

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

David C. Burke,

*Appellant,*

v.

Case No. 08-REM-04-0197

Department of Education,

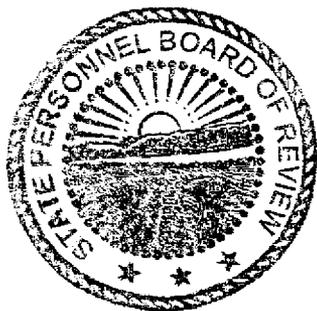
*Appellee.*

**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*

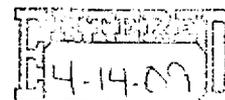
**CERTIFICATION**

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 Hunsberger  
*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 C. Burke,

Case No. 08-REM-04-0197

*Appellant*

v.

March 4, 2009

Ohio Department of Education,

Christopher R. Young

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

On or about April 29, 2008, the Ohio Department of Education, Appellee herein, served an order of removal, in accordance with Ohio Revised Code Section 124.34, upon David Burke, a Mail Center Manager, and Appellant herein. That order alleged the following:

This will notify you that you are removed from you position of Mail Center Manager, PN 20009498 effective April 30, 2008.

The reason for this action is that you have been guilty of Specifically: Failure of good behavior: Discourteous and/or rude treatment of another. Violations Specific to Managers: Failure to support and/or administer agency initiatives. Workplace Violence: Threatening, intimidating, or coercing another whether by action or communication.

Thereafter, on April 29, 2008, a timely appeal from this order was filed by the Appellant. Further, prior to going onto the record the jurisdiction of this Board was established and stipulated too. The record hearing in this case was held on September 17, 2008. The Appellant, David Burke, appeared at the hearing *pro se*. The Appellee, the Ohio Department of Education was present through its designee, John Aldergate, the Associate Director, and was represented by James Hogan and Robert Eskridge, both Assistant Attorneys General.

This hearing was conducted by the State Personnel Board of Review in accordance with 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 after having received the same with the State Personnel Board of Review.

### **STATEMENT OF THE CASE**

The Appellee called as its first witness Mr. David Burke to the witness stand, as if on cross-examination. The Appellant identified Appellee's Exhibit 2 as a March 31, 2008 notice of pre-disciplinary hearing, which he received for a hearing, which took place on April 4, 2008. The witness identified Appellee's Exhibit 3, which evidenced his attendance at the April 4, 2008, pre-disciplinary hearing. The Appellant testified although he did say he was on thin ice at the hearing, he did not say that he wanted to take anger management courses. The witness then identified Appellee's Exhibit 5 as an April 28, 2008, letter, which he received from Susan Zelman, the Superintendent of Public Instruction evidencing that he was going to be terminated from his position of Mail Center Manager effective at the close of business on April 30, 2008. The witness then identified Appellee's Exhibit 6 as the instant 124.34 order of removal, which was issued to him. The Appellant identified Appellee's Exhibit 7 as a receipt and acknowledgment of the notice of discipline and the copy of the order of removal that he received on or about April 29, 2008.

The Appellant testified that his position within the Ohio Department of Education was that as the Mail Center Manager, also known as the Mail Room Manager and that he reported directly to Mr. Paul Johnson, and that Mr. Johnson reported directly to John Aldergate. The witness agreed that he initially supervised five individuals within the mail room and later only three and agreed that he is a supervisor and is there to set the example on how to perform work within the agency for his subordinate employees. Mr. Burke then testified and agreed that on February 21, 2008, both Mitzi Cornett and he talked to both Becki Anderson and Denise Litle. The witness then identified Appellee's Exhibit 1 as his job description as a Mail Center Manager and agreed that most of the things on the position description matched his duties thereon. The witness testified although the job description did not match exactly his job duties, he did state that he had to respond to client inquiries, both internal and external, and that he dealt with the licensure department with both Becki Anderson and Denise Litle and handled them as clients. The witness testified he was also aware of the policies and procedures for the Ohio

Department of Education, although he did not understand it necessarily. Upon further questioning, the witness's memory was refreshed as he signed off as an acknowledgment on August 5, 2005, but did not recall every reading the same. The witness then identified Appellee's Exhibit 20 as copy of the Standards of Employee Conduct which was issued on August 1, 2005 revised that same date. The witness although unresponsive to the question of whether he had received said document, he did agree that he has been aware of the rules of conduct for quite some time, as this has not been his first disciplinary action taken against him. On page four of seventeen on Appellee's exhibit 20, paragraph numeral three under personal conduct, the Appellant agreed that employees have the responsibility to respect diversity of the workforce and to afford their fellow workers a workplace free of harassment and intimidation. Further under paragraph four, the Appellant agreed that the employees in the workplace must treat colleagues, co-workers, internal and external customers, and the public with respect, courteous and positive communication; belittling, rude, hostile and volatile behavior will not be tolerated. The witness agreed that individuals engaging in any type of this activity could face disciplinary action up to and including removal, as well. The witness testified he was not aware of these rules and that he has had his boss curse at him, clients and even co-workers and continually maintained that he did not engage in any rude behavior.

The Appellant then identified a series of previous disciplinary actions which had been taken against him. The witness identified Appellee's Exhibit 8 as a document dated July 12, 2002, which indicated that the Appellant had received a verbal reprimand for his failure of good behavior for inappropriate behavior in which that he was advised that further incidents of this nature would result in more severe discipline being issued. The Appellant identified Appellee's Exhibit 9 as an interoffice memorandum dated February 4, 2005, indicating, among other things, a verbal reprimand was issued to Mr. Burke, wherein it indicated that he became loud and disrespectful to a co-worker and was given this discipline for his inappropriate behavior constituting failure of good behavior and neglect of duty. It was also noted that Mr. Burke was advised that any further behavior of this type would not be tolerated by the agency. The Appellant explained that the complainant in this matter, Ms. Crabtree was lying, as well as she was a racist and that he totally disagreed with the procedure and the account of what had happened. The Appellant then identified Appellee's Exhibit 10 as a memorandum dated February 7, 2005, regarding a written reprimand which was issued to him for failure of good behavior for among other things raising his voice at a meeting to which he agreed, but that he

disagreed with the procedures and accounts of the incident. The witness explained his supervisor; Ms. Crabtree was lying again, as well. Upon further questioning, Mr. Burke testified he did receive some suspensions, as well. The witness stated he received a ten-day suspension which he appealed to the State Personnel Board of Review which was reduced down to a five-day suspension. The witness had also received a fifteen-day suspension which in the Appellant's own words testified that he did not appeal it, and that was a mistake with in itself. When asked after he had received his verbal reprimands, his written reprimand, his five day suspension and his fifteen day suspension if he had ever once thought of pulling the personnel policy regarding the policies and procedures for the Ohio Department of Education, testified he did not, because he stated he did not have any reason to pull them.

Mr. Burke's attention was then drawn to the incident which occurred on or about February 21, 2008. The witness testified on that date in question, both Becki Anderson and Denise Litle and himself had exchanged words regarding a mailing that was to be sent out. The witness then identified Appellee's Exhibit 18 as his written statement which he submitted at the pre-disciplinary hearing which he testified he wrote approximately fifteen to twenty minutes after the incident in question. The witness testified he does not really remember when he finished the statement exactly, but he did recall talking to Mr. Paul Johnson, whom he says explained to him to leave it alone. When asked if he presented this written statement to the panel at the predisciplinary hearing, he testified he could not recall this.

The witness then went over a scamatic of the floor plan or layout of the offices within the mailroom center. The witness then testified in the affirmative that he remembered that on February 21, 2008, while sitting in his office both Becki Anderson and Denise Litle came in to see him. The witness recalled that he was sitting in his office and both of them brought back defective letters/envelopes to him that Scott Norris had initially taken the letters, a big bundle of them, to them. The witness recalled there were about twenty or so that were defective. The witness explained that when Ms. Anderson and Ms. Litle initially came in they went to see Mr. Paul Johnson, Mr. Burke's supervisor and then they went to see Mitzi Cornett who in turn told them to come see me because Mr. Johnson was not present. The witness recalled that both Ms. Anderson and Ms. Litle asked how should they do with these letters and he testified that he told them to print the letters themselves, in addition he told Ms. Litle that as an Administrative Assistant she should be able to do this, as well. The Appellant explained any Administrative Assistant should be

able to do a mail merge. The witness explained he did not grab the letters and eventually he told them that he would take care of it. The Appellant testified they had the PDF file and that they should just simply print the letters and that he would simply mail them out. When questioned as to what Denise Litle's position was at the agency, the witness responded that he understood that she was recently promoted to a Management Analyst position. The witness stated at some point Ms. Anderson said for him to talk to her and that he assumed that she was assuming that we would fix the problem, but we did not have the PDF file. The witness testified that the standing operating procedure was for when letters like this were damaged the department would send back the PDF file so they could take care of it. Mr. Burke testified he did not raise his voice, nor did he grab the letters and/or box and that they simply placed it on his desk. The Appellant further said that he told them both just to "leave" and not get out. The witness stated that after Becki got smart with him, is when he did this. Further, the witness explained he told Becki and Denise that they do not pay him, as well. At some point the witness said he was just done with this. The witness did not recall every grabbing the box that Becki Anderson was holding on to, but only that he had letters in his hand. The witness testified that he did not pull the letters away from her, at any time.

Mr. Burke reidentified Appellee's Exhibit 18 as Mr. Burke's statement which he wrote out on or about February 21, 2008. When questioned as to what was meant by "it was best that you leave", the witness testified there was not really any meaning behind it, but that things were not going as mannerly as it should be at that point. The witness testified at that point "he was done" with Ms. Anderson and with Ms. Litle and that is when Ms. Anderson said "don't talk to Ms. Litle, but talk to me". When questioned if he told Lloyd Pascal, a co-worker, that he had to put them out, responded in the negative. When recalling his statement, the witness affirmed that there was no mention that they have to print the letters themselves, and no mention that they don't pay me and/or that his voice became elevated.

Mr. Burke testified he has had previous discussions with Paul Johnson, his supervisor, about customer service within the mailroom.

Appellee's next witness was Ms. Denise Litle, a Management Analyst for the Ohio Department of Education. When questioned as to her duties within the department, the witness explained that a Management Analyst understands and knows the flow of the office procedures and processes of the department wherein she tries to figure out if there any problems to ensure applicants get their licensures

in a timely fashion. Within the context of her duties, the witness explained that she does often coordinate with the mailroom to ensure applicants get their licenses in a timely manner. The witness explained her direct supervisor is Ms. Becki Anderson, the Assistant Director and that the Director of her department is Jim Miller. Ms. Little testified when she goes down to the mailroom she usually interacts with either David Burke and/or Scott Norris.

The witness was then questioned as to her activities and interactions with Mr. Burke prior to February 21, 2008, the day of the incident in question. The witness testified that once there was a concern about a piece of certified mailing which the tracking was lost on and that she eventually talked to Mr. Burke and that he said he would take care of it, to which she responded by asking how and that all of his answers were vague and non specific. The witness also testified that one time she went down and she had talked to Scott Norris and David Burke thought that she should have gone to him wherein Mr. Burke explained to her that the processes had changed. When she asked what process, again Mr. Burke was again non-specific and/or vague on answering her questions. The witness then explained that she emailed her director Mr. Miller to find out exactly what the processes were. Further, the witness stated that a meeting was held in early January 2007 wherein David Burke and Paul Johnson, the director and herself sat down to try to figure out what exactly were the processes in the mailroom.

Ms. Little then identified Appellee's Exhibit 16, the third page thereof as the letter which was sent out. The witness also explained that the first and second pages are basically record keeping wherein the first page was something that would concern Mr. Burke's area in the mailroom wherein the second page would be something that would be kept by the print shop which was ran by DAS, as checks and balances. When questioned as to how many letters were actually "messed up", the witness explained there were probably thirty to fifty letters and/or envelopes. When questioned as to the importance of these letters actually going out, the witness explained there was an increase in fees which was substantial and that the urgency of mailing these letters out on the February 15, 2008 date, when the response were due before March 1, 2008, and if the applicants did not respond it could slow the process by the department by issuing payment holds and a substantial increase in phone calls and the like.

The witness explained she initially got involved with the process with printing the envelopes at approximately 2:00 p.m. on Friday February 15, 2008, a holiday

weekend. The witness explained her director had told her that Paul Johnson, David Burke, Karen and Jason thought a mail merge would work best to process the letters and the envelopes at issue. However, the witness was not familiar how to do a mail merge and that she went down to talk to the people in the mailroom, as she did not know what to do. The witness explained Mr. Burke at that time told her that he needed to know the sizing of the letter and the envelopes to understand the placement thereof or to process this, but that he did not know, so they eventually took it to Lacy Snoke, to do the mail merge, which she processed. It was not until Wednesday night on February 20, 2008 late that evening that Scott Norris brought up the thirty-to-fifty messed up letters which were not sent out. The next morning on the February 21, 2008, she went into talk to Becki Anderson and that they proceeded to go into the director, Jim Miller's office. The witness stated that Becki Anderson and herself then went downstairs to look for Paul Johnson wherein they talked to Mitzi Cornett who explained that Mr. Johnson was not present as he had the day off and that they eventually were directed to talk to David Burke. The witness explained when both Becki Anderson and herself entered Mr. Burke's office he was behind his desk, but sometime during the conversation she knew that he eventually was standing. The witness explained that Ms. Anderson initiated the conversation with Mr. Burke to the best of her recollection wherein she explained that Mr. Burke needed the mail out the letters/envelopes since the mailroom mangled the letters up and that basically Mr. Burke should fix the problem. The witness testified at that time that Mr. Burke said "no" to them, as they had to mail them out because he did not have the PDF file and thought that she did, but she did not. It was her understanding that Lacy Snoke had the PDF file as she had given her all of the information to her to create the mail merge. The witness would not say that Mr. Burke knew who actually had the PDF file at that time. At this time, Mr. Burke was insistent that she had the file and she told him she did not and that she did not know how to mail merge, wherein he responded by saying any Administrative Assistant should know how to do that. At that time, Ms. Anderson told Mr. Burke to talk directly to her after that remark. The witness further explained during this conversation Ms. Anderson had the box of letters in her hand and that she was telling Mr. Burke he had to mail these letters out. The witness explained that Ms. Anderson was pushing Mr. Burke that it was his job to mail these letters out. The witness explained that Mr. Burke then eventually said "well then just give these letters to me" in a raised voice and that Ms. Anderson then said "no, no". The witness also recalled that when Ms. Anderson was pushing that it was his job, he stated he did not care for the way she was talking to him. The witness stated Ms. Anderson would not give the letters to him, as well. Eventually, the witness testified

that Mr. Burke said to get out of his office and Ms. Anderson at that time had the letters and they walked out.

The witness testified that she was surprised at the way Mr. Burke had talked to Ms. Anderson, as the Assistant Director, and explained that Mr. Burke has not been in her opinion a, "go along guy" within the office. There has always been a conflict with anything that she has taken down to the mailroom, as well. The witness further explained that Mr. Burke has never really treated her respectfully. However, the witness explained when Mr. Burke was in the presence of his supervisors and/or her supervisors he would treat them very respectfully. On the other hand, the witness reiterated that when she was alone by herself Mr. Burke did not treat her respectfully, as it appeared that he knew everything and she did not know anything.

On cross-examination, the witness re-identified Appellee's Exhibit 16 and questioned the witness as to if she were to process any work through the mailroom if there had to be a work order, to which she responded in the negative. The witness reiterated that while the agency would prefer to have work orders sent through, that does not in reality always happen that way as she has processed other stuff before without having a work order. The witness testified that Mr. Burke should have known in the very least that Lacy Snoke had the PDF file as he was in the meeting with Paul Johnson, herself, Mr. Miller when Lacy was asked to create the mail merge PDF file. The witness when questioned was not sure when she came down to Mr. Burke's office on the morning on February 21, 2008, and whether if in fact he had the PDF file or not.

Appellee's next witness called to the witness stand was Ms. Becki Anderson, the Assistant Director of the Office of Educator Licensure. Ms. Anderson testified that their office ensures all license for all the teacher's aides and principals and the like, and that they are up to date and current with the State of Ohio. Within this context the witness testified her duties are to manage people and to manage the processes in order to fulfill that the licensure process for all the teachers are carried out promptly. The witness testified that she is in fact the direct supervisor of Denise Litle, and that she does know Mr. David Burke, as he worked in the mailroom, as well.

The witness identified Appellee's Exhibit 16 as a series of documents which evidenced the request form to have 2,900 pieces of mail being mailed out and

within that document on page three was the template of the letter which was sent out. The witness testified if the applicant fails to receive this and they fail to pay, the license would just not expire but they did have in fact additional time to submit their fee balance before expiration in June of that year.

When questioned, the witness did have in fact an exchange of words with Mr. Burke on or about February 21, 2008, which is at issue for today's hearing. The witness identified Appellee's Exhibit 17 as a memorandum which she wrote to record the events which occurred on that date. The witness stated that she wrote this document immediately after the exchange and/or right after it had occurred on February 21, 2008. When asked why she in fact went down that day, the witness explained she do so to discuss the problems which had occurred by the letters being destroyed by the folding machine. The witness testified they had not had a problem like this before and it was a very important communication that was being sent out so she went down to oversee the process. The witness testified that at first she was looking for Mr. Paul Johnson and that she eventually went into David Burke's office since Mr. Johnson was not present. The witness testified she was simply looking for solution and that she had the box of mangled letters in her hand. The witness explained that Mr. Burke was sitting at his table when they arrived and that she simply asked how this problem can be fixed. The witness testified Scott Norris had originally brought these letters to us, meaning Denise Litle and herself. Mr. Burke replied that Mr. Norris should have told them what to do, wherein they responded that Mr. Norris had not. After this reply, the witness questioned Mr. Burke as to what they could do next? The witness testified Mr. Burke then told Denise Litle that she should pull the file and reprint the letters. However, the witness replied that Mr. Burke's office had made it into a PDF file and that they gave them a different file and that their office had merged the file and they could not do that from where they were. Mr. Burke responded by stating, "just merge the files". At that point, the witness felt that Mr. Burke was talking to Denise Litle in a derogatory fashion and that she asked Mr. Burke to directly talk to her instead of Ms. Litle. The witness stated that this was done after Mr. Burke said that any Administrative Assistant can mail merge, a comment that was directed to Ms. Litle, wherein it appeared that Mr. Burke thought she was stupid. Afterwards, the witness testified that she explained to Mr. Burke that he doing a service and it needs to be completed. The witness said at that point "let's just stop here" and she would talk to Mr. Johnson tomorrow. Mr. Burke at that point said she did not pay him, with a raised voice, in which she believed it was an aggressive manner coming towards her at that time. At this point, right before she began to leave, the witness testified

that Mr. Burke said he would fix it. The witness stated she did not give the box of letters to Mr. Burke at that point, even though he attempted to try to get the box when they both were leaving, and at one point both of them were holding it. The witness testified she did not believe Mr. Burke would fix the problem after this exchange. Further, the witness stated that Mr. Burke explained to Denise and her that he did not like the way they came down to the mailroom, as well. Further, the witness testified that Mr. Burke in a very loud voice said he could not fix the problem if he did not know who to send the letters to while they both were exiting. Then, as testified by Ms. Anderson, Mr. Burke said to "get out, get out" and at that point she let go of the box and that she proceeded to walk out of Mr. Burke's cubicle with Denise still inside his office. The witness testified that she then motioned for Denise to get out of the office and that they both left. The witness testified then Mr. Burke at that time appeared to have his voice raised very loud and appeared angry. The witness then described Denise Litle as appearing to be "shell shocked" at that time, as well. The witness explained further that when she initially arrived at the office she passed Mitzi Cornett's office and when she exited, she remembered seeing Mitzi just shaking her head. As a result of this incident, the witness stated she was very upset and that her heart was pounding when she left Mr. Burke's office.

On cross-examination, Ms. Anderson testified that she did not know why she said in her statement that she thought he would not complete the job of fixing the problem and mailing the letters out. When asked if she was already aggravated prior to coming down to the mailroom, she responded in the negative. When questioned by the undersigned, testified that although it is not written in her statement on Appellee's Exhibit 17, she did in fact leave the letters with Mr. Burke, as that was her testimony to this Board, as well. The witness testified in her opinion she did not raise her voice to Mr. Burke, but that her voice was probably a little louder than normal.

On re-direct examination, the witness reiterated that she thought that both Denise Litle and she should just go, as the situation had broken down, and it was not a very positive one at that, as a reason for their departure.

Appellee's next witness was Ms. Mitzi Cornett, presently employed as a Motor Fleet Coordinator Specialist within the Department of Education. Ms. Cornett testified she began her employment with the Ohio Department of Education in the mailroom under Mr. Burke's supervisory capacity as a Delivery Worker in 2003. Further, the witness explained that she has known Mr. Burke since 2000-2001 as

they use to bowl together and would consider herself a friend of Mr. Burke's, as well. The witness stated she was then promoted to the Motor Fleet Coordinator Specialist position in 2005, but that her position where she is currently located still was within the mailroom itself. Along this line of questioning, she testified she was familiar with the floor plan of the mailroom, as well.

Ms. Cornett recalled the incident in question, that two ladies walked in by the name of Denise Litle and Becki Anderson and that asked for Mr. Paul Johnson. The witness explained Mr. Johnson was not there, but Mr. Burke was in and so they went into his office. The witness stated that Ms. Anderson had a box in her hand, as well. The witness testified she is approximately ten feet from Mr. Burke's office and that she could hear his voice but that it is essentially hard to understand what is being said. The witness stated she did hear conversations taking place between Mr. Burke and the ladies, but that she just heard voices and this appeared to take approximately five minutes long. Afterwards, the witness testified she saw Mr. Burke, opened the door and told them to, "Get out". When questioned as to Mr. Burke's tone of voice at that time, the witness testified it was very forceful and that they in fact left the box with Mr. Burke, as well.

Ms. Cornett testified she thought Mr. Burke's actions were not appropriate, as he was being very aggressive and that she thought he was being disrespectful in this regard by talking to Ms. Litle and Ms. Anderson. The witness explained in the past she has also heard Mr. Burke raise his voice to others, specifically a previous manager of Mr. Burke's. The witness when questioned if she did hear Mr. Burke tell the ladies to get out, Ms. Cornett testified that his back was in fact towards her and that he was pointing for them to get out.

On cross-examination, Ms. Cornett testified she heard voices, but could not hear the context in which the voices were heard except for the fact when she heard Mr. Burke tell both of the women to "get out".

The Appellee's next witness was Mr. John Aldergate, the Associate Director of Human Resources for Labor and Employee Relations and Facilities Management. The witness testified he has held his present position since October 2007 although he has been employed by the agency since 2006 working in Labor and Employee Relations. When he was working in Facilities Management, the witness stated he in fact supervised Mr. Paul Johnson, Mr. David Burke's immediate supervisor. Within his duties, the witness stated he is familiar with the disciplinary records and

personnel files of all of those within the Facilities Management team, including Mr. David Burke. The witness testified that he has personally counseled Mr. Burke on the policies and procedures and that just prior to his removal action Mr. Burke had received discipline for a number of infractions, and that he told Mr. Burke at that time that he was at the end of his progressive disciplinary track, as well.

Mr. Aldergate identified Appellee's Exhibit 20 as the Standards of Employee Conduct which each and every employee of the department is given, and that Mr. Burke specifically was given this from time-to-time as either presented to him individually or through the disciplinary process which he had gone through previously. The witness testified just prior to the testimony which was previously elicited, explained that David Burke in the most previous discipline did not have a drivers license and that as a Mailroom Manager from time-to-time individuals need to drive delivery trucks and the he as a manager should have reported the loss of his license to management. The witness was then questioned as to whether or not he had had a general discussion with Mr. Burke about his disciplinary history and the progressive nature it, as well to which he responded he had. The witness stated that he, along with others, were very concerned of Mr. Burke's disciplinary history wherein they felt that Mr. Burke was consistently not adhering to the policies and the discipline simply was not changing his attitude. The witness then explained that verbal and written reprimands remain in one's personnel file for approximately one year whereas suspensions and/or the like remain in one's file for two years from the date of incident.

Mr. Aldergate then identified a series of disciplinary actions taken against Mr. Burke. The witness identified Appellee's Exhibit 8 as a written reprimand issued to Mr. Burke on or about July 12, 2002, for failure of good behavior. The witness explained this was not issued during his tenure, but was in fact in Mr. Burke's file and that for this to stay active in the file another discipline had to occur before July 11, 2003. The witness then identified Appellee's Exhibit 9 as a verbal reprimand which was issued February 4, 2005, for failure of good behavior and neglect of duty. The witness identified Appellee's Exhibit 10 as a written reprimand issued on February 7, 2005, for failure of good behavior, and Appellee's Exhibit 11 as a five-day suspension issued on May 3, 2005, for dishonesty and neglect of duty. Further, Mr. Aldergate identified Appellee's Exhibit 12 as a ten-day suspension which was issued to Mr. Burke on October 3, 2005, for neglect of duty and Appellee's Exhibit 13 as a fifteen-day suspension which was issued to him on April 10, 2006, for neglect of duty, as well. The witness then identified Appellee's Exhibit 14 which

evidenced the previous Appellee's Exhibit 12, a ten-day suspension, was in fact as a result of a settlement of that dispute, was resolved to reflect only a five-day suspension. The witness then identified Appellee's Exhibit 15 as a twenty-three hour deduction and/or suspension of twenty-three hours which occurred on August 28, 2007, for failure of good behavior, dishonesty and neglect of duty. The witness then identified Appellee's Exhibit 2 as the instant predisciplinary meeting notification issued to Mr. Burke on or about March 31, 2008, regarding the instant charges which are at issue today's hearing for failure of good behavior, violations specific to managers and/or workplace violence. The witness stated that he reviewed Exhibits 9 through 15 in Mr. Burke's personnel file and that all of these were in fact active at the time of the issue at hand. In essence, Mr. Aldergate testified that the whole purpose of issuing these disciplines were that they wanted to have Mr. Burke correct his behavior and comply with the work rules in place, but that he had not.

Mr. Aldergate was then questioned about when he became aware of the situation that had occurred on February 21, 2008. The witness believed he first became aware of the incident by reading Ms. Anderson's email she had sent him or when Mr. Burke came to his office. At the meeting he had with Mr. Burke at his office, the witness stated he told Mr. Burke not to send any emails to Ms. Anderson and that he told him to talk to his supervisor Mr. Paul Johnson. At this meeting, the witness stated Mr. Burke explained his version of the incident and how Ms. Anderson disrespected him.

The witness then identified Appellee's Exhibit 19 as a memorandum which Mr. Paul Johnson wrote to his supervisor Mr. John Aldergate regarding a disciplinary recommendation on Mr. David Burke. The witness explained that anytime that discipline is sought the supervisor must write such a summary to his or her supervisor like the memorandum points out. The February 27, 2008, memorandum acknowledges Mr. Aldergate authorizing it to proceed to disciplinary action and for Mr. Johnson to set up a predisciplinary hearing. The witness discussed this memorandum with Mr. Johnson and he was very concerned by Mr. Burke's actions. The witness reiterated that he thought that that Mr. Burke's actions were unprofessional and potentially having threatening behavior was exhibited by Mr. Burke, as well. When reviewing the second page of Appellee's Exhibit 19, the witness testified it was during this time on February 21, 2008 that Mr. Burke became confrontational arguing over the letters being reprinted. The witness stated he met with Ms. Anderson and Ms. Cornett about the issues at hand. The witness also

reiterated that Ms. Anderson submitted a written statement to himself as well as Mr. Johnson.

Upon further questioning, Mr. Aldergate testified he was most overall concerned with the fact that Mr. Burke was not grasping the necessity of complying with the violated work rules, when coupled with his previous disciplines. The witness explained that Mr. Burke often blamed others for his actions, and never himself for his misconduct. In this case, Mr. Burke blamed Ms. Anderson, as she was at fault for even being there in the first place and telling her to get out.

Mr. Aldergate testified notwithstanding the other disciplines that have been issued to Mr. Burke, the issue of the workplace violence towards two female co-workers and the harassing nature of it he considered this incident to be a very severe incident, as the agency has a zero tolerance against workplace violence. The witness testified that in almost every one of his disciplines he has received he has blamed everyone else but himself, even with the incident when his own license was suspended, that too was not his fault.

When questioned, the witness testified that he attended the predisciplinary hearing of Mr. Burke on April 4, 2008, and it went on as scheduled. The witness testified that Ms. Pam King was the Hearing Officer for Mr. Burke's case and that Mr. Burke did try to explain what had happened and he submitted documents and he spoke on his behalf about the incident. Through Mr. Burke's own statements at the predisciplinary hearing he thought he had done nothing wrong at all and he pretty much blamed Ms. Becki Anderson about the incident. The witness testified Mr. Burke did inquire if he could take any kind of classes and/or training in anger management because he believed that Mr. Burke knew he was on his last leg in terms of all the progressive disciplinary actions that he has had in the past. When questioned, the witness explained that all of Mr. Burke's previous disciplines seemed to be scattered amongst variety of supervisors, not just one and that this concerned him extremely. Additionally, the witness explained that they do have a zero tolerance policy against workplace violence, as well.

Next, Mr. Aldergate identified Appellee's Exhibit 6 as the instant 124.34 order of removal that was issued to Mr. Burke. The witness stated that Mr. Burke in fact was charged with failure of good behavior, violations specific to managers and violating the workplace violence rule. The witness also identified Appellee's Exhibit 17 as the agency's Standard of Employee Conduct and on page four of seventeen

specifically referred to the personal conduct of employees in the workplace. The personal conduct encompasses that employees have a responsibility to respect the diversity of the workforce and to afford their fellow coworkers a workplace free from harassment and intimidation. Along this line of questioning, the witness testified he felt that Mr. Burke had intimidated and harassed the two female employees and/by through his actions. With respect to the workplace, the employees must treat colleagues, co-workers internal/external customers and the public with respect and courteous and positive communication is expected. Along this line of questioning, the witness testified that through Mr. Burke's actions or inactions as the case may be, he did not adhere to the workplace policy as read. At this point, the witness when questioned identified Appellee's Exhibits 9, 10, 11, 12, 13, and 15 and identified each and every rule violation.

On cross-examination, the witness testified that when he in fact had a meeting with Mr. Burke he told Mr. Burke specifically to talk to Mr. Johnson his supervisor and not to talk to either Becki Anderson and/or Denise Little, as to not escalate the situation. The witness stated he was aware of numerous counselings that were provided during the number of disciplines that had been passed out over the last couple of years that were offered by Mr. Johnson to correct Mr. Burke's behavior. Further, the witness testified that Mr. Burke at no time to his knowledge ever entered into any employee assistance program, even though he talked to Mr. Burke numerous times about his actions and how the agency wanted them corrected. The witness testified that Mr. Burke has been to harassment training, workplace violence training and training in general as a supervisor within the last couple of years, as well. With respect to the disciplines that were handed out with regards to Appellee's Exhibits 9, 10, 11, the witness agreed that they were all involving one supervisor, Ms. Shirley Crabtree.

The Appellant began his case-in-chief by calling himself, Mr. David Burke to the witness stand. The witness testified he began employment with the Ohio Department of Education in April 1999 as a Delivery Worker and was soon promoted approximately a year later to the Mailroom Manager position, a position he held for approximately the last eight years.

When testifying Mr. Burke stated that he did not harass or threaten anyone, let alone the two ladies that had accused him of the same. Further, the witness testified he would not be in this particular situation if the two ladies who he had discussed these things were in fact "black". The witness explained on the day in

question, February 21, 2008, Denise Litle had come down to him with approximately twenty letters that had been mangled when run through the mail machine. The nature of the conversation was completely different than what they characterized the conversation to be. Mr. Burke stated that the conversation took an unprofessional tone, instigated by Ms. Anderson and that he finished the conversation by asking them to "please leave".

On cross-examination, the witness testified he had testified earlier that his last performance evaluation was exemplary. However, when looking at his last performance evaluation which covered from May of 06 through May 07, it stated that among other things, his interpersonal skills were below target and there were no above target expectations on any of the items checked thereon.

### **FINDINGS OF FACT**

1. The Appellant, David Burke, as a Mail Center Manager, was removed from employment with the Ohio Department of Education, for failure of good behavior by being discourteous and/or rude treatment of another; for violations specific to managers in failing to support and/or administer agency initiatives and; workplace violence by threatening, intimidating, or coercing another whether by action or communication.
2. The Appellant, David Burke, was served an Ohio Revised Code Section 124.34 Order of Removal on or about April 29, 2008, and was removed from employment effective April 30, 2008.
3. The testimony and documentary evidence presented at the record hearing established by a preponderance of the evidence that the Appellant as the Mail Center Manager, was the highest ranking individual in the mail room at the time of incident on February 21, 2008.
4.
  - a. The Appellee did prove, by a preponderance of the evidence, that the Appellant was guilty of failure of good behavior when he was discourteous and/or rude toward both Becki Anderson, an Assistant

Director, and Denise Little, a Management Analyst, when they dropped off a small box of mail, totaling approximately 30-50 pieces, that had been previously damaged when initially run through the postage machine. The evidence revealed that the Appellant agreed that employees have the responsibility to respect diversity of the workforce and to afford their fellow workers a workplace free of harassment and intimidation. Further, the Appellant agreed that the employees in the workplace must treat colleagues, co-workers, internal and external customers, and the public with respect, courteous and positive communication; and that belittling, rude, hostile and volatile behavior will not be tolerated. The witness agreed that individuals engaging in any type of this activity could face disciplinary action up to and including removal, as well. On the day of the incident, February 21, 2008, the evidence indicated that Burke's tone was elevated and manner when dealing with both Ms. Anderson and Ms. Little, and his behavior was both rude and belittling, when speaking, as he told Ms. Little that any Administrative Assistant could do a mail merge, and eventually telling them to "Get out" of his office.

- b. The Appellee did prove, by a preponderance of the evidence, that the Appellant was guilty of violations specific to managers in failing to support and/or administer agency initiatives. The evidence revealed that the Appellant when questioned on how the mail room ran procedurally was often vague and non-responsive to the questions asked. Further, the evidence revealed when Becki Anderson, an Assistant Director, initially requested that Mr. Burke fix the problem of the mangled letters, he responded by stating, "No", stating that he did not have the PDF file, but she did not either. However, the undersigned finds that Mr. Burke knew who had the PDF file, or should have known, at that time, as Lacy Snoke had given those files to the mail room in the first place. Further, the undersigned finds that clearly Mr. Burke's demeanor was not one of trying resolve the issue, but lay blame to others to avoid working to fix the situation.
- c. The Appellee did prove, by a preponderance of the evidence, that the Appellant was guilty of violating the agency's workplace violence rule by threatening, intimidating, or coercing another whether by action or communication. The evidence revealed that during the incident in

question, Mr. Burke's voice was raised and made aggressive moves toward Ms. Anderson. Further, the evidence in this manner revealed that right after Ms. Anderson left Mr. Burke's office, her heart was racing and Ms. Little appeared to be "shell-shocked". Clearly, these above noted occurrences should not be allowed to happen in today's workplace.

5. The Appellee, by a preponderance of the evidence, established a standard of conduct required by the Appellant, David Burke, as a Mail Center Manager, and that he had knowledge of the proper procedures and regulations utilized by the Ohio Department of Education and agreed that he is a supervisor and is there to set the example on how to perform work within the agency for his subordinate employees.
6. The evidence revealed that the Appellant, David Burke, in his previous nine years of employment with the Ohio Department of Education had seven disciplinary actions taken against him ranging from verbal reprimands to suspensions prior to issuing the instant removal order, including cases wherein Mr. Burke was disciplined for being disrespectful to a co-workers and for inappropriate behavior constituting failure of good behavior
7. The Appellant, David Burke, did not present any evidence of disparate treatment in the presentation of his case.
8. The Jurisdiction of this Board to conduct this hearing was established by Ohio Revised Code Section 124.34.

### **CONCLUSIONS OF LAW**

In order for Appellee's removal of Appellant, David Burke, to be upheld, the Appellee has the burden of proving by a preponderance of the evidence the allegations contained in the removal order. The Appellee in this regard has met its burden.

The issues before this Board of Review are whether the Appellant violated or was guilty of failure of good behavior by being discourteous and/or rude treatment of

another; for violations specific to managers in failing to support and/or administer agency initiatives and; workplace violence by threatening, intimidating, or coercing another whether by action or communication. Further, this Board must also consider whether the Appellant's removal from employment was too harsh considering the circumstances and/or constituted disparate treatment. The Appellee believes that the Appellant's removal was necessary and appropriate considering that he as the Mail Center Manager acting the way he did was absolutely unacceptable and outside the bounds of what he as the Mail Center Manager/Supervisor is required to do or should, in the performance of his job, on top of all of his previous disciplines which have had little to no effect on correcting his behavior towards others. However, the Appellant believes that his removal was too harsh as he simply reacted to the situation wherein he thought that Ms. Anderson was disrespecting him and that she was not following protocol, in putting in for a work order.

The Appellee, in it Revised Code Section 124.34 Order of Removal, charged the Appellant with failure of good behavior by being discourteous and/or rude treatment of another; for violations specific to managers in failing to support and/or administer agency initiatives and; workplace violence by threatening, intimidating, or coercing another whether by action or communication.

In the instant appeal, the Appellee did prove, by a preponderance of the evidence, the charges set forth in the Appellant's Order of Removal.

If the Order of Removal issued to the Appellant in this proceeding could be decided based upon the intentions of the Appellant, and if the Appellant's testimony about a lack of culpable intent were to be believed, such a defense could be employed to disaffirm or modify the disciplinary action imposed. The intention of the Appellant, however, in participating in the misconduct alleged within an Order of Removal is not the issue upon which this removal rests. In this removal action, as well as in all disciplinary cases, the finder of fact is less concerned with the intention of the accused and more concerned with whether the alleged misconduct occurred and, if so, what disciplinary action reasonably attaches to the proven misconduct.

Ohio Revised Code Chapter 124. nowhere defines “failure of good behavior.” However, Black’s Law Dictionary does define “failure of good behavior” to mean:

. . . Behavior contrary to recognized standards of propriety, morality, misconduct or wrong conduct. (Further citations omitted). Black’s Law Dictionary at page 594 (Deluxe 6<sup>th</sup> Edition 1990).

Therefore, for the Appellee to establish that an employee violated or was guilty of failure of good behavior, the Appellee must demonstrate that the behavior in question was contrary to the recognized standards of propriety and morality or that the employee demonstrated or participated in wrong conduct. In determining whether the Appellant violated or was guilty of failure of good behavior, the Appellee established that the Appellant did, in fact, understand the Ohio Department of Education’s work rules and regulations, although the Appellant was extremely evasive to answer the question of understanding the work rules, while in fact he had been previously disciplined seven times under these work rules and regulations. Thus, the Appellant knew of the standards, which the Appellee required its employees to adhere to in the performance of their respective job. Further, as outlined in the findings of fact, the Appellant fell below the standards and/or participated in wrong conduct, by violating or was guilty of failure of good behavior by being discourteous and/or rude treatment of another; for violations specific to managers in failing to support and/or administer agency initiatives and; workplace violence by threatening, intimidating, or coercing another whether by action or communication.

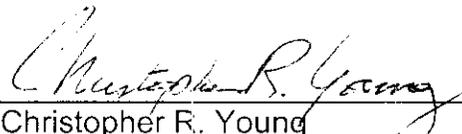
As was revealed by the testimonies, whether it was from the Appellee’s witnesses or the Appellant himself, the Appellee did prove by a preponderance of the evidence that the Appellant spoke to both Ms. Anderson and Ms. Little in a rude and inappropriate manner. The testimony of Ms. Cornett was very enlightening as she could be considered a personal friend of Mr. Burke’s, as he hired her into her position. The evidence revealed that Ms. Cornett overheard the incident, but could not make out the specifics of the conversation, but heard Mr. Burke tell the women to “Get out”. Further, the evidence revealed that Ms. Cornett testified she thought Mr. Burke’s actions were not appropriate, as he was being very aggressive and that she thought he was being disrespectful in this regard by talking to Ms. Little and Ms. Anderson. The witness explained in the past she has also heard Mr. Burke raise his voice to others, specifically a previous manager of Mr. Burke’s.

In the instant appeal, the documentary evidence and testimonial evidence revealed that the Appellant knew of the established standard of conduct which he was required to maintain in the performance of his job as a Mail Center Manager. Consequently, I conclude that the Appellant's actions, or inactions as the case may be, did violate and constitute an actual violation under Ohio Revised Code Section 124.34 for failure of good behavior.

However, there remains a 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 removal of the Appellant. If the violated rules in this case had been a solitary event, removal in this case would not have been appropriate. However, in this case the evidence revealed that the Appellant, David Burke, had worked for approximately nine years while having seven previous disciplinary actions being imposed on him, apparently having no, to little, impact upon the Appellant to comply with the rules and regulations of the agency. As such, I cannot find fault on the Appellee's account to separate this employee from employment. This recommendation as to this removal is made in the hope that such disciplinary action will impress upon the Appellant, and others, the necessity of complying with the violated rules and that such future misconduct in this area will not occur.

#### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the instant order of removal issued to the Appellant, effective April 30, 2008, be **AFFIRMED** and that the Appellant's appeal be **DENIED**.

  
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Christopher R. Young  
Administrative Law Judge