

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

David W. Miller,

Appellant,

v.

Case No. 07-SAR-01-0040

Cuyahoga County Sheriff,

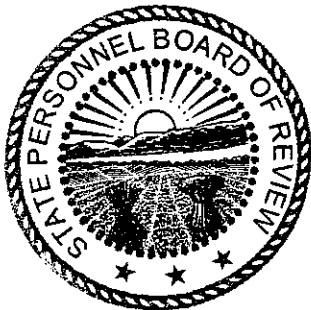
Appellee.

ORDER

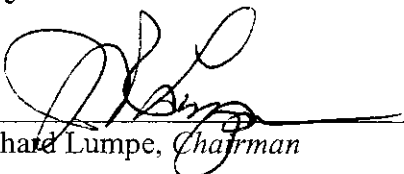
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Appellee's 30-day suspension and subsequent reduction of Appellant from Deputy Sheriff Sergeant to Deputy Sheriff be **AFFIRMED**, pursuant to O.R.C. § 124.34.



Lumpe - Aye
Booth - Aye
Sfalcin - Aye

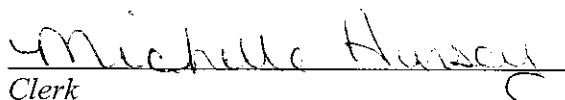


J. Richard Lumpe, *Chairman*

CERTIFICATION

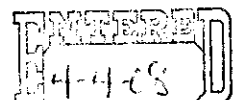
The State of Ohio, State Personnel Board of Review, ss:

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, April 9, 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**

DAVID W. MILLER,

Case No. 07-SAR-01-0040

Appellant

v.

December 20, 2007

CUYAHOGA COUNTY SHERIFF,

JAMES R. SPRAGUE

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard on September 20, 2007. Present at the hearing was Appellant, who was represented by Joseph M. Hegedus, Attorney at Law. Appellee, Cuyahoga County Sheriff (CCS), was present through his designee, Christopher Russ, Employment Relations Administrator, and was represented by James C. Cochran, Assistant Prosecuting Attorney. Although the hearing addressed the general fact pattern and applicable law of this case, the hearing focused primarily on the disparate treatment argument raised by Appellant. By agreement of the parties, simultaneous post-hearing briefs were filed on October 31, 2007. On November 2, 2007, Appellee filed corrected pages 6. through 9. of Appellee's post-hearing brief and the record was then closed.

This cause came on due to Appellant's January 23, 2007 filing of an appeal from his 30-day suspension and concomitant reduction from a position of Deputy Sheriff Sergeant to a position of Deputy Sheriff with Appellee, CCS. The pertinent R.C. 124.34 Order of Suspension and Reduction was signed on January 19, 2007, was delivered to Appellant on January 19, 2007, and was effective on January 22, 2007.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.34.

STATEMENT OF THE CASE

Appellant was suspended for 30 days and thereafter reduced in rank from Deputy Sheriff Sergeant to Deputy Sheriff. The R.C. 124.34 order reads, in pertinent part:

Specifically: "Failure of Good Behavior" and "Malfeasance in Office"

See attached Exhibit "A", incorporated by reference, for specifics of the above offenses.

As well as the above, the instant R.C. 124.34 Order of Suspension and Reduction has attached to it a three-page text narrative and various additional pertinent documents.

Testifying at the hearing for Appellee was Christopher Russ, Employee Relations Administrator for the CCS Office, and Appellee's designee for this matter. Testifying for Appellant was Appellant, David W. Miller, currently a Deputy Sheriff with the CCS and formerly a Deputy Sheriff Sergeant with the CCS prior to receiving the 30-day suspension and reduction that is the subject of the instant appeal.

We begin by noting that the facts of this case are not generally in dispute and are set forth as follows:

Appellant began his career with the CCSO in 1993. Appellant subsequently resigned from his Corrections Officer (CO) position on May 21, 1997 to obtain a promotion. On May 22, 1997, Appellant was re-hired by the CCS as a Patrol Officer Cadet. On November 13, 2004, Appellant was promoted to Deputy Sheriff Sergeant, a supervisory position within the CCSO.

Appellant had two previous convictions for operating a vehicle while under the influence of alcohol. The first conviction occurred in 1988, when Appellant was a civilian. The second conviction occurred after Appellant returned from military service in 1994, at a time when Appellant was serving as a CO with the CCSO.

On the evening of January 8, 2007, Ohio State Highway Patrol Trooper Cottom received a dispatch that indicated that a motorist had been spotted driving westbound on I-90 in Lorain County in a vehicle with a missing tire. At approximately 10:00 p.m., Appellant's personal vehicle was spotted and Appellant,

the driver, was pulled over by Trooper Cottom; due to Appellant's allegedly driving his vehicle with a flat tire as he proceeded westbound on I-90 in Elyria Township, Lorain County, Ohio. Appellant was off-duty at the time of this incident.

During the time when Appellant was out of his vehicle during this stop, Trooper Cottom suspected that Appellant was impaired and ultimately took Appellant into custody. Appellant was then transported to an OSHP Post, where Appellant executed the requisite forms acknowledging that he would not participate in a breathalyzer test.

Appellant was thereafter charged with violations of and entered not guilty pleas to the following: R.C. 4511.19 (A)(1)(a) (operating a vehicle under the influence of alcohol -- a first degree misdemeanor); R.C. 4511.19 (A)(2) (operating a vehicle while under the influence of alcohol having had a previous conviction and refusing to submit to a blood test after the first conviction -- a first degree misdemeanor); and R.C. 4513.02 (operating an unsafe vehicle -- a minor misdemeanor).

The requisite pre-disciplinary proceedings then occurred. On January 19, 2007, Cuyahoga County Sheriff Gerald T. McFaul suspended Appellant for 30 days and reduced him in rank from Deputy Sheriff Sergeant to Deputy Sheriff. These actions were principally based on Appellant's arrest, the adverse publicity it generated, Appellant's two previous convictions for operating a vehicle while under the influence of alcohol, and Appellant's supervisory role.

Also in January, 2007, Appellant voluntarily entered into an intensive outpatient alcohol abuse treatment program at Serenity Hall. Appellant subsequently received a certificate of attendance and met the requirements associated with the program. Further, as a continuing requirement of the program, Appellant must continue to submit to random drug and alcohol testing.

Ultimately, on January 31, 2007 in the Elyria Municipal Court, Appellant pled no contest to a violation of **R.C. 4511.19 (A)(1)(a) (operating a vehicle under the influence of alcohol -- a first degree misdemeanor)** and pled no contest to a violation of **R.C. 4513.02 (operating an unsafe vehicle -- a minor misdemeanor)**. Appellant was then found guilty regarding both of these offenses.

Appellant currently possesses a valid Driver License for the State of Ohio.

Sheriff McFaul charged Appellant with express violations of R.C. 124.34 (*i.e.* malfeasance and failure of good behavior) and with a corresponding violation of **Rule 72.** of the CCSO Standard Schedule of Disciplinary Offenses, which reads:

Committing acts which constitute a misdemeanor, other than a minor traffic violation, under the laws of the United States, the State of Ohio, or the State or Municipality in which such acts were committed.

Appellee's Position Statement

Appellee argues that Appellant's acts of operating a vehicle while under the influence of alcohol constitute the facts and circumstances of a first degree misdemeanor and, thus, fall under the parameters set forth in Rule 72. Appellee further argues that Appellant's subsequent plea of no contest and conviction for same validate that assertion. Additionally, Appellee argues that, while Appellant's offenses constitute first offenses for the purpose of the "look back" rule, Appellant had already committed two such offenses (in 1988 and 1994).

As well, Appellee argues that while Rule 72. applies to all CCSO employees, it should be applied more strictly to supervisory personnel who must maintain their credibility with their subordinates.

Appellee also argues that reduction, as versus removal, was a viable alternative here; since Appellant was at a higher rank than a Deputy Sheriff and could be disciplined and still stay with the CCSO.

Additionally, Appellee argues, Sheriff McFaul took into account that Appellant had been by and large a good employee other than having a previous alcohol offense. Further, Appellee argues, Sheriff McFaul took into account Appellant's young family. Accordingly, Appellee argues, Sheriff McFaul utilized a suspension and a reduction in this instance as opposed to the contemplated removal of Appellant.

In this same vein, Appellee argues that the line employee Deputy Sheriffs whom Appellant asserted were less severely disciplined than Appellant were not similarly situated to Appellant when Appellant was a supervisor. Moreover, Appellee argues, even the examples of the Deputy Sheriff Sergeants whom

Appellant asserts were less severely disciplined than Appellant did not have circumstances that are comparably similar to Appellant's.

Appellant's Position Statement

Conversely, **Appellant argues** that the CCSO did not even wait for the conclusion of legal proceedings in Appellant's cases in the Elyria Municipal Court before both conducting pre-disciplinary proceedings and issuing the instant suspension and reduction. Further, while Appellant agrees that this offense should constitute a first offense under the "look back" provision, Appellant argues that this fact should mitigate against the severity of the penalty the CCSO contemplated for this violation.

Additionally, Appellant argues that neither the 1988 conviction nor the 1994 conviction should be considered in weighing the need for and the severity of any discipline meted out. This is because the 1988 conviction was far distant in time and was obtained prior to the beginning of Appellant's service with the CCSO. This is also because, Appellant argues, the 1994 conviction was obtained when Appellant was a CO and before Appellant resigned and was re-hired by the CCSO. Accordingly, Appellant argues, Appellant has had only one such conviction during Appellant's current tenure with the CCSO.

As well, Appellant argues, there are a number of examples both at the Deputy Sheriff and at the Deputy Sheriff Sergeant levels where employees similarly situated to Appellant received substantially less severe discipline for committing the same or in some cases even more serious offenses.

Moreover, Appellant argues, adverse media coverage and a few citizen complaints may have motivated the CCSO to rush the disciplinary process. As a result, Appellant argues, Appellee was unable to assess the gravamen of the two convictions Appellant actually received on January 31, 2007. Neither, Appellant argues, was Appellee able to fully consider Appellant's voluntary entrance into and successful completion of an intensive alcohol abuse treatment program.

Finally, Appellant argues that Rule 72 applies to all CCSO personnel and it should be applied equally to all those same individuals.

Disparate Treatment Discussion

Appellant has asserted that six Deputy Sheriffs and two Deputy Sheriff Sergeants have comparable circumstances to Appellant and that all of these employees were disciplined less severely than was Appellant.

Let us begin with the Deputy Sheriffs that Appellant has put forth as comparables for purposes of disparate treatment. They are: Deputy Sheriff Nicholas M. Paluch; Deputy Sheriff James Lever; Deputy Sheriff James Bonnette; Deputy Sheriff Gerald E. Echon; Deputy Sheriff Anthony Church; and Deputy Sheriff Gerald Pace.

Appellee has argues that, while Rule 72. applies to all CCSO personnel, supervisory personnel are held to a higher standard, since they must maintain discipline and set an example of behavior for subordinates. Based on the testimony presented, Sheriff McFaul took Appellant's supervisory role into consideration in considering the appropriate discipline to mete out to Appellant. It is not uncommon for an appointing authority to consider that a supervisory employee should receive more severe discipline for an infraction than should a line employee. This rationale seems particularly appropriate when one is discussing, as here, circumstances that led to a supervisory law enforcement employee of the County's law enforcement entity receiving a conviction for a first degree misdemeanor.

Thus, we may accept Appellee's argument that Appellant was not similarly situated to line employee Deputy Sheriffs at the time when Appellant encumbered his Deputy Sheriff Sergeant position. Thus, it is not necessary to further consider the circumstances of the above-referenced Deputy Sheriffs for purposes of ascertaining the presence or absence of disparate treatment in the instant appeal.

Next, let us examine the circumstances regarding the two Deputy Sheriff Sergeants (namely Robert Chilton and David Bartko) whom Appellant asserts committed similar offenses to Appellant's but, Appellant argues, received more lenient discipline than did Appellant.

In August, 2002, Deputy Sheriff Sergeant Robert Chilton received a 20-day suspension for a Rule 79. and R.C. 124.34 violation and a written reprimand for Rules 72. and 79. violation. Sergeant Chilton had been charged with violations of the following: Cleveland Municipal Court City Code (Municipal Code) 627.03 (using weapons while intoxicated — an unspecified misdemeanor); Municipal Code 627.04

(improperly handling firearms in a motor vehicle – an unspecified misdemeanor); and Municipal Code 627.20 (discharging a firearm – an unspecified misdemeanor). The record is not entirely clear that Sergeant Chilton was actually convicted of any of these charges.

Essentially the underlying facts of this situation are that Sergeant Chilton, apparently while under the influence of alcohol, fired one shot from a .308 caliber rifle into the air in a Cleveland neighborhood while apparently sitting in the vehicle and while Sergeant Chilton also had concealed on his person a Walt[h]er .380 pistol. Neither weapon was a CCSO-authorized weapon for Deputy Sergeant Chilton. Sergeant Chilton was off-duty at the time of this incident.

In March, 2001, Deputy Sheriff Sergeant David Bartko received a three-day suspension for a Rule 72. violation. Sergeant Bartko was found guilty of a violation of Lakewood Codified Ordinance 333.01 (A) ((driving while under the influence – an unspecified misdemeanor).

Essentially, the underlying facts of this situation are that Sergeant Bartko was involved in a multi-vehicle accident while operating his vehicle under the influence. Sergeant Bartko attempted to avoid a vehicle making a U-turn in front of him but was unable to regain control of his vehicle. He then rear ended one vehicle and bounced off several others. Sergeant Bartko was off-duty at the time of this incident.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at hearing and upon the post-hearing briefs submitted by the parties, I make the following Findings:

I incorporate by reference any express or implied Findings set forth in the Statement of the Case, above.

Without putting too fine a point on this discussion, it appears that a credible argument can be made, and I so find, that the facts and circumstances of Sergeants Chilton and Bartko respective situations and the facts and circumstances of Appellant's situation are sufficiently similar that the discipline that Sergeants Chilton and Bartko received should be a relevant factor in considering the level of discipline that Appellant received.

However, one may also argue, and I so find, that, although Sheriff McFaul probably would have been justified in more severely disciplining Sergeants Chilton and Bartko, this fact is not of sufficient weight to alter Sheriff McFaul's legitimate need to discipline Appellant for what were, by all accounts, acts that resulted in Appellant's third conviction for operating a vehicle under the influence.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether a Deputy Sheriff Sergeant who committed acts that resulted in a third conviction for operating a vehicle under the influence and a conviction for operating an unsafe vehicle has engaged either in malfeasance or failure of good behavior? If the answer to this first question presented is in the affirmative, then this case presents this Board with a second question of whether Appellant's evidence of disparate treatment bears sufficient weight to mitigate against Appellant's suspension and reduction?

Based on the Findings, above, and for the reasons set forth, below, this Board should answer the first question in the affirmative and find that Appellant engaged in a failure of good behavior. This Board should proceed to answer the second question in the negative. This Board should, as a result, affirm Appellant's instant discipline issued by Cuyahoga County Sheriff McFaul. Finally, based on the above, it is not necessary at this time to ascertain whether Appellant engaged in malfeasance.

The CCSO has charged Appellant with two R.C. 124.34 disciplinable offenses, failure of good behavior and malfeasance.

Black's Law Dictionary defines "failure of good behavior" as follows:

As enumerated in statute as ground for removal of a civil service employee, means behavior contrary to recognized standards of propriety and morality, misconduct or wrong conduct. (*Black's Law Dictionary*, Sixth Deluxe Edition, p. 594)

Clearly, a law enforcement officer, and particularly one in a supervisory role, is expected to refrain from becoming impaired and then operating a vehicle while in that condition. In that same vein, Appellant's acts committed on the evening of

January 8, 2007 clearly fall outside the behavior expected of a Deputy Sheriff Sergeant. Since this was Appellant's third such commission of these or similar acts, he cannot argue that he was not on notice of his potential propensity to engage in this sort of behavior. Further, engaging in this behavior yet again after his two previous convictions evidences a potentially cavalier attitude toward the consumption of alcohol and the contemporaneous operation of a vehicle.

Given these facts and circumstances, neither the CCSO's past leniency provided to certain of Appellant's fellow Sergeants nor Appellant's subsequent and praiseworthy voluntary entrance into and completion of an intensive alcohol abuse program can sufficiently mitigate against the suspension and reduction that Appellant received. Finally, Appellant should take some comfort in the fact that Sheriff McFaul did not remove Appellant. Thus, since Appellant is still an employee of the CCSO and since Appellant may now have a much better appreciation of the need to carefully monitor or eliminate his consumption of alcohol, Appellant may at some future point again be able to attain a supervisory rank within the CCSO.

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's 30-day suspension and subsequent reduction of Appellant from Deputy Sheriff Sergeant to Deputy Sheriff, pursuant to R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge

JRS: