

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

Anthony Dinardo,

Appellant,

v.

Case No. 2015-RED-10-0219

Department of Rehabilitation & Correction,

Appellee,

ORDER

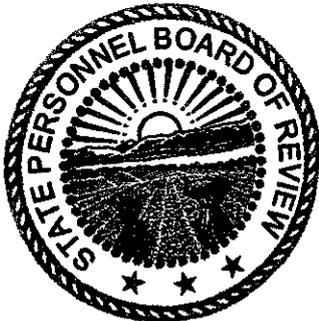
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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.

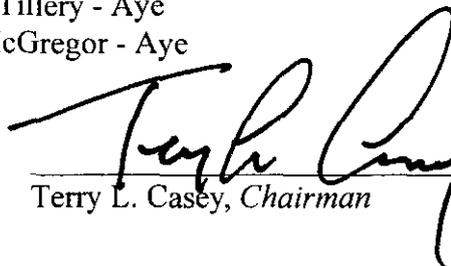
Wherefore, it is hereby **ORDERED** that Appellant's instant **REDUCTION** be **MODIFIED** to a **FINE** equivalent to the sum owed to Appellant representing the difference between his current pay and his back pay arising from restoration to the rank of Correction Lieutenant, commencing from the effective date of the reduction until the final Order of this Board, pursuant to R.C. 124.03 and R.C. 124.34.

(INSTRUCTION: The Appointing Authority will set off the fine against the back pay owed at the time of restoration. For example, if Dinardo is restored the same day as the final Board Order, there will be no money owed to Dinardo.)

It is further **ORDERED** that this Fine so levied should be construed as the highest level of discipline short of Removal contained within the Disciplinary Grid of the Department of Rehabilitation and Correction.



Casey - Aye
Tillery - Aye
McGregor - 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, June 09, 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 June 16, 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: 2015-RED-10-0219

Transcript Costs: \$438.00 Administrative Costs: \$25.00

Total Deposit Required: * \$463.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: June 24, 2016

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

Anthony Dinardo

Case No. 2015-RED-10-0219

Appellant

v.

May 12, 2016

Department of Rehabilitation and Correction,
Madison Correctional Institution

Appellee

Raymond M. Geis
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case arises from Appellant, Anthony Dinardo's ("Dinardo"), timely appeal of his disciplinary reduction/demotion from Correction Lieutenant (Lt.) to Correction Officer (CO) effective October 18, 2015. Dinardo received the R.C. 124.34 Order by hand delivery on October 14, 2016. This case was heard April 28, 2016 by Administrative Law Judge (ALJ) Raymond M. Geis.

Dinardo appeared and was represented by James J. Leo, Attorney at Law. Appellee, Department of Rehabilitation and Correction, Madison Correctional Institution ("MCI") was represented by State Assistant Attorneys General Matthew J. Karam and Kevin C. Hulick. Warden Rhonda Richard was Appellee's designee.

MCI reduced Dinardo primarily for engaging in a romantic relationship with CO Kristen Anderson ("Anderson"), whom he supervised and for related dishonesty.

MCI alleges the dishonesty component is twofold: (1) Dinardo failed to disclose that the relationship was anything other than "professional" when asked about it and (2) Dinardo suggested that Anderson send two emails shared between them to an investigator to bolster her EEO harassment case, however, the emails tended to characterize the relationship between him and her as purely professional - which was false.

MCI also reduced Dinardo for sending romantically toned emails to Anderson using state email and/or a state computer.

The parties more or less agree that the relationship was personal with a romantic tone that went beyond professional. The parties also agree that state email was used to facilitate the relationship in part. Dinardo rejects the notion that

he was dishonest by trying to cover up his relationship but admits that he did not technically fully disclose the romance.

Prior to this hearing, ALJ James Sprague issued an April 6, 2016 procedural order responsive to MCI's motion to exclude evidence of disparate treatment. The order held in abeyance a ruling on admissibility of one comparator, another Lieutenant found guilty of engaging in a personal relationship with a subordinate, and who received a two-day suspension. Evidence concerning the remaining comparators was proffered.

I then received this case for hearing. At issue is whether Dinardo's collective misconduct was so egregious as to warrant reduction in lieu of lesser discipline such as a suspension.

The pertinent 124.34 Order exhaustively states:

You violated the following SEOC: #5(F) – Damage, loss, or misuse of state owned or leased computers hardware/software, email, internet access/usage. #24 Interfering with, failing to cooperate in, or lying in an official investigation or inquiry. #27 – Failure of a supervisor to properly supervise or enforce work rules or failure to properly process employee payroll forms #37 – Any act or failure to act that could compromise or impair the ability of an employee to effectively carry out his/her duties as a public employee. #50 Any violation of ORC 124.34... During the course of an Administrative investigation it was found that you did in fact violate the Standards of Employee Conduct. You used a state owned computer to send and receive numerous non-work related personal emails. These emails were sent and received during working hours to a subordinate you were having a personal relationship with. You coached CO Anderson on what to include in her incident report regarding her allegations and advised her to include emails that contained false information during the investigation of these matters. Being involved in a personal relationship with a subordinate and exchanging emails impaired the subordinate's ability to carry out her duties as a public employee and has impaired and has impaired your ability to effectively carry out your duties as a supervisor. All of your actions

constitute a failure to supervise, neglect of duty and failure of good behavior.

SUMMARY OF WITNESS TESTIMONY

Appellant, Anthony Dinardo

Dinardo was called by both parties. He has 18 years of service with MCI. He is aware of MCI work rules. He admits to sending emails to CO Anderson using his state email account.

The subject matter within the emails included pictures of him with Anderson and her child at Kalahari waterpark. At various points in the emails, he remarks that he loves Anderson so much, that he misses her so much, that he wishes he could be with her, and wanted to cuddle.

He visited Anderson on occasion at her mother's home where Anderson lives, and would cuddle and watch TV, and slumber (but not become sexually intimate) with her. Dinardo felt their relationship was "on and off". They could not be together because he was going through a divorce. They were teased at work and there were rumors about a supposed affair between them, and this also complicated their relationship.

Dinardo testified that he did not get sexually intimate with Anderson until November of 2015 after his demotion. However, he did admit to having strong romantic feelings of love for her and to flirting with her and this predated supposed sexual activity. Also, they went on dates together as early as June 2015.

Dinardo openly admitted that his behavior toward Anderson was inappropriate under the circumstances. And Dinardo states, "I was not completely forthcoming with the answer" when asked about his failure to disclose the affair during an EEO investigation involving Anderson. (Note: Dinardo was not the charged party but was interviewed as a witness.)

Dinardo later related that he was also subject to pervasive teasing by the Captains on her shift and feared reprisal for reporting it. Dinardo stated he honored Anderson's wishes to handle the harassment her way, by taking progressive steps to speak with various correction officials before filing a complaint. At the same time, he suggested she go to the Union because he did not believe MCI officials would do anything.

CO Kristen Anderson (Dinardo's romantic interest)

CO Anderson was hired into MCI in the spring of 2014. Anderson stated she experienced harassment from various Captains while at MCI. The record reflects that Anderson exchanged emails with Dinardo regarding this harassment she was apparently experiencing. In an effort to demonstrate the starting point of the harassment, she forwarded these emails to the investigator.

She agrees that Dinardo suggested that she send these emails to the investigator, but that it was her choice. When asked if she was fully forthright representing her relationship with Dinardo *via* the emails, she replied that she forwarded the emails to defend herself against the "vile" acts by the Captain, and it had nothing to do with her relationship with Dinardo.

She testified that she casually dated Dinardo but did not reveal this to the investigator. She was angry about the rumors of romance between her and Dinardo. At one point, she was mad about a situation when his wife called in to his work.

Investigator Angela Hunsinger ("Investigator")

The Investigator is a 20-year veteran of the Department and serves as Deputy Warden and investigator at another institution. She was assigned to investigate Anderson's complaint. As part of the inquiry, she obtained Anderson's emails and reviewed them.

She interviewed Dinardo three times. On at least two occasions, she asked about the nature of Dinardo's relationship with Anderson and testified that she asked Dinardo in writing to describe his relationship with Anderson. Investigator identified the document signed by Dinardo stating the relationship was "professional". By comparing his responses to the subject matter of the emails, Investigator determined that Dinardo was dishonest about the nature of the relationship.

Warden Rhonda Richard ("Warden")

The Warden manages MCI and has 26 years of corrections experience. She states that she must have "absolute trust" and "comfort" with her management staff in order to make "quick decisions". Warden previously dealt with inappropriate relationships between supervisors and staff. She noted that such relationships are perceived as unfair and are known to cloud [supervisory] judgment.

Warden stated she reviewed the discipline packet and it was obvious to her that Dinardo's relationship with Anderson was romantic, and that he was not forthcoming about it during an official investigation. This led her to demote Dinardo because, she declared, she cannot trust him to tell the truth implying that she cannot afford to have him in a leadership role.

Warden distinguished Dinardo's discipline from the discipline issued to Lieutenant, Arthur Smith ("Smith"). Warden recollects that Smith admitted his inappropriate relationship right away when questioned on it.

She felt that warranted the 16-hour working suspension, which is the equivalent of a two-day suspension. For Warden, Dinardo's misconduct is much more serious because of her perception that he was dishonest.

In Warden's view, dishonesty rendered Dinardo incapable of performing the leadership role because she could not trust him anymore, hence his demotion to non-managerial status.

Warden testified that it was her practice to immediately separate employees engaged in improper relationships and that disciplinary decisions take time; due to the investigation and decision making process.

Labor Relations Officer ("LRO") James Hogon

The LRO manages discipline at MCI. He is a former Union local president. He is very familiar with the collective bargaining agreement ("CBA"). He testified that CBA section 17.05 governs selection of bargaining unit employees. The Sergeant classification is filled by bargaining unit employees.

He testified it was impossible to place Dinardo into a Sergeant position, but that placement into the CO position was possible, according to the CBA terms. [For Dinardo, this meant he had to go down two classifications instead of just one.]

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

There is little dispute in this case. Evidence establishes that Dinardo directly supervised Anderson and that he engaged in flirtation, developed romantic feelings for her, visited her outside of work to "snuggle" and nap with her, went on outings with her, and told her he loved her and missed her. At least some of these feelings were reciprocated.

Romantic relationships between supervisor and subordinate are prohibited in the workplace for various reasons. Appellee did not put forward any specific rule

prohibiting dating between supervisor and subordinate. Yet, the Warden testified regarding the reasons why this activity is problematic.

Evidence also establishes that Dinardo was asked about the nature of his relationship with Anderson. It is undisputed that Dinardo did not disclose the nature of the relationship during an EEO Investigation. But does this rise to dishonesty within the meaning of MCI work rules or R.C. 124.34?

Black's Law Dictionary, 6th Edition, Centennial Edition 1991 defines dishonesty as a "[d]isposition to lie, cheat, deceive or defraud, untrustworthiness; lack of integrity."

Regarding investigations, the Department's "Standards of Employee Conduct" creates an affirmative duty for employees to "fully cooperate" in any investigation or inquiry. Here the Employer was carrying out its affirmative duty to investigate a charge of harassment by Anderson.

In this case, Dinardo's perceived relationship with Anderson became fodder for some of the teasing they experienced. Their relationship was not dispositive to the question of whether Anderson was harassed. However, on its face, these rumors tended to show possible motivation for the harassment and would ostensibly aid the Employer in discerning the entire truth about the situation. (Note: No employee should be subjected to harassment for their association with others.)

Dinardo undoubtedly had several opportunities to come clean about the relationship during the investigation. Instead, he affirmatively misrepresented that it was just "professional". Thus Dinardo affirmatively misrepresented a material fact during an official investigation which by its very nature is untrustworthy.

It does not matter that Dinardo was just being interviewed as a witness, as he suggests. What matters is that his assertion was untrue, and the subject matter of the untruth was relevant to the investigation.

Next, the Employer argues that Dinardo conspired with Anderson to deflect the appearance of romantic activity by forwarding old emails to the investigator that tend to describe their relationship as platonic. Dinardo denies any intention to deceive his employer. He testified, he only suggested Anderson forward the emails to show that harassment by the Captain had started way earlier than the present. Anderson's testimony corroborates this.

Nevertheless, the content of the emails tends to mislead the Employer about the nature of their relationship. What both Dinardo and Anderson do not seem to realize is that their relationship is relevant to her harassment charges. (NOTE: The

fact of the relationship cannot be used to diminish their right to be free from illegal harassment). Indeed, Dinardo's participation in the relationship with Anderson may have engendered ill-conceived motivation for the alleged bad acts by others, albeit inadvertently and without malice toward Anderson.

The Employer had a duty to root out the cause of the harassment, if any, and remediate it. Any rumor mongering contributing to harassment could be more effectively diminished by ensuring that Dinardo and Anderson were not supervisor and subordinate. For this reason, Dinardo's encouragement of Anderson to provide the emails without concomitant disclosure of their relationship was deceiving.

Since we have established that Dinardo engaged in and concealed an inappropriate relationship, we must next establish the appropriate level of discipline. Warden strongly suggests that demotion to non-managerial status is the only option because of the dishonesty and lack of trust that comes with it. Warden gave a two-day suspension for a merely inappropriate relationship. But does dishonesty aggravate the misconduct to the demotion level?

The comparator, Lt. Arthur Smith, is relevant and similarly situated on the issue of inappropriate relationships. Accordingly, I admit evidence of same into the record for purposes of disparate treatment. From comparison, Dinardo should receive something more than two days, due to the aggravating factors of dishonesty and misuse of email.

I will have to depend solely on the Agency disciplinary grid and traditional principles of progressive discipline to recommend the appropriate level, because there were no dishonesty cases or personal use of email cases cited.

The Agency "Performance Track Disciplinary Grid" ("Grid") is found in the Employee Standards of Conduct. (Exhibit 11 at page 14) Dinardo has no prior discipline. (Exhibit 5 at page 2) Therefore, all references to the Grid are for the first offense.

As previously established, Dinardo inappropriately used state email in furtherance of his romance with Anderson. There are approximately 100 emails or short email chains between them over the course of approximately 6 months. (Assuming a 5 day, 8 hour per day week, and attributing all the emails to work time, this is less than one email per workday, even when viewing the facts most negatively against Dinardo.) The singular range of discipline for this offence (#5 f) is a written reprimand to one-day suspension.

The grid suggests the penalty of a written reprimand to a 1-day suspension, to removal for rule #27 (regarding improper supervision) and a 2-day suspension to removal for #37 (acts/omissions negatively affecting discharge of duties).

These two rules are substantively the same under the circumstances. Both charges arise from the same transaction or occurrence of the relationship. Accordingly, I use only the rule with the more serious minimum penalty and regard the other as a lesser included offense. To do otherwise, would be "stacking" charges to get to a higher discipline than would otherwise be warranted under the policy. (Note: Below, I add each separate offense together which is not redundant, and then merge them into a single combined level of discipline.)

Next, the grid suggests 2 days to removal for failure to cooperate during an investigation under Rule #24.

In the same vein, the low-end penalty for all non-redundant violations would be a 4 to 5 day suspension.

This consists of a written reprimand to 1-day suspension for improper use of email plus a 2-day suspension for the inappropriate relationship plus an additional 2 days for Dinardo's failure to cooperate during an investigation. Aggravation is considered below.

Dinardo had three opportunities to disclose the relationship during the investigation. However, because it was the same investigation and a continuation of the same interview, I decline to view it as three separate counts so it is not aggravating.

Dinardo most likely did not purposefully mislead with the intent to conspire to cover up his relationship with CO Anderson through his suggestion for her to forward emails. But, without concomitant additional disclosure, Dinardo committed an additional count of failure to cooperate in an official investigation or inquiry, meriting at least an additional two days. This is despite the notion that Dinardo's suggestion to Anderson was legitimately offered to establish the timeline of harassment. As mentioned, the Grid suggests at least two days for a first time offense of Rule #24, this time interfering with an investigation by way of providing misdirection by omission.

Finally, the Grid prescribes a written reprimand to removal for violations of R.C. 124.34. Again, this is a redundant charge stacked on top of all the other Rule violations arising from the same transaction. It will, therefore, not enhance the level of discipline.

Overall, the appropriate discipline is a 7-day suspension. I arrive at this level by adding up the following: 4 days (for 2 counts of failure to cooperate/interference with an investigation); 2 days (for the inappropriate relationship), and 1 day (for misuse of email).

The Grid's highest level suspension is 5 days but the corresponding policy states bargaining unit members will not receive a suspension greater than 5 days. It is silent regarding exempt employees. And, I take administrative notice that other appellants of this Department who are exempt from collective bargaining have filed appeals with this Board for suspensions in excess of 5 days as recently as this April.

The policy is also silent regarding demotion. However, R.C. 124.34 permits demotion also known as reduction. Given the permanent nature of demotion, it is widely considered more severe than suspension. It is also considered the last step before termination or an alternative to termination in cases where termination is contemplated.

Another factor to consider is Dinardo's past service. He has 18 years of service. It is a custom of jurisprudence in employee discipline cases that the level of discipline correlates inversely with tenure. This principle favors a less severe penalty than demotion.

CONCLUSIONS OF LAW

For these reasons articulated above, the demotion would ordinarily be reduced to a 7-day suspension without pay. The modified discipline would then be considered the last step before termination under the Grid. Dinardo would be restored to the post of Lieutenant.

However, I find that the Warden's initial decision was not arbitrary or capricious and was well intentioned and reasonable for the reasons she articulated. Indeed, the Warden appears to have acted expeditiously and decisively in addressing the situation involving third shift, when it was brought to her attention. Yet, Dinardo's demotion does have an unintentional disparate impact upon Dinardo *vis a vis* the Department's treatment of Lt. Arthur Smith.

Accordingly, I reluctantly support disturbing Warden's decision. Rather, I support imposing a lengthy fine equivalent to no back pay. This is due to Dinardo's long service, lack of prior discipline, the aforementioned disparate impact, and the penalties prescribed in the standards of conduct. Under the principles of progressive discipline, Dinardo should have one opportunity to earn back the trust lost arising from his misconduct.

Therefore, I respectfully **RECOMMEND** that Appellant's instant **REDUCTION** be **MODIFIED** to a **FINE** equivalent to the sum owed to Appellant representing the difference between his current pay and his back pay arising from restoration to the rank of Correction Lieutenant, commencing from the effective date of the reduction until the final Order of this Board, pursuant to R.C. 124.03 and R.C. 124.34.

(INSTRUCTION: The Appointing Authority will set off the fine against the back pay owed at the time of restoration. For example, if Dinardo is restored the same day as the final Board Order, there will be no money owed to Dinardo.)

I further **RECOMMEND** that this Fine so levied should be construed as the highest level of discipline short of Removal contained within the Disciplinary Grid of the Department of Rehabilitation and Correction.


Raymond M. Geis
Administrative Law Judge