

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

Anne M. Hershey,

Appellant,

v.

Case No. 09-SUS-01-0035

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.

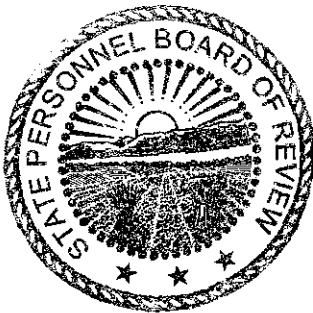
After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.


Wherefore, it is hereby **ORDERED** that Appellant's appeal be **DENIED** and that the O.R.C. § 124.34 Order of Suspension for ten (10) working days be **SUSTAINED**.

Lumpe - Aye

Sfalcin - Aye

Tillery - Aye



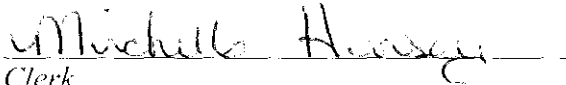


J. Richard Lumpe, *Chairman*

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, July 30, 2009.



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**

Anne M. Hershey,

Case No. 09-SUS-01-0035

Appellant

v.

June 26, 2009

Dept. of Taxation,

Christopher R. Young

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On or about January 21, 2009, the Ohio Department of Taxation, Appellee herein, served an order of suspension, in accordance with Ohio Revised Code Section 124.34 upon the Appellant, Anne M. Hershey, a Tax Auditor Agent Manager 1, effective January 26, 2009. The order alleged the following:

You are hereby being given a ten (10) day suspension, without pay, from employment with the Ohio Department of Taxation effective at the beginning of business Monday, January 26, 2009 and extending through the close of business Friday, February 6, 2009.

The reason for this action is Violation of Section 124.34 of the Ohio Revised Code as Neglect of Duty- Major-Failure to Comply with Section 5703.081 of the Ohio Revised Code "Dismissal of Employee for Non-compliance with Tax Laws," Department 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 report income and/or pay an outstanding balance due on your 2006 Ohio Individual Income Tax Return.

Thereafter on January 23, 2009, a timely appeal from this order was filed by Appellant. The Appellant, Anne M. Hershey, appeared at the record hearing heard on June 10, 2009, and was represented by Marc E. Myers, Attorney at Law. The Appellee, the Ohio Department of Taxation, was present through its designee Charles Kumpar, a Labor Relations Administrator for the Ohio Department of

Taxation, and was represented by Reid T. Caryer, an Assistant Attorney General.

This hearing was conducted by the State Personnel Board of Review in accordance with the Ohio Revised Code Section 124.34, which specifically provides that an employee may file an appeal of any order filed under Ohio Revised Code Section 124.34, within ten (10) days from the date the order is served on the employee. Further, the parties agreed that the appellant timely filed his appeal and the parties agreed to the jurisdiction of this Board.

STATEMENT OF THE CASE

The Appellant, Anne M. Hershey, was called as upon cross examination as Appellee's first witness. Ms. Hershey testified that she is currently employed with the Ohio Department of Taxation as a Tax Auditor Agent Manager 1 and has been so employed for the last eight years while holding various positions within the Department for the last twenty-four and one half years. The witness testified that she works in the Sales and Use Tax Division. When questioned, the witness identified Appellee's Exhibit 1 as the job description of a Tax Auditor Agent Manager 1. Further, when questioned, the witness agreed that the duties which are listed Appellee's Exhibit 1 accurately reflect, for the most part, the job which she performs.

The witness testified that she knew her taxes must be timely filed because the Ohio Department of Taxation sent her notices every year reminding her to file on time and her sister lost her job at the Ohio Department of Taxation over a bounced tax return check. The witness identified Appellee's Exhibit 8 as the letter she received from the Ohio Department of Taxation on March 5, 2007, reminding her to file her 2006 taxes on time.

When questioned, the witness testified that she filed her income taxes on time, but later found out that she had underreported her income on her federal tax return. The witness testified that she did not know that underreporting her income on her federal tax return would affect her Ohio tax return, but knew her Ohio tax return was based on her federal adjusted gross income. Additionally, the witness testified that she did not know she had sixty days to amend her Ohio taxes after she got the federal notice, but she thought the Ohio Department of Taxation would send her a notice to inform her that she must amend her state tax return.

The witness identified Appellee's Exhibit 6 as the email Mr. Delbert Harlan sent her to inform her that there was a problem with her Ohio tax return. Next, the witness testified that Mr. Charles Kumpar, from the Ohio Department of Taxation's Human Resources, interviewed her about the problem with her Ohio tax return after she received the email from Mr. Harlan. The witness testified that she dropped off her files to her tax preparer, but opined that two 1099s were stuck together and, therefore, one was unclaimed on her income taxes. The witness further testified that the returns were filed electronically by her preparer and she just assumed they were right without reviewing them.

Next, the witness identified Appellee's Exhibit 4 as the order of suspension for violation of Section 124.34 of the Ohio Revised Code by failing to comply with Section 5703.081 of the Ohio Revised Code. The witness then identified Appellee's Exhibit 3 as the notice of her pre-disciplinary hearing. The witness testified that she was familiar with the policy and identified Appellee's Exhibit 5 as the policy at issue, Work Rule #11. The witness also identified Appellee's Exhibit 9 as an acknowledgement that she received the policy. She further testified it was her signature on policy, dated July 5, 2006.

The witness, affirmed, when questioned, that she received a notice from the Internal Revenue Service in March of 2008 to inform her that she had underreported on her Federal Individual Income Tax.

Appellee's next witness to testify was Mr. Delbert Harlan, who is currently employed as the Executive Administrator of Operations. Mr. Harlan explained that he has held this position for approximately the last two years. Further, the witness testified that he has held various positions over the last twenty-one years within the Department of Taxation. When questioned, the witness explained that his duties include overseeing all personal taxes, corporate franchise taxes and school district income taxes, and anything that affects those taxes.

The witness also testified that he is in charge of employee compliance and that he receives a nightly report on employee compliance. The witness explained that the nightly report gives him employees' names whose federal and state incomes do not match. The witness further explained that the Compliance 2000 software informs him if someone underreported his or her income. The witness testified that once he receives the email, he tries to disprove the audit by looking for system or data errors. The witness continued by explaining that after he fails to

disprove the report, he sends a letter to the employee to inform the employee about his or her tax liabilities. The witness testified that Ms. Brenda Peters assists him with this process.

Next, the witness testified that he received the report concerning Ms. Hershey's 2006 taxes in mid August of 2008. The witness explained there was a delay between Ms. Hershey filing her 2006 income taxes and the August 2008 report because people have the ability to extend their filing deadline until October or November and then it takes some time to run the information through the system. The witness identified Appellee's Exhibit 12 as the Employee DQ Analysis prepared by Ms. Peters to investigate Ms. Hershey's notice. The witness also identified page 3 of Appellee's Exhibit 12 as the audit he received on August 14, 2008 that let him know of the problem with Ms. Hershey's 2006 taxes. The witness explained how to read the report and where it shows Ms. Hershey's name. The witness testified that the report showed March 17, 2008, as the date the IRS mailed her notification of the problem with the income she reported on her federal tax return. The witness testified that he concluded from his investigation that Ms. Hershey did underreport her income to the IRS and to Ohio and had not amended her Ohio tax return.

The witness then explained that he sent Ms. Hershey an email to notify her of her liability to the state with an attached letter. The witness identified Appellee's Exhibit 6 as his email to Hershey with the attached letter. The witness then stated that he knew she paid the delinquency the same day she received his email.

On cross examination, the witness testified that he was not Ms. Hershey's immediate supervisor nor was he in the chain of command over her. When questioned about why Ms. Hershey was suspended, he explained it was because she underreported her income and then did not fix the mistake when she received the notice from the IRS in March of 2008. The witness identified Appellee's Exhibit 8 as the email he sends to remind the Ohio Department of Tax Employee's to file timely. The witness acknowledged that the email said nothing about the sixty day time limit to file amendments. The witness also testified that Ohio Revised Code Section 5703.81 only says that taxes must be filed timely and does not mention the sixty day amendment requirement. The witness then identified Appellee's Exhibit 5 as the Ohio Department of Taxation's policy on the timely filing of taxes and stated that it says nothing about the sixty day amendment requirement. The witness did agree that the initial filing of Anne M. Hershey's taxes was timely.

On redirect examination, the witness testified that Appellee's Exhibit 5, the Ohio Department of Taxation's work policy, does state that employees must comply with the requirements of all taxing authorities. The witness also identified similar language in Appellee's Exhibit 8, the email sent to employees reminding them to file on time.

Appellee's next witness to testify was Mr. Charles Kumpar. The witness testified that he is currently employed as the Labor Relations Administrator for the Ohio Department of Taxation, but was a Labor Relations Officer 3 when Ms. Hershey was suspended. The witness explained that he has been working for the Ohio Department of Taxation in various positions for almost 21 years.

When questioned, the witness testified that he was in charge of getting an investigatory interview with Ms. Hershey to get more facts from her about her Ohio tax return. The witness testified that Ms. Brenda Peters was also present at the interview and they questioned Ms. Hershey about her 2006 tax return. The witness recalled from his notes that Ms. Hershey admitted that she received Mr. Harlan's notice and paid the difference immediately. The witness also recalled that Ms. Hershey said she thought she was fine because she paid it right away. The witness did not recall telling Ms. Hershey that he knew about the March IRS notification, but that she explained what happened. The witness testified that he did not ask her about whether she paid the difference she owed the IRS. Then the witness testified that after the interview he wrote a memo of his findings which he submitted to his superior.

The witness then identified Appellee's Exhibit 3 as the pre-disciplinary notice he drafted. The witness identified Appellee's Exhibit 7 as the policy referred to in Appellee's Exhibit 3. The witness testified that he was not present the pre-disciplinary hearing.

On cross examination, the witness testified that he did not discuss the sixty day amendment requirement in his investigatory interview with Ms. Hershey, nor did he cite Ohio Revised Code section 5747.10. The witness then identified that Appellee's Exhibit 6, the email Mr. Harlan sent to Ms. Hershey about the problem with her Ohio tax return which stated that she had to pay the remaining balance on her Ohio taxes within 15 days. The witness agreed that Ms. Hershey did pay within 15 days, by paying the same day she received the notice.

The Appellant, Anne M. Hershey, began her case-in-chief by taking the stand. The witness testified again that she had worked at the Ohio Department of Taxation for over 24 years and that she has had no previous disciplinary history. The witness then testified that she works in Sales and Use Tax, which has nothing to do with Income Tax.

The witness then went on to testify that Ms. Carol Stolz, a C.P.A. from her church, prepared and filed in 2006 tax return. The witness further testified that the federal tax return was filed online by the deadline. The witness recalled that when she received the notice from the I.R.S. about her underreported income she called Ms. Stolz to ask how this happened and then found two 1099s must have stuck together in her folder. The witness then testified that she fixed her federal tax return and paid the difference on time. Next, the witness testified that she did not know she had sixty days to amend her state tax return. The witness elaborated that her training never covered the sixty days to amend rule and she thought she would be notified by the state if she owed something.

Next, the witness testified that the letter received she from Mr. Harlan said that she had 15 days to pay the difference and that she paid it the same day. The witness identified Appellant's Exhibit A as a copy of her check and the form they filled out to make the correction.

On cross examination, the witness testified that she did not take any affirmative steps to find out what she needed to do about her state income tax return after receiving the notice about her underreported income from the IRS.

FINDINGS OF FACT

1. The Appellant, Anne M. Hershey, a Tax Auditor Agent Manger 1, working for the Ohio Department of Taxation, was suspended for ten (10) working days without pay for neglect of duty.
2. The Appellant, Anne M. Hershey, was served an Ohio Revised Code Section 124.34 order of suspension on January 21, 2009, and was suspended from her position without pay for ten (10) working days, effective January 26, 2009.

3. The testimony and documentary evidence presented at the record hearing, established by a preponderance of the evidence that:
 - a. The Appellant, as a Tax Auditor Agent Manager 1, bore a duty to abide by the work rules in place at the Ohio Department of Taxation.
 - b. The Appellant, through her own admission, testified she understood and acknowledged her responsibility as an employee of the Ohio Department of Taxation to timely file her Income Tax Returns and comply with all taxing authorities.
 - c. The Appellant in her twenty-four and one half years of service had no previous discipline.
 - d. No evidence of disparate treatment of any similarly situated employee was introduced by the Appellant.
4. The testimony and documentary evidence also established, by a preponderance of the evidence, that the Appellant did, in fact, fail to report income and/or pay an outstanding balance due on her 2006 Ohio Individual Income Tax Return by failing to file an amendment to her 2006 Ohio Individual Income Tax Return within sixty days of notification by the Internal Revenue Service that she underreported her income on her Federal Individual Income Tax Return in violation of Sections 5703.081 and 5747.10 of the Ohio Revised Code and the Ohio Department of Taxation's policy ODT – HR – 004.
5. The jurisdiction of this Board to conduct a hearing is established by Ohio Revised Code Section 124.34.

CONCLUSIONS OF LAW

The issues before this Board of Review are whether the Appellant violated and/or was guilty of neglect of duty and whether the Appellant's ten (10) day suspension was excessive. The Appellant argued that she was treated too severe considering that she was a twenty-four year employee with no previous disciplinary history. The Appellant also argued that she did not know she had sixty (60) days to file an amendment to her state income tax return and that her original taxes were

filed on time. However, the Appellee contended that the suspension of the Appellant was necessary, adequate, and fair considering the necessity of the Ohio Department of Taxation's policy of ensuring that its employees abide by the State of Ohio's rules and regulations regarding the tax laws which it enforces. The Appellee also argued that the Ohio Revised Code Section 5703.081 and the Ohio Department of Taxation policies require employees to abide by all laws, not just the initial timely filing of taxes.

The Appellee in its Ohio Revised Code Section 124.34 order of suspension, had charged the Appellant with neglect of duty for her failure to comply with Section 5703.081 of the Ohio Revised Code regarding the prompt filing and payment of tax returns, and for failing to report income and/or pay an outstanding balance due on your 2006 Ohio Individual Income Tax Return.

Appellee has established, by a preponderance of the evidence, the charge set forth in the Appellant's order of suspension.

For Appellee to establish that an employee committed neglect of duty, the Appellee must demonstrate that a duty upon the part of the employee existed, that the employee knew of that duty, and that after knowing of that duty, the employee breached that duty.

Revised Code Chapter 124 nowhere defines "neglect of duty." However, *Black's Law Dictionary* defines "neglect" to mean:

... to omit, fail, or forebear to do a thing that can be done or is required to be done, but it may also impact an absence of care or attention of the doing or omission of a given act. And it may mean design refusal, indifference, or unwillingness to perform one's duty. (Further Citations Omitted) Black's Law Dictionary pg. 1032 Dlx. 6th ED. 1990.

In determining whether the Appellant had violated and was guilty of neglect of duty, the Appellee clearly established that the Appellant, Anne M. Hershey, as a Tax Auditor Agent Manger 1, bore a duty to comply with the work rules in place at the agency, as well as the laws of the state of Ohio. Further, the documentary and testimonial evidence indicated that the Appellant knew of the work rules and knew that she must follow the laws of the state of Ohio. While the Appellant testified that

she did not know of the specific Ohio Revised Code Section 5747.10 provision, she knew that she had a duty to follow all laws of the state of Ohio. Further, the witness testified that she did not take any affirmative steps to find out what she needed to do about her state income tax return after receiving the notice about her underreported income from the IRS in March of 2008. In the very least, any citizen, let alone someone working for the Ohio Department of Taxation, should after being notified of an underreporting of federal tax should reasonably conclude that their Ohio Income Tax based upon the Federal Tax would need amended. An old maxim is that ignorance of the law no excuse, and it should hold true in this case. As it is the undersigned's understanding that many taxpayers could use the excuse that they weren't aware of one law or the other to avoid paying taxes, to which the Ohio Department of Taxation would not take that into consideration for the most part. Consequently, I find and conclude that the Appellant's actions or inactions as the case may be, did violate the Ohio Department of Taxation's work rules and/or constituted an actual violation under Ohio Revised Code Section 124.34 for neglect of duty.

The Ohio Department of Taxation bears no statutory duty to send yearly reminders to employees to remind them of their duty to timely file. However, if the Ohio Department of Taxation is going to send a reminder, it would nice for the employer to provide information about amending taxes within 60 days to comply with the Ohio Revised Code Section 5747.10 to help their employees comply with the law, and better educate them about the tax laws and to better assist the public.

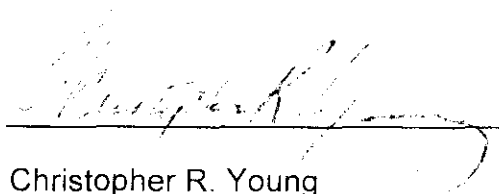
However, there remains the question of whether the discipline imposed should be sustained. The undersigned Administrative Law Judge recommends that the evidence presented at the record hearing, taking the totality of the circumstances into account is sufficient to support the length of the suspension imposed upon Appellant. Considering the Appellant knew she had underreported her federal gross income, but did not take any affirmative steps to make sure her Ohio tax return was accurate prior to receiving the letter from Mr. Harlan, the undersigned Administrative Law Judge will not modify the appointing authority's judgment and hereby concurs with the length of the suspension imposed upon the Appellant.

The recommendation as to the sustaining of this suspension is made in the hope of the undersigned Administrative Law Judge that the importance of such discipline will impress upon the Appellant, if not others at the agency, the necessity

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of complying with the Ohio Department of Taxation's work rules and regulations and that such future misconduct in this area will not occur.

Therefore, I respectfully **RECOMMEND** that the Appellant's appeal be **DENIED** and that the Ohio Revised Code Section 124.34 Order of Suspension for ten (10) working days be **SUSTAINED**.



Christopher R. Young
Administrative Law Judge

CRY: