

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

Benjamin Fisher,

Appellant,

v.

Case No. 06-RED-03-0078

Miami County Sheriff,

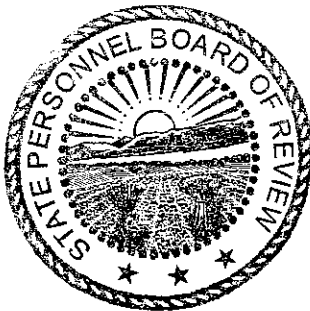
Appellee.

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 reduction from Sergeant to Deputy Sheriff be **AFFIRMED**, pursuant to O.R.C. §§ 124.03 and 124.34.



Lumpe - Aye

Booth - Aye

Sfalcin - Aye

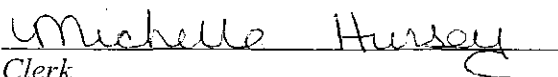


J. Richard Lumpe, *Chairman*

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 constitute ~~(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 30, 2008.



Michelle Hursey
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**

Benjamin Fisher,

Case No. 06-RED-03-0078

Appellant

v.

April 8, 2008

Miami County Sheriff

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on August 28 and 29, 2007. Present at the hearing were the Appellant, Benjamin Fisher, represented by Robert W. Sauter and Kristen Seifert Watson, Attorneys at Law and Appellee Miami County Sheriff Charles Cox, represented by Eugene P. Nevada, Attorney at Law.

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

Appellant Fisher was reduced from his position of Sergeant to Deputy Sheriff, effective March 3, 2006. The pertinent part of the reduction order states as follows:

The reason for this action is that you have been guilty of Specifically: Failure of good behavior, neglect of duty, misfeasance, and/or malfeasance for inappropriately touching a subordinate employee and making sexual comments in violation of the Employer's sexual harassment and other personnel policies.

Attached to the reduction order was a memorandum detailing the Appellee's reasons for demoting Appellant Fisher. That memorandum, states in pertinent part, the following:

1. You did engage in inappropriate conduct which was demeaning and humiliating to a subordinate, female employee by removing her ASP from her belt holder and sticking it down the back of her pants.

2. You did repeat the above listed misconduct on other occasions, despite the subordinate employee's request to give her back the ASP, not to touch her, "knock it off", and "quit it".

3. You did make inappropriate, lewd, and sexually implicit remarks while placing the ASP down the pants of the female subordinate, indicating that she liked what you were doing to her.

4. You did violate and fail as a supervisor to properly enforce the Miami County Sheriff's Office policy prohibiting sexual harassment.

Appellant Fisher filed a timely appeal from his reduction.

STATEMENT OF THE CASE

Appellee's first witness was Appellant Fisher, as if on cross-examination. Appellant Fisher testified he is currently a Deputy Sheriff. Prior to his demotion to Deputy Sheriff, he was a Sergeant, supervising nine people with Amber Mahan as one of his subordinates.

Appellant Fisher identified Appellee's Exhibit 1 as the notice of his pre-disciplinary conference, which he received. The conference was held on February 9, 2006 and was conducted by Captain Duchak. Appellee's Exhibit 2 was identified as the pre-disciplinary conference report and Appellee's Exhibit 3 was identified as the order of reduction which he received.

Appellant Fisher testified he was hired by Appellee in April 1999 as a Deputy Sheriff. He went through the basic police academy and Eric LaChey was his training officer. Appellant Fisher identified Appellee's Exhibit 4 as the field training checklist. He stated most of the policies and procedures were covered with him by the field training officers, as was most of the other noted items on the checklist. He received satisfactory marks and confirmed he was aware of the Code of Ethics and Conduct. In looking at Appellee's Exhibit 5, the Personnel Policy and Procedure manual, Appellant Fisher testified no one told him he should be "exemplary in obeying the laws of the land and the regulations of the department", but he knew he should. Appellee's Exhibit 6 is the sexual harassment policy of Appellee and

Appellant Fisher testified he has never seen the policy, although he assumed there was such a policy. He testified he knew he was not permitted to make degrading comments or to do unauthorized touching. Appellant Fisher stated he was aware that discipline could result from a hostile work environment, but did not realize that a hostile work environment could result from lewd jokes or unwanted touching.

Appellee's Exhibit 7 was identified as the disciplinary guidelines, which he is familiar with. Appellant Fisher explained that an ASP is an expandable metal baton, which will open if one makes a striking motion toward the ground. He stated the ASP is a small, light and compact potential lethal weapon. Appellant Fisher identified Appellee's Exhibit 8 as photographs of an ASP and stated he teaches training in the use of the ASP. It can expand to lengths of 21, 26 or 32 inches.

Appellee's Exhibit 9 was identified as Appellant Fisher's training record and he stated training is usually conducted every year for purposes of re-certification. Appellee's Exhibit 10 was identified as a certificates of training which he received in 2002, 2003 and 2004 in the use of the ASP. Appellee's Exhibit 11 was identified as Appellant Fisher's instructor training course certificate. Appellee's Exhibit 12 was identified as an overview of the ASP training program, which he used to learn how to be an instructor. He testified the ASP is not a toy but is a multi-purpose tool.

In October 2005, Appellant Fisher testified he took Deputy Mahan's ASP from her, opened it and shoved it down her pants. He testified he did this two times, with the first time being in the summer of 2004. At that time, he was not her supervisor. When asked why he put the ASP down Deputy Mahan's uniform, he testified he was engaging in horseplay. She was on the telephone and he told her to hurry up, as they were going out to eat. She took the ASP out of her belt and he opened it and practiced his golf swing. Deputy Mahan continued to talk on the telephone and when she leaned forward, Appellant Fisher dropped the ASP down her belt and said "We'll see you later". He testified Deputy Mahan was laughing so hard she could hardly carry on her telephone conversation. Appellant Fisher stated that the ASP is hard to get out of one's pants, as it has to be moved around to get it out. He also added, however, that with the vests tucked in the pants like an undershirt, there is no possible way the ASP could have made contact with Deputy Mahan's buttocks. He testified he just dropped the ASP down her pants, he did not shove it in. Deputy Adam Switzer witnessed Appellant Fisher doing this.

Appellant Fisher testified he and Deputy Mahan were good friends and when he put the ASP down her pants before, she laughed about it. He stated he has put the ASP down the pants of male academy students also. He opined that if the person with the ASP down their pants has a problem and feels violated, then it is wrong. If it is done in horseplay, then it's just not a good idea. Appellant Fisher testified he and Deputy Mahan have always bantered around, engaging in horseplay and joking together. He stated there was never a problem between the two of them and they were very good friends. Appellant Fisher stated Deputy Mahan was one of three females among the forty or so deputies employed by Appellee.

When he was interviewed by Detective Lord, Appellant Fisher admitted that he had seen Deputy Mahan one night in the parking lot and jokingly said to her, "Hey Hoe – what's for dinner?". He also admitted that at another time, another deputy made a comment that Deputy Mahan and her boyfriend were having oral sex and Appellant Fisher then commented to her the "she looked like she had a rough one".

Appellant Fisher then identified Appellee's Exhibits 13 through 30 as various verbal and written reprimands he received as well as a three day suspension in August 2005 for paying too much unwanted attention to another employee, Jenny Noll. He received ten verbal warnings, five written warnings and one written reprimand since January 2000.

Appellee's next witness was Amber Mahan, a Deputy Sheriff since 2003. She currently works in the schools as a resource officer. Deputy Mahan testified that in October 2005, her supervisor was Appellant Fisher. She was a road deputy then and before and after her shift, she sometimes attended training with Appellant Fisher. One day when she was sitting at her computer doing a report, Appellant Fisher came up and grabbed her ASP out of her belt. She told him to stop and to give it back. Appellant Fisher proceeded to lengthen the ASP and stick it down her pants. Deputy Mahan testified she told Appellant Fisher to stop more than once and stated she did not welcome that attention. The ASP went down her pants six or so inches and another employee, Adam Sweitzer, witnessed the incident.

Deputy Mahan testified she felt mad and embarrassed. She stated she never saw Appellant Fisher do the same thing to any males. She testified that while Appellant Fisher was putting the ASP down her pants, he told Deputy Sweitzer that "she acts like she doesn't like it but she does." Deputy Mahan testified Appellant Fisher had done the same thing with the ASP a few times before he was promoted to Sergeant. She stated she has never had any other Sergeant do that to her and that it is her belief that a Sergeant should be a role model.

Appellant Fisher never called her Amber, only "Hoe" or "Bitch". Deputy Mahan testified Appellant Fisher called her those names on a daily basis. She testified that one time during roll call, her hair was messy and Appellant Fisher stated "Well, I guess we all know what you were doing last night." When asked why she did not report the comment and the names, Deputy Mahan replied that there was another female deputy, Fraley, that had had some problems with Appellant Fisher and when she reported it, nothing happened, so Deputy Mahan figured there was no point in making a report.

Appellee's Exhibit 33 was identified as her report, which she prepared on January 16, 2006. Deputy Mahan stated she and Appellant Fisher got into an argument that day at the training center and she decided to write her report. She stated that the incidents with the ASP affected her ability to work with Appellant Fisher.

On cross examination Deputy Mahan testified there is a fair amount of banter in the office and she admitted the atmosphere can get crass with the number of men in the office. She stated she and Appellant Fisher were good friends, with him helping her put siding on her house and looking for a new car. They remained good friends, going to lunch together and training together, until January 2006. Sometime during that month, near the end of the shift, Appellant Fisher was working on a report when he turned around and told Deputy Mahan to move, stating he could not do his report "with someone standing over his fucking shoulder." Deputy Mahan and Appellant Fisher both had words and the next day, she was told she was getting a verbal reprimand. That day she also talked to Lieutenant LaChey and told him about the ASP incident. She then wrote her report. A few days later, Deputy Mahan also talked to Lieutenant Stevenson and reported the ASP incident again.

Appellant's first witness was Jeremy Adams, an employee of the Appellee for approximately five years. Deputy Adams stated there are only three female employees in the Appellee's office and everyone tends to be close friends since the department is so small. Deputy Adams testified Appellant Fisher was his training officer when he began and he also worked with him on the shifts. He also worked frequently with Deputy Mahan. He testified Appellant Fisher and Deputy Mahan got along well and joked around a lot, as well as going to lunch together frequently.

Deputy Adams testified he saw Appellant Fisher put the ASP down Deputy Mahan's pants when Appellant Fisher was still a deputy. At that time, Deputy Mahan did tell Appellant Fisher to stop and to give the ASP back. Appellant Fisher kept the ASP and put it down Deputy Mahan's pants.

Appellant's next witness was Adam Sweitzer, a Deputy Sheriff with Appellee for approximately five years. Prior to that, he worked in the jail for approximately five years. Deputy Sweitzer stated there is a lot of goofing around that goes on in the office and that most of the employees get along with one another. He testified he has worked with both Appellant Fisher and Deputy Mahan before and would classify their relationship as friendly. They both goofed around, engaged in horseplay and ate out a lot together. He stated Deputy Mahan has always spoken her mind.

Deputy Sweitzer testified he was in the training center and Deputy Mahan was in a chair by the computer. Appellant Fisher took his ASP and put it down Deputy Mahan's pants. This occurred when Appellant Fisher was still a deputy. At that time, Deputy Mahan was laughing and told Appellant Fisher to stop. After the ASP incident occurred again in October, 2005, Deputy Sweitzer testified the three of them, Appellant Fisher, Deputy Mahan and himself, all went to the training room and practiced self-defense and hand to hand combat. He then identified Appellee's Exhibit 2 as a summary of his testimony at the pre-disciplinary conference.

Appellant's next witness was Randy Slusher. He has been employed with Appellee for five years and has worked with Appellant Fisher and Deputy Mahan. He perceived them to be close friends who ate lunch together.

Appellant's next witness was Stephen LaChey, a Lieutenant with Appellee for approximately nineteen years. He has worked with both Appellant Fisher and Deputy Mahan and knows them to be friends in and outside of work. On January 16, 2006, at the end of the shift, people were working on paperwork for a homicide and it was near 11:00 p.m. There was a verbal altercation between Appellant Fisher and Deputy Mahan. Appellant Fisher then discussed with him the possibility of disciplining Deputy Mahan, as Appellant Fisher said she had gone too far in what she said and was insubordinate. On January 17, 2006, Deputy Mahan told him that she had no respect for Appellant Fisher because of the way he talked to her and treated her and she then related the story of Appellant Fisher putting an ASP down her pants. Lieutenant LaChey stated he did not pursue an investigation of Deputy Mahan's allegations because he felt that she was only saying those things because of what happened between her and Appellant Fisher the day before.

On cross examination Lieutenant LaChey stated he was Appellant Fisher's training officer and that he made Appellant Fisher aware of the policies and procedures of the Appellee. He did not specifically remember talking to him about sexual harassment but stated it is part of the policies and procedures. In looking at Appellee's Exhibit 4, he testified he covered all of these things with Appellant Fisher. Lieutenant LaChey testified he has been Appellant Fisher's supervisor since March 2004 and has counseled him not to make comments about females that belittle them. He identified Appellee's Exhibit 13 as a memorandum he wrote in August 2004 where he counseled Appellant Fisher to not make sexist comments. Lieutenant LaChey stated that in January 2006, Deputy Mahan also told him that Appellant Fisher had referred to as "Hoe".

Appellant Fisher identified Appellee's Exhibit 9 as his training record with Appellee. He testified he never received training in sexual harassment until sometime in 2006 after the incident with the ASP. At the training, Appellant Fisher testified he learned to be more sensitive to everyone's concerns, feelings and beliefs and the training made him more aware of what is said and the atmosphere. Since the training, he stated things are different.

Appellant Fisher testified he had a close relationship with Deputy Mahan and they socialized outside of work. He stated their relationship changed after the January 2006 incident when Deputy Mahan was insubordinate.

He stated the first incident with the ASP occurred in 2004 when they were both in the downtown office in Troy. He was a deputy and they were going to a restaurant. Deputy Mahan was on the telephone and he motioned to her to hurry. He then walked over to her pulled out her ASP, lengthened it and tapped it on the table while she talked. She then leaned forward, he dropped it down her pants, she laughed and they went to eat. Appellant Fisher testified Deputy Mahan did not tell him she was offended.

In October 2005, he asked Deputy Mahan if she wanted to get something to eat. Once again, she was on the telephone and he was talking to Deputy Sweitzer. He pulled Deputy Mahan's ASP out of her belt, lengthened it, did a golf swing with it and dropped it down her pants. She was laughing. He and Deputy Sweitzer then went outside and she met them out there. Deputy Mahan pinched Appellant Fisher on the back of the arm and the three of them went for pizza. Appellant Fisher testified Deputy Mahan did not appear to be upset or offended. They were at dinner for approximately a half of an hour and there was no discussion about the ASP incident. At the end of the shift, the three of them did self defense training, which involves wrestling-like positions and bodily contact.

In January 2006, Appellant Fisher testified he was typing and Deputy Mahan was standing over his shoulder. He asked her to move and she did not. She called him a "fucking baby", "fucking asshole" and continued to curse him. He went into the third shift room and Deputy Mahan was still being loud. He felt she had stepped over the line, as her behavior was witnessed by two shifts, so he proceeded to give her a verbal warning. A few days later he was asked about the ASP incidents.

FINDINGS OF FACT

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

1. Appellant Fisher had been employed with Appellee for approximately seven years at the time of his demotion from Sergeant to Deputy Sheriff. His previous discipline consists of five written warnings, a written reprimand and a three day suspension in August 2005.

2. While employed by Appellee, Appellant Fisher has attended numerous training sessions. He is certified as an instructor and trains other employees on the proper use of an ASP.
3. As a Sergeant, Appellant Fisher was familiar with the policies and procedures of Appellee and was aware that he was responsible for adhering to and enforcing them.
4. Appellant Fisher supervised nine subordinates as a Sergeant. One of his subordinates was Deputy Amber Mahan.
5. In October 2005, while on duty and in front of another deputy, Appellant Fisher took Deputy Mahan's ASP from her belt, lengthened it and dropped it down her pants. Appellant Fisher had done the same thing previously when he and Deputy Mahan were both deputies. Deputy Mahan was both embarrassed and angry by Appellant Fisher's actions.
6. Appellant Fisher admits that he has referred to Deputy Mahan as "Hoe" and "Bitch".
7. Deputy Mahan reported the ASP incident on January 16, 2006. That same day, she and Appellant Fisher got into an argument and she was told he was going to write her up for insubordination.

CONCLUSIONS OF LAW

In order for Appellee's reduction of Appellant Fisher from Sergeant to Deputy Sheriff to be upheld, Appellee has the burden of proving by a preponderance of the evidence, the allegations contained in the reduction order. Appellee has met its burden.

Appellant Fisher admitted that he stuck Deputy Mahan's ASP down her pants on more than one occasion, with the last one occurring when he was her supervisor. He also admitted to referring to Deputy Mahan as "Hoe" and to making a comment about her appearance during roll call. The evidence also established that Appellant Fisher made comments to another Deputy about Deputy Mahan liking the ASP down her pants.

Appellant Fisher was in a supervisory position as a Sergeant and had an obligation and responsibility to follow and uphold the Appellee's policies and procedures. He testified he was familiar with the policies and procedures, yet by engaging in "horseplay" and joking around with his subordinates, he did not exhibit the higher standard of behavior that accompanies a supervisor. His actions were a failure of good behavior and a neglect of his duty. The comments he made to and about Deputy Mahan, at roll call in front of the shift and while putting the ASP down her pants, can certainly be construed as creating a hostile working environment.


The defense relied upon by Appellant Fisher was that he and Deputy Mahan were good friends. He stated they had always joked around with each other and that it was not until he took steps to discipline her that she filed her incident report regarding the ASP and comments he has made to her. The problem with this argument is that it does not take into account the supervisory position that Appellant Fisher was in. The relationship between Appellant Fisher and Deputy Mahan had to change when he became her supervisor. The joking, the "horseplay" and the comments he made to her when he was on an equal level with her are no longer acceptable when made in the context of supervisor to subordinate.

One of the reasons for this is to prevent what happened from happening. Appellant Fisher and Deputy Mahan had a history of joking with each other, which Appellant Fisher continued when he became her supervisor. Although there were incidents of his joking that Deputy Mahan did not welcome, such as the ASP down her pants and the names he used to refer to her, from her point of view, their relationship did not change when he became her supervisor. Until that day in January when Appellant Fisher decided that the language she used toward him was not becoming that of a subordinate talking to a supervisor. That was when he decided to "pull rank" and discipline her because this time, her behavior undermined his authority as a supervisor. Deputy Mahan probably did become angered that Appellant Fisher was going to discipline her for her behavior, when from her point of view, he had "gotten away" with his behavior toward her and received no discipline. Even though Appellant Fisher was her supervisor, she had no respect for him as a supervisor because of incidents like the ASP down her pants and his language toward her. It was impossible for her to know when, in Appellant Fisher's mind, he would consider their bantering back and forth seriously and decide that she was not respecting him as a supervisor, even though he had not acted like her supervisor previously.

The rules change when one employee, who had been on equal footing with other employees, receives a promotion and is now the supervisor of those employees. A supervisor can no longer be "one of the guys" and at the same time, be responsible for disciplining those employees and enforcing the rules. This is what Appellant Fisher failed to realize.

Appellant Fisher has an extensive disciplinary record. Five written warnings, a written reprimand and a three day suspension justify a demotion given the circumstances. The appointing authority did not abuse its discretion by levying a demotion as part of progressive discipline.

Therefore, it is my **RECOMMENDATION** that Appellee's reduction of Appellant Fisher from Sergeant to Deputy Sheriff be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge

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