

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

GARY GROSZEWSKI,

Appellant

v.

Case No. 05-REM-01-0016

LUCAS COUNTY COURT OF COMMON PLEAS,

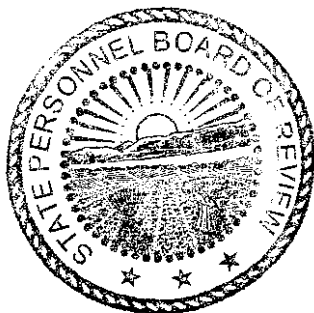
Appellee

ORDER

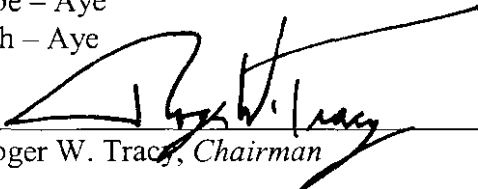
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the record and 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 be **AFFIRMED**, pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.



Tracy – Aye
Lumpe – Aye
Booth – Aye

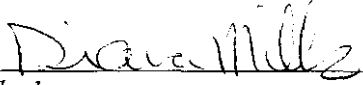


Roger W. Tracy, *Chairman*

CERTIFICATION

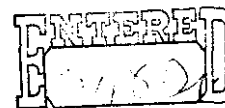
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that the foregoing is ~~(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 18, 2006.



Diane Millz
Clerk

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



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

Gary Groszewski,

Case No. 05-REM-01-0016

Appellant

v.

March 3, 2006

Lucas County Court of Common Pleas,

Elaine K. Stevenson

Appellee

Hearing Officer

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for consideration upon Appellant's timely appeal of his removal from employment as a case manager with Appellee, Lucas County Court of Common Pleas. A record hearing was held in this matter on September 7, 2005. Appellant was present at record hearing and appeared *pro se*. Appellee was present through its designee Bernard E. Hite, III, Department Director, and was represented by Assistant Prosecuting Attorney Brenda G. Meyer.

At the pre-hearing immediately preceding the record hearing, the parties stipulated to the jurisdiction of this Board.

The particulars of the O.R.C. 124.34 Order of Removal issued to Appellant are as follows:

On 10/22/04, you were stopped by the Toledo Police and found to have a baggie of marijuana in your pocket. You subsequently admitted to this illegality in a written statement. You also admitted having smoked marijuana with teenagers, thereby not only participating in illegal behavior, but allowing young individuals to do the same in your presence.

In addition to this infraction, you have also incurred one Oral Reprimand, one Written Reprimand, one Two-Day Suspension, and one Five-Day Suspension, for various infractions while an employee of Common Pleas Court as a Case Manager.

STATEMENT OF THE CASE

Bernard E. Hite testified that he has been employed by Appellee for approximately nine years. Mr. Hite stated that he currently holds the position of Department Director of the Lucas County Correctional Treatment Facility (CTF). Mr. Hite indicated that CTF is a state funded, community-based correctional facility that falls under the guidelines of the Judicial Corrections Board. Mr. Hite explained that CTF operates a prison diversion program utilized by the courts to sentence convicted felons to undergo drug and alcohol treatment in lieu of being sentenced to prison.

Mr. Hite testified that Appellant was employed by Appellee as a case manager at CTF for approximately three years. Mr. Hite explained that case managers are primarily responsible for providing case management and documentation, facilitating chemical dependency education groups, and working with other staff to provide information regarding chemical dependency treatment and education issues. Mr. Hite noted that CTF promotes total abstinence from drug and alcohol use. Mr. Hite stated that a case manager who actively uses an illegal substance compromises CTF's credibility and the substance abuse treatment process. Mr. Hite also noted that such illegal activity would cause embarrassment for the court should it become public knowledge.

Upon further questioning, Mr. Hite recalled that, on December 13, 2004, Appellant requested to be certified as a Law Enforcement Automated Data System (LEADS) technician. Mr. Hite explained that in order for an employee to be certified as a LEADS technician, the employee must be fingerprinted and undergo a criminal history check. Mr. Hite confirmed that Appellant was fingerprinted and a criminal history check was performed on December 13, 2004. Mr. Hite stated that Appellant's criminal history check revealed that Appellant had two outstanding bench warrants for his arrest. Mr. Hite identified Appellee's Exhibit 1 as a copy of the LEADS printout for Appellant showing the outstanding bench warrants for Appellant's arrest. Mr. Hite noted that one of the bench warrants issued for Appellant's arrest was for misdemeanor possession of drugs. Mr. Hite identified Appellee's Exhibit 2 as a copy of the October 22, 2004 Toledo Police Department crime report regarding Appellant's drug possession.

Mr. Hite confirmed that, on December 13, 2004, he met with Appellant to discuss Appellant's conduct on October 22, 2004. Mr. Hite identified Appellee's Exhibit 3 as a copy of Appellant's "Garrity Warning," which was signed by Appellant on December 13, 2004. Mr. Hite indicated that Unit Manager Sean McConnell, Unit Manager Bill Muckinhaupt, and Court Deputy Rocky Cutlip were also present at the December 13, 2004 meeting. Mr. Hite noted that Mr. Cutlip was not present for the entire meeting.

Upon further questioning, Mr. Hite recalled that when he asked Appellant whether he was aware that there was a warrant for his arrest, Appellant indicated that he did not know of the warrant nor did he know why there would be a warrant for his arrest. Mr. Hite stated that when he showed Appellant the LEADS report and the October 22, 2004 Toledo Police Department crime report, Appellant admitted that, on October 22, 2004, he received a small bag of marijuana from someone in an alley, and that shortly after leaving the alley, he was stopped by a Toledo police officer. Mr. Hite further stated that Appellant indicated that the police officer discovered the marijuana in Appellant's pocket. Mr. Hite identified Appellee's Exhibit 4 as a copy of the notes of the December 13, 2004 meeting with Appellant.

Mr. Hite identified Appellee's Exhibit 5 as a copy of Appellant's written statement regarding his conduct on October 22, 2004. Mr. Hite identified Appellee's Exhibit 6 as a copy of the December 13, 2004 letter to Appellant notifying Appellant that he was being placed on paid administrative leave pending an investigation. Mr. Hite identified Appellee's Exhibit 7 as a copy of the acknowledgment of receipt of the notice of paid administrative leave, signed by Appellant on December 13, 2004.

Mr. Hite testified that he conducted a second meeting with Appellant on December 15, 2004. Mr. Hite identified Appellee's Exhibit 8 as a copy of the minutes of the December 15, 2004 meeting. Mr. Hite stated that Unit Manager Sean McConnell and Unit Manager Bill Muckinhaupt were also present at the December 15, 2004 meeting.

Mr. Hite stated that, during the December 15, 2004 meeting, he discussed Appellant's admission that he occasionally smoked marijuana with teenagers that were eighteen and nineteen years of age. Mr. Hite recalled that Appellant indicated to him that he and the teenagers would gather in his grandmother's garage and he would take a hit of a joint that was passed around. Mr. Hite recalled that Appellant stated that smoking marijuana was no more than a traffic ticket and that the states were leaning toward legalizing marijuana. Mr. Hite stated that when he questioned Appellant about the dates he used marijuana, Appellant indicated that he had used marijuana during the week of December 4, 2004 through December 11, 2004. Mr. Hite noted that Appellant later became vague about the time period he had smoked marijuana.

Upon further questioning, Mr. Hite confirmed that Appellant told him that he was using marijuana to alleviate his neck and back pain. Mr. Hite identified Appellee's Exhibit 9 as a copy of a December 7, 2004 medical release authorizing Appellant to resume his regular job duties.

Mr. Hite identified Appellee's Exhibit 10 as copies of CTF time sheets for Appellant. Mr. Hite indicated that the time sheets cover four separate weeks. Mr. Hite noted that the time sheets indicate that Appellant was working during the week of December 4, 2004 through December 11, 2004.

Mr. Hite identified Appellee's Exhibit 11 as a copy of his report recommending that Appellant's employment be terminated. Mr. Hite identified Appellee's Exhibit 12 as a copy of his memorandum to Administrative Director Fred Schmidt concerning that recommendation. Mr. Hite identified Appellee's Exhibit 13 as a copy of Administrative Director Schmidt's recommendation that Appellant's employment be terminated. Mr. Hite identified Appellee's Exhibit 14 as a copy of the memorandum from Judge Wittenberg to Court Administrator Jean Atkin regarding the recommendation that Appellant's employment be terminated. Mr. Hite identified Appellee's Exhibit 15 as a copy of Appellant's Notice of Termination. Mr. Hite confirmed that Appellant also received an O.R.C. 124.34 Order of Removal.

Mr. Hite identified Appellee's Exhibit 16 as a copy of Appellee's disciplinary policy. Mr. Hite identified Appellee's Exhibit 17 as a copy of the receipt of disciplinary procedures policy, signed by Appellant. Mr. Hite identified Appellee's Exhibit 18 as a copy of the Acknowledged of Receipt of Policies & Procedures Manual and Ohio Ethics Law and Related Statutes Handout, signed by Appellant on November 5, 2001. Mr. Hite identified Appellee's Exhibit 19 as a copy of Appellee's Drug-Free Workplace Policy. Mr. Hite identified Appellee's Exhibit 20 as a copy of Appellee's Code of Conduct for court employees. Mr. Hite confirmed that Appellant received copies of Appellee's policies and procedures, as reflected in the identified exhibits.

Mr. Hite identified Appellee's Exhibit 21 as a copy of Appellant's acknowledgment of receipt of revised policies, signed by Appellant on February 15, 2002 and January 21, 2003. Mr. Hite identified Appellee's Exhibit 22 as a copy of updated policies received by Appellant on December 15, 2003.

Mr. Hite identified Appellee's Exhibit 23 as copies of Appellant's disciplinary history. Mr. Hite confirmed that Appellant's disciplinary history consists of an oral reprimand, effective March 13, 2003; a written reprimand, effective June 10, 2003; a five-day suspension, effective September 14, 2003; and a two-day suspension, effective October 12, 2004.

Mr. Hite identified Appellee's Exhibits 24, 25, 26, and 27 as a copies of Appellant's performance appraisals. Mr. Hite identified Appellee's Exhibit 28 as a copy of the case manager position description.

On cross-examination, Mr. Hite testified that he had no knowledge of other CTF employees using illegal drugs. Mr. Hite recalled one instance where he terminated an employee who was discovered to have drug paraphernalia in her home. Mr. Hite indicated that he has not conducted any drug testing of employees.

Mr. Hite confirmed that December 13, 2004 was the date that he first learned that Appellant had an outstanding bench warrant for his arrest. Mr. Hite further confirmed that Appellant had admitted to smoking marijuana with teenagers in his grandmother's garage.

Upon further cross-examination, Mr. Hite confirmed that Appellant had told him that he had been involved in two automobile collisions in July 2004. Mr. Hite stated that he was aware that Appellant was on medication for back and neck pain. Mr. Hite confirmed that Appellant had told him that he smoked marijuana to alleviate his back pain. Mr. Hite further confirmed that he did not have Appellant tested for drugs.

Mr. Hite noted that Appellee's drug policy states that employees are to conduct themselves in such a manner as to foster public trust by maintaining an expectation for integrity, honesty, and responsibility for both on and off the job conduct.

Upon further questioning, Mr. Hite confirmed that Appellant had once reported that a CTF employee was operating an office football pool. Mr. Hite testified that he investigated that issue and found that it was not illegal to have an office football pool and that the office football pool in question was not conducted in a manner that was against Appellee's policies.

Upon further cross-examination, Mr. Hite testified that he had no knowledge regarding a court employee allegedly indicted for welfare fraud. Mr. Hite further testified that although he was aware that another court employee had been charged or convicted of domestic violence, the incident occurred before he became director and he was not familiar with the particular circumstances of that case.

Mr. Hite stated that while there were instances during the December 13 and 15, 2004 meetings where Appellant expressed some remorse for his October 22, 2004 conduct, Appellant never accepted full responsibility for his actions.

On re-direct examination, Mr. Hite explained that he did not consider it necessary to conduct drug testing on Appellant because Appellant provided both verbal and written statements acknowledging that he smoked marijuana.

Frederick Schmidt testified that he has been employed by Appellee for approximately thirty-one years. Mr. Schmidt stated that he is the Administrative Director of Court Services. Mr. Schmidt indicated that he acts as the due process hearing officer for court employees and that he conducted Appellant's pre-disciplinary hearing. Mr. Schmidt identified Appellee's Exhibit 29 as copies of the two pre-disciplinary hearing notices issued to Appellant. Mr. Schmidt noted that Appellant requested that the pre-disciplinary hearing be rescheduled. Mr. Schmidt noted that Appellant's pre-disciplinary was held on January 4, 2005.

Mr. Schmidt testified that, during Appellant's pre-disciplinary hearing, Appellant was given the opportunity to respond to the allegations made against him. Mr. Schmidt confirmed that Appellant provided statements admitting that he smoked marijuana. Mr. Schmidt confirmed that Appellee's Exhibit 13 is a copy of his recommendation that Appellant's employment be terminated.

Appellant testified that he had intense back pain due to an automobile accident, and that the medications he took for his back pain made him lethargic. In addressing the issue of his conduct on October 22, 2004, Appellant stated that, "when the kid asked me if I wanted a little pot, I said yes, I never smoked it, I put it in my pocket and I was found with it." Appellant averred that he was remorseful from the beginning and that he does not advocate the use of marijuana. Appellant indicated that if he had been tested for marijuana use in December 2004 the test would have shown "no levels or low levels" of marijuana. Appellant averred that he smoked marijuana to alleviate his back pain. He indicated that he used marijuana only a couple of times in 2004, and he has not smoked marijuana since that time. Appellant stated that terminating his employment was too harsh a discipline considering his contributions to CTF and the fact that he admitted to his October 22, 2004 conduct.

Appellant further stated that his assertions concerning a court employee allegedly charged with welfare fraud and a court employee allegedly convicted of domestic violence were evidence of disparate treatment that should be considered by this Board in evaluating the discipline imposed in this case.

On cross-examination, Appellant confirmed that the allegations he raised concerning disparate treatment did not involve employees charged with illegal drug use. Appellant then stated that he was not sure of that information.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at record hearing, and the entirety of the record, I make the following findings of fact:

1. Prior to the termination of Appellant's employment on January 15, 2005, Appellant was employed by Appellee as a case manager at the Lucas County Correctional Treatment Facility (CTF). Appellant held that position for approximately three years.
2. CTF is a state funded, community-based correctional facility that falls under the guidelines of the Judicial Corrections Board. CTF operates a prison diversion program utilized by the courts to sentence convicted felons to undergo drug and alcohol treatment in lieu of being sentenced to prison. CTF promotes total abstinence from the use of drugs and alcohol.
3. As a case manager, Appellant was responsible for providing direct case management services to residents and aftercare clients based on individual treatment plans. Appellant served as a primary counselor of residents and aftercare clients and he was a primary resource for the coordination of service needs for residents and aftercare clients. Appellant facilitated individual counseling, group co-facilitation, crisis intervention, and he reviewed treatment plans.
4. Appellee's Code of Conduct Policy states that employees are expected, at all times, to represent the Court with the highest professional attitude of service to the community, and that employees will be held accountable for their behavior on the job and, in some instances, off the job. Appellee's Drug-Free Workplace Policy states that, ". . . it is the policy of the court to foster public trust by maintaining an expectation for integrity, honesty, and responsibility for both on and off the job conduct. . . ."
5. Appellant received copies of and understood Appellee's Policies and Procedures. Specifically, Appellee's Code of Conduct Policy and Appellee's Drug-Free Workplace Policy.
6. Appellant's previous discipline consists of the following actions: an oral reprimand; a written reprimand; a two-day suspension; and a five-day suspension.
7. On December 13, 2004, Appellee received the results of Appellant's criminal history background check, which was initiated pursuant to Appellant's request to be certified as a LEADS technician. The criminal history report revealed that Appellant had an outstanding bench warrant for his arrest for misdemeanor possession of drugs.

8. During a meeting with Appellant on December 13, 2004, Appellee questioned Appellant concerning the outstanding bench warrant. Initially, Appellant indicated that he did not know of the bench warrant, nor did he know the reason such a warrant was issued. Upon showing Appellant his LEADS report, Appellant admitted that, on October 22, 2004, Appellant obtained a baggie of marijuana from an individual in an alley in Toledo, Ohio. Appellant was immediately stopped by a Toledo police officer, who found the baggie of marijuana in Appellant's pocket.
9. During a second meeting held on December 15, 2004, Appellant also admitted that he smoked marijuana with teenagers.
10. On January 14, 2005, Appellant was removed for failure of good behavior pursuant to O.R.C. 124.34. The specific allegations contained in Appellant's O.R.C. 124.34 Order of Removal concern Appellant's conduct on October 22, 2004, and his admission that he smoked marijuana with teenagers.
11. Prior to Appellant's termination from employment, Appellee conducted a pre-disciplinary hearing on January 4, 2005. At that pre-disciplinary hearing, Appellant had an opportunity to respond to the charges made against him.
12. Appellant's allegations of disparate treatment are not supported by the information contained in the record, in that Appellant failed to establish through testimony or documentary evidence that the employees he identified at record hearing were similarly situated to him in either position or circumstance.

CONCLUSIONS OF LAW

O.R.C. 124.34(A) provides that the tenure of every employee in the classified civil service of the state shall be during good behavior and efficient service, and no such employee shall be reduced in pay or position, fined, suspended or removed, except for one or more of the enumerated grounds listed in this statute, grounds that include incompetency, inefficiency, insubordination, dishonesty, neglect of duty, and any other failure of good behavior. In an appeal of a disciplinary action taken pursuant to O.R.C. 124.34, this Board may affirm, disaffirm, or modify the judgment of the appointing authority.

* * * *

The record established that Appellant was employed by Appellee as a case manager at the Lucas County Correctional Treatment Facility (CTF). CTF is community-based correctional facility, which operates a prison diversion program utilized by the courts

to sentence convicted felons to undergo drug and alcohol treatment in lieu of being sentenced to prison. Residents assigned to CTF are guided through the treatment process by case managers. A case manager provides direct case management services to residents and aftercare clients based on individual treatment plans. A case manager serves as the primary counselor of residents and aftercare clients and serves as the primary resource for the coordination of service needs of residents and aftercare clients. A case manager facilitates individual counseling, group counseling, crisis intervention, and reviews treatment plans.

Appellee's Code of Conduct Policy states that employees are expected, at all times, to represent the Court with the highest professional attitude of service to the community, and that employees will be held accountable for their behavior on the job and, in some instances, off the job. Appellee's Drug-Free Workplace Policy states that, ". . . *it is the policy of the court to foster public trust by maintaining an expectation for integrity, honesty, and responsibility for both on and off the job conduct. . .*." The record established that Appellant received copies of and understood Appellee's policies.

The testimony presented and evidence admitted at record hearing established that, on October 22, 2004, Appellant obtained marijuana from an individual in an alley in Toledo, Ohio. Appellant was immediately stopped by a Toledo police officer, who had observed the transaction and who discovered the marijuana in Appellant's pocket. The record further established that Appellant admitted to having smoked marijuana with teenagers. On January 15, 2005, Appellant was removed from employment for his conduct on October 22, 2004, and for having smoked marijuana with teenagers.

In considering Appellee's employee conduct policies and the job responsibilities of CTF case managers, I find that CTF case managers are required to conduct themselves, both on and off the job, in a manner appropriate for their primary function, which is to provide substance abuse counseling to CTF residents. In this case, Appellant's conduct clearly is not appropriate conduct for a CTF case manager and is of such a serious nature as to jeopardize CTF operations. Accordingly, I further find that Appellant's conduct constitutes failure of good behavior within the meaning of O.R.C. 124.34.

Appellant argues, however, that removal from employment is not an appropriate disciplinary response to his conduct because he smoked marijuana to alleviate his back pain. Appellant further argues that removal is not appropriate discipline in his case because he admitted to his conduct and he was remorseful.

Appellant's arguments are not persuasive. First, I note that Appellant did not admit to his October 22, 2004 conduct until he was confronted with the criminal history report showing the outstanding bench warrant for his arrest for misdemeanor drug possession.

Second, I note that Appellant's testimony at record hearing was focused on minimizing the seriousness of the charges contained in his removal order. For instance, Appellant testified that he only smoked marijuana a couple of times, and he pointed out that he did not actually smoke the marijuana he obtained on October 22, 2004. Third, I note that Appellant never acknowledged that it is illegal in the State of Ohio to possess and to use marijuana, and he never acknowledged the very serious nature of his misconduct with respect to smoking marijuana with teenagers.


Appellant further argues that removal from employment is not an appropriate disciplinary response to his conduct because his removal constitutes disparate treatment. O.A.C. 124-9-11 provides that an employee may introduce evidence of disparate treatment between that employee and other similarly situated employees of the same appointing authority for the purpose of evaluating the appropriateness of the discipline imposed.

Although Appellant attempted to introduce evidence regarding disparate treatment pursuant to O.A.C. 124-9-11, Appellant failed to establish for the record that the employees he identified at record hearing were similarly situated to him in either position or circumstance.

Lastly, it is noted that Appellant was employed by Appellee for approximately three years. Appellant's previous discipline during his employment with Appellee consists of an oral reprimand, a written reprimand, a two-day suspension, and a five-day suspension.

RECOMMENDATION

After careful consideration of the evidence in the record and the totality of the circumstances, I find that the charges proven in Appellant's O.R.C. 124.34 Order of Removal support Appellant's removal from employment. Therefore, I respectfully **RECOMMEND** that Appellant's removal be **AFFIRMED**, pursuant to O.R.C. 124.03 and O.R.C. 124.34.


Elaine K. Stevenson
Hearing Officer