

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Derek Leak,

Appellant,

v.

Case No. 2014-REM-03-0069

Warren County Board of Commissioners,

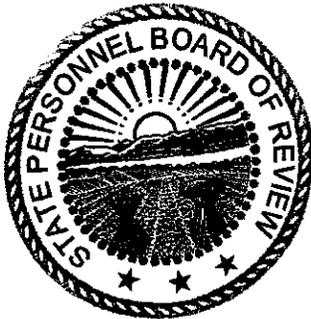
Appellee,

ORDER

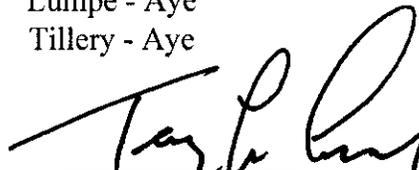
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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

Wherefore, it is hereby **ORDERED** that Appellant's removal from employment is **AFFIRMED**.



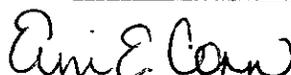
Casey - Aye
Lumpe - Aye
Tillery - Aye


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**

Derek Leak,

Case No. 14-REM-03-0069

Appellant

v.

February 25, 2015

Warren County Board of Commissioners,

Jeannette E. Gunn

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his removal from employment with Appellee. A record hearing was held in the instant matter on September 24, 2014. Appellant was present at record hearing and was represented by William G. Fowler, attorney at law. Appellee was present at record hearing through its designee, Water and Sewer Department Distribution Superintendent Jeff Byrd, and was represented by Keith Anderson, Assistant Prosecuting Attorney.

Appellant was removed from employment with Appellee effective March 20, 2014. The R.C. 124.34 Order of Removal issued to Appellant stated as grounds for his removal:

In Mr. Leak's position he is required daily to drive a vehicle and required to be on-call at times and be able to respond in 30 minutes by phone and respond to emergen(c)y situations within 1 hour if needed. Mr. Leak was cited for OVI and had a breath alcohol concentration of .191 while he was assigned on-call duty and was unfit to respond to an emergency situation if needed. His actions raise concerns of responding to the job site unfit for duty, putting employees at risk as well as general public. With the recent charge of OVI Mr. Leak would not be able to drive a County vehicle for an extended amount of time due to his driver's license suspension. Mr. Leak's actions are in violation of Personnel Policy Manual section 8.03(A)(1): Group III, #8, Group III #2 and the Drug Free Workplace

policies 7:12.I.1, 7:12.I.3 and 7:12.J; is a failure of good behavior and malfeasance all of which justify removal pursuant to RC 124.34.

The parties stipulated to the jurisdiction of the Board to consider the appeal, as well as the authenticity and admissibility of Joint Exhibits 1 through 5.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant was employed full-time by Appellee as a Meter Reader 2 in its Water and Sewer Department from 2007 through the date of his removal, March 20, 2014. His removal was premised upon a violation of Appellee's policies, constituting a failure of good behavior and malfeasance.

Appellant was arrested for operating a vehicle under the influence of alcohol or drugs (OVI) on February 22, 2014, with a breath alcohol concentration (BAC) of .191. At the time of his arrest, Appellant was assigned on call duty as a third-level responder. Appellant confirmed that he knew Appellee's policies prohibit employees from drinking alcoholic beverages while they are on call (Joint Exhibit 1, Policy 7.12(I)(3) Drug Free Workplace Policy).

On call employees are scheduled for two-week rotations and deal with water-related emergencies and problems when they arise. Primary responders must respond and be on-site within thirty minutes after taking a call, while secondary and third-level responders must respond within thirty minutes and be on-site or at Appellee's warehouse within two hours. Some problems require only a primary responder, but larger problems could require all three to deal with the location and hazards involved. When responding to a more serious problem, the primary and secondary responders are responsible for repairs, while the third-level responder monitors traffic, safety and working conditions.

The on call rotation schedule is set at the beginning of each year for the entire year. There is no written procedure in place, but it is common and permissible practice for on call employees to trade their assignment with another employee or to watch each other's pagers when they are on call. It is the responsibility of the individual who is assigned the on call duty to make sure that his

or her assignment is covered and to notify his or her supervisor of any adjustments made to the on call rotation. Appellant had not arranged with any other employee to cover his on call responsibilities on either Friday, February 21, or Saturday, February 22, 2014, prior to the time of his arrest.

Employees receive additional compensation during their scheduled on call rotation duty. They also receive overtime compensation for responding to an emergency or problem that occurs outside regular work hours during their on call rotation.

Appellant acknowledged that he knew he was required to hold a valid Ohio Driver's License in order to perform the essential duties of his Meter Reader 2 position (Joint Exhibit 4). Appellant's driver's license was under administrative suspension from the date of his arrest through May 2014.

Appellant had received prior discipline in 2011 (a three-day suspension) as the result of a suspension of his drivers' license. He had received a copy of and was familiar with Appellee's work policies and procedures. Appellant had notice of and participated in a pre-disciplinary hearing prior to his termination.

CONCLUSIONS OF LAW

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

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

mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

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

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based upon failure of good behavior and malfeasance, specifically a violation of Appellee's policies and failure to maintain a valid driver's license. Specifically, Appellee alleged that Appellant violated Personnel Policy Manual section 8.03(A)(1): Group III, #8, Group III #2 and the Drug Free Workplace policies 7:12.I.1, 7:12.I.3 and 7:12.J; is a failure of good behavior and malfeasance.

A copy of Appellee's Personnel Policy Manual section 8.03(A)(1) was not submitted into evidence at record hearing, however, the Resolution of the County Commissioners accompanying the R.C. 124.34 Order provided to Appellant and contained in the record of the instant appeal defines Group III #8 as "Manufacturing, distributing, possessing or using alcohol or controlled substance in the workplace," and Group III #2 as "Wanton, willful, or gross neglect in the performance of assigned job duties." Appellee's Drug Free Workplace policy (Joint Exhibit 1) 7:12.I.1 prohibits employees from reporting to or remaining on duty while having a breath alcohol concentration of .04 or greater. Policy 7:12.I.3 prohibits on-call employees from drinking alcoholic beverages or using controlled substances. Policy 7:12.J provides that employees who violate Section H of the Drug Free Workplace policy are subject to a variety of consequences, including termination.

Evidence and testimony presented at record hearing clearly indicated that Appellant was aware that the consumption of alcoholic beverages while on call was prohibited, and that his conduct violated that work rule (Policy 7:12.1.3). Appellant was determined to have a BAC of .191 at the time of his arrest; because Appellant was being compensated for his on call rotation duty, I find that his conduct also violated Policy 7:12.1.1, which prohibits employees from reporting to or remaining on duty while having a BAC of .04 or greater.

Although Appellee's Personnel Policy Manual section 8.03(A)(1) was not submitted into evidence at record hearing, the parties identified an acknowledgement form signed by Appellant stating that he had received a copy of Appellee's Personnel Policy (Joint Exhibit 4). Appellant did not dispute the information contained in the R.C. 124.34 Order defining a violation of Group III #2 as "Wanton, willful, or gross neglect in the performance of assigned job duties" or a violation of Group III #8 as "Manufacturing, distributing, possessing or using alcohol or controlled substance in the workplace."

As noted, Appellant acknowledged that he knew the consumption of alcohol while on call was prohibited. Black's Law Dictionary defines "wanton" as reckless, heedless, or malicious; "willful" is defined as voluntary, knowingly, or deliberate; "gross neglect" is a serious nonfeasance or failure to perform one's duties. Although the record contains no evidence of a malicious intent underlying Appellant's actions, I find the evidence and testimony submitted at hearing does support a conclusion that his conduct was knowing and voluntary. Accordingly, I find that Appellant's conduct was a violation of Group III #2.

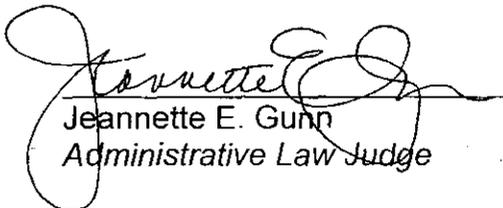
No information contained in the record indicates that Appellant was called to a worksite or Appellee's warehouse to respond to an emergency or problem while in on call status on February 21 or 22, 2014. Therefore, I find that Appellant did not violate Group III #8 by possessing or using alcohol in the workplace.

An immediate consequence of Appellant's OVI arrest was the administrative suspension of his driver's license. Evidence established that Appellant was required to maintain a valid driver's license in order to perform the essential job duties of his position. Although testimony was presented to establish that Appellee had previously accommodated the suspension of Appellant's driver's license, there was no evidence presented to suggest that Appellee had a continuing obligation to do so.

Derek Leak
Case No. 14-REM-03-0069
Page 6

Appellee demonstrated by a preponderance of the evidence that Appellant's conduct violated its Drug Free Workplace policies, and constituted willful neglect in the performance of his job duties. I find that such conduct is sufficient to constitute both a failure of good behavior and malfeasance as referenced by Ohio Revised Code Section 124.34(A). I further find that removal was an appropriate disciplinary response.

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



Jeannette E. Gunn
Administrative Law Judge