

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

Darrell Bruffy,

Appellant,

v.

Case No. 2015-REM-06-0072

Franklin County Board of Developmental Disabilities,

Appellee,

ORDER

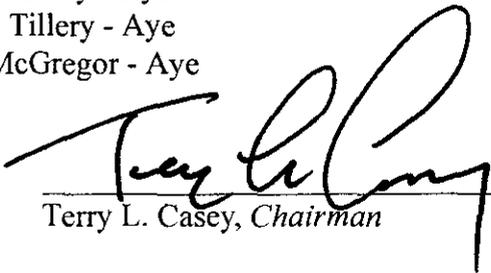
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 with Appellee is **AFFIRMED** pursuant to R.C. 124.03 and R.C. 124.34.



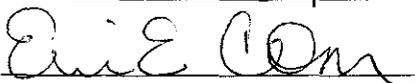
Casey - Aye
Tillery - Aye
McGregor - Aye


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-06-0072

Transcript Costs: \$397.50 Administrative Costs: \$25.00

Total Deposit Required: * \$422.50

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

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

Darrell Bruffy

Case No. 15-REM-06-0072

Appellant

v.

May 18, 2016

Franklin County Board of
Developmental Disabilities

Appellee

Jeannette E. Gunn
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 November 20, 2015. Appellant was present at record hearing and was represented by Merl H. Wayman, Attorney at Law. Appellee was present at record hearing through its designee, Director of Human Resources Dan Darling, and was represented by Denise L. DePalma, Assistant Prosecuting Attorney

The R.C. 124.34 Order of Removal issued to Appellant stated as grounds for his removal:

Terminated for violations of Board policies. Please see the attached Pre-Disciplinary Report.

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

Prior to his removal from employment, Appellant was employed by Appellee as a Training Specialist. Appellant was responsible for training and supervising adults with developmental disabilities to assist them with vocational and social skills.

In his capacity as Training Specialist, Appellant oversaw the area where the buses used by Appellee are washed, and supervised the clients who washed them.

On May 1, 2015, Appellant backed up a school bus at the Transportation East Compound and struck another parked school bus ("the Accident"). The parked school bus was adjacent to the fuel pump and both buses were situated near the vehicular entrance to the lot. No employees or clients were injured as a result of the Accident, but Appellant's bus struck the parked bus with sufficient impact that it visibly shook and suffered resulting significant damage.

As a result of the Accident, Appellee required Appellant to take a drug test on May 1, 2015. Appellant was contacted by the lab that conducted the drug test (WorkHealth) on the evening of May 1, 2015, and informed that he had tested positive for heroin. Appellant requested that a second analysis be performed by a different laboratory (Quest Laboratories); he received the results of the second analysis on or about May 13, 2015.

On May 5, 2015, Appellant's supervisor, Mike Dancho, requested that the Board hold a pre-disciplinary conference due to the Accident. A notice of pre-disciplinary conference was provided to Appellant on May 6, notifying him that the conference had been scheduled to take place on May 8, 2015. Appellee received a copy of the results of the drug test performed by WorkHealth on May 7, 2015.

On May 8, 2015, Appellee's Director of Human Resources, Dan Darling, modified the pre-disciplinary conference notice to include a charge arising from Appellant's positive drug test result. Mr. Darling advised Appellant of the additional charge and informed Appellant that he could postpone the pre-disciplinary conference, however, Appellant elected to proceed with the pre-disciplinary conference as scheduled.

Prior to May 1, 2015, Appellant and other Transportation Specialists had unintentionally damaged buses but had not been disciplined as a result of those accidents or required to undergo drug testing. There were no drug tests or pre-disciplinary hearings resulting from the Transportation Incident Reports for Darrell Bruffy reflected in Appellant's Exhibits 10-15.

Appellant had received Appellee's policy manual, including its Drug Free Workplace Policy and its Progressive Discipline Policy. The Drug Free Workplace Policy and the Progressive Discipline Policy provide for termination when an employee's drug test is positive, regardless of whether the employee has received prior discipline.

On May 22, 2015, the Board's Superintendent signed an R.C. 124.34 Order of Removal terminating Appellant's employment effective May 29, 2015. On May 28, 2015, Appellant received the R.C. 124.34 Order of Removal by certified mail. Appellant appealed his removal to the State Personnel Board of Review on June 2, 2015.

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. Evidence contained in the record indicates that Appellant was notified of and had an opportunity to participate in a pre-disciplinary hearing on May 8, 2015. Appellant had notice of the charges against him and an opportunity to respond to those charges. Although the additional charge arising from Appellant's positive drug test was added on the day of the pre-disciplinary hearing, testimony at record hearing established by a preponderance of the evidence that Appellant was made aware of the charge prior to the commencement of his pre-disciplinary conference, offered an opportunity to postpone the pre-disciplinary conference, and declined that opportunity.

Appellant argued in his Closing Brief that Appellee violated his due process rights by citing evidence in its Pre-Disciplinary Meeting Report that was not presented to him at the May 8, 2015, pre-disciplinary conference. A review of the Pre-Disciplinary Meeting Report indicates that Mr. Darling referenced not only the original drug test results, which had been received by the parties and presented at the May 8 conference, but also the results of the second drug test, which were not received by the parties until after the pre-disciplinary conference.

Upon consideration, I find that Appellant's due process rights were observed with regard to the charges arising from the Accident and the positive results of the May 1, 2015, drug test conducted by WorkHealth. Appellee failed to properly afford Appellant the opportunity to respond to evidence arising from the results of the drug test conducted by Quest Laboratories. Accordingly, any discipline imposed may not be properly based upon the results of the Quest Laboratories test. The parties did not dispute that Appellee otherwise substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in effectuating Appellant's removal.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based upon violations of Board policies. R.C. 124.34 provides that violation of any policy or work rule of an employee's appointing authority is an infraction upon which discipline may be premised. The pre-disciplinary report attached to the R.C. 124.34 Order of Removal provided to Appellant referenced alleged misconduct arising from Appellant's operation of a bus in connection with the Accident, and Appellant's positive drug test results.

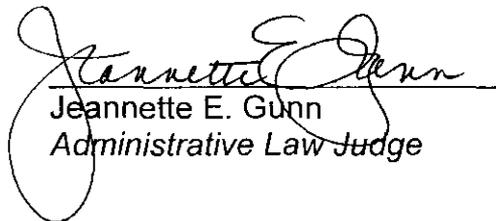
The parties stipulated that Appellant had received Appellee's policy manual, including both its Drug Free Workplace policy and its Progressive Discipline policy. The Drug Free Workplace policy specifically prohibits the use, possession, sale, manufacture or distribution of illegal drugs while working or while on Appellee's premises or other work locations, stating that employees are expected to report for work and render service without being impaired by or under the influence of illegal drugs of any kind. The parties further stipulated that the results of the drug test performed by WorkHealth on the urine sample given by Appellant on May 1, 2015, following the Accident were positive for heroin. Appellee's Progressive Discipline policy lists violation of the Drug Free Workplace Policy as a Group III offense for which discipline up to and including termination may be appropriate. No other policy violations were specifically identified by Appellee.

Appellant argues that he was subject to disparate treatment and produced documentation to establish that other Transportation Specialists who had been involved in a bus accident had not been ordered to take a drug test or removed from employment. Appellee asserted that Appellant was not similarly situated to the identified employees because his accident presented a greater safety risk based on its location and the force with which Appellant struck the parked bus.

This Board may consider evidence of disparate treatment in evaluating the appropriateness of any discipline which has been imposed. O.A.C. 124-9-11(B). The Board may hear evidence of disparate treatment to determine whether work rules or administrative policies have been selectively applied or whether discipline is uniform. O.A.C. 124-9-11(A). Appellee's Drug Free Workplace policy allows for drug testing in certain defined instances, as well as at the discretion of the Superintendent or his/her designee. In this instance, the circumstances of Appellant's accident did not mandate that he be drug tested, however, they were sufficient to support Appellee's exercise of discretion in ordering Appellant to undergo drug testing. Appellant produced no evidence that Transportation Specialists who had been involved in a bus accident and subsequently tested positive for illegal drug use received discipline that differed from that imposed upon Appellant.

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Accordingly, I find that Appellee has demonstrated by a preponderance of the evidence that it had an established standard of conduct that was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. Therefore, I respectfully **RECOMMEND** that Appellant's removal from employment with Appellee be **AFFIRMED** pursuant to R.C. 124.03 and R.C. 124.34.


Jeannette E. Gunn
Administrative Law Judge