

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MICHAEL COLEMAN,

Appellant,

v.

Case No. 06-SUS-02-0039

HAMILTON COUNTY
BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

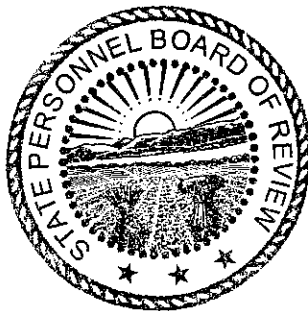
Appellee.

ORDER

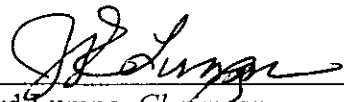
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 suspension be **DISAFFIRMED** and that Appellant receive the back pay due him minus any monetary set off that may be applicable, pursuant to O.R.C. §§ 124.03 and 124.34.



Lumpe – Aye
Booth – Aye
Tracy – Aye

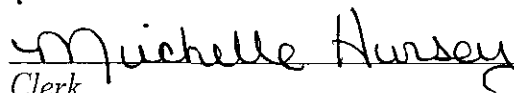


J. Richard Lumpe, *Chairman*

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, May 14, 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.

5-14-07



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

Michael Coleman

Case No. 06-SUS-02-0039

Appellant

v.

March 30, 2007

Hamilton County Board of Mental Retardation
and Developmental Disabilities

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on July 20, 2006. Present at the hearing were the Appellant, Michael Coleman, appearing *pro se* and Appellee Hamilton County Board of Mental Retardation/Developmental Disabilities designee Craig Landers, Director of Business Services, represented by Kathleen Bailey, Assistant Prosecuting Attorney.

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

Appellant Coleman was suspended from his position of Custodian for a period of seven days, effective February 16, 2006. The pertinent part of the suspension order states as follows:

Pursuant to Section 124.34 of the Ohio Revised Code, the reason for this action is that you have been found guilty of malfeasance, dishonesty and a general failure of good behavior in the following particulars, to wit:

On Monday, November 28, 2005, you did not appear for work at your scheduled start time of 3:00 p.m., did not inform your supervisor of your whereabouts, and later signed your timesheet stating you appeared for work at 3:00 p.m.

Appellant Coleman filed a timely appeal of his suspension

STATEMENT OF THE CASE

Appellee's first witness was Calvin Phillips, an employee of Appellee since March 1996. Mr. Phillips is the head custodian at the Jackson Adult Center, which is an adult workshop. He has three subordinates, one of whom is Appellant Coleman. Appellant Coleman's hours in November 2005 were from 3 to 11:30 p.m. Mr. Phillips identified Appellee's Exhibit 1 as a position description for a Custodial Worker 1, which is the position held by Appellant Coleman. As a Custodial Worker 1, Appellant Coleman is responsible for mopping floors, changing light bulbs, doing lawn work and cleaning carpet.

Appellee's Exhibit 2 was identified by Mr. Phillips as his statement as to the events that took place on November 28, 2005. He stated that Appellant Coleman had been off work for two days and was told that he needed to have a doctor's slip releasing him to return to work, so Mr. Phillips wanted to see Appellant Coleman when he arrived for work to check if he had the doctor's statement. Mr. Phillips worked from 6:30 a.m. to 3:00 p.m., so he waited at 3:00 p.m. to talk to Appellant Coleman. He testified he went through the building two times looking for Appellant Coleman and asked the secretary if she saw him. He testified she had not seen Appellant Coleman, so he went to the door and looked out to the parking lot to look for him and went to the lunch room to look for him. About 3:30 p.m. Mr. Phillips testified he headed to his car in the parking lot and sat in his car for approximately fifteen minutes and never saw Appellant Coleman. Mr. Phillips left the parking lot at approximately 3:45 p.m.

Mr. Phillips testified that when he was still inside the building looking for Appellant Coleman, he saw Don Williams, a co-worker of Appellant Coleman's and told him he was looking for Appellant Coleman. He told Mr. Williams to have Appellant Coleman call him and Mr. Williams agreed, but Mr. Phillips testified he never received a call. He stated he had walked through the building several times calling out Appellant Coleman's name and if Appellant Coleman had been there, he would have seen or heard him, as the building is not that big.

The next day, November 29, 2005, when he arrived for work, he looked at Appellant Coleman's time sheet for the previous day and it was not filled in for November 28, 2005. He looked at Appellant Coleman's half of the building that he is responsible for cleaning and it was cleaned, so he knew then that Appellant Coleman had worked the day before, on November 28, 2005. He looked at

Appellant Coleman's time sheet sometime later and it had written on it that Appellant Coleman worked from 3:00 p.m. to 11:30 p.m. on November 28, 2005. Mr. Phillips identified Appellee's Exhibit 3 as Appellant Coleman's time sheet.

On cross examination Mr. Phillips testified he does not know if it rained on November 28, 2005 or not. On redirect examination Mr. Phillips denied being in the parking lot on November 28, 2005 and putting windshield wipers on his car at approximately 2:55 p.m. He testified that would have been during his work hours and he would not have done that during his work hours.

Appellee's next witness was Michael Trabue, Custodial Maintenance Supervisor with Appellee since approximately 1990. As such, he supervises ten employees, one of whom is Mr. Phillips. When he was apprised by Mr. Phillips that Appellant Coleman's time sheet reflected that he signed in at 3:00 p.m. on November 28, 2005, when in reality he was not there at that time, Mr. Trabue testified he asked Appellant Coleman about the discrepancy and Appellant Coleman told him he could not remember that day.

Mr. Trabue then identified Appellee's Exhibits 4 through 17 as past verbal and written reprimands as well as suspensions that comprise Appellant Coleman's progressive discipline history. The previous discipline dates from November 1989 to the present and consists of 2 verbal reprimands for tardiness, eight written reprimands for tardiness, absences and a falsified timesheet and two three day suspensions for tardiness and watching television during work hours. His last suspension was served in October 2005 for watching television during work.

On cross examination Mr. Trabue confirmed that Appellant Coleman had complained to him several times about Mr. Phillips being unfair to him. Mr. Trabue testified that he talked with Appellant Coleman on November 28, 2005, when Appellant Coleman called him and told him he was having car problems. Mr. Trabue testified he told Appellant Coleman he needed to come to work. Mr. Trabue also testified that sometime after the incident, Appellant Coleman called him and told him that he remembered what happened on November 28, 2005. This was sometime before the pre-disciplinary conference and Appellant Coleman told him that once he saw his time sheet he remembered that he had to get a ride into work since his car was broken. Mr. Trabue testified that at the pre-disciplinary hearing, Appellant Coleman told him he didn't remember what had happened on November 28, 2005.

Appellee's next witness was Craig Landers, Director of Business Operations. He supervises five staff, one of whom is Mr. Trabue. He identified Appellee's Exhibit 18 as the pre-disciplinary report for Appellant Coleman. Mr. Landers testified he was at the pre-disciplinary conference and Appellant Coleman had no explanation as to what happened on November 28, 2005. During the investigation, Mr. Landers testified Appellant Coleman said he didn't remember what happened on that day, so he was sure that he was at work on time. Mr. Landers testified he looked at the evidence and discussed it with the Superintendent and they both felt that a seven day suspension was appropriate.

Appellee's Exhibit 19 was identified by Mr. Landers as Appellee's personnel and policy manual section on discipline. The policy shows that a Group 1 offense includes a failure to report on time as well as a Group 3 offense of falsifying a document or altering a sign-in. Appellee's Exhibit 20 was identified by Mr. Landers as a receipt for the manual signed by Appellant Coleman on July 23, 2003. Mr. Landers testified Appellant Coleman had thirteen previous disciplinary actions against him, with the most recent being a three day suspension within a month of this incident. He then identified Appellee's Exhibit 21 as the letter and order of suspension for Appellant Coleman from the Superintendent suspending him for seven days.

On cross examination Mr. Landers confirmed that Appellant Coleman has called him from time to time about problems he has had.

Appellant Coleman testified that in February 2006, he was asked about two separate incidents. He remembered the specifics about the one incident, but could not remember what he did on November 28, 2005. Two days after the pre-disciplinary conference was held, when he received a copy of his time sheet for November 28, 2005, he remembered what happened and he called Mr. Trabue to tell him. Appellant Coleman testified he remembered that he had been off sick for two days and when he went to go to work on November 28, 2005, the pressure in a black TransAm that he had bought went out. He called Mr. Trabue to tell him he was having car trouble and Mr. Trabue told him he needed to get to work. Appellant Coleman testified a friend or co-worker of his came and got him and took him to work. He testified that when he got to the parking lot, he saw Mr. Phillips putting windshield wipers on his car.

Appellant Coleman identified Appellant's Exhibit A as a report from the National Weather Service showing that it did rain on November 28, 2005. He testified he remembered it raining and called the National Weather Service to obtain proof that it was raining that day. He testified that he got to work on time on November 28, 2005, went in the building and called the car place regarding his car and then began his work. Appellant Coleman testified that there is a public announcement system in the building and Mr. Phillips could have called his name over that system and he would have responded. Appellant Coleman testified he was at work on time on November 28, 2005.

FINDINGS OF FACT

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

1. Appellant Coleman has been employed by Appellee since 1989. He currently holds the position of Custodial Worker 1. His previous discipline consists of two verbal warnings and a written reprimand in 1989; a three day suspension in 1990; two written warnings in 1996; a fifteen day suspension and a written reprimand in 1997; a written reprimand in 1998; a written warning in 2001; a written warning in 2002; and a three day suspension in October 2005.
2. Appellant Coleman's work hours on November 28, 2005 were from 3:00 p.m. to 11:30 p.m.
3. Appellant Coleman's supervisor on November 28, 2005 was Calvin Phillips. Mr. Phillips work hours were from 6:30 a.m. to 3:00 p.m.
4. On November 28, 2005, Appellant Coleman was to bring to work a doctor's statement regarding his absence of the prior two days.
5. Appellant Coleman called Mr. Trabue, Custodial Maintenance Supervisor, on November 28, 2005, telling him he had car problems. Mr. Trabue told Appellant Coleman he needed to come to work.
6. Mr. Phillips began looking for Appellant Coleman at approximately 3:00 p.m. and did not see him by the time he left at 3:45 p.m.

7. According to documentation from the National Climatic Data Center, it was raining from 3:00 p.m. until 8:00 p.m. on November 28, 2005.
8. Appellant Coleman had a friend drive him to work on November 28, 2005.
9. The next day, November 29, 2005, Mr. Phillips checked Appellant Coleman's area and it was clean, so he knew Appellant Coleman did work on November 28, 2005. When he reviewed Appellant Coleman's time sheet for November 28, 2005, it indicated he worked from 3:00 p.m. to 11:30 p.m. that day.

CONCLUSIONS OF LAW

In order for Appellee's seven day suspension of Appellant Coleman to be affirmed, Appellee has the burden of proving by a preponderance of the evidence, the allegations in the suspension order. Appellee has failed to meet its burden.

Essentially this case has come down to Appellant Coleman insisting he was at work on time on November 28, 2005 and his supervisor, Mr. Phillips, testifying he did not see Appellant Coleman at work between 3:00 p.m. and 3:45 p.m. on November 28, 2005. If the evidence is equal on both sides, then Appellee has not met its burden of proving the allegations in the suspension order by a preponderance of the evidence. In this case, the evidence is more weighted in the Appellant's favor.

Appellant Coleman testified, and it was confirmed by Mr. Trabue, that he called into work prior to his shift beginning to tell Mr. Trabue that his car was not working. Mr. Trabue told him he needed to come into work. Appellant Coleman testified he then called a friend, Spencer Greene, to drive him to work. Mr. Greene signed a notarized affidavit stating he drove Appellant Coleman to work prior to 3:00 p.m.

Appellant Coleman also testified that when he arrived at work, at approximately 2:55 p.m., he saw Mr. Phillips in the parking lot putting windshield wipers on his car. Appellant Coleman presented evidence from the National Climatic Data Center that it did rain the afternoon of November 28, 2005. Although Mr. Phillips denied being in the parking lot at 2:55 p.m. putting windshield wipers on his car, it is possible that he did not want to admit to that, as he testified that was still during his work hours and he would not have done that during work hours. In

this particular instance, Mr. Phillips would not want to “tell on himself” if indeed Appellant Coleman is correct.

Appellant Coleman testified, uncontradicted, that there is public address system in the building. He stated that had Mr. Phillips paged him on the public address system, he would have heard the page and would have called Mr. Phillips. Mr. Phillips did not give an explanation as to why he did not do so. Mr. Phillips testified he looked for Appellant Coleman in the building, but Appellant Coleman testified when he arrived at work, he went directly to wherever there is a phone and called to inquire about his car and then began performing his duties. It is not out of the realm of reasonable possibility that while Mr. Phillips was looking in one room for Appellant Coleman, he was in another and they kept missing each other.

Mr. Phillips also testified that he told another co-worker, Don Williams, to have Appellant Coleman call him. Mr. Williams did not testify, so there is no evidence to establish that Mr. Williams was actually told or that he simply forgot or that he did not see Appellant Coleman.

Appellee’s Exhibit 18, the report of the pre-disciplinary conference, states that at the pre-disciplinary hearing, Mr. Phillips stated he left work on November 28, 2005 at 3:30p.m. That is a discrepancy as to what he testified to at the record hearing, as then he stated he did not leave work until 3:45 p.m. While this is a minor discrepancy, it is nonetheless a discrepancy. Appellant Coleman’s testimony was corroborated by Mr. Trabue’s testimony, by Mr. Greene’s affidavit and by the National Climatic Data Center.


While Appellant Coleman does have an extensive history of previous discipline, each case or instance must stand on its own. The fact that Appellant Coleman has many previous disciplines cannot be used as a basis to indicate that it is more likely than not that he is guilty of the current alleged infraction. The facts of this case have not established that he falsified his timesheet nor that he was not at work on time on November 28, 2005.

If Appellant Coleman was not being truthful about the time he arrived at work on November 28, 2005, it is doubtful that he would have gone to the trouble of having his friend appear before a notary public to sign an affidavit or to have contacted the National Climatic Data Center to obtain proof that it rained the afternoon of November 28, 2005. Appellant Coleman has never wavered in his insistence that he was at work on time, as reflected in his timesheet, on November

Michael Coleman
Case No. 06-SUS-02-0039
Page 8

28, 2005, and Appellee has not established by a preponderance of the evidence that he was late.

Therefore, it is my **RECOMMENDATION** that Appellant Coleman's seven (7) day suspension be **DISAFFIRMED** and that he receive the back pay due him minus any monetary set off that may be applicable.



Marcie M. Scholl
Administrative Law Judge

:mms