

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Jason Harris,

Appellant,

v.

Case No. 2014-REM-06-0148

Gallia County Board of Commissioners,

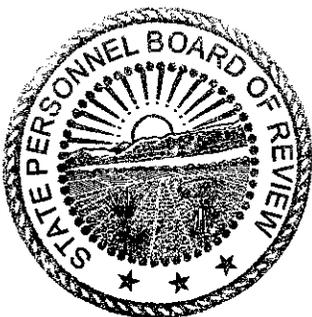
Appellee,

ORDER

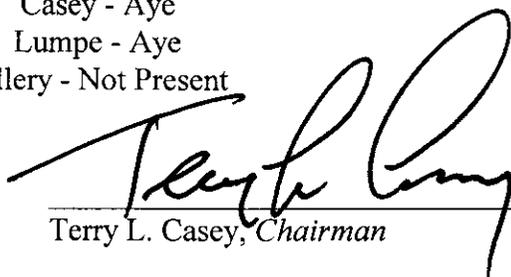
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 his position of Assistant Dog Warden/Custodial Worker is **AFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



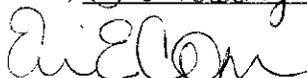
Casey - Aye
Lumpe - Aye
Tillery - Not Present


Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, January 06, 2016.


Clerk

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

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice.

Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE January 13, 2016. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then **YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.**

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2014-REM-06-0148

Transcript Costs: \$126.00 Administrative Costs: \$25.00

Total Deposit Required: * \$151.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: January 21, 2016

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

Jason Harris

Case No. 2014-REM-06-0148

Appellant

v.

December 1, 2015

Gallia County Board of Commissioners

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 September 24, 2015. Present at the hearing was Appellant, who was represented by William S. Cole, Attorney at Law. Appellee, Gallia County Board of Commissioners (BOC), was present through its designee, County Administrator Karen Sprague, and was represented by Brian D. Butcher, Attorney at Law. By agreement of the parties, on or before November 6, 2015, Appellee and Appellant timely filed their respective post-hearing briefs and the instant record was then closed.

This cause comes on due to Appellant's June 24, 2014 timely filing of an appeal from his removal from the position of Assistant Dog Warden/Custodial Worker with the Gallia County Dog Warden, which office falls under the authority of the BOC. Appellant received his R.C. 124.34 Order of Removal on June 19, 2014 through agreed service on his counsel and Appellant's removal was effective on that same date.

The record reflects that this appeal was held in abeyance pending resolution of several misdemeanor charges filed against Appellant in the Municipal Court of Gallipolis, Ohio. Following a trial on those charges, the Honorable Margaret Evans issued an 11-page Journal Entry in Case No. 14CRB157 finding Appellant not guilty on all counts. On April 29, 2015, a copy of that Journal Entry was filed with this Board.

On May 13, 2015, this Board issued a Procedural Order, which, among other things, noted the following:

... The Journal Entry finds Appellant herein, Jason Harris, "not guilty" regarding any charged violation of R.C. 959.131 (C) (1). That Revised Code provision states:

(C) No person who confines or who is the custodian or caretaker of a companion animal shall negligently do any of the following:

(1) Commit any act by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief, against the companion animal;

Appellant's pertinent R.C. 124.34 Order of Removal contains several allegations. A careful reading of Judge Evans' 11-page Journal Entry suggests that Judge Evans considered, and made findings on, at least some of the facts that would impact this Board's determination regarding the merits of Appellant's instant removal.

On June 2, 2015, this Board held a pre-hearing in the instant appeal. At the pre-hearing, the undersigned discussed with counsel what might be the dispositive impact of certain determinations that Judge Evans set forth in her above-referenced Journal Entry. Further, at the pre-hearing, the undersigned and respective counsel agreed that this appeal was ready to proceed to hearing, established a schedule for the exchange of witness lists and documents, and discussed the utility of offering Stipulations to this Board concerning agreed items regarding this matter.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The R.C. 124.34 Order of Removal in this matter reads, in pertinent part:

Based on our investigation, it was determined that Mr. Harris acted well beyond the scope of his authority, representing charges of failure of good behavior and malfeasance, when he administered euthanasia on 11 dogs without the authorization of Dog Warden Simmers and without his certificate having been submitted to the Board of Pharmacy's list of approved individuals to perform euthanasia under the Gallia County Animal Shelter's license. There is also no doubt that this controversy has placed the Employer in a negative light.

At hearing, three witnesses testified.

First to testify was **Paul Simmers**, who served at the time of the alleged incidents as the Gallia County Dog Warden and, thus, as Appellant's supervisor.

Next to testify was County Administrator **Karen Sprague**, who has served in that capacity since October 19, 1991, and who served as Appellee's designee at hearing.

Next to testify was **Richard Grau**, who has served as the Chief Deputy for the Gallia County Sheriff's Office for slightly more than four years. Chief Deputy Grau and Lt. Anthony Werry conducted a Sheriff's investigation regarding the aforementioned deaths of 11 dogs at the Gallia County Animal Shelter.

Last to testify, on rebuttal, was County Administrator **Karen Sprague**.

General Background

This case involves the unfortunate intersection of American society's love of dogs with the unintended consequences of over-breeding, strays, abused or neglected dogs, vicious dogs, canine harassment of livestock and poultry, *et cetera*. The record reflects that, to an important degree, it is up to the requisite County Board of Commissioners and their assigned Dog Warden and Assistant or Deputy Dog Wardens to effectuate proper animal control out in the County while simultaneously helping to protect these dogs whenever possible. All this, of course, occurs within the constraints of County budgets which face many competing needs and interests.

In this case, the Gallia County Board of Commissioners have instructed their Dog Warden and his or her subordinates to exercise the appropriate level of control over these pertinent dog populations. The BOC have also instructed the Dog Warden and staff to assist humane and adoption groups to offer new circumstances to many of these canines, whose health and behavior allows them to be eligible for adoption.

The Dog Warden's legal authority extends to the authority to euthanize animals, when needed, in conformance with all applicable Revised Code and Ohio Administrative Code provisions, including those set forth, below. This includes the

authority to utilize the appropriate approved controlled substance (here, sodium pentothal or sodium pentobarbital) to sedate and then euthanize an animal.

It also extends to the authority to use a firearm to destroy an animal. This is particularly so in the field, under circumstances where injury to the Dog Warden, Deputy or Assistant Dog Warden, a civilian, livestock, or poultry appears imminent, or where it is necessary to humanely dispatch a terminally injured animal that is suffering; if the available firearm appears capable of dispatching the animal. (Please see Joint Exhibit D, "Gallia County Animal Shelter Operations Manual", at p.2)

Animal Shelter and employee licensing and controlled substance provisions

R.C. 4729.532 is entitled "Performing euthanasia by means of lethal injection on animal." and states:

(A) No agent or employee of an animal shelter shall perform euthanasia by means of lethal injection on an animal by use of any substance other than combination drugs that contain pentobarbital and at least one noncontrolled substance active ingredient, in a manufactured dosage form, whose only indication is for euthanizing animals, or other substance that the state veterinary medical licensing board and the state board of pharmacy both approve by rule adopted in accordance with Chapter 119. of the Revised Code. *The agent or employee of an animal shelter when using a lethal solution to perform euthanasia on an animal shall use such solution in accordance with the following methods and in the following order of preference:*

- (1) Intravenous injection by hypodermic needle;
- (2) Intraperitoneal injection by hypodermic needle;
- (3) *Intracardial injection by hypodermic needle, but only on a sedated or unconscious animal;*
- (4) Solution or powder added to food.

(B) Except as provided in division (D) of this section, no agent or employee of an animal shelter, other than a registered veterinary technician as defined in section 4741.01 of the Revised Code, shall perform euthanasia by means of lethal injection on an animal unless he has received certification after successfully completing a euthanasia technician certification course as described in this division. The curriculum for a euthanasia technician certification course shall

be one that has been approved by the state veterinary medical licensing board, shall be at least sixteen hours in length, and shall include information in at least all of the following areas:

- (1) The pharmacology, proper administration, and storage of euthanasia solutions;
- (2) Federal and state laws regulating the storage and accountability of euthanasia solutions;
- (3) Euthanasia technician stress management;
- (4) Proper disposal of euthanized animals.

(C)

(1) Except as provided in division (D) of this section, no agent or employee of an animal shelter shall perform euthanasia by means of lethal injection on animals under this section unless the facility in which he works or is employed is licensed with the state board of pharmacy under section 4729.531 of the Revised Code.

(2) Any agent or employee of an animal shelter performing euthanasia by means of lethal injection shall do so only in a humane and proficient manner that is in conformity with the methods described in division (A) of this section and not in violation of Chapter 959. of the Revised Code.

(D) An agent or employee of an animal shelter who is performing euthanasia by means of lethal injection on animals on or before the effective date of this section may continue to perform such euthanasia and is not required to be certified in compliance with division (B) of this section until ninety days after the effective date of the rules adopted in compliance with Section 3 of House Bill No. 88 of the 120th general assembly. (emphasis added)

R.C. 3719.09 is entitled “Authorized possession of controlled substances”. and includes:

(D) Possession in the course of business of combination drugs that contain pentobarbital and at least one noncontrolled substance active ingredient, in a manufactured dosage form, the only indication of which is for euthanizing animals, or other substance that the state veterinary medical licensing board and the state board of pharmacy both approve under division (A) of section 4729.532 of the Revised

Code, by an agent or employee of an animal shelter who is authorized by the licensure of the animal shelter with the state board of pharmacy to purchase and possess the drug solely for use as specified in that section. As used in this division, "in the course of business" means possession or use at an establishment described in a license issued under section 4729.54 of the Revised Code, or outside that establishment when necessary because of a risk to the health or safety of any person, provided that the substance is in a quantity no greater than reasonably could be used to alleviate the risk, is in the original manufacturer's container, and is returned to the establishment as soon as possible after the risk has passed. (emphasis added)

O.A.C. 4729-14-03 is entitled "Qualifications for licensure as an animal shelter" and states:

(A) No license shall be issued to an applicant for licensure as a limited terminal distributor of dangerous drugs unless the applicant has furnished satisfactory proof to the board of pharmacy that:

(1) The applicant is equipped as to land, buildings, and equipment to properly carry on the business of a terminal distributor of dangerous drugs within the category of license requested.

(2) A responsible person shall maintain supervision and control over the possession and custody of such dangerous drugs that may be acquired by or on behalf of the applicant.

(3) Adequate safeguards are assured to prevent the illegal acquisition, distribution, or utilization of dangerous drugs or their diversion into illicit channels.

(4) If the applicant, or any agent or employee of the applicant, has been found guilty of violating section 4729.51 of the Revised Code, the "Federal Food, Drug and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C. 301, the Federal Narcotic Law, sections 3715.01 to 3715.72 of the Revised Code, Chapter 2925., 3719., or 4729. of the Revised Code, or any rule of the board, adequate safeguards are assured to prevent the recurrence of such violation.

(B) The applicant shall submit a current copy of the renewal certificate for each registered veterinary technician.

(C) The applicant shall submit a copy of each euthanasia technician's certificate. This certificate shall document that that individual successfully completed a certification course as described in section 4729.532 of the Revised Code.

(D) The notarized drug list required by section 4729.54 shall include the statement: "The drug(s) listed on this document will be purchased and stored at this location for the sole purpose of the performance of euthanasia on animals by registered veterinary technicians or euthanasia technicians pursuant to section 4729.531 and 4729.532 of the Revised Code." This statement shall be signed by the responsible person and at least one registered veterinary technician or euthanasia technician. (emphasis added)

Specific facts of this case

Appellant was an employee of the BOC. He had previously worked at the Gallia County Animal Shelter in approximately 2007 and some time thereafter. He then left the employ of Gallia County for other employment. He subsequently returned as a full time Custodial Worker with the BOC. Thereafter, he was transferred over to the Animal Shelter. Subsequent to February 14, 2014 and the events in question; Appellant was transferred back to the BOC's Maintenance Department staff at the Courthouse until his removal, effective June 19, 2014.

The record reflects that the Gallia County Animal Shelter was a duly licensed shelter. The Animal Shelter maintained a license as "a limited terminal distributor of dangerous drugs".

As set forth, above, in order for the Animal Shelter to have the Dog Warden authorized to administer a controlled substance using any of the four methods of euthanasia listed in R.C. 4729.532 (A), the Animal Shelter was required to and did, annually, provide a list of individuals qualified as Certified Euthanasia Technicians (CET) whom the Dog Warden wished to be eligible to be able to administer specified euthanasia drugs and techniques.

Both then-Dog Warden Paul Simmers and Appellant were CETs (qualified in the technique of "euthanasia by injection"), as was former Dog Warden Jean Daniels. This is because each had completed the required training course administered by the American Humane Association (AHA); in 2007 for Appellant, in

2008 for Daniels, and in 2012 for Simmers. Thus, each held the requisite AHA Certificate and Ohio License to perform this function.

However, when the Animal Shelter submitted its 2012 and later its 2013 "Limited License Personnel List – Renewal" form to Ohio State Board of Pharmacy (OSBOP), Appellant's name was not placed on the form. *The only name that then-Warden Simmers placed on the form was Mr. Simmers' own name.* (Please see Appellee's Exhibit C and D). Please note that the 2012 list basically covered a time period *before* Appellant transferred over to the Animal Shelter.

The 2013 list was also submitted before Appellant transferred over, but would have also covered a time when Appellant was employed at the Animal Shelter. Testimony reflects that then-Warden Simmers did not amend the list to place Appellant's name on the form when Appellant transferred over. This is because Warden Simmers was waiting for clarification or confirmation regarding the paperwork that he had pending with the OSBOP.

This is important because, on February 14, 2014, Appellant was not authorized under Ohio law to euthanize any animal at the Animal Shelter by any drug including by sodium pentothal. However, on February 14, 2014, Appellant performed this function 11 times at the Gallia County Animal Shelter.

Appellant's acts of euthanizing these 11 dogs -- despite the fact that his name had not been submitted on the requisite list to the OSBOP -- was one of the three reasons listed for his removal. The other two reasons listed for Appellant's removal were for euthanizing these 11 dogs without the authorization of then-Warden Simmers and for allegedly placing Appellant's employer in a negative light.

Appellee has proven that Appellant was not authorized by Ohio law to administer sodium pentothal to 11 dogs on February 14, 2014. However, it is still necessary to examine the other two allegations in Appellant's Order of Removal.

The record is mixed as to whether then-Warden Simmers authorized Appellant to euthanize any, some, or all of the 11 dogs dispatched on February 14, 2014. Mr. Simmers indicated at hearing that he did not authorize Appellant to pick up any sodium pentothal from Four Seasons Veterinary Clinic on February 13, 2014, where Appellant received the sodium pentothal that Appellant used on February 14, 2014.

Mr. Simmers indicated he did not authorize Appellant to pick up this drug for two reasons. First, he stated, he had a concern for Appellant driving the Animal Shelter truck in or after the heavy snow on that date. Secondly, Mr. Simmers indicated, he did not authorize this activity due to the much higher price that Four Seasons charged for the drug in comparison to the Animal Shelter's regular supplier. Thus, Mr. Simmers appears to have believed, probably correctly, that, but for Appellant's picking up this drug on February 13, 2014 at Four Seasons, there would not have been a sufficient quantity of the drug for Appellant to euthanize that many dogs at the Animal Shelter.

Further, Mr. Simmers offered at hearing that most of these 11 dogs had already received their vaccinations from the Veterinarian, that the cards on most of their cages had been so marked, and that they were ready to be adopted. Moreover, he stated, but for the intervention of two weekends of bad weather, the Friends of the Gallia County Shelter would have already picked up these dogs to be placed for adoption.

Appellant did not choose to testify at hearing. Yet, it does appear from the record that Appellant may have been subjectively confused about the scope of his authority provided by then-Warden Simmers to euthanize animals at the Animal Shelter. Thus, it is problematic to assign specific bad intent or ill motive to Appellant in this situation.

The record is clearer regarding the attendant negative publicity that the Animal Shelter, its employees, and the County Commissioners received as a result of this incident. This included articles in the newspaper and national and international on-line petitions. It even included threats of violence against County employees.

If these had come about through no fault of Appellant's, Appellant could not be disciplined for the negative light that was cast upon Appellee. However, Appellant clearly exceeded his authority under Ohio law when he administered sodium pentothal to these dogs. Further, Appellant exceeded the authority provided to him by Warden Simmers when Appellant dispatched these dogs; even though Appellant may have misunderstood the scope of that authority. Accordingly, Appellant must be held to some account regarding the attendant negative publicity that resulted from his actions.

Based on the testimony presented and evidence admitted at hearing and upon the post-hearing briefs submitted by the parties, I make the following Findings:

I incorporate by reference, any finding set forth, above, whether express or implied.

Further, the parties have stipulated, and I find, that Appellee provided Appellant with his requisite procedural due process rights in regard to the pre-disciplinary process that occurred in this matter. This includes Appellee's timely and properly providing Appellant with his pertinent R.C. 124.34 Order of Removal.

I also find that Appellant has demonstrated, by a preponderance of the evidence, that Appellant committed (or in the case of negative publicity was responsible for) the three allegations listed in Appellant's R.C. 124.34 Order of Removal.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether an employee who violates Ohio law regarding administering a controlled substance, who exceeds the scope of his authority as the Assistant Dog Warden, and who, as a result, causes his employer to be placed in a negative light, has committed either failure of good behavior or malfeasance? Based on the findings set forth, above, and for the reasons, below, this Board should find that Appellant has committed failure of good behavior. Yet, since it appears that Appellant did not seem subjectively aware that he was exceeding the scope of his authority, this Board should not find that Appellant committed malfeasance.

Black's Law Dictionary defines "failure of good behavior" as follows:

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 (citations omitted) (*Black's Law Dictionary*, Deluxe 6th Ed., p. 594)

It is clear that Appellant committed wrong conduct, and perhaps misconduct, when he violated Ohio's controlled substance provisions. It also appears that Appellant committed wrong conduct when he exceeded the scope of his authority as an Assistant Dog Warden. These acts led to Appellee being cast in a negative light and also led to the disruption of Appellee's operations. Thus, I find that Appellant has committed failure of good behavior.

Black's Law Dictionary defines "malfeasance" in pertinent part as follows:

Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful or unlawful; the doing of an act which person ought not to do at all (citations omitted) (*Black's Law Dictionary*, Deluxe 6th Ed. p. 956)

An argument can be made that Appellant's behavior fits parts of this definition. Yet, the better argument is that Appellant's behavior, while inappropriate and violating Ohio law, does not seem to rise to the level of ill intent or malefaction contemplated by this definition. Thus, I do not find that Appellant's actions rise to the level of malfeasance.

I have found, above, that Appellee demonstrated the allegations set forth in Appellant's R.C. 124.34 Order of Removal. I have also found that Appellant's actions constitute failure of good behavior. Given the level of Appellant's offenses and the negative and disruptive consequences they brought about, Appellant's removal, while unfortunate, is justified in this case.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's **REMOVAL** from his position of Assistant Dog Warden/Custodial Worker, pursuant to R.C. 124.03 and R.C. 124.34.



James R. Sprague
Administrative Law Judge