

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Ryan McCarley,

*Appellant,*

v.

Case No. 2015-REM-10-0204

Gallia County Health Department

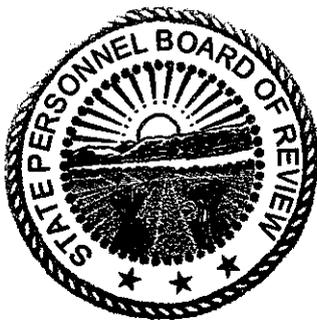
*Appellee,*

**ORDER**

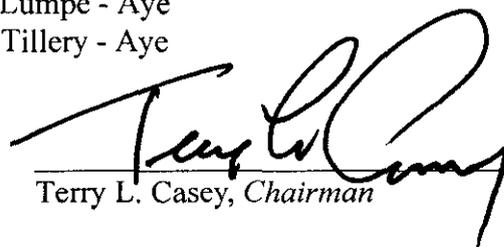
This matter came on for consideration upon a pre-hearing and a record hearing conducted by the Full Board in the above-captioned appeal.

After a thorough examination of the entirety of the record as permitted by law, including a careful examination of the parties' respective supplementations of the record, the Board hereby MODIFIES Appellant's removal to a time-served suspension and restores Appellant to his Sanitarian in Training position, effective with the date of issuance of this final Order; *for the reasons fully set forth in the Board Opinion, attached, hereto.*

Wherefore, it is hereby **ORDERED** that Appellant's **REMOVAL** be **MODIFIED** to a **TIME-SERVED SUSPENSION** and that Appellant be **RESTORED** to his Sanitarian in Training position, effective with the date of issuance of this final Order, pursuant to R.C. 124.03 and R.C. 124.34.



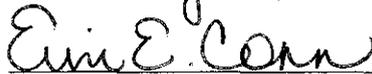
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
Terry L. Casey, *Chairman*

**CERTIFICATION**

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, May 31, 2016.

  
Erin E. Conn  
*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 7, 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-10-0204

Transcript Costs: \$187.50 Administrative Costs: \$25.00

Total Deposit Required: \* \$212.50

Notice of Appeal and Deposit Must  
Be Received by SPBR on or Before: June 15, 2016

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

Ryan McCarley,

*Appellant*

v.

Case No. 2015-REM-10-0204

Gallia County Health Department,

*Appellee,*

**OPINION**

We, the State Personnel Board of Review heard this case on May 4, 2016. Appellant Ryan McCarley (“McCarley”) appeared *pro se*. Appellee, Gallia County Health Department (“GCHD”), was represented by Eugene P. Nevada, Attorney at Law. Assistant Administrator Lou Ann Whittington, Personnel Director (“Whittington”) was the designee for GCHD.

At the conclusion of the record hearing, this Board gave the parties the opportunity to supplement the record and both parties timely filed their supplementations of the record.

This case arises from McCarley’s timely appeal of his termination from the position of Sanitary in Training with GCHD. McCarley was terminated on October 5, 2015 and received the 124.34 Order by hand delivery the same day.

The R.C. 124.34 Order states in pertinent part:

You failed to reveal to the employer that you were arrested on May 1, 2014, while returning from a work related activity, and that you were found to be 31% over the limit for alcohol. You claimed a day of sick leave for June 24, 2014; when you were really at a Court appearance. You had a firearm in your possession on Health Department property. In August 2015, you were asked to conduct after-hours mosquito spraying, but on the first night of the spraying, you did not set the alarm when you exited the building, leaving the health department unsecured. There are discrepancies between your time card and your written log, calling into question how you spent your time when you were supposed to be spraying. These offenses violated agency policies and constitute neglect of duty and failure of good behavior.

GCHD first called McCarley as a hostile witness and examined him as though on cross-examination.

Next, GCHD called Bobbi Conrad, a former Sanitary in Training to testify that McCarley showed her a firearm on GCHD premises.

Next, GCHD called Lou Ann Whittington, Personnel Administrator for GCHD

McCarley testified on his own behalf in narrative form.

GCHD argues that the aforementioned offenses individually and collectively warrant termination:

**Charge 1: Failure to report the OVI arrest**

For the first offense, GCHD cites its Personnel Policies and Procedures Manual (“PPP”), Chapter 7 Employee Conduct, section 7.10 Job-Related Convictions which states:

**An employee must report** job related convictions to the employer which will require time off from the job or are due to felonies, dishonesty, theft *and* **those things which impose restrictions upon the employee’s ability to perform his or her job (i.e. driver’s license suspension)**. Any employee must immediately notify the employer of the employee’s conviction of a felony, whether job related or not (felony as defined within the meaning of R.C. 124.34) (emphasis added) (Exhibit 3, p. 91)

Under GCHD’s interpretation, McCarley had an affirmative duty to report his arrest, even though he had not been convicted, because the ticket he received listed his license as suspended. Also, GCHD viewed McCarley’s arrest bore a sufficient nexus to his employment because he was returning from offsite training for work on this day (even though he was off the clock).

McCarley testified that he had occupational work driving privileges on May 1, 2014 at the time of his arrest for speeding and OVI (Operating a vehicle while intoxicated). At this time his license was already under suspension for failure to provide proof of financial responsibility (a.k.a failure to maintain automobile liability insurance). Whittington testified she was aware of this prior suspension.

The supplemented record shows that McCarley received a verbal reprimand from the Director of Environmental Health on April 21, 2014, admonishing him for “[d]riving on a suspended license. Did not notify employer of situation. [sic]” In the “Necessary Corrective Action” section, the Director wrote, “None, future situations should be brought to the employer immediately for assistance.” (Exhibit 28)

Though this Board does not acknowledge verbal reprimands for purposes of showing progressive discipline, we acknowledge that the verbal reprimand shows McCarley was warned about the obligation to immediately report license suspensions. Therefore, he had actual notice of his obligation to promptly report any issues with his ability to drive for the GCHD.

Whittington testified that McCarley obtained occupational driving privileges in conjunction with the proof of financial responsibility incident. The supplemented record bears this out. McCarley had occupational driving privileges for the period April 11, 2014 through February 14, 2015. (Exhibit 29)

McCarley testified that he didn't possess his occupational driving privileges letter on his person during his May 1<sup>st</sup> traffic stop. On its face, this might explain why McCarley was additionally charged with violation of R.C. 4510.16(A), driving under financial liability law suspension. (See Exhibit 5: ticket) However, we note that the occupational driving privileges letter apparently expired in February of 2015. (Exhibit 29)

We are puzzled why McCarley would need such a letter if he was eligible for reinstatement at the expiration of his limited driving privileges. Was there an additional intervening violation between the Financial Responsibility suspension and the OVI stop in May?

The judgment entry from the OVI stop in May shows that on June 24, 2015 McCarley was granted occupational privileges by the Butler County Area III court and that his automatic license suspension ("ALS") was terminated. It also shows the court imposed a 180 day suspension with occupational driving privileges. (See Exhibit 5 at p. 2: Judgement Entry And Sentence of the Court)

Because McCarley was initially charged with OVI, he had an affirmative duty to report his license suspension. R.C. 4511.192 (D) imposes an ALS for those testing above the legal limit for alcohol.<sup>1</sup> A Defendant may appeal the ALS which may have the effect of staying the suspension, but McCarley didn't appeal the ALS until May 6 when he was arraigned. Eventually, the OVI charge was amended to violation of R.C. 4511.20, *Operation in willful or wanton disregard of the safety of persons or property*, and his ALS was terminated. We take administrative notice that the disposition of his case includes a 180 day license suspension with occupational driving privileges *retroactive* to the date he was pulled over.

However, McCarley could not have known the outcome of his case at the time of his arrest. Therefore, PPP section 7.10 was applicable and McCarley had a duty to report his ALS as soon as possible after his arrest on May 1st. GCHD had a strong interest in knowing whether or not McCarley could drive in order to perform his job duties.

Both McCarley's and Whittington's testimony establish that operation of a county vehicle was necessary to perform many of the Sanitary in Training job duties (including spraying for mosquitos,

---

<sup>1</sup> (D) (1) If a law enforcement officer asks a person under arrest as described in division (A)(5) of section 4511.191 of the Revised Code to submit to a chemical test...and the test results indicate a prohibited concentration of alcohol...the arresting officer shall do all of the following: (a) On behalf of the registrar of motor vehicles notify the person that, independent of any penalties or sanctions imposed upon the person, **the person's Ohio driver's...driver's license...is suspended immediately, that the suspension will last at least until the person's initial appearance on the charge, which will be held within five days after the date of the person's arrest or the issuance of a citation to the person, and that the person may appeal the suspension at the initial appearance or during the period of time ending thirty days after that initial appearance;**... (emphasis added)

making restaurant inspections, etc.) The supplemented record contains the Sanitarian-in-Training position description which requires that the incumbent, “Maintains valid Ohio Driver’s License and insurability under Employer’s vehicle insurance policy...” (Exhibit 26)

McCarley implicitly argues that since he already had occupational driving privileges at the time of his stop, he was able to continue to drive. However, the limited driving privileges letter apparently expired in February of 2015 and the May 1 ticket cites McCarley for driving under a suspended license. Taken together, it tends to show that McCarley could not legally drive, (though not conclusively). [NOTE: In any event, we cannot conclude from the record whether McCarley actually drove for the GCHD while under ALS.]

Additionally, even if McCarley could legally drive prior to the May stop, he does not consider the effect of a new violation on his ability to subsequently drive legally. McCarley is on constructive notice of his ALS. We also presume that the arresting Officer told McCarley about his ALS in accordance with R.C. 4511.192 (D).

Alternatively, we are mindful that McCarley’s testimony suggests he genuinely believed that he could legally drive. His intentions were apparently not nefarious. Traffic law can be complex and difficult to understand. However, subjective belief alone will not excuse one from a legal obligation or an obligation to one’s employer.

**We hold that McCarley violated Section 7.10 of his Appointing Authority’s work rules when he failed to report his license suspension in conjunction with his May, 1 arrest.**

**Charge 2: Bringing a firearm onto GCHD property**

Next, GCHD charges McCarley with bringing a gun on GCHD property. PPP section 6.12 is entitled “Concealed Carry”. (Exhibit 3 at p. 65) This section generally prohibits carrying a firearm into any GCHD building. PPP, Chapter 8: Employee Discipline classifies “[c]arrying or possession of firearms...on health department property at any time without prior authorization” as a “Group III” offense. Group III carries a penalty “up to and including termination” for a first offense. (Exhibit 3 at p. 103)

GCHD called witness Bobbi Conrad to testify that McCarley showed her a handgun inside the GCHD building. PPP section 6.12 allows an employee with a “valid license to carry a concealed handgun” to bring it into the parking lot of GCHD as long as it is secured in a locked case, glove compartment or trunk. PPP section 6.12 C (2) expressly prohibits “Displaying a weapon or firearm while on duty...” Whittington testified that she learned of the alleged incident from a subordinate supervisor who shared that Conrad declared the matter to her. Whittington ordered Conrad to write a statement which declares:

I Bobbi Conrad was asked by Lou Ann to put in writing if I have ever personally witnessed Ryan McCarley in possession of a gun in the

GCHD building. Yes, I have. Had I not been asked this statement would not have been written against my fellow coworker. [sic]

We note that the statement recited above is neither sworn nor dated in its original form.

In contrast, McCarley testified on cross-examination to whether he brought a gun, "I did one day but it was not inside the building. The day I purchased a gun, I had it in pieces in a case, in a locked case, in my car." (Recording at 10:28 am)

Later, when asked by SPBR Member Tillery if he brought the gun, McCarley answered, "Not inside the building, I did not...when I bought that gun that day ... and we went to lunch **and I showed her that gun**... and it was in parts and pieces... and it stayed in my truck. (Recording at 12:07:32 – 12:07:48) (emphasis added)

Testimony by Whittington, McCarley and Conrad establish that some type of gun "display" occurred during the summer. At hearing, Whittington conceded that there was no further follow up on the matter until other charges were levied against McCarley in October.

The evidence is evenly weighted on this issue concerning the location of the firearm display. We note the apparent reluctance in Conrad's statement and her testimony. It is clear that she was not threatened by the showing of the firearm, and there is no allegation of workplace violence.

Moreover, McCarley raised doubt as to the reliability of Conrad's recollection that the gun was shown inside the building. On cross examination, McCarley elicited that Conrad was made to sign the statement at a time when she was facing termination. (Recording at 10:34:39 am) By doing so, he successfully raised the implication that Conrad was motivated to sign the statement near the time of her pre-termination hearing in order to leave on good terms with a good reference from GCHD. In our eyes, GCHD did not adequately refute this doubt on redirect. As a result we accord equal weight to Conrad's and McCarley's testimony and cannot conclude whether the firearm was present inside or outside.

Accordingly, we give McCarley the benefit of the doubt, and treat the firearm as having been displayed outside. A narrow reading of PPP section 6.12 Concealed Carry bans "displaying a firearm while on duty." Furthermore, "An employee... with a valid license to carry a concealed handgun who is reporting for work may remove the handgun from their own vehicle parked on health department property **only for the purpose of transporting it to and from** the trunk of the vehicle for storage." (emphasis added)

McCarley's testimony is self-evident. He denies that the gun was ever in the building but also does not suggest it was entirely off premises either. In this case, his gratuitous display of his firearm to coworker Conrad could seem to violate the PPP section 6.12 depending on his status and the exact location of the display.

Even though we find that the display occurred outside the building, the record is not conclusive as to whether the firearm was in the parking lot of GCHD, and if so, whether the parking lot was in fact on GCHD property. An additional issue is whether the display occurred during lunch, as McCarley testified, and whether one is on duty during lunch.

One of these findings is necessary to establish that he “displayed” the gun in violation of PPP 6.12 either while on duty or in the parking lot. Taking the matters together, we think the chances are good that one or the other or both conditions were present.

However, we decline to view this probable violation as egregious because GCHD’s own delayed response demonstrates that the matter was not considered urgent or very serious. Also, Conrad’s testimony dismisses any notion that it was brandished in some intimidating fashion.

**We hold that there is a thin preponderance of the evidence to show McCarley technically violated PPP section 6.12 when he “displayed” a firearm either assembled or disassembled to a coworker either while on duty or in the parking lot.**

### **Charge 3: Sick leave abuse**

The third charge raised by GCHD is abuse of sick leave which it characterizes as “dishonesty”. Specifically, McCarley asked for the whole day off from 8am to 4 pm on June 24, 2014. His request for leave stated that he had a doctor appointment at 3:00 PM. McCarley testified that his doctor’s office was in Columbus, Ohio. We are mindful that this trip takes more than two hours each way.

The leave was recommended by the supervisor. Later, Whittington discovered that McCarley had a court date on the same day but in the morning. GCHD argues that McCarley’s actions were dishonest as he did not disclose that he also needed to attend court as well as the doctor appointment. GCHD also reiterates that McCarley should have reported his need for time off due to his license being suspended under PPP section 7.10.

We decline to view McCarley’s use of sick leave as dishonest. He noted his appointment was at 3:00 PM directly on the leave request form, which is dated “5-30-14”. The request was for “6/24/14”. Whittington’s and McCarley’s testimony establish that sick leave is granted for the whole day upon request for single health care appointments which will not fill the entire day. GCHD waived its right to curtail McCarley’s incidental usage of the time off once it approved it -knowing well ahead of time that the doctor appointment wasn’t until one hour before his normal quitting time. **We hold that McCarley did not abuse sick leave under the GCHD policy and that GCHD failed to prove this charge by preponderant evidence.**

### **Charge 4: Neglect of duty for failure to set the building alarm**

Next GCHD charges McCarley with neglect of duty, stating he failed to arm the alarm on one night in August 2015 when leaving the building to conduct mosquito spraying. McCarley admits to

this but maintains the door was locked so that the building was still secure. Whittington acknowledges that she cannot tell whether the door was locked or not, only that the alarm wasn't set. **We conclude that it was McCarley's duty to reset the alarm before leaving, and that he failed to complete the task, and that this constitutes minor neglect of duty within the meaning of R.C. 124.34.**

#### **Charge 5: Work log discrepancies**

Whittington testified that she compared McCarley's mosquito spraying work logs against his time clock stamps and alarm arm/disarm logs and noticed that it was apparent on three to four occasions that he was at the GCHD building during times he noted that he was spraying. Whittington further testified that the entire spraying shift would be logged as program code 705 which is mosquito spraying. McCarley testified that he needed to return to the building to fix malfunctioning equipment and perform other tasks incidental to spraying. Whittington agreed that the equipment was "temperamental" meaning that it frequently broke down. Whittington testified that she did not investigate any further into the matter after her comparison of various logs because information "came together so fast".

We note that the investigation into this matter was wholly insufficient. Whittington discovered one piece of circumstantial evidence tending to show McCarley was in the building at unexpected times, but she did not follow up with McCarley for an explanation or bother to execute a surveillance plan if she suspected idleness. There is no dispute that McCarley got his spraying done by the deadline, and that his time entries show he was at work during all times relevant. **For these reasons, we hold that the evidence is insufficient to show that McCarley was inefficient or otherwise failed in good behavior concerning this charge.**

#### **What is the appropriate discipline?**

The GCHD has NOT proven by preponderant evidence 2 of the 5 charges in the R.C. 124.34 Order. Only a thin preponderance of evidence supports the second charge regarding a firearm on the premises, and only because he showed it to an apparently willing coworker. GCHD argues that any one violation is sufficient to sustain the removal. We disagree.

McCarley's tenure is only approximately a little over two years. He has no prior discipline for purposes of our review. As previously mentioned, he received a verbal reprimand for having his license suspended. Because of this, we find that McCarley had actual prior notice of the requirement to report any license suspension.

We note that GCHD apparently suffered no actual harm by McCarley's misconduct. There is nothing in the record to indicate that the building was burglarized from his failure to set the alarm. There is no evidence to show that McCarley actually drove for GCHD without occupational privileges. There is no evidence that employee Conrad was endangered or suffered psychological harm from the apparently consensual display of the firearm.

We further note that the case disposition for McCarley's OVI arrest culminated in a retroactive license suspension with occupational driving privileges. So, if McCarley could not drive, it was for a short period of time from arrest to arraignment. There is nothing in the record to show that McCarley's arrest is notorious (well publicized) or in any way disrupted GCHD's operation.

Whittington testifies strongly that McCarley's termination should be sustained because honesty is paramount for a Sanitarian who must perform inspections with a high degree of credibility and trustworthiness. Whittington regards McCarley's misconduct as dishonest when, in her view, he deceived his employer about the reason for needing time off and when he failed to report his OVI arrest.

We agree that McCarley's failure to report that his license was suspended appears to be a violation of GCHD policy, and GCHD has a compelling interest in knowing whether its employees are presently fit to carry out their job duties – in this case the ability to legally drive for the employer.

Still, this Board favors progressive discipline in cases where misconduct is not so egregious as to render an employee unfit for tenure on a first offense. Also, GCHD's investigation of McCarley was severely lacking.

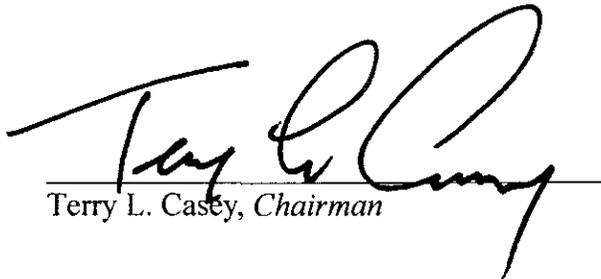
GCHD throws up numerous charges in this case along with the failure to report his license suspension. All this was done in an apparent effort to support summary discharge. This simply does not comport with the principle of progressive discipline.

Additionally, as pointed out by SPBR Chairman Casey, the GCHD apparently lacks a working performance appraisal process in that no evaluations were done on McCarley. We were a bit taken aback by Whittington's response on this matter which was less than positive in acknowledging the importance of fair appraisal so that Employee's know where they stand in relation to performance.

We choose instead to strike a balance between the principles of progressive discipline to correct McCarley's behavior and GCHD's compelling interest in deterring non-disclosure. It is our holding that the proper balance in this case is short of absolute termination.

**Therefore, the Order of termination is MODIFIED to a time-served SUSPENSION. McCarley shall be REINSTATED to the position of Sanitarian in Training.**

It is **SO ORDERED**.

  
Terry L. Casey, *Chairman*