

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Bryan K. Dixon,

Appellant,

v.

Case No. 08-REM-01-0018

Department of Taxation,

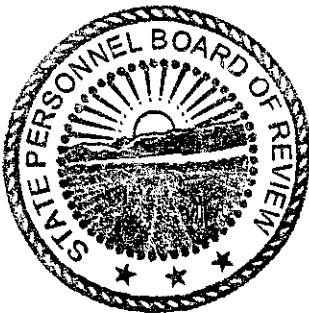
Appellee.

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
Sfalcin - Aye
Tillery - Aye

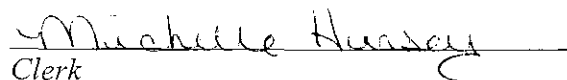


J. Richard Lumpe, *Chairman*

CERTIFICATION

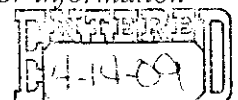
The State of Ohio, State Personnel Board of Review, ss:

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 14, 2009.



Michelle Hussey
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**

Bryan K. Dixon

Case No. 08-REM-01-0018

Appellant

v.

February 20, 2009

Department of Taxation

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 May 27, 2008. Present at the hearing were the Appellant, Bryan K. Dixon, appearing *pro se*, and Appellee Department of Taxation designee Charles Kumpar, Labor Relations Officer 3, represented by Timothy A. Lecklider and Timothy M. Miller, Assistant Attorneys General.

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

Appellant Dixon was removed from his position of Tax Audit Agent Manager 1, effective January 4, 2008. The order of removal states as follows, in pertinent part:

The reason for this action is that you have been guilty of Violation of Section 124.34 of the Ohio Revised Code as Neglect of Duty-Failure to Comply with Section 5703.081 of the Ohio Revised Code "Dismissal of Employee for Non-compliance with Tax Laws;" Departmental Work Rule #11 and/or Any Violation of State of Ohio Policies and/or Departmental Policies (ODT-HR-07/Prompt Filing of Taxes). Specifically, you failed to comply with Section 5703.081 of the Ohio Revised Code regarding the prompt filing and payment of tax returns. You failed to timely file your 2005 Ohio Individual Income Tax Return which was due on April 15, 2006. You filed the return untimely on March 12, 2007.

STATEMENT OF THE CASE

Before taking evidence in this matter, Appellee had filed on May 22, 2008, a Motion to Exclude Appellant Dixon's Witnesses and Documents, a Motion to Quash and a Motion to Exclude Appellant Dixon's Disparate Treatment Evidence. Appellant Dixon filed a Response to Appellee's Motions on May 27, 2008. After hearing oral argument on the Motions, Appellee's Motion to Quash and to Exclude Appellant Dixon's Disparate Treatment Evidence was **GRANTED**. Appellee withdrew its Motion to Exclude Witnesses and Documents.

Appellee first called Appellant Dixon, as if on cross examination. Appellant Dixon identified Appellee's Exhibit 1 as his employment history, which includes a ten day suspension for failure to file his 2004 tax return. He identified Appellee's Exhibit 2 as his position description. Appellant Dixon testified he has been employed by Appellee for approximately twenty years and that he was aware of his obligation to timely file his tax returns. Appellant Dixon identified Appellee's Exhibit 3 as a 2002 memorandum to all employees reminding them to promptly file their tax returns and Appellant Dixon testified he understood that as an employee of the state agency of tax, he had a heightened responsibility to file and comply with the tax laws.

His ten day suspension order was identified as Appellee's Exhibit 5, along with the accompanying personnel action form. Appellant Dixon testified he did not recall receiving this order but stated that he was suspended for ten days in January 2007 and that he did not appeal the suspension. Appellee's Exhibit 6 was identified as his pre-disciplinary notice and packet, which was hand delivered to him in October 2007. Appellee's Exhibit 7 was identified as the recommendation from the pre-disciplinary hearing and Appellee's Exhibit 8 was identified as the order of removal, which Appellant Dixon testified he received.

Appellee's next witness was Delbert Harlan, an Executive Administrator and an employee of Appellee since 1989. Mr. Harlan testified that Appellee's Exhibit 3 is an example of a memorandum issued by the Tax Commissioner each year to remind employees of their obligation to file and pay taxes. Appellee's Exhibit 4 was identified by Mr. Harlan as the file he compiled during his investigation of Appellant Dixon. He explained that page one is a sequence of events based on an annual edit which he receives. The edit matches an employee's social security number with a master tax list in order to determine if an employee filed and paid his or her

taxes. In 2006, Appellant Dixon's name was indicated on the edit. Mr. Harlan explained that since extension deadlines to file the 2004 taxes are August 15 and October 15, 2005, the edit he received in January 2006 showed the non-filed taxes of 2004.

Mr. Harlan testified he sent a letter to Appellant Dixon's home address asking about the 2004 tax return and no response was received. He then talked to Human Resources and was told to send Appellant Dixon an email, which he did on July 3, 2006. Appellant Dixon responded that he did not receive the letter and inquired as to what was going on. Mr. Harlan explained that Appellant Dixon's 2004 tax return had extensions granted until August 15, 2005, but that the tax return was still not received until July 22, 2006. This was eleven months after the due date of the extension, which led to Appellant Dixon's ten day suspension. Mr. Harlan testified that Appellant Dixon was very remorseful and stated that it would not happen again. He told Appellant Dixon that it was getting close to the 2005 tax return deadline and he had not yet filed his return. He told Appellant Dixon to file it and they would work with him if he needed to amend the return.

Appellant Dixon had been assessed a \$150.00 penalty from Appellee, due to the late filing, but Appellant Dixon requested and was granted an abatement. Mr. Harlan identified a document from the Internal Revenue Service, contained in his investigation report, which confirmed that Appellant Dixon had been granted an extension of time to October 15, 2006 to file his 2005 tax return.

On cross examination, Mr. Harlan confirmed that Appellant Dixon responded immediately to his email and that his 2006 tax return was timely filed.

Appellee's next witness was Charles Kumpar, an employee of Appellee for approximately twenty years. For the last six years, he has been a Labor Relations Officer, conducting investigations or work rule violations by employees. He stated Appellee has approximately 1400 employees.

Mr. Kumpar testified he knows Appellant Dixon from working with him, as he has done three investigations of him. He stated the investigations were all recent with two of them being instances of non-filing of tax returns and one instance of a co-worker making allegations regarding Appellant Dixon, which were unfounded.

Mr. Kumpar testified in July or August 2007, he investigated Appellant Dixon for failing to file his 2005 tax return. The allegation was brought to him by Mr. Harlan, as Mr. Harlan had conducted an investigatory interview in August 2007. Appellant Dixon admitted that he did not file his 2005 tax return and Mr. Kumpar stated he then reviewed the information and held a pre-disciplinary conference. Mr. Kumpar testified he did not make a recommendation in this matter and that the final decision to remove Appellant Dixon was made by the Tax Commissioner.

Appellee's Exhibit 8 was identified by Mr. Kumpar as the removal order signed by the Tax Commissioner and Mr. Kumpar testified he recognizes the signature of the Tax Commissioner. Appellee's Exhibit 9 was identified by Mr. Kumpar as a memorandum to him stating that the removal order had been hand delivered to Appellant Dixon on January 4, 2008. Mr. Kumpar testified that the first offense of failing to file a tax return is a ten day suspension, which amounts to two weeks of loss of pay and is considered to be a serious discipline. He stated a ten day suspension is the highest level suspension and that the next step is removal.

On cross examination Mr. Kumpar testified that Appellant Dixon's 2004 and 2005 tax returns were filed late and that his 2006 return was timely filed. He stated that his mission is to gather facts to determine if a work rule violation has occurred. Mr. Kumpar testified that he does not look at mitigating circumstances. He identified Appellant's Exhibit A as the progressive discipline policy and he confirmed that it talks about mediation.

Appellant Dixon admitted that he violated the work rules with regard to his 2004 and 2005 tax returns and stated that he timely filed his 2006 return. He stated that he did not feel removal was warranted and that his work environment was very hostile. Appellant Dixon testified that the progressive discipline policy is a guideline and that lesser discipline can be given as the situation dictates. He stated there are alternative measures and that he felt that in his case, a step reduction would have been appropriate. Appellant Dixon testified that he responded immediately to Mr. Harlan's email and that due to being in stressful situations, he was unaware of his untimely filing. He stated he made no attempt to evade the issue and that the timely filing of his 2006 tax return should have restored his trustworthiness. Appellant Dixon stated that his non-filing was a total oversight and that the public would agree with him.

When asked what his mitigating circumstances were, Appellant Dixon replied that he worked in a hostile environment; that he had to give a subordinate a bad performance evaluation; that he tried to solve the problem, but he was under a lot of stress and just forgot to file his taxes; and that his daughter died and he was not himself.

Upon cross examination Appellant Dixon confirmed that he made his monthly mortgage payment, but that the filing of his tax return is on an annual basis. He stated he filed for extensions and then forgot about the filing.

FINDINGS OF FACT

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

1. Appellant Dixon held the classification of Tax Audit Agent Manager 1 at the time of his removal. He had been employed by Appellee for approximately twenty years and his previous discipline consists of a ten day suspension for failure to timely file his 2004 tax return.
2. As a Tax Audit Agent Manager 1, Appellant Dixon was aware of and was responsible for following and enforcing the policies and procedures of the Appellee.
3. Appellee has a policy and work rule which mandates that its' employees must promptly file and pay all taxes and that failure to do so subjects an employee to disciplinary action, up to and including dismissal from Appellee. Section 5703.081 of the Ohio Revised Code also mandates the same of Appellee's employees.
4. Appellant Dixon admitted that he filed his 2004 and 2005 tax returns untimely.
5. Appellant Dixon did timely file his 2006 tax return.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Dixon to be affirmed by this Board, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the removal order. Appellee has met its burden.

Appellant Dixon admitted to the allegations in the order of removal. He did not timely file his 2005 tax return, as it was due on April 15, 2006, and even with extensions granted to him, Appellant Dixon did not file his 2005 tax return until March 12, 2007. He also admitted to receiving a ten day suspension for the untimely filing of his 2004 tax return.

Appellant Dixon also admitted that he knew of and understood his obligation as an employee of Appellee to timely file his tax returns. Therefore, Appellant Dixon admitted committing the violations he was charged with.

The arguments put forth by Appellant Dixon go to admission and mitigation. He correctly states that he did not try to hide the fact, once confronted, that he was untimely in his filings. He correctly asserts that he fully admitted to the untimely filings and was forthcoming in the investigations. While it is refreshing to have an employee admit to his wrongdoings and take responsibility for his actions, such honesty does not negate or erase the wrongdoings.

Appellant Dixon argued that his honesty should have mitigated his discipline and that the reason he forgot to file his taxes was due to the hostile work environment he had to work in. If Appellant Dixon had only once untimely filed his tax return, perhaps his argument that he forgot would carry more weight. However, the facts are that he failed to timely file his 2004 tax return and because of that, he received a ten day suspension. One would think that having been disciplined for the untimely filing of a tax return, one would ensure that the next year's tax return would be timely filed. This was not the case. His 2005 tax return was also filed untimely, even after Appellant Dixon applied for and received extensions of time to file. Therefore, the argument that he forgot is not persuasive to the point that he should be absolved from discipline.

Appellant Dixon argued that the proper punishment should have been a reduction in his pay step and that somehow Appellee erred by not giving him a

lesser punishment than removal. The appointing must adhere to a standard of not abusing its discretion in meting out discipline. Appellant Dixon has not presented any evidence that Appellee abused its discretion in removing Appellant Dixon. This was Appellant Dixon's second offense, within a short time period, of untimely filing his taxes. He was put on notice with the receipt of a ten day suspension that such action is punishable. He committed the same violation the very next tax year and the Appellee made the decision to remove him from its employ. The Appellee had the authority to do so. Appellant Dixon clearly violated the Appellee's policies and a statutory mandate not once, but twice. The Appellee is under no obligation to give Appellant Dixon a second or third chance to comply with its rules and with the laws of this state. Appellee was well within its discretion to forgo a lesser punishment and remove Appellant Dixon. There has been absolutely no showing of an abuse of discretion on the part of the Appellee.

Although Appellee's Motion to Exclude Disparate Treatment Evidence was granted by this Administrative Law Judge, it may be helpful to explain the administrative rule governing disparate treatment. This Board's administrative rule on disparate treatment provides that such evidence can be considered between "similarly situated employees". This Board has historically held that to mean that the employees should be in the same classification and/or on the same supervisory level. From the documents provided by Appellant Dixon, which were proffered, it appears that Appellant Dixon was Mr. Walters supervisor and therefore not on the same supervisory level. Also, the infractions for which Mr. Walters was disciplined were for something other than not timely filing his tax returns. Therefore disparate treatment is not a factor in Appellant Dixon's discipline. As was stated by the court in the case of *Long v. Ohio Dept. of JFS* (2009) 2009 Ohio 643; 2009 Ohio App. LEXIS 519:

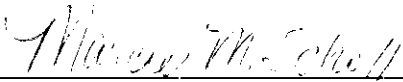
The issue of whether employees are similarly situated sufficiently to merit consideration as evidence of disparate treatment is for the trier of fact, i.e., the SPBR. *Swigart v. Kent State Univ.*, Portage App. No. 2004-P-0037, 2005 Ohio 2258, P37, citing *Ohio Dept. of Mental Retardation & Developmental Disabilities v. Moore* (June 18, 1998), Gallia App. No. 98 CA 1, 1998 Ohio App. LEXIS 2953. Although the SPBR has discretion to consider evidence of disparate treatment in evaluating the appropriateness of discipline, the Ohio Administrative Code does not mandate absolute uniformity of discipline. 'An employee's discipline must stand or fall on its own merits.' *Id.*, quoting

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Green v. Western Res. Psychiatric Habilitation Ctr. (1981), 3 Ohio App.3d 218, 219, 3 Ohio B. 248, 444 N.E.2d 442.

The final argument of Appellant Dixon is one of this Board's laches rule. That administrative rule, 124-3-04 of the Ohio Administrative Code, provides that employees cannot be disciplined for acts that occurred more than two years after the appointing authority had knowledge of the alleged violation. By Appellant Dixon's own admission, the disciplinary action of removal was imposed "approximately ten months after the initial violation". Therefore there is no violation of the laches rule. The section of the rule quoted and argued by Appellant Dixon is only applicable if the appointing authority has taken discipline more than two years after the incident. Since the Appellee disciplined Appellant Dixon within the timeframe of the administrative rule, such argument has no applicability in this case.

Inasmuch as Appellee has met its burden in this case and since Appellant Dixon did not produce any evidence of an abuse of discretion on the part of the Appellee, it is my **RECOMMENDATION** that the removal of Appellant Dixon be **AFFIRMED**.



Marcie M. Scholl
Administrative Law Judge

:mms