

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

Cedric Tolbert,

Appellant,

v.

Case No. 2015-REM-03-0026

Department of Rehabilitation & Correction,

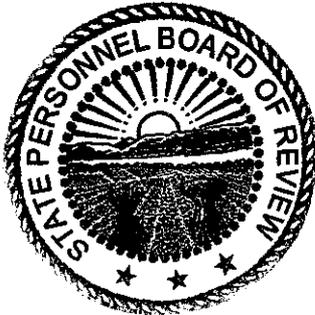
Appellee,

ORDER

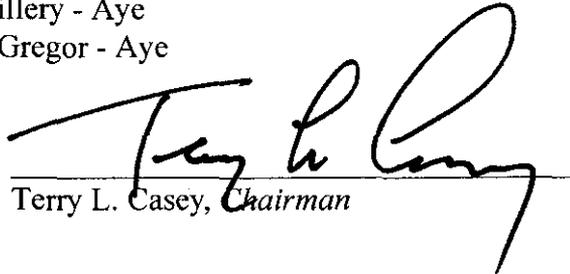
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellee's removal of Appellant Tolbert is **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.



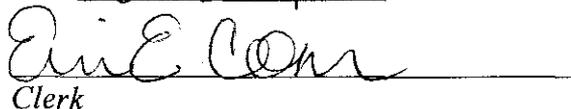
Casey - Aye
Tillery - Aye
McGregor - Aye


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-REM-03-0026

Transcript Costs: \$244.50 Administrative Costs: \$25.00

Total Deposit Required: * \$269.50

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

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

Cedric Tolbert

Case No. 2015-REM-03-0026

Appellant

v.

May 10, 2016

Dayton Correctional Institution
Department of Rehabilitation & Correction

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

Present at the record hearing held in this matter were the Appellant, Cedric Tolbert, represented by Matthew Schultz, Attorney at Law and Appellee Dayton Correctional Institution designee Jimmy Sexton, Lieutenant, represented by Tracy M. Nave and Matthew J. Karam, Assistant Attorneys General.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Tolbert was removed from his position of Activity Therapy Administrator effective March 9, 2015, for the following:

The reason for this action is that you have been guilty of Specifically: You have violated the following Standards of Employee Conduct Rules: SOEC #38 – Any act or failure to act that, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under supervision of the Department, or member of the general public. SOEC # 45 B – Without express authorization, giving preferential treatment to any individual under the supervision of the Department, or any individual within 6 months following their release from custody or supervision of the Department – B. The offering, receiving, or giving of anything of value. SOEC # 46 B – Engaging in any other unauthorized personal or business relationship(s) with any individual currently under the supervision of the Department or any individual within 6 months following their release from custody or supervision of the Department, or friends or family of same.

SOEC# 50 – Any violation of ORC 124.34 and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any acts of misfeasance, malfeasance, or nonfeasance in office.

As a result of an internal investigation on 7/03/2014, it has been determined that you engaged in an unauthorized relationship with an inmate incarcerated by attending the funeral of her Grandfather and visiting her family including the Grandmother and Cousin and taking breakfast to their house. In addition, you visited on another occasion and gave money (\$150.00) to the Grandmother for the Inmate. Your actions constitute a threat to the staff, inmates and security of the institution, gave preferential treatment to the inmate, and letters from the inmate indicate that an unauthorized personal relationship existed between you and the inmate which compromised your ability to perform your duties as an Activity Therapy Administrator and demonstrates a failure of good behavior.

Appellant Tolbert filed a timely appeal of his removal.

STATEMENT OF THE CASE

Appellee's first witness was Appellant Tolbert, as if on cross examination. Appellant Tolbert testified he began his career with Appellee in February, 1994, as a Library Assistant, and when he was removed from employment, he was an Activity Therapist Administrator, supervising General Activity Therapists. As such, he supervised activities for inmates. Some of the activities he coordinated were a 5K run for breast cancer, softball games, a Lupus run, memorial balloon launchings and other yard activities. Appellant Tolbert stated he treated the inmates like clients and gave them activities to do so they would be less violent, citing that the Institution only had four fights in a year. He stated he worked closely with those inmates classified as level 3 and 4.

Appellee's Exhibits 10 and 11 were identified by Appellant Tolbert as his receipt of the removal order and the removal order itself, respectively. Appellee's Exhibit 4 was identified as a list of the employee trainings he attended, including training on the Standards of Employee Conduct and Inmate Nexus. Appellee's Exhibit 5 was identified by Appellant Tolbert as his receipt for the Unauthorized Relationship Policy, which he signed on August 28, 2000, and Appellee's Exhibit 3 was identified as his signed receipt, dated December 18, 2012, for the Standards of

Employee Conduct. In looking at Appellee's Exhibit 6, the Standards of Employee Conduct, Appellant Tolbert agreed that it covers the topic of Unauthorized Relationship with an Inmate and states that an employee must notify a supervisor in writing if the employee knows an inmate. Appellant Tolbert stated his supervisor was Rudolph Pringle, Deputy Warden of Operations.

In looking at Appellee's Exhibit 2, Appellant Tolbert identified it as a nexus form which he signed in 2000, indicating he had no associations or relationships with any inmate. He stated he does not remember signing any other nexus form.

Appellee's Exhibit 7 was identified as the Unauthorized Relationships Policy. Appellant Tolbert stated that the policy provides that an unauthorized relationship will not be tolerated.

Appellant Tolbert testified he knows inmate Amber Swain, as he worked with her on a regular basis. He stated he attended inmate Swain's grandfather's funeral and went to the grandfather's home on the day of the funeral and took breakfast to the family, but testified that at that time, he did not know that the deceased gentleman was the grandfather of inmate Swain. He stated he did not know the last name of the deceased when he attended the funeral and went to the home. He testified he did not notify Mr. Pringle of his attendance at the funeral.

On direct examination Appellant Tolbert explained that he and inmate Swain's grandfather were Masonic brothers although they were not in the same lodge, but had attended some of the same parties. He stated he did not know the grandfather's last name, as he called him "Slick" or "Old School". Appellant Tolbert stated he was notified by another Masonic brother that the grandfather had passed. He stated he and approximately twenty to thirty other Masonic brothers attended the funeral and then he and a few others went to the widow's home, delivering food from Bob Evans and also gave the widow some money. Appellant Tolbert testified it is his habit to bring food to a family, as he always tries to support the family of a deceased person, as he would want the same done for him. He stated he did the same for a relative of Warden Lisath, although he was not a Mason. Appellant Tolbert stated the money given to the widow was the collection that resulted from passing the hat. He testified he did not think he actually handed the money to the widow, but did give her the food.

Appellant Tolbert stated he does remember inmate Swain stating at some point that her grandfather had passed, but he does not remember when. He denied ever exchanging or receiving a letter or phone call from inmate Swain.

Appellant Tolbert testified the training classes he attended are not taken seriously by the employees, rather they are viewed as a "get out of jail free day"

since the employees do not have to work those days and they get to sit around and talk to each other. He stated employees are walking in and out of training all day and no employee takes it seriously due to the way the trainings are presented. He stated the trainers seem as if they are just going through the motions.

Appellant Tolbert testified his only previous discipline consists of a written reprimand.

On re-cross examination Appellant Tolbert testified Warden Mack told him he did not have to complete the nexus forms for the funerals he attended. He stated he has stopped attending Masonic funerals now since he does not know if the person is related to an inmate.

Appellee's next witness was Eliza Swain, the widow of Mr. Swain. She testified she recognized Appellant Tolbert as someone she saw at her husband's funeral. She stated he brought some breakfast to the house and gave her some money at the funeral, telling her to give it to her grand-daughter, Amber. He told her he was a truck driver and a Mason. Ms. Swain testified Appellant Tolbert gave her more money when he went to her house and told her again to give that money to Amber. He also told her he was a friend of Amber's.

Appellee's next witness was Warden Wanza Jackson. She stated she has been the Warden at Dayton Correctional Institution since December, 2014, and it is her responsibility to maintain the safety and security of the facility and to manage the inmates and staff.

In looking at the Standards of Employee Conduct, Warden Jackson stated the Standards apply to all staff and under the rules, no one is permitted to have an unauthorized relationship. She stated that anytime an employee finds him or herself knowing someone incarcerated or a family member of someone who is incarcerated, a nexus form must be completed. Warden Jackson explained that just by knowing someone does not mean that the employee will be automatically terminated, instead, she would discuss the relationship with the employee and determine if either the staff person or the inmate could be transferred to a different prison.

Warden Jackson explained there is a risk to the institution when there is an unauthorized relationship, as such relationship could jeopardize the security, could result in contraband being brought in, could result in favoritism or could potentially result in an escape of an inmate.

Appellee's Exhibit 11 was identified as the Order of Removal which Warden Jackson stated she signed. She testified removal was warranted in this case due to

the severity of the charges involving an inappropriate relationship and the giving of money to family members.

On cross examination Warden Jackson stated it was not until after the charges were brought against Appellant Tolbert that he stated he was not aware of the relationship of the deceased to inmate Swain.

Appellee's next witness was Trooper Kimberly Trout, a plain clothes investigator out of Piqua who handles incidents at Appellee. Trooper Trout stated she has been a Trooper for approximately six years. She testified she went to the Swain's house with Lieutenant Sexton to ascertain if Ms. Swain knew Appellant Tolbert. While there, another grand-daughter was at the house, J'nay Bray Jackson, who told them that Appellant Tolbert was at the funeral and had a specific flower to put on the grave of her grandfather on behalf of inmate Swain.

On cross examination Trooper Trout testified she was not aware of any statement by inmate Swain that her cousin had a vendetta against her.

Appellee's final witness was Jimmy Sexton, a Lieutenant with Dayton Correctional Institution. He stated he began his employ there as a Correction Officer in approximately January, 1990. He testified he knows Appellant Tolbert as he worked with him both at Montgomery and Dayton Correctional Institutions.

Lieutenant Sexton testified he was involved in the investigation of Appellant Tolbert, as inmate Saunders came to him and told him she had letters from inmate Swain which indicated that Swain and Appellant Tolbert were having a relationship. Lieutenant Sexton explained that inmates Saunders and Swain were cell mates.

On cross examination Lieutenant Sexton testified when he checked Appellant Tolbert's phone records, the records did not show any phone calls between him and inmate Swain.

FINDINGS OF FACT

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

1. At the time of his removal, Appellant Tolbert was employed as an Activity Therapy Administrator. He had been employed for approximately twenty-one (21) years. His only previous discipline was that of a written reprimand.

2. Appellant Tolbert testified he received the Standards of Employee Conduct and the Policy regarding Unauthorized Relationships. He also attended several trainings regarding these policies. He completed one nexus form in 2000, stating he had no relationship to or with any inmate.
3. As an Activity Therapy Administrator, Appellant Tolbert interacted with inmates on a daily basis, providing activities for them to participate in. Appellant Tolbert knew inmate Amber Swain.
4. Appellant Tolbert was a member of a Masonic Lodge and as such, attended funerals of other Masons.
5. One funeral Appellant Tolbert attended was that of a fellow Mason who was the grandfather of inmate Swain. After the funeral, Appellant Tolbert went to the house of the deceased, along with other Masons, and took breakfast to the widow and also gave her some money, telling her to give it to her grand-daughter.
6. During another occasion, Appellant Tolbert gave more money to the widow, again telling her to give the money to her grand-daughter, inmate Swain.
7. Appellant Tolbert did not complete a nexus form stating his relationship with inmate Swain or with her grandfather.
8. The parties stipulated that Appellant Tolbert timely received the order of removal and that the order was signed by the proper person.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Tolbert to be affirmed, Appellee had the burden of proving by a preponderance of the evidence that the allegations contained in the removal order are true. Appellee has met its burden.

The testimony established that Appellant Tolbert was familiar with and had received the Standards of Employee Conduct and the Unauthorized Relationship Policy. He attended training on the Standards and had previously completed a nexus form in 2000, stating he had no relationship with any inmate. Appellant Tolbert testified he knew what the nexus form was for and stated he was told by the former Warden that he did not have to complete a nexus form for funerals he attended for persons that may have been related to inmates.

It is clear that Appellant Tolbert knew of and understood the purpose of a nexus form since he had completed one previously. Even though a previous Warden told him he did not have to complete a form for attending funerals, with the advent of a new Warden, Appellant Tolbert should have checked with her. Warden Jackson testified that the completing of a nexus form does not always mean that an employee is going to be disciplined. Instead, she stated it puts her on notice and she can then investigate and/or discuss the situation to determine if an alternative to discipline can be reached. When Appellant Tolbert did not file a nexus form, he took away that alternative.

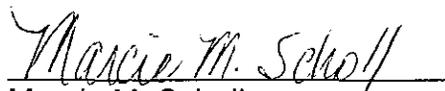
Ms. Swain testified it was Appellant Tolbert who gave her money on two occasions and told her to give the money to her grand-daughter, Amber, an inmate who Appellant Tolbert testified he knew. She also testified Appellant Tolbert brought breakfast to her house along with other Masons. Appellant Tolbert argued that because Ms. Swain testified Appellant Tolbert told her he was a truck driver, her testimony was not credible. That argument is not persuasive. Ms. Swain appeared credible in her testimony and she identified Appellant Tolbert as the person who gave her money on two occasions for her grand-daughter. If Appellant Tolbert is to be believed, the Masons took up a collection of money for Ms. Swain. If that were the case, why would Ms. Swain state that the money was earmarked for Amber? There was no reason for Ms. Swain to single out her grand-daughter in the testimony if she was not telling the truth. There was no reason for Ms. Swain to be untruthful, as she has no stake in Appellant Tolbert's continued employment. Also, if Appellant Tolbert was giving Ms. Swain money for Amber and carrying on a relationship with her, it is not out of the realm of possibility that he did tell Ms. Swain he was a truck driver to cast away any evidence of a relationship with Amber in his position as an employee of the institution. A motive can be seen for Appellant Tolbert to tell Ms. Swain he was a truck driver instead of his true occupation. There is no explainable motive as to why Ms. Swain would be fabricating her testimony.

Appellant Tolbert testified he did not know the last name of the deceased at the time he attended the funeral. This testimony is not credible. Appellant Tolbert testified he was in the Masons with the deceased and called him by a nickname and did not know his last name. While that may be true, it is hard to imagine that in going to a funeral for someone, the deceased's last name was not known. An obituary, a placard at the funeral home and figuring out where the deceased lived to deliver breakfast and money, would all involve having to know the last name of the deceased.

While Appellant Tolbert was a long time employee of the Appellee with minimal past discipline, anytime an employee has a relationship with an inmate, there is the possibility of a security threat to the institution. Appellant Tolbert testified he knew Amber as an inmate, he attended her grandfather's funeral, he

went to the home of the grandfather, gave money to the grandmother and told her specifically to give the money to Amber. All of those actions point to some sort of relationship between Appellant Tolbert and Amber. Appellant Tolbert did not file a nexus form disclosing any relationship between Amber's grandfather and himself nor of any relationship or friendship between himself and Amber. By not doing so, he appears dishonest and as if he is trying to hide something. When looking at Appellant Tolbert's actions, coupled with Ms. Swain's testimony, the evidence points to an unauthorized relationship between Appellant Tolbert and an inmate. The Standards of Conduct and the disciplinary grid provide for removal on a first offense of an unauthorized relationship. The Warden testified she felt removal was warranted due to the unauthorized relationship with an inmate and the giving of money to an inmate's family member. Both of those indiscretions are possible security breaches and given Appellant Tolbert's close contact with inmates, security is a definite concern. There was no showing of an abuse of discretion in the decision of the Warden to remove Appellant Tolbert from his position. Absent a finding of an abuse of discretion on the part of the appointing authority, this Board will not substitute its judgment for that of the appointing authority.

Therefore, I respectfully **RECOMMEND** that Appellee's removal of Appellant Tolbert be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge