussed. It wasn't until Mr. Flannery picked up the truck that he asked him how much he was charging and Mr. Flannery replied \$200.00. Appellant Fuller stated the pay is usually calculated as so many cents per mile, depending on experience and knowledge. He testified he gave Mr. Flannery \$200.00 up front, before he left and he did not get a receipt for the money.

Appellant Fuller explained that a com check price is negotiated with a broker. A rate confirmation and dispatch (pick-up location, commodity, weight and destination) are received and an inquiry is made as to whether or not a payment advancement (com check) will be needed, as there is a fee for getting a com check. If a com check is requested, the driver calls the broker and requests one. The check can be collected several times, but has to be collected prior to the load being delivered. Appellant Fuller testified he received a com check on the load Mr. Flannery took and he identified Appellant's Exhibit 21 as the com check he received. It was in the amount of \$847.10 and he paid Mr. Flannery his \$200.00 and deposited the remainder in the bank to cover the cost of the truck and trailer.

Appellant Fuller stated the driver is responsible for his own food on the road. He testified he does not recall a discussion regarding the leave time Mr. Flannery would use for the first trip but he did approve his leave time. Mr. Flannery was going to use leave time from Thursday through Sunday, with Monday being a holiday and he would be back on Tuesday. Appellant Fuller stated Mr. Flannery told him he wanted to take his wife and go out west. Appellant Fuller testified he did not agree to pay for any cost associated with Mr. Flannery's wife. Appellant Fuller testified he spoke with Mr. Flannery a few times while he was out, as Mr. Flannery wanted to get a load to bring back since there was not one there waiting when he

made the delivery. On that Saturday, Mr. Flannery told Appellant Fuller he was going to look at the load board, which Appellant Fuller explained was an internet site which posted loads and are located on TV monitors in the truck stops. Appellant Fuller testified he never told Mr. Flannery he could not come back without a load and stated he would have had no issue if he came back empty. He testified Mr. Flannery never mentioned any problems he was having with his wife or child care issues. Appellant Fuller stated Mr. Flannery got com checks while he was on the road and Mary was trying to find him a back load, but they were hard to find after 3:00 p.m. on Fridays.

At some point Mr. Flannery told Appellant Fuller he had found a back load and he met Mr. Flannery in Franklin, Ohio, where he then took over the load and delivered it to Pennsylvania.

Appellant Fuller testified that at one point he considered turning FTS into a partnership in order to grow the business. He talked to several people about it, including Mr. Flannery. Mr. Flannery would bring knowledge and experience plus he was a mechanic. The cost of the partnership was estimated between \$500 and \$5,000, but it never reached fruition. Mr. Flannery told Appellant Fuller he could not afford to contribute to the partnership but offered to drive.

The second trip that Mr. Flannery took came about from a call from Mary to Mr. Flannery and Mr. Flannery said he would take the load. He told Appellant Fuller about it while they were working at Appellee and said he needed to take leave time. Mr. Flannery took sick leave for the time off and Appellant Fuller testified that the first time he knew Mr. Flannery used sick leave was during his interview with Mr. Reel. Appellant Fuller testified he would not have approved sick leave for Mr. Flannery and that Mr. Flannery was supposed to call him to request time off, but instead of calling Appellant Fuller, he called someone else. Appellant Fuller testified he does not recall approving sick leave for Mr. Flannery or telling anyone to do so. The second trip would have earned Mr. Flannery between \$50 and \$75.00, depending on the mileage.

Appellant Fuller testified he attended ethics training at Appellee and that he would not have risked his thirty years of service in order to work with Mr. Flannery. He stated he never discussed the issue of Mr. Flannery's probationary status with him and he never threatened Mr. Flannery with it. He stated the reason Mr. Flannery did not get as much overtime after the driving incidents was that Mr. Flannery was

attending training in Columbus after working a night shift, which put him in an overtime situation, so that affected his ability to accrue more overtime.

He testified he was not aware of any cell phone policy, except for safety issues, such as not being permitted to be on the phone while operating machinery or driving. Appellant Fuller stated employees could have their own cell phones during work and he was called on his cell phone all the time throughout the day and during emergencies in the evenings. He testified every supervisor had a list with the private cell phone numbers of the employees.

Appellant Fuller testified he had a state cell phone for only a couple of months. His personal cell phone had a feature where some voicemails would turn into text messages, which would show up on the bill as calls. He stated he did not recognize some of the numbers showing up on his bill.

Appellant Fuller testified he never used sick leave to drive for FTS and that his sick leave balance was always between 800 to 1,000 hours. He stated he caught leave errors on pay stubs or in looking at the AU15s. In looking at Appellant's Exhibit 8, he testified he reviewed the AU15s on Mondays and signed all of them except his own. Appellant Fuller testified he does not recall seeing this one and stated he would not have used sick leave one day in the middle of the week when he was off the whole week and using vacation for the rest of the week. He stated this must be an error that he did not catch on his pay stub.

Appellant's Exhibit 11 was identified as the December 15, 2008, written reprimand he issued to Ms. Haney. He stated his relationship with her was off and on. If he denied her time off, then she would get an attitude. He testified that he first found out about her complaint against him when he read the interview transcripts. Appellant's Exhibits 28 and 29 were identified as sick leave forms for Mr. Flannery. Appellant Fuller testified he did not recall approving sixteen hours of sick leave for Mr. Flannery on September 25, 2009, nor did he recall seeing this document before. He stated the printout does not state "jr." after his signature and he usually signs his name as "Abell Fuller, Jr.". He also testified that at the pre-disciplinary hearing, this form showed him approving it on September 28, 2009, but after he stated he wasn't working on that day, another printout appeared with the date of September 25, 2009.

Appellant's Exhibit 25 was identified as his letter placing him on administrative leave. Appellant Fuller testified that Mike Brown gave him the letter at work and told him to leave without any explanation about administrative leave. When Appellant Fuller received the deduction of pay when he went to court, he called Carl Best and asked him what he could and could not do on leave. He stated he called in every day to Mr. Wiseman to tell him he was available. He did not think FTS was an issue since he was the owner and not an employee.

In looking at Appellant's Exhibit 16, Mr. Flannery's leave request which states Appellant Fuller approved it on September 14, 2009, Appellant Fuller testified he does not recall approving this and he was off work on September 14, 2009. He stated his name shows up because his alternate went in the system in his place but his name still shows up. Appellee's Exhibit 5P was identified as Appellant Fuller's driver logs for the time period of September 13 and 14, 2009, showing him as being on the road driving on those days. Appellee's Exhibit 5M also shows him as having a truck checked out from September 9 to the 16th, 2009. Appellant Fuller testified he returned the truck on September 16, 2009 and two payments were made that day, which also proves he was not at work on September 14, 2009.

Appellant Fuller testified he does not remember approving Mr. Flannery's leave request on September 4, 2009, as indicated in Appellant's Exhibit 17. Appellant's Exhibit 19 was identified as a receipt of Mr. Flannery's for straps he purchased and Appellant Fuller testified he would cover that cost for Mr. Flannery. Appellant's Exhibit 20 was identified as a document which shows Mr. Flannery received \$800.00 through com checks when he was out on the road. Appellant's Exhibits 22 and 23 were identified as Appellant Fuller's leave requests but he testified he does not remember requesting leave on those days. Appellant's Exhibit 26 was identified as his removal order dated December 30, 2010. Appellant Fuller testified Mr. Best called him and told him he was being terminated. Appellant's Exhibit 27 was identified by Appellant Fuller as his removal order dated September 23, 2011, which he stated he was never served with.

On cross examination Appellant Fuller stated rental companies usually do not charge for weekends, as most rentals are for five days. He testified that in his absence, Ms. Taylor approved leave. In looking at Appellee's Exhibit 15, page 12, it shows Appellant Fuller taking five hours of vacation on September 14, 2009, beginning at 10:00 a.m. On redirect examination, he testified he remembers being

off the entire day and stated he could have used flex time to get to the eight hours, as flex time does not appear on a 502 form.

Appellee's Exhibit 16 was identified as a 502 form for September 14, 2009 which Appellant Fuller signed on September 15, 2009, showing five hours of leave time and eight hours of regular time. Appellant Fuller stated this was five hours of leave and three hours of flex time. Appellee's Exhibit 17 was identified as a sign in sheet for September 15, 2009, although the date is hard to read and Appellant Fuller testified it was not his signature on the form. Appellee's Exhibit 18 was identified as the sign in sheet for September 15, 2009 and it shows Appellant Fuller was at work from 7:00 a.m. to 3:30 p.m., but Appellant Fuller testified he did not think it was his signature on the form. He stated there are not usually multiple sign in sheets for the same day. In looking at Appellee's Exhibit 5 N, Appellant Fuller testified that signature was not the same signature in Appellee's Exhibit 17. Appellant Fuller testified that even if a person is off work on a particular day, someone else puts your name on the sign-in sign-out sheet and writes down the reason you are off. He stated he was not at work on September 14, 2009, even though someone wrote that he was there from 7:00 to 10:00 a.m.

Appellee's first rebuttal witness was Douglas Burke, an employee of Appellee since 1990 and currently a Transportation Engineer. As such, he is responsible for purchasing equipment, overseeing the contracts for equipment, and for dump truck assembly and the central garage. Mr. Burke testified there is a contract for rental equipment and it changes from year to year. In the years 2009 and 2010, Mr. Burke testified, there were no semis on the rental contract. There were twelve districts in Appellee then and each district had at least one semi and some had multiples. He stated Appellee offered training on purchasing and contract administration and the county managers were included in the training. He explained that if a county manager wanted to rent a semi, they would first look to see if Appellee had one, then if not, the county manager would contact vendors and get a quote and would ask if they could supply X and if the answer was yes, then the manager would send out the paper form for completion.

On cross examination Mr. Burke testified he knows Appellant Fuller but does not know if he received the contract training. He explained the county manager runs his or her own budget and the manager could call and get their own quotes, as that happens quite frequently.

Appellee's last rebuttal witness was Aisha Powell, an employee of Appellee since March, 2008. She is an attorney and is the records custodian for Appellee. In looking at Appellee's Exhibits 15, 16, 17 and 18, Ms. Powell testified that those are accurate copies of the originals. In looking at Appellee's Exhibit 17, Ms. Powell explained she knows this is from September 14, 2009 because she received the documents in sequence and when she compared it to the 502 form, the dates matched.

FINDINGS OF FACT

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

1. Appellant Fuller was an Administrative Officer 3 at the time of his removal, effective September 23, 2011. At the time of his removal, he had been employed by Appellee for approximately 29 years and 3 months.
2. Appellant Fuller's previous discipline consisted of a written reprimand in January, 2006, for failing to follow the policies of the Director and other actions that could harm persons; a three day suspension in August, 2006, for failing to follow the policies of the Director; a written reprimand in June, 2007, for failing to follow the policies of the Director; and a working three day suspension in November, 2008, for neglect of duty and failing to follow the policies of the Director.
3. Appellant Fuller was responsible for knowing and enforcing the rules and policies of the Appellee and of the district. He attended many trainings during the course of his employment, including a session on Fraud and Ethics on July 7, 2009.
4. As an Administrative Officer 3, Appellant Fuller was responsible for the employees in Hamilton County. One of the employees he supervised was Shawn Flannery, a TM1, who was promoted into that position effective July 19, 2009. He served a six month promotional probationary period, which he passed and which ended in January, 2010.

5. In approximately 2006 or 2007, Appellant Fuller began Fuller Transportation Services (FTS). It was a company which delivered loads of materials for other companies as well as providing other services.
6. Over Labor Day weekend, 2009, FTS had a load of material which needed to be delivered to South Dakota. While at work at Appellee, Appellant Fuller approached Mr. Flannery and asked him if he knew anyone who could drive the semi-truck to S. Dakota. Mr. Flannery stated his cousin may be able to and when he could not reach his cousin, Mr. Flannery told Appellant Fuller he was able to drive a semi and he could take the load.
7. This conversation took place on Wednesday, September 2, 2009, and Mr. Flannery was scheduled to work overtime that night as well as the next day, Thursday, September 3, 2009. Appellant Fuller called another employee to work the overtime shift on Wednesday, September 2, 2009.
8. Appellant Fuller approved eight hours of vacation leave for Mr. Flannery for Thursday, September 3, 2009. Mr. Flannery had previously been scheduled off for Friday, September 4, 2009, as on June 30, 2009, he requested to use a cost savings day that day. He was not scheduled to work on Saturday, Sunday or Monday (September 5, 6, and 7). Mr. Flannery had planned on returning to Ohio on Monday, September 7, but he did not want to bring the semi-truck back without a return load, as he feared Appellant Fuller would be angry with him for doing so. Therefore, due to the time it took to locate and pick up a load, Mr. Flannery did not return to Ohio until Saturday, September 12, 2009 and he returned to work on Monday, September 14, 2009.
9. Appellant Fuller paid Mr. Flannery \$200.00 in advance for driving the truck. Mr. Flannery told him he was charging \$250.00 and he hoped to get the rest of the money, plus his expenses from the trip, from Appellant Fuller at a later date.
10. Mr. Flannery used eight (8) hours of vacation leave on Thursday, September 3, 2009, which was approved by Appellant Fuller. For Friday, September 4, 2009, he used eight (8) hours of cost saving days, but he requested this time off in June, 2009 and it was approved by Appellant Fuller in July, 2009. Saturday and Sunday no time was used as Mr. Flannery was not scheduled to work the weekend and Monday, September 7, 2009, was a holiday and he

was not scheduled to work that day. For Tuesday, September 8, 2009, Mr. Flannery use eight (8) hours of cost saving days and for Wednesday through Friday, September 9 -11, 2009, he used twenty-four (24) hours of vacation, all approved by Appellant Fuller. The records indicate that for the twenty-four (24) hours of vacation, Mr. Flannery called into Ms. Taylor Wednesday morning to ask for the rest of the week off.

11. Appellant Fuller approved all of the time off for Mr. Flannery. The records indicate Appellant Fuller approved the above time off on September 14, 2009, however, other records admitted into evidence establish that Appellant Fuller was not at work on September 14, 2009, as he was off driving a truck on behalf of FTS.
12. Mr. Flannery was off work again to drive for FTS on September 25 and 26, 2009. He used sixteen (16) hours of sick leave for those two days and Appellant Fuller approved Mr. Flannery's time off on September 25, 2009.
13. Appellant Fuller never threatened Mr. Flannery with the loss of his job in any connection with FTS.
14. With regard to the Requests for Leave, the process begins with the employee submitting a request for leave. The employee's supervisor then signs the request form and then Ms. Haney or Ms. Taylor inputs it into the computer as the submitter. After that, the supervisor recommends approval, as the recommender, and finally Appellant Fuller actually approves the request.
15. Appellant Fuller was off work the week of August 3 through 7, 2009, in order to drive for FTS. The time sheets reflect that he used cost savings day on Monday and Wednesday, vacation on Thursday and Friday and sick leave on Tuesday, August 4, 2009.
16. Appellant Fuller was off work on Monday and Tuesday, August 17 and 18, 2009. On August 18, 2009, documents establish Appellant Fuller was driving a truck on behalf of FTS that day. His time sheet shows that he used eight (8) hours of sick leave that day.

17. Appellant Fuller used his personal cell phone at work for work-related business and also for personal calls and calls that pertained to FTS. Mr. Reel found in his investigation that most of the time when Appellant Fuller was conducting FTS business on his phone that it was not on state time.
18. Appellant Fuller was placed on administrative leave on March 4, 2010. The letter he received placing him on administrative leave informed him that he "must remain ready for work" throughout the day and if he would not be available, he must contact his supervisor to request leave time. On September 29, 2010, Appellant Fuller appeared in court on behalf of FTS and he did not request leave time to do so.

CONCLUSIONS OF LAW

In order for Appellant Fuller's removal to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the removal order and if so proven, that removal was the proper punishment. Appellee has met its burden.

Appellant Fuller was an Administrative Officer 3 at the time of his removal. He was in charge of approximately fifty employees in Hamilton County, with seven direct reports, and was the only person in the county listed as the "approver" on the leave requests of the employees. Appellant Fuller attended many training sessions over the years and was responsible for knowing the policies and procedures of Appellee and for communicating such to his subordinates. He conducted probationary evaluations for employees, disciplined employees, assigned overtime and had input into hiring decisions. At the time of his removal, he had almost thirty (30) years of tenure and he was responsible for carrying out and devising Appellee's goals and objectives in his county. In other words, Appellant Fuller had been around for awhile and was a seasoned state employee.

The first allegation in the removal order is that Appellant Fuller was dishonest and engaged in misfeasance. Misfeasance is defined by Black's Law Dictionary, Sixth Edition, as "The improper performance of some act which a person may lawfully do." Appellant Fuller did commit misfeasance in that he could properly approve leave time for employees. The evidence established that he did so but did so improperly. There is no dispute that Mr. Flannery was not sick when he used sick leave on September 24 and 25, 2009. He was not sick, as he was driving a

truck on behalf of FTS. Appellant Fuller knew that Mr. Flannery was driving a truck for his private business and should not have approved sick leave for Mr. Flannery. Section 124.382(D) of the Ohio Revised Code provides when sick leave can be used by a state employee. That paragraph states as follows:

(D) Employees may use sick leave, provided a credit balance is available, upon approval of the responsible administrative officer of the employing unit, **for absence due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee's immediate family.** When sick leave is used, it shall be deducted from the employee's credit on the basis of absence from previously scheduled work in such increments of an hour and at such a compensation rate as the director of administrative services determines. The appointing authority of each employing unit may require an employee to furnish a satisfactory, signed statement to justify the use of sick leave. (Emphasis added).

As can be seen from reading the above statute, sick leave can only be used by an employee for the specific purposes enumerated above. Obviously, absence from work due to driving a truck is not one of the listed purposes. Appellant Fuller certainly knew that his approval of Mr. Flannery's sick leave was not proper, as he even testified that he knows it was not a proper use of sick leave and would not have approved sick leave for him on those days. He then continued to argue that he did not approve Mr. Flannery's time, but someone else did. Appellant Fuller made this same argument with regard to his improper usage of sick leave on August 4 and 18, 2009. Both times, there is documentary evidence to establish that Appellant Fuller was driving a truck on those days on behalf of FTS. First Appellant Fuller argued that the sick leave was an error, as he would not take sick leave in the middle of a week that he was off, with using vacation and cost savings days for the other days. Then he argued he did not request sick leave, but even so, his leg and knee hurt on August 4, 2009, when he was driving. He also argued that someone else must have gone into the payroll system and approved the sick leave on his behalf.

Ms. Haney, Mr. Issac and Mr. Brown all testified that if an alternate went into the payroll and leave system, the alternate's name would show up and not the person's name who they were an alternate for. Ms. Taylor first testified she was

“fairly sure” that if she went into the system as an alternate for Appellant Fuller, it would show up under her name. On redirect examination, she testified the system “could possibly” show the name of the person she was an alternate for instead of her own. What was clear was that everyone had their own unique user name and password on the system and if Appellant Fuller suspected someone was using his incorrectly or without permission, then he should have notified the IT department. There was no evidence presented to show that he did so.

Ms. Haney testified Appellant Fuller told her, on several occasions around the time period that Mr. Flannery was driving for him, to approve the leave he told her to use for Mr. Flannery, explaining to her that Mr. Flannery had some personal things going on.

Appellant Fuller testified he did not recall approving the sick leave forms or seeing the forms in which he approved sick leave for Mr. Flannery and himself. A lot of time and testimony was spent arguing whether or not Appellant Fuller was at work on September 14, 2009 – the day which the leave approval forms for Mr. Flannery using vacation and cost savings hours were approved by Appellant Fuller. Those approvals are not relevant, as vacation time and cost savings days could be used for any purpose. The only argument Appellee put forth with regard to those days is that they did not follow the policy of calling off as much as in advance as the time requested off, or the “hour for hour” policy. However, the policy states “Exceptions to this policy will be considered on a case by case basis and will be give (sic) favorable consideration by the appropriate staff person only where mitigating circumstances warrant.” The specifics of the removal order only reference Mr. Flannery driving for FTS while on sick time, not vacation or cost savings days.

The request for leave form in which Appellant Fuller approved sick time for Mr. Flannery while driving for FTS on September 24 and 25, 2009, was approved by Appellant Fuller on September 25, 2009. There is nothing in the record to indicate Appellant Fuller was not at work on that day, as his driver logs show him driving on September 26, 2009, not September 25. Therefore, Appellee has proved that Appellant Fuller approved sixteen (16) hours of sick leave for Mr. Flannery for September 24 and 25, 2009, knowing that Mr. Flannery was not sick but was driving a truck on behalf of FTS on those days. By doing so, Appellant Fuller falsified a document. He also falsified documents on August 4 and 18, 2009, when he requested sick leave while he was driving a truck on behalf of his personal business, FTS. By doing so, he misused his sick leave.

The remaining allegation in the removal order is that Appellant Fuller “Engaged in activities for personal profit during paid working hours, including break times” and specifically, “. . . appeared in court on behalf of your company while on administrative leave.” There is no dispute that Appellant Fuller went to court on behalf of FTS on the morning of September 29, 2010, while he was on paid administrative leave. The notice of administrative leave which was given to Appellant Fuller on March 4, 2010, states he must “remain ready to report to work during your normal work hours. If you wish to use leave (vacation, personal, etc.), you must contact Mr. Weisman in advance for approval.” The evidence established that Appellant Fuller did not request leave time for his court appearance on behalf of FTS and as such, he was not ready to report to work during the time he was in court. Inasmuch as he was getting paid while on administrative leave, he was on state time conducting business for his personal business. Appellant Fuller argued he did not understand what he was permitted and not permitted to do while on administrative leave, but this argument fails, as the letter placing him on administrative leave is clear and unambiguous.

Appellee also presented voluminous records with regard to Appellant Fuller’s cell phone usage to purportedly show he made calls relating to his personal business, FTS, during work hours. However, the testimony of Mr. Reel, the person responsible for the investigation into Appellant Fuller, testified that the majority of time spent conducting business on behalf of FTS was not on state time. Therefore, Appellee did not prove that Appellant Fuller spent more than a *de minimus* amount of state time on his personal business.

There was also a large amount of testimony and some documentary evidence presented on the fact that Mr. Flannery was a probationary period employee working for Appellant Fuller’s private business. While that is true and is not the best business practice, there was no evidence to show that Appellant Fuller ever threatened Mr. Flannery with failure of his probationary period if he did not work for FTS. In fact, the evidence established that Mr. Flannery volunteered to drive for Appellant Fuller’s company and that he was never coerced into doing so. Mr. Flannery testified he felt that if he did not return from the South Dakota run without a backload, Appellant Fuller might be angry with him, but there was no evidence presented to show that to be true. Other witnesses testified they never saw Appellant Fuller treat Mr. Flannery poorly or threaten him. There was nothing in

the record to establish or prove that Appellant Fuller used his position as Mr. Flannery's supervisor to coerce him to drive for FTS.

Similarly, there was a lot of testimony with regard to how much money was owed to Mr. Flannery by Appellant Fuller and FTS for the long trip he made to South Dakota. There is nothing in the removal order referencing this and it is a matter to be resolved solely between Appellant Fuller and Mr. Flannery. None of that testimony is relevant to the allegations contained in the removal order.

In summary, Appellee has proved by a preponderance of the evidence that Appellant Fuller did misuse sick leave when he took sick leave on two occasions while driving a truck on behalf of FTS; he falsified a document and allowed the misuse of sick leave when he approved sixteen (16) hours of sick leave for Mr. Flannery knowing full well that Mr. Flannery was not ill but was driving a truck on behalf of FTS for those days; and he conducted business for personal profit while on state-paid time when he appeared in court on behalf of FTS on September 29, 2010.

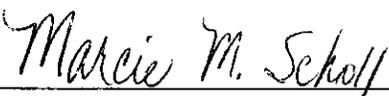
Given Appellant Fuller's long tenure with Appellee, the above violations of section 124.34 of the Ohio Revised Code and Appellee's policies would not normally be enough to warrant removal from employment. However, Appellant Fuller has past disciplines based on violations of the same work rules that he violated in the instant case, namely his failure to follow policy, WR101 Item 2C. All of his past four disciplines cite that rule as being violated by Appellant Fuller. In looking at the disciplinary grid, it states that a first offense for violation of that work rule is a reprimand to a suspension; a second violation is a suspension; and a third violation is a removal. This is Appellant Fuller's fifth violation of that rule, and as such, removal is warranted. A violation of misuse of leave is subject to a suspension or removal for a first offense and removal for a second offense. Falsifying a document is subject to suspension or removal for a first offense and removal for a second offense. Engaging in activities for personal profit during paid work hours is subject to a reprimand or removal for a first offense and removal for a second offense.

It is up to the discretion of the appointing authority to decide the level of punishment for an employee and as long as the punishment decided fits within the disciplinary grid, has been considered and investigated thoroughly and there has been no showing of an abuse of that discretion, this Board cannot substitute its

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judgment for that of the appointing authority. There has been no evidence presented by Appellant Fuller to show any abuse of authority on the behalf of the Appellee.

Therefore, I respectfully **RECOMMEND** that Appellee's removal of Appellant Fuller be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge