

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

James Freisthler,

*Appellant,*

v.

Case No. 2013-SUS-07-0174

Shelby County Department of Job & Family Services,

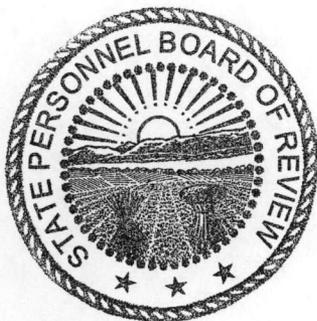
*Appellee.*

**ORDER**

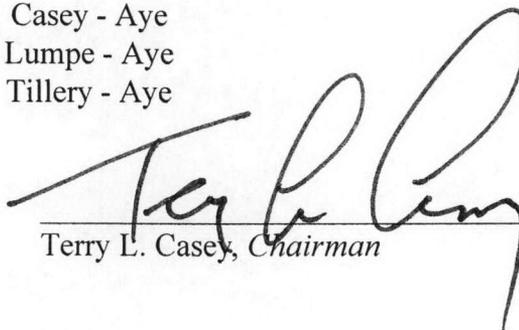
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 five-day suspension is **AFFIRMED**, pursuant to Ohio Revised Code Sections 124.03 and 124.34.



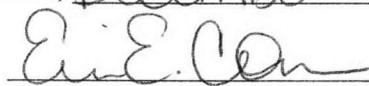
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
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, December 4, 2013.

  
Clerk

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

ENTERED  
12/4/13

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

James Freisthler,

Case No. 2013-SUS-07-0174

*Appellant*

v.

November 6, 2013

Shelby County Department of Job and Family Services

*Appellee*

James R. Sprague  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This case came to be heard on October 11, 2013. Present at the hearing was Appellant, who was represented by Thomas W. Kerrigan, II, Attorney at Law. Appellee, Shelby County Department of Job and Family Services (SCDJFS), was present through its designee, Tom Bey, Director, and was represented by Stacy V. Pollock, Attorney at Law.

This cause comes on due to Appellant's July 3, 2013 timely filing of an appeal from a five-day suspension from his position of Eligibility Referral Specialist (ES) 2. Appellant's pertinent R.C. 124.34 Order of Suspension was signed on June 27, 2013. The Order was delivered on June 27, 2013 and was also effective on that date.

**CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT**

The pertinent language in Appellant's R.C. 124.34 Order (Appellee's Exhibit 10), reads:

Insubordination, discourteous reference to the public, neglect of duty, violation of any policy or work rule of employee's appointing authority, failure of good behavior, misfeasance in office, and malfeasance in office. Specifics are outlined in the attached cover letter to this Order.

The pertinent language of the cover letter of the appointing authority (referenced in the Order) reads, at paragraphs 2 through 6:

The specific reason for this action is that on June 10, 2013 when asked by Administrator Helen Scott how things were going in the Job Center you stated it was "pretty dark in there." When asked to clarify this statement you replied there were "lots of blacks in there." Your statements are considered to be racially discriminatory and therefore fall under Section 8.04 GUIDELINES FOR DISCIPLINARY ACTION AND PENALTIES in the Shelby County Department of Job & Family Services – Employee Policies and Handbook.

Specifically:

GROUP II OFFENSES

#8 Use of offensive language towards the general public, insubordination (you were suspended previously for a similar offense and warned not to continue)[.] **failure of good behavior** and malfeasance.

#11 Willful disregard of the Employer's rules, regulations, policies, and procedures, **failure of good behavior**, misfeasance and malfeasance.

GROUP II [Should read Group III] OFFENSES

#8 **Willfully demeaning a person** (discourteous treatment of the public, neglect of duty, **failure of good behavior**, and malfeasance)[.]

#10 **Engaging in conduct giving insult or offense on the basis of race, color.** (neglect of duty, **failure of good behavior** and malfeasance)[.] (emphasis added for later ease of reference)

At hearing, four witnesses testified.

First to testify was **James Freisthler, Appellant**, an SCDJFS Eligibility/Referral Specialist 2, on as if on cross examination.

Next to testify was **Helen Scott**, SCDJHS Employment & Family Services Unit Administrator.

Next to testify was **Lisa Seeger**, SCDJFS Eligibility/Referral Supervisor 1, Supervisor of the Job and Family Services Unit, and Appellant's immediate supervisor.

Next to testify was **Tom Bey**, SCDJFS Director.

Last to testify was **James Freisthler, Appellant**, on direct and on re-direct off his as if on cross examination.

Appellee constitutes a consolidated County Department of Job and Family Services. In that capacity, Appellee performs the myriad core functions of a County Department of Job and Family Services and also performs/administers the functions of Child Support and Childrens Services.

Appellant serves as an Eligibility Referral Specialist 2 with Appellee at its Job Center. Appellant interacts daily with clients of the SCDJFS who are seeking employment in the workforce. Appellant's functions include but are limited to assisting in the administration of on-site job interviews performed by employers, assisting applicants in constructing/updating resumes, and generally facilitating the potential hiring process for these applicants.

In 2006, prior to his layoff from SCDJFS, Appellant received fiscal recognition as a department manager. In 2010, Appellant received Appellee's Outstanding Service Award among all department managers, for outstanding service for the facility.

On **June 10, 2013**, Appellant was working in the Job Center preparing for job interviews (a Job Fair) for Cargill, a large multi-faceted corporation whose portfolio includes energy and which has a significant and respected presence in the local economy. Appellant has received little advance information regarding Cargill's preferences for this day. Further, Appellant was aware that Cargill would likely require background checks on any applicants for its positions, given that it was involved in the energy field.

Fairly recently prior to June 10, 2013, an applicant at the Job Center had filled out an application, taking a considerable amount of time to do so, perhaps more than one hour. As a result of the length of time the applicant took to fill out this application, the employer had left the interview site without interviewing this particular job-seeker. Apparently, this course of events prompted the applicant or a person familiar with the applicant to write to the local newspaper concerning these events, with the result that Appellee and Appellant felt a reinforced priority to ensure the smooth functioning of the Job Center's employment application/interview process.

On the morning of June 10, 2013, Appellant was individually working the Job Center while other SCDJFS employees were in the building performing other work. Accordingly to the testimony presented, Appellant arrived for his shift at around 7:30 a.m. Perhaps around 9:00 a.m. to 9:30 a.m., Appellant walked into the back offices of Appellee out of earshot of the general public.

Helen Scott serves as Appellee's Employment and Family Services Unit Administrator and is the supervisor of Lisa Seeger, Appellant's immediate supervisor. Ms. Scott offered at hearing that the State staff had set up the Job Fair for this date, expecting lots of people.

At this time, (according to Ms. Scott's testimony) Ms. Scott inquired of Appellant how it was going out there (*i.e.* in the Job Center).

Here is where the testimony diverges. Ms. Scott indicated that Appellant responded that: **"It's getting pretty dark up there."** Ms. Scott followed up with the question: "What do you mean?" Ms. Scott averred that Appellant essentially responded: "Well, there are only four people up there and they're all Blacks."

This phrasing aligns with the phrasing that Appellant used in his written statement (Appellee's Exhibit 8) offered at his pre-disciplinary conference that relates to the instant five-day suspension. Appellant's phrasing in that document reads: **"It's dark up there today"**.

Appellant indicated at hearing that what he wrote in his pre-disciplinary statement was not what he said on June 10, 2013. He offered that he wrote up his pre-disciplinary statement so that he could speak well at the pre-disciplinary conference and that he usually does not speak like that, in his words.

Ms. Scott further offered at hearing that Appellant then asked whether Cargill would be checking criminal backgrounds. Ms. Scott indicated she responded by pulling up the pertinent e mail and then confirmed to Appellant that Cargill would be conducting the pertinent background checks. Ms. Scott stated that she then sent Appellant back out front to assist with the Job Fair.

According to Appellant, when Appellant went into the back and received Ms. Scott's initial inquiry, Appellant essentially responded: **"I'm in the dark up there."** Appellant offered that he responded to Ms. Scott's follow-up inquiry by noting "There are four Blacks up there."

Appellant indicated at hearing that the "last time" brought 300 applicants and one or more of those applicants was upset because they did not get interviewed, resulting to a letter published in the local newspaper. He further offered that it was a dark and dreary day, that the atmospheric conditions reflected the lack of information (*i.e.* "in the dark") he had received at that point for the Job Fair, and that the turnout at that point was low.

As well, he indicated that, of the 10 to 12 people in the Job Center of diverse background, only four people at that time indicated they were there for the Cargill Job Fair. Appellant also noted that at least one of the four Job Fair applicants in the Job Center had been convicted of attempted murder, served 10 years in prison, and, thus, would not likely pass Cargill's anticipated background check.

Appellant indicated at hearing that he served for 25 years as an Accountant and, thus, prefers to have, and is in the habit of getting, a satisfactory amount of advance information prior to the occurrence of an event. Indeed, Appellant offered that he is anal and that detail is what he is based on.

He offered that he had received little advance information regarding the specifics of the Job Fair and felt his ability to offer quality service was somewhat compromised by this lack of information. He also indicated at hearing that he did not follow up on these concerns with his supervisor; because he felt doing so might appear to be insubordinate.

Appellant also indicated at hearing that he was 59 years old and has never referred to a Black person as "dark". He further noted that he came back later that

day and indicated that there had been good diversity achieved at the Job Fair. He also offered that Cargill likes doing interviews in Shelby County because it does offer a diverse pool of applicants.

Appellant indicated at hearing that he had not meant to discriminate and that he had already given out the applications to the applicants present; before he went into the back office. He declared that he never referred to a client by race and understood that was wrong. He disputed that he had committed misfeasance or malfeasance. He testified that he did not try to discourteously treat the public. He denied that he committed any of the other offenses listed in the R.C. 124.34 Order.

He offered that this situation is a misunderstanding. He agreed that he does understand now how the word "dark" could be seen. He further offered that he understands that Appellee's managers and appointing authority may not necessarily share his viewpoint and may be sensitive to something he does not consider to be sensitive.

Ms. Scott stated at hearing that she was shocked by Appellant's initial statement and at that time asked Appellant for clarification. She further averred that it was offensive to categorize people by their skin color, that it's not done, and that it's just not correct.

The record reflects that on December 7, 2012, Appellant received a one-day working suspension for a failure of good behavior. (Please see Appellee's Exhibit 12) Appellee found that, on November 13, 2012, Appellant had sent an e mail to Helen Scott regarding: "Job Center Update".

The text of the e mail reads:

Tuesday, November 13, 2012 no unusual activity today. LaSaunda (nasty black women [sic]) in tonight made lots of copies for online course work.

Appellant indicated that this e mail reflected a situation in which the Job Center had limited its applicants to 20 copies per applicant. Here, Appellant indicated, the applicant in question had run well over 100 copies, had asked for other office supplies, and had a "nasty attitude".

Administrator Scott discussed Appellant's aforementioned June 10, 2013 statement with Appellant's supervisor, Lisa Seeger, and the statement and situation were in due course brought to the attention of SCDJFS Director Tom Bey, who authorized proceeding with the pre-disciplinary process for Appellant.

The requisite pre-disciplinary procedures were then followed with a Hearing Officer's recommendation of just cause. Since this was considered to constitute a second offense (the November 13, 2012 e mail and one-day suspension being the first), this escalated Appellant's discipline. Based on the offense and the level of infraction, Appellant received a five-day suspension, the least severe discipline Appellant could have received under Appellee's disciplinary parameters.

Director Bey indicated at hearing that he wanted Appellant to realize the seriousness of Appellant's June 10, 2013 statements. Further, Director Bey indicated, since Appellant had already been disciplined in 2012 for using improper language with a racial content, the Director reemphasized that he wanted Appellant to take the instant five-day suspension seriously. He also indicated there have been times that he was disappointed about Appellant's interaction with his supervisor.

Director Bey also averred that Appellant was excellent with Appellee's consumers and took seriously the quality of service. Additionally, the record reflects that Appellant has never had a complaint filed against him by any customer, consumer, or applicant of the SCDJFS.

Director Bey further indicated that, for discipline rising to the level of a suspension or more severe, the Shelby County Board of Commissioners (as the co-appointing authority for these purposes) must issue a Resolution effectuating such discipline. Appellee's Exhibit 11 constitutes that Resolution.

Appellee's Exhibit 1 contains Section 8 of the Shelby County DJFS – Employee Policies and Handbook, which section is entitled "EMPLOYEE DISCIPLINE, APPEALS, AND GRIEVANCES". Appellant has received all pertinent copies of same.

Group II Offenses are set forth on pages 82 through 84 and Group III Offenses are set forth on pages 84 through 87. I find that the alleged offenses contained within the attachment to Appellant's instant R.C. 124.34 Order are respectively among the Group II and III Offenses listed in Section 8.

Group II Offenses call for a minimum of a five-day suspension for a second offense. Group III Offenses call for discipline up to and including removal.

Appellant is alleged to have committed several Group II offenses as well as several Group III Offenses. Thus, if this Board finds that Appellant did commit a second Group II Offense or finds that Appellant did commit a Group III Offense, then a five-day suspension is within the disciplinary parameters set forth in Section 8. Indeed, as noted, a five-day suspension is the least severe discipline Appellant could have received under these parameters, if Appellant is found to have committed any offense(s) alleged in the instant R.C. 124.34 Order of Suspension.

Based upon the testimony presented and the evidence admitted at hearing, I make the following Findings:

First, I note that I incorporate, herein, any finding set forth above, whether express or implied.

Next, I find that it is more probable than not that Appellant utilized language closely approximating the words "It's getting dark in here."

Based upon the extant record, I cannot find that Appellant intended any harm by using these words and this phrasing. It appears that Appellant had a very different expectation or interpretation of those words than did Helen Scott, who was present when Appellant uttered them.

Appellant has indicated that he now understands that words might convey a different content or attitude than intended, depending on the listener and the circumstances surrounding the speech.

I also find that Administrator Helen Scott and Director Tom Bey, among others, found these words in this context to be offensive and inappropriate.

The undersigned is conversant with Appellant's view of the context in which Appellant's words were uttered. Yet, the undersigned must agree with Appellee that this setting and context present to Appellant a highly problematic situation when he chooses language of this sort to convey meaning. This is all the more so, since

Appellant was disciplined in 2012 for another inappropriate and ill-thought out phrasing in his e mail to Helen Scott (Appellee's Exhibit 12).

### CONCLUSIONS OF LAW

This case presents this Board with the question of whether an employee of a County Department of Job and Family Services has committed a failure of good behavior when, for a second time, that employee used racially insensitive language with his Administrator while on the job? Based upon the Findings set forth, above, and for the reasons set forth, below, this Board should answer that Appellant has done so, and accordingly, should affirm his five-day suspension.

Black's Law Dictionary defines "failure of good behavior" to mean:

As enumerated in statute as ground for removal of a civil service employee, means behavior contrary to recognized standards of propriety and morality, misconduct or wrong conduct (citation omitted). (Black's Law Dictionary, Deluxe 6<sup>th</sup> Ed., p. 594)

In this case, we have seen that Appellant utilized language that, in the context and setting in which it was uttered, could be, and was taken to be, racially insensitive and offensive. Clearly, in the modern office setting, use of such language in this context is bound to cause disruption, as it did here. Thus, Appellee has demonstrated by a preponderance of the evidence that Appellant committed a failure of good behavior.

Failure of good behavior constitutes a Group II and a Group III Offense. Thus, a five-day suspension of Appellant is within Appellee's disciplinary parameters.

As well, a five-day suspension is of sufficient seriousness that it should sensitize Appellant to the need to take stock of his surroundings and then speak appropriately for that setting. Yet, a five-day suspension is not so severe that it should sidetrack Appellant from continuing to do a good job interacting with the clients of the Job Center and aiding them in their search for employment.

James Freisthler  
Case No. 2013-SUS-07-0174  
Page 10

Since I have found, herein, that Appellant did commit a failure of good behavior, it is not necessary, at this time, to review whether Appellant committed the other offenses set forth in the attachment to Appellant's instant R.C. 124.34 Order of Suspension.

### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's five-day suspension, pursuant to R.C. 124.03 and R.C. 124.34.

  
James R. Sprague  
Administrative Law Judge

JRS: