

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

IVERSON MAY,

Appellant,

v.

Case No. 06-REM-03-0079

CLARK COUNTY ENGINEER,

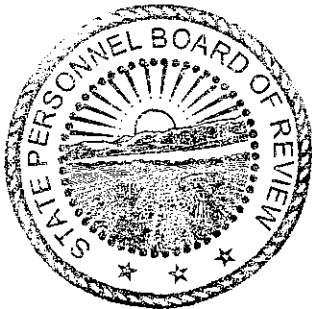
Appellee.

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 O.R.C. §§ 124.03 and 124.34.



Lumpe – Aye
Booth - Aye
Tracy – Aye

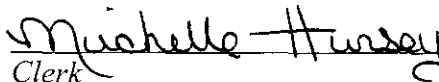


J. Richard Lumpe, *Chairman*

CERTIFICATION

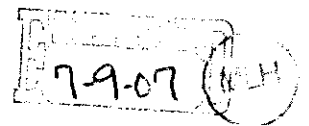
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that 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, July 9, 2007.



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**

Iverson May

Case No. 06-REM-03-0079

Appellant

v.

June 5, 2007

Clark County Engineer

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 October 18, 2006. Present at the hearing were the Appellant, Iverson May, represented by Jack P. Reynard, Jr., Attorney at Law and Clark County Engineer Bruce Smith represented by Cheri B. Hass, 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 May was removed from his position of Road Supervisor, effective March 10, 2006. The pertinent part of the removal order states as follows:

The reason for this action is that you have been guilty of Drunkenness, Neglect of Duty, Malfeasance in Office, and other Failure of Good Behavior. Specifically, on February 8, 2006, you reported for work unfit for duty in that you failed a breath alcohol test administered in accordance with CDL licensing standards.

Appellant May filed a timely appeal of his removal.

STATEMENT OF THE CASE

Appellee's first witness was Appellant May, as if on cross examination. Appellant May testified he received the order of removal as shown to him in Appellee's Exhibit 8. He stated that removal was rescinded.

Appellant May was a Road Supervisor and he started out with four subordinates. In the winter months, his subordinates were mowers and in the winter, they also picked up dead animals and repaired guardrails. In the winter, Appellant May supervised anywhere from one to three employees. His direct supervisor was Don Boyle. Appellant May testified he has had a commercial driver's license (CDL) for approximately eighteen or nineteen years and has held a chauffeur's license since 1969. He stated that lately he mostly drives a pick-up truck which does not require a CDL, but in the winter, he sometimes drives a snowplow, which does require a CDL.

As a supervisor, Appellant May testified he was responsible for distributing policies to his employees and having them sign for their receipt. He would bring violations of any the policies to his supervisor. In looking at Appellee's Exhibit 3, the Drug and Alcohol Free Workplace Policy, Appellant May testified he was familiar with the policy. He stated that some years prior, he was at a bowling tournament where someone served brownies laced with marijuana, of which he was unaware. The following day, he was drug tested and received a thirty day suspension. Appellant May testified he does not do drugs but does drink in the evenings. He testified if he had been under the influence of alcohol recently, he would not have gone into work.

Appellee's Exhibit 4 was identified as another policy regarding drug and alcohol usage, with an effective date in 1998. Appellant May testified he has seen this policy also. Appellee's Exhibit 12 was identified as a memorandum regarding his previous thirty day suspension, although Appellant May testified he did not see this memorandum as Mr. Smith sat down and explained the suspension to him.

Appellant May testified he is not familiar with the laws regarding testing for a CDL. He testified he went to work on February 8, 2006 about 6:45 a.m. He drove the county vehicle into work, as he has a county vehicle assigned to him. Appellant May testified he was drinking the night before as he was up late watching basketball. He stated he stopped drinking after midnight. Appellant May testified he would drink a beer, then have a shot and he has no idea how many beers he had. He also stated that he had lent his cousin his sweatshirt, which he wore to work on February 8, and it smelled of alcohol because his cousin spilled beer on it.

Every morning at 7:00 a.m. there was a supervisor's meeting. Appellant May testified he attended the meeting on February 8, 2006 and after that meeting, he went to another meeting with his supervisor, who was angry with him because he did not come in for overtime the day before. Appellant May stated he did not work the overtime because he was at his mother-in-law's in Dayton fixing broken water pipes. Appellant May testified Don Boyle was not in the second meeting, but he opened the door of the room they were meeting in, stuck his head in and said "I smell alcohol." He then shut the door and came in and sat down. At the meeting were Ned Weber, Mr. Boyle's supervisor, and Doug Frank, the Bridge Superintendent. The meeting did not last longer than 10 minutes and Appellant May told them he had not been drinking and would gladly take an alcohol test.

Appellant May left the room and went to his employees. As he was talking to his employees, Mr. Weber came to him and told him to go for an alcohol test. Appellant May testified he complied and Mr. Boyle drove him to the test. Appellee's Exhibit 5 was identified as the results of the test he received, showing his blood alcohol level to be .077 and .078. Appellant May testified he knew after he tested positive that he was in violation of the Drug and Alcohol Free Workplace policy. In looking at Appellee's Exhibit 2, the sign-in sheet containing his signature for the Drug Free Workplace Training which took place on October 21, 2003, Appellant May testified he remembered going to the training but could not remember hearing about drugs and alcohol at the training.

Appellee's next witness was Donald E. Boyle, Maintenance Superintendent/Road with Appellee since 1995. He identified Appellee's Exhibit 1 as a table of organization showing his position. Mr. Boyle testified Appellant May was a Road Supervisor at the time of his removal. He stated Appellant May became a supervisor in 1999 and he began to supervise him at that time, although he was not Appellant May's direct supervisor at that time.

Mr. Boyle testified it is necessary for supervisors to hold at least a Class A CDL as they have to know how to operate the machines that their subordinates operate. He stated all supervisors hold CDL's as he sees their driver's license records once a year.

On February 8, 2006, Mr. Boyle testified that approximately forty-five minutes to an hour after the supervisor's meeting, another meeting took place. He was not immediately in that meeting, but they were discussing coverage from the day

before. Mr. Boyle testified he entered the room and Appellant May was off in the corner, sitting alone. As soon as he walked in, Mr. Boyle testified he smelled alcohol and he asked Appellant May if he consumed any alcohol in the last twelve hours. Appellant May told him no but said his brother or brother-in-law had spilled alcohol on his shirt. He also told Mr. Boyle he had had alcohol the night before.

Appellee's Exhibit 6 was identified as Mr. Boyle's written statement regarding the incidents of February 8, 2006 and Appellee's Exhibit 10 was identified as a written reprimand he gave to Appellant May in 2002.

Appellee's next witness was Ned Weber, Deputy over Operations and Maintenance with Appellee. He reports directly to the Engineer and stated there are approximately fifty employees employed by Appellee. Mr. Weber identified Appellee's Exhibit 2 as the sign-in sheet for the Drug Free Workplace Training which took place on October 21, 2003. Appellee's Exhibits 3 and 4 were identified as the drug policies in effect in February 2006. He stated Exhibit 3 is the county's policy, specific to Appellee and Exhibit 4 is the Engineer's policy. Appellee's Exhibit 7 was identified as the February 8, 2006 personnel action letter to Appellant May. He stated Appellant May was out of service for twenty-four hours, then placed on paid administrative leave. Mr. Weber stated the third page of the document shows that Appellant May waived his right to his pre-disciplinary conference. Appellee's Exhibit 8 was identified as the letter and removal order for Appellant May, effective March 10, 2006. Appellee's Exhibit 9 was identified as a one day suspension order which Appellant May received on October 24, 2003 and Appellee's Exhibit 10 was identified as a written reprimand for excessive cell phone usage, dated December 6, 2002.

Mr. Weber testified that he called the second meeting on February 8, 2006 to discuss snow removal. He asked Appellant May to come into the meeting after he was done making his work assignments. Mr. Weber saw Mr. Boyle and invited him into the meeting also. Mr. Weber stated the meeting was held in a small conference room and when Mr. Boyle walked in, he stated he smelled alcohol. Appellant May stated he had been drinking the previous evening but stopped at 10:30 p.m. The participants finished their discussion regarding snow and ice and Appellant May left the room. Mr. Weber and Mr. Boyle then discussed sending Appellant May for a test. Mr. Weber told Appellant May he was being sent for an alcohol test and that Mr. Boyle would take him. The test result was phoned back to the Engineer and he

and Mr. Weber discussed the requirements of the CDL license and the need to be out of service for twenty-four hours and to be placed on administrative leave.

Mr. Weber testified he did not smell alcohol on Appellant May that morning, but does remember Appellant May having a coffee cup up near his mouth all morning.

On cross examination, Mr. Weber testified it was cold on February 8, 2006 and that Appellant May usually drank coffee in the mornings.

Appellee's next witness was Bruce C. Smith, county Engineer for approximately seven years. He stated he has worked at the Engineer's office since the early 1990's and was the Chief Deputy prior to becoming Engineer.

Mr. Smith testified the Road Supervisor must have a CDL. He identified Appellee's Exhibits 8 and 9 as the removal order and one day suspension order, respectively, which he signed. Mr. Smith testified that before he decided upon removal for Appellant May, he reviewed his personnel file for prior discipline. The thirty day suspension and counseling that Appellant May received in 1999, plus the fact that he held the position of supervisor, was predominant in making the decision to remove Appellant May. Mr. Smith testified he was thinking mainly of the public safety issue. He also stated he gave Appellant May a chance to resign.

Appellant's first witness was Richard Gaus, an employee of Appellee who had been supervised by Appellant May. He testified Appellant May was a good supervisor. Mr. Gaus testified that on February 8, 2006, he was three feet from Appellant May's face and could smell alcohol on him. Mr. Gaus testified he did not ask Appellant May about it, as Appellant May was in a hurry. Mr. Gaus testified he did not notice any unusual walk or talk from Appellant May, nor did he notice any bloodshot eyes or slurred speech.

Appellant's next witness was Thomas J. Cline, a previous employee of Appellee who was supervised by Appellant May for approximately six years. Mr. Cline stated he quit working for Appellee on September 1, 2005. He stated he knew of another employee of Appellee who failed a drug test two times and was removed, approximately four and one-half years ago.

Appellant May testified he did not receive any counseling or attend a rehabilitation program when he was suspended for thirty days. On cross examination, Appellant May confirmed that during the time he was suspended he was given a paper by Mr. Weber to see and talk to a woman at Source One. He stated he did talk with her and she was a psychiatrist.

FINDINGS OF FACT

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

1. Appellant May had been employed by Appellee for approximately eighteen and one-half years at the time of his removal, effective March 10, 2006. His previous discipline consists of a thirty day suspension in 1999; a verbal warning in April 2002; a written reprimand in December 2002; and a one day suspension in October 2003.
2. Appellant May was a Road Supervisor at the time of his removal and was required to have and maintain a CDL.
3. On February 8, 2006, Appellant May arrived at work and smelled of alcohol. He was sent for an alcohol test and the results of that test indicated a breath test of .077 and .078. The U. S. Department of Transportation alcohol testing form states that if the results of the breath test are 0.02 or greater, then the employee "cannot drive, perform safety-sensitive duties, or operate heavy equipment."
4. Appellant May was given notice of a pre-disciplinary conference and he voluntarily waived his right to attend the conference, in writing, on February 14, 2006.
5. As a supervisor, Appellant May received a copy of the Appellee's Drug and Alcohol Free Workplace Policy, was familiar with its contents and was responsible for enforcing the policy.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant May to be affirmed, Appellee must prove by a preponderance of the evidence the allegations contained in the removal order. Appellee has met its burden.


Appellant May did not dispute that the breath alcohol test was wrong. He testified that as soon as he received the results of the test, he knew he was in violation of Appellee's policy. He argued that he did not need to have a CDL in order to perform his job, as his subordinates had CDL's and could operate all of the needed machinery. Appellee argued that all supervisors must have CDL's as they have to be able to operate the same machinery as their subordinates. Mr. Boyle testified all supervisors have CDL's, so Appellant May was not being treated differently than any other supervisor. It makes sense that, in the case of an absence or an emergency, a supervisor may be called upon to operate the equipment normally assigned to a subordinate. Appellant May's own testimony was that during the winter, he operated a snow plow, which requires a CDL. Therefore, Appellant May's argument that he did not need a CDL is not persuasive.

Appellant's own witness, Richard Gaus, testified that he was three feet from Appellant May on the morning of February 8, 2006 and could smell alcohol on him. Another of Appellant's witnesses, Thomas Cline, stated that he knew of another employee who failed a drug or alcohol test twice and was removed. Therefore, there was no evidence of disparate treatment presented, as this was also Appellant May's second failure of a drug or alcohol test. Appellee stated the other employee may have resigned or been fired, as Engineer Smith could not remember. He testified, however, that he also gave Appellant May a chance to resign in lieu of being removed.

There was no evidence of abuse of discretion on the part of Engineer Smith in making the decision to remove Appellant May. Engineer Smith testified he took into consideration the previous thirty day suspension for a positive drug test, the fact that Appellant May was a supervisor and also considered the safety issue to the public. All of these are legitimate concerns and do not show any abuse of discretion on the part of the Engineer.

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Therefore, since Appellee has proved by a preponderance of the evidence the allegations contained in the removal order, it is my **RECOMMENDATION** that the removal of Appellant May be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge

:mms