

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

Chris R. Graham,

Appellant,

v.

Case No. 05-REM-02-0044

Department of Rehabilitation and Correction,
Pickaway Correctional Institution,

Appellee.

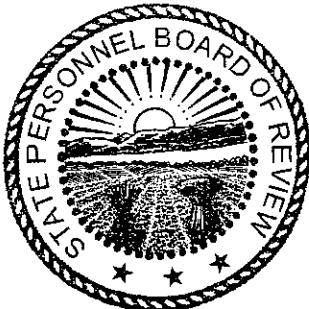
ORDER

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 findings of the Administrative Law Judge yet, for the reasons set forth herein, must modify the Administrative Law Judge's recommendation of disaffirmance to a five-day suspension.


Appellee demonstrated by a preponderance of the evidence that Appellant accepted mail delivery of a \$25.00 sequentially numbered gift certificate. Appellee also demonstrated by a preponderance of the evidence that Appellant retained that same certificate for a number of months after an institutional investigator first questioned Appellant about the certificate. There is no question that Appellant recalled receiving and possessing that certificate upon first being questioned by the investigator. Even though Appellant allowed a number of months to elapse before finally turning in that certificate, there is also no question that Appellant did turn in same and that Appellant never redeemed the certificate. While Appellant may or may not have been blameless in receiving the certificate, turning in that certificate is an act that Appellant should have performed. His failure to perform that act in a timely manner constitutes nonfeasance as cited by Appellee in the instant R.C. 124.34 order of discipline. Appellant's previous discipline includes a two-day suspension and a five-day suspension that has been modified to a written reprimand. Accordingly, Appellant's proven acts and/or omissions in this appeal, combined with his pertinent previous discipline, merit a five-day suspension from his position of Penal Industries Manager 1.

Wherefore, it is hereby **ORDERED** that Appellant's removal from the position of Penal Industries Manager 1 be **MODIFIED** to a five-day suspension, to be effectively served for the first five days beginning with the date of February 3, 2005 that Appellant would have been scheduled to work. Appellant shall thereafter be reinstated to his position. Appellant is to receive any pertinent back pay and benefits due as a result of the issuance of this Order, subject to setoff, pursuant to R.C. 124.34.



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, June 23, 2006.

Dianna Mills
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**

Chris R. Graham,

Case No. 05-REM-02-0044

Appellant

v.

April 24, 2006

Department of Rehabilitation and Correction,
Pickaway Correctional Institution,

Appellee

Elaine K. Stevenson
Hearing Officer

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on to be heard due to Appellant's timely appeal of his removal from employment with Appellee, Department of Rehabilitation and Correction. A record hearing was held in this matter on November 9, 2005. Appellant was present at record hearing and was represented by Thomas M. Tyack, Attorney at Law. Appellee was present through its designee, Labor Relations Officer Christina Wendell, and was represented by Assistant Attorneys General Quinn Dorgan and Nicole S. Moss.

At the pre-hearing held immediately preceding the record hearing, the parties stipulated to the jurisdiction of the State Personnel Board of Review over the subject matter of this proceeding. Appellant stipulated that he received notice of and attended a pre-disciplinary hearing, at which time he had the opportunity to explain his position regarding the charges made against him. Appellant further stipulated that his previous discipline includes a two-day suspension, effective September 29, 2004, and a five-day suspension, effective January 10, 2005.

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

Rule 49: 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 other acts of misfeasance, malfeasance or nonfeasance in office and Rule 16: Misusing official position for personal gain, to include but not limited to the accepting or

soliciting of bribes in the course of carrying out assigned duties. You provided your home address to a sales representative from a company located in Atlanta that you conducted sale business with. You self-admitted to receiving gifts such as a restaurant coupon and a NASCAR cup at your residence. The restaurant confirmed that the gift certificate you submitted was purchased by a large corporation in Atlanta.

STATEMENT OF THE CASE

In its case in chief, Appellee called the following witness: Deputy Warden Kathleen Butler, Appellant, Corrections Officer Jeffrey A. Bisel, and Investigator Jeffrey T. Howard.

Kathleen Butler testified that she is employed by Appellee as the Deputy Warden of Administration at Pickaway Correctional Institution (PCI). Ms. Butler stated that she is responsible for supervising the administrative support areas at PCI, including maintenance, food service, laundry, and the Ohio Penal Industries (OPI) shops located at PCI. Ms. Butler explained that OPI is a separate for-profit agency that operates various penal industries, including print shops and milk processing plants.

Ms. Butler identified Appellee's Exhibit 14 as a copy of Appellee's Standards of Employee Conduct, effective October 17, 2004. Ms. Butler indicated that these standards govern all of Appellee's employees. Ms. Butler stated that all of Appellee's employees receive annual in-service ethics training. Ms. Butler indicated that PCI employees receive thirty-two hours of in-service training each year.

Ms. Butler testified that she was Appellant's immediate supervisor for nine months. Ms. Butler confirmed that Appellant had authority to purchase supplies for the Beverage Processing Center (BPC) located at PCI. Ms. Butler indicated that Appellant had a \$1,000.00 limit per each vendor purchase made on his payment card and that Appellant had discretion to select from which state vendor he would purchase supplies.

On cross-examination, Ms. Butler indicated that the OPI Farm Supervisor Kevin Reid was responsible for reviewing Appellant's payment card log and signing off on the purchases made by Appellant. Ms. Butler confirmed that Mr. Reid is an employee of OPI rather than PCI.

Appellant testified that he was employed by Appellee as a Penal Industries Manager 1. Appellant indicated that he held this position for approximately one year. Appellant confirmed that his disciplinary history includes a two-day suspension for failure to properly supervise and a five-day suspension for failure to properly supervise. Appellant identified

Appellee's Exhibit 6 as a copy of the O.R.C. 124.34 Order for his two-day suspension, effective September 29, 2004, and Appellee's Exhibit 7 as a copy of the O.R.C. 124.34 Order for his five-day suspension, effective January 10, 2005.

Appellant testified that as a Penal Industries Manager 1, he was responsible for overseeing the operations of the BPC located at PCI. Appellant identified Appellee's Exhibit 8 as a copy of the position description for Penal Industries Manager 1. Appellant confirmed that the job duties listed in the position description accurately reflect the job duties he performed as a Penal Industries Manager 1. Appellant confirmed that he is aware of Ohio Ethics Law, which prohibits employees of the state from accepting anything of value from individuals and businesses that conduct business with the state. Appellant confirmed that he received training regarding Ohio Ethics Law.

Appellant confirmed that he had the authority to purchase supplies for the BPC, including cleaning supplies, lubricants, insecticides, and equipment parts. Appellant indicated that his spending authority limit was \$1,000.00 per vendor purchase. Appellant stated that for purchases under \$1,000.00 he used a purchase card and for items over \$1,000.00 a purchase order was required. Appellant stated that the BPC has a maintenance budget of \$300,000.

Appellant testified that Zim International is a company located in Atlanta, Georgia. Appellant indicated that Zim International manufactures environmentally safe chemical products such as insecticides and lubricants. He confirmed that Zim International sells its products to the State of Ohio and that he purchased products from this company for the BPC.

Appellant identified Appellee's Exhibit 13 as a copies of three of his payment card logs for purchases he made from August 2004 to December 2004. Appellant confirmed that he made the following three purchases from Zim International: On August 24, 2004, he purchased food grade lube for \$781.44; on September 2, 2004, he purchased food grade lube for \$292.92; and on December 13, 2004, he purchased stainless steel cleaner for \$300.72.

Appellant identified Appellee's Exhibit 12 as a copy of a June 7, 2004 facsimile transmittal he received from Shawn Zim, who is the sales representative he dealt with concerning purchases from Zim International. Appellant indicated that Ms. Zim called him approximately once a month. Appellant noted that there were several other companies that sold similar chemical products to the state, including State Chemical and Graingers. Appellant indicated that his relationship with Ms. Zim was the same as his relationships with other sales representatives from other companies. Appellant explained that he purchased products based on their quality, and he noted that he purchased Zim International's stainless steel cleaner only once because it was of poor quality.

Upon further questioning, Appellant recalled that PCI Investigator Jeff Howard interviewed him on two occasions concerning gifts from Zim International. Appellant estimated that the first interview took place in July 2004 and the second interview took place in November 2004. Appellant recalled that Mr. Howard asked him if there were any items that he received that could possibly have come from Zim International. Appellant stated that he told Mr. Howard that he had received a \$25.00 Damon's gift certificate in the mail at his home address. Appellant acknowledged that Mr. Howard asked him to turn the gift certificate over at that time; however, he forgot about the gift certificate. Appellant stated that he was on disability leave for four weeks and returned to work in November 2004. Appellant recalled that, in November 2004, Mr. Howard spoke with him again and repeated his instructions concerning the gift certificate. Appellant stated that he went home that day, retrieved the gift certificate and turned it over to Mr. Howard. Upon further questioning, Appellant indicated that he was uncertain as to how Zim International obtained his home address.

Appellant identified Appellee's Exhibit 9 as a copy of a \$25.00 Damon's gift certificate, dated June 25, 2004. Appellant confirmed that he received a \$25.00 Damon's gift certificate from Zim International.

Upon further questioning, Appellant recalled that Mr. Howard also asked him if there were any other items that he received that could possibly have come from Zim International. Appellant indicated that he told Mr. Howard that he remembered a plastic mug that had been mailed to his home and that his son told him about the mug; however, he did not know who sent the cup. Appellant stated that he did not notice any insignia on the cup, he was not sure where the cup came from, and he did not know what happened to the cup.

Appellant confirmed that he attended a NASCAR race in Atlanta, Georgia in October 2004. Appellant indicated that he attended the race with his wife and six other individuals. Appellant recalled that, some time in June or July 2004, he mentioned to Shawn Zim that he was going to attend the October 2004 NASCAR race in Atlanta, Georgia. Appellant recalled that during this conversation, Ms. Zim offered him pit passes for that race. Appellant stated that he told Ms. Zim that he could not accept the passes because Zim International was a vendor for the state and it was not a good idea. Appellant indicated that his wife and the six other individuals had regular spectator seats for the October 2004 NASCAR race and that no one had pit passes.

Upon further questioning, Appellant testified that Jeff Bisel is a Corrections Officer from Marion Correctional Institution, and that Mr. Bisel picked up milk from the BPC approximately three times a week. Appellant confirmed that he had conversations with Mr. Bisel and that he did discuss NASCAR racing with Mr. Bisel. Appellant indicated that

during one conversation with Mr. Bisel, Appellant mentioned that a sales representative had offered him pit passes for the October 2004 NASCAR race in Atlanta, Georgia.

When asked to explain the difference between the \$25.00 gift certificate that he received in the mail at his home and the offer of pit passes, Appellant explained that the gift certificate unexpectedly arrived in the mail at his home; whereas, the pit passes were a direct offer made during a conversation.

Jeffrey A. Bisel testified that he has been employed by Appellee as a Corrections Officer at Marion Correctional Institution (MCI) for approximately twenty-five years. He stated that he is currently a "CDL" driver hauling milk for use at MCI. Mr. Bisel indicated that, in 2004, he drove to the BPC at PCI approximately three times a week to pick up milk for use at MCI. Mr. Bisel confirmed that he and Appellant discussed various topics, including hunting, fishing, and NASCAR racing. Upon further questioning, Mr. Bisel stated that Appellant told him that he was attending a NASCAR race in Atlanta and that he had four pit passes for that race, which he accepted from a state vendor sales representative who was visiting PCI. Mr. Bisel indicated that another employee, Brad Schwendemen, was also present during this conversation concerning NASCAR pit passes. Mr. Bisel identified Appellee's Exhibit 10 as a copy of his July 14, 2004 statement regarding his conversation with Appellant.

On cross-examination, Mr. Bisel stated that his conversation with Appellant took place in June 2004. Mr. Bisel explained that Appellant told him that he had tickets for the Atlanta race and that he also had pit passes for the Atlanta race. Mr. Bisel acknowledged that he never saw any NASCAR pit passes.

Jeffrey T. Howard testified that he is employed by Appellee as an Investigator at PCI. Mr. Howard stated that his job duties include conducting investigations of PCI employees. Mr. Howard confirmed that he conducted an investigation of Appellant concerning allegations that Appellant accepted free NASCAR pit passes from a state vendor. Mr. Howard recalled that he conducted two interviews with Appellant. Mr. Howard testified that during the initial interview, Appellant told him that he did not receive any gifts from any state vendors. Mr. Howard recalled that when he questioned Appellant about receiving NASCAR pit passes from a state vendor, Appellant told him that he purchased regular race passes for a NASCAR race but he did not receive pit passes for that race from a state vendor. Mr. Howard stated that he also conducted a telephone interview with Shawn Zim, who is a sales representative for Zim International. Mr. Howard recalled that Ms. Zim indicated that the company often sent various items to business contacts, items such as cups and hats. Mr. Howard stated that Ms. Zim told him that something was sent to Appellant and that she would check company records to determine what was sent. Mr. Howard further stated that Ms. Zim was to call him back on November 9, 2004 with this information.

Upon further questioning, Mr. Howard stated that during his second interview with Appellant on November 9, 2004, the witness mentioned his conversation with Shawn Zim. Mr. Howard stated that when he mentioned speaking with Ms. Zim, Appellant indicated that he was offered NASCAR pit passes. Mr. Howard recalled that Appellant stated that he had a conversation with Ms. Zim and that she offered the NASCAR pit passes, but he did not accept the passes. Mr. Howard recalled that Appellant indicated that passes might have been sent to his home and his son might have mailed them back to the company. Mr. Howard stated that during this second interview, Appellant also told him that he received items at his home address from Zim International, including a \$25.00 Damon's gift certificate, a NASCAR cup, and a hat. Mr. Howard further stated that when he asked Appellant how Zim International obtained his home address, he told him that he did not know but he must have given his address to Shawn Zim. Mr. Howard indicated that Appellant turned over the Damon's \$25.00 gift certificate on November 10, 2004, and that he told the witness that he did not know what happened to the cup and hat. Mr. Howard confirmed Appellee's Exhibit 9 as a copy of the \$25.00 Damon's gift certificate that Appellant turned over to him. Mr. Howard recalled that he checked the routing number on the Damon's gift certificate and discovered that Zim International had purchased 500 of these gift certificates. Mr. Howard indicated that he did not recognize Appellee's Exhibit 11.

On cross-examination, Mr. Howard testified that his investigatory interviews with Appellant were recorded, but he did not bring these recordings with him to the hearing. Upon further questioning, Mr. Howard further confirmed that Shawn Zim did not call him back regarding what items were sent to Appellant, nor did Shawn Zim provide any documentation indicating that NASCAR pit passes were sent to Appellant. When questioned concerning his testimony regarding multiple gift certificates and cups received by Appellant, Mr. Howard stated that Appellant spoke of one \$25.00 Damon's gift certificate and one NASCAR cup.

Melissa L. Graham testified that she is Appellant's wife. Mrs. Graham confirmed that she, her husband, and three other couples attended a NASCAR race in Atlanta, Georgia in October 2004. Mrs. Graham stated that they did not have pit passes for this race or for any other NASCAR race. Mrs. Graham identified Appellant's Exhibit A as a copy of a check register notation for a \$350.00 check issued to Miki Schmidt for her and Appellant's tickets to the October 2004 NASCAR race in Atlanta, Georgia. On cross-examination, Mrs. Graham acknowledged that she did not have a copy of the cashed \$350.00 check that she issued to Miki Schmidt, nor did she have a copy of the bank statement covering this check.

On direct examination, Appellant testified that he never received any NASCAR pit passes from Zim International. Appellant further testified that he never had any conversations with any individual from Zim International wherein he was informed that the company would be sending him a \$25.00 Damon's gift certificate. Appellant confirmed that the unredeemed \$25.00 Damon's gift certificate he received was turned over to PCI Investigator Jeff Howard in November 2004. Appellant stated that he never told Mr. Howard that he received a NASCAR cup in the mail.

Appellant testified that Appellee's Exhibit 11 is not a copy of his hand written statement, although the statements contained in this document accurately reflect what he told Jeff Noble, who was an acting administrative assistant for PCI. Appellant recalled that, in January 2005, he was interviewed by Jeff Noble concerning gifts from Zim International. Upon further questioning, Appellant indicated that he never met Shawn Zim and that his only contact with Ms. Zim was via the telephone. Appellant stated that he never received anything of value from a state vendor in return for doing business on behalf of the state.

In reviewing Appellee's Exhibit 13, Appellant confirmed that, from August 2004 to December 2004, he purchased three products from Zim International. Appellant noted that he returned the \$781.44 purchase of food grade lube because it was of poor quality.

Upon further questioning, Appellant reiterated that he mentioned to Mr. Bisel that he had been offered pit passes. Appellant further confirmed that he paid for regular NASCAR tickets himself for the October 2004 race in Atlanta, Georgia.

On re-direct examination, Appellant stated that he returned the food grade lube from Zim International and purchased a different food grade lube from that company. Appellant confirmed that the statements contained in Appellee's Exhibit 11 accurately reflect the statements he made to Mr. Noble. Appellant confirmed that he told Mr. Noble that he did not recall giving his home address to a sales representative from Zim International but that he must have done this. Appellant confirmed that he probably did mention to Shawn Zim that he was a NASCAR fan and that he was going to attend a NASCAR race in Atlanta, Georgia in October 2004.

* * * * *

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. Appellant was employed by Appellee for approximately twenty-four years. At the time of his removal on February 3, 2005, Appellant held the position of Penal Industries Manager 1 at the Pickaway Correctional Institution (PCI). Appellant was responsible for overseeing the operations of the Beverage Processing Center (BPC), which is an Ohio Penal Industries (OPI) operation.
2. Appellant's job duties included purchasing supplies for the BPC, including cleaning supplies, lubricants, insecticides, and equipment parts. Appellant's spending authority limit was \$1,000.00 per vendor purchase. Appellant utilized a payment card for these purchases.
3. Zim International is a company located in Atlanta, Georgia. Zim International manufactures environmentally safe chemical products, including cleaning products, insecticides, and lubricants. Zim International does business with the State of Ohio and is a state vendor at the present time.
4. From August 2004 to December 2004, the copies of Appellant's payment card logs admitted into evidence indicate that Appellant made twenty-three purchases of supplies and equipment parts for the BPC. Three of these purchases were for products made by Zim International: On August 24, 2004, Appellant purchased food grade lube for \$781.44; on September 2, 2004, Appellant purchased food grade lube for \$292.92; and on December 13, 2004, Appellant purchased stainless steel cleaner for \$300.72.
5. Appellant spoke by telephone with Shawn Zim, who is a sales representative for Zim International. Appellant spoke with Ms. Zim approximately once a month.
6. In 2004, Zim International commonly sent items to its business contacts. These items included restaurant gift certificates, plastic mugs or cups, and hats.
7. In July 2004, Appellant received via U.S. mail at his home address a \$25.00 Damon's gift certificate from Zim International. Appellant placed the gift certificate on his desk at home and forgot about it. Appellant did not redeem the gift certificate. The routing number on this Damon's gift certificate shows that Zim International made a batch purchase of 500 of these gift certificates.

8. Appellant was interviewed by PCI Investigator Jeffrey T. Howard in July 2004 and on November 9, 2004. Mr. Howard questioned Appellant concerning any items he may have received from Zim International. Appellant apprised Mr. Howard that he received a \$25.00 Damon's gift certificate from Zim International and that the gift certificate was mailed to him at his home address. During questioning by Mr. Howard concerning any possible items sent to him by Zim International, Appellant told Mr. Howard that he remembered a plastic mug that had been sent to his home address. Appellant told Mr. Howard that he did notice any insignia on the mug, he did not know who sent the mug, and he did not know what happened to the mug.
9. Mr. Howard instructed Appellant to turn the \$25.00 Damon's gift certificate over to him. Appellant forgot to follow Mr. Howard's instructions concerning the gift certificate until Mr. Howard repeated those instructions at the second interview on November 9, 2004. Appellant gave Mr. Howard the \$25.00 Damon's gift certificate on November 10, 2004.
10. During the investigatory interviews, Appellant apprised Mr. Howard that he attended a NASCAR race in Atlanta, Georgia in October 2004. Appellant informed Mr. Howard that Shawn Zim had offered him pit passes for that race but he declined her offer of the pit passes. Appellant further informed Mr. Howard that he purchased regular spectator seats for himself and his wife.
11. Appellant discussed attending the NASCAR race in Atlanta, Georgia with Corrections Officer Jeffrey A. Bisel, who is an employee of Marion Correctional Institution. Mr. Bisel testified that Appellant told him that he had four pit passes that they were given to him by a sales representative from a company doing business with the BPC. Appellant testified that he told Mr. Bisel that he was offered pit passes by the sales representative but he did not tell Mr. Bisel that he accepted these pit passes.
12. On November 8, 2004, Mr. Howard conducted a telephone interview with Zim International sales representative Shawn Zim, concerning items that may have been sent to Appellant. Mr. Howard indicated that Ms. Zim stated that Zim International often sends items to business contacts, items such as cups and hats. Mr. Howard indicated that Ms. Zim stated that something was sent to Appellant and that she would check company records to determine what item had been sent to Appellant. Shawn Zim did not provide Mr. Howard with any information concerning his inquiry.

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.

O.A.C. 124-3-06 provides that the appointing authority shall prove, by a preponderance of the evidence, the factual allegations contained in a disciplinary order. Failure to prove all the allegations contained in an order does not, as a matter of law, require disaffirmance of an order.

* * * * *

Appellant's O.R.C. 124.34 Order of Removal states that Appellant violated Appellee's Standards of Employee Conduct Rule #49 and Rule #16. Rule #16 states that an employee shall not use his or her position for personal gain, to include but not limited to, the acceptance or solicitation of bribes in the course of carrying out assigned duties. Specifically, Appellee alleges that Appellant provided his home address to a sales representative from an Atlanta company that he conducted sales business with and that Appellant admitted to receiving a \$25.00 Damon's gift certificate and a NASCAR cup from the Atlanta company.

The testimony presented and evidence admitted at record hearing established that Appellant's job duties as a Penal Industries Manager 1 included purchasing supplies for the Beverage Processing Center (BPC) located at Pickaway Correctional Institution. Appellant's spending authority limit was \$1,000.00 per vendor purchase. Appellant utilized a payment card for these purchases. The record established that Zim International is a company located in Atlanta, Georgia. Zim International manufactures environmentally safe chemical products, including cleaning products, insecticides, and lubricants. Zim International sells its products to the State of Ohio. The evidence established that, from August 2004 to December 2004, Appellant purchased three products made by Zim International. Appellant's contact at Zim International was Shawn Zim. Appellant spoke with Ms. Zim approximately once a month.

The testimony established that, in July 2004, Appellee initiated an internal investigation concerning allegations that Appellant had accepted gifts from Zim International. PCI Investigator Jeffrey T. Howard conducted the investigation. Mr. Howard interviewed Appellant in July 2004, and on November 9, 2004. When questioned by Mr. Howard, Appellant stated that he received a \$25.00 Damon's gift certificate from Zim

International in July 2004. Appellant indicated that the gift certificate was mailed to his home address and that he forgot about the gift certificate. Although Appellant was not sure how Zim International obtained his home address, he told Mr. Howard that he must have given it to Shawn Zim. Mr. Howard instructed Appellant to turn the gift certificate over to him. Appellant gave Mr. Howard the \$25.00 Damon's gift certificate on November 10, 2004. Mr. Howard also asked Appellant if there were any other items that may have been sent to him from Zim International. Appellant recalled that a plastic travel mug arrived in the mail and his son had opened the container. Appellant indicated that he never looked at the mug and that he did not know who sent the mug. During the November 9, 2004 interview, Appellant also apprised Mr. Howard that Shawn Zim had offered him pit passes for a NASCAR race in Atlanta, Georgia, but he did not accept these passes.

The testimony of Appellant and Mr. Howard differs in certain key aspects. Mr. Howard testified that Appellant denied receiving anything from Zim International during the first interview, and that Appellant's statements concerning the \$25.00 Damon's gift certificate, the cup, and the NASCAR pit passes were made during the November 9, 2004 interview. Mr. Howard testified that Appellant told him that he received a \$25.00 Damon's gift certificate, a plastic NASCAR cup, and a hat. Mr. Howard also testified that when he questioned Appellant concerning NASCAR pit passes during the first interview, Appellant told him that he purchased regular seating tickets for a NASCAR race but he did not receive pit passes from a state vendor. Mr. Howard testified that when he questioned Appellant about NASCAR pit passes at the second interview, Appellant indicated that NASCAR pit passes may have been mailed to his home and his son may have mailed them back to the company. In comparison, Appellant testified that he told Mr. Howard that he received a \$25.00 Damon's gift certificate from Zim International during the first interview. Appellant testified that he placed the gift certificate on his desk at home and he forgot about it until Mr. Howard repeated his instructions regarding the gift certificate during the November 9, 2004 interview. Appellant also testified that he never told Mr. Howard that he received a NASCAR cup from Zim International; rather, he told Mr. Howard that a plastic mug was sent to his home but he did not know who sent the mug. Appellant testified that he told Mr. Howard that he did not accept the NASCAR pit passes offered by Shawn Zim.

In evaluating the testimony presented, I note some inconsistencies in Mr. Howard's testimony. For example, Mr. Howard testified that Appellant admitted receiving certificates, cups, and a hat from Zim International, at another point, Mr. Howard indicated that Appellant admitted receiving one gift certificate, one cup, and possibly one hat. During Mr. Howard's testimony, he also briefly mentioned an alleged statement by Appellant that tickets may have been mailed back to the company by his son. It also is noted that Mr. Howard testified that he conducted a telephone interview with Shawn Zim and that Ms. Zim stated that the company often sends items to its business contact, items such as cups and hats.

During parts of Mr. Howard's testimony, it was unclear whether he was referring to Ms. Zim's statement that the company sent items to its business contacts or whether he was testifying that Appellant made the statement that he received multiple items, including gift certificates, cups, and hats. Lastly, it is noted that Mr. Howard testified that Ms. Zim stated that something was sent to Appellant and that she would check company records and telephone him with this information. Ms. Zim did not provide Mr. Howard with the requested information. Thus, Ms. Zim's statement to Mr. Howard that something was sent to Appellant may have been in reference to the \$25.00 Damon's gift certificate, which was one of five-hundred such gift certificates purchased by Zim International and most likely mailed to hundreds of the company's business contacts, including Appellant. Without Shawn Zim's testimony, either on the witness stand or in the form of a testimonial deposition taken under this Board's administrative rules, the discrepancies concerning statements allegedly made by Appellant during these investigatory interviews cannot be reconciled.

In addition to Mr. Howard's testimony concerning his investigatory interviews with Appellant, Appellee called Jeffrey A. Bisel as a witness. Mr. Bisel testified that Appellant told him that he received four NASCAR pit passes from a sales representative of a company that sold products to the BPC. Mr. Bisel further testified that another employee, Brad Schwendemen, was present and heard Appellant's statement regarding the NASCAR pit passes. Appellant testified that he told Mr. Bisel that he had been offered NASCAR pit passes by a state vendor, but he never told Mr. Bisel that he had accepted the pit passes. It is noted that throughout Appellant's testimony, he consistently maintained that he did not accept the NASCAR pit passes offered by Shawn Zim. Because both Mr. Bisel and Appellant presented credible testimony regarding their conversation, I find their testimony to be in equipoise. Mr. Schwendemen was not called to testify regarding the conversation between Mr. Bisel and Appellant.

To summarize, Appellee relies upon the testimony of Mr. Howard and Mr. Bisel to establish that Appellant received NASCAR pit passes from Zim International. As the analysis set forth above indicates, that testimony is insufficient to establish by a preponderance that Appellant accepted NASCAR pit passes from Zim International. Appellant's contact at Zim International, Shawn Zim, was not called as a witness, nor was a testimonial deposition submitted into evidence. Further, no documentary evidence was submitted establishing that Appellant received NASCAR pit passes from Zim International, and the recordings of the investigatory interviews wherein Appellant is alleged to have made incriminatory statements were not submitted into evidence.

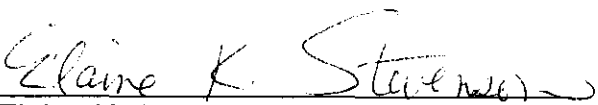
Appellant testified that he informed Mr. Howard that he received a \$25.00 Damon's gift certificate from Zim International. Appellant testified that he did not solicit the gift certificate and he had no indication from Shawn Zim that the company was planning to mail

a \$25.00 Damon's gift certificate to him at his home address. It is noted that although Appellant agreed that he may have given his home address to Shawn Zim, there was no information in the record that Appellant did so for an improper purpose. Appellant never redeemed the \$25.00 Damon's gift certificate. Appellant testified that he placed the gift certificate on his desk at home and forgot about it until November 2004. With respect to the allegations that Appellant received a plastic NASCAR cup, a hat, and NASCAR pit passes, Appellant consistently testified that he never stated to anyone that he received these items from Zim International.

Based on the foregoing, I find that Appellee has proven by a preponderance of the evidence that Appellant received a \$25.00 Damon's gift certificate from Zim International. As previously stated, Appellant was charged with violating Appellee's Standards of Employee Conduct Rule #49 and #16. Rule #16 states that an employee shall not use his or her position for personal gain. The evidence in the record indicates that, from August 2004 to December 2004, Appellant made twenty-three purchases of supplies and equipment parts for the BPC. Three of these purchases were for products made by Zim International. There was no evidence presented to establish that the three purchases made by Appellant were unusual or improper.

Because Appellant did not solicit the \$25.00 Damon's gift certificate from Zim International and he did not redeem this gift certificate, and because there was no evidence that Appellant improperly purchased Zim International products, the evidence is insufficient to support a finding that Appellant misused his position for personal gain or that his conduct was in violation of O.R.C. 124.34.

Therefore, I respectfully **RECOMMEND** that Appellant's removal be **DISAFFIRMED** and that Appellant be **REINSTATED** with all back pay and benefits due him, subject to set off, pursuant to O.R.C. 124.03 and O.R.C. 124.34.


Elaine K. Stevenson
Hearing Officer