

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Thomas P. Brown IV,

Appellant,

v.

Case No. 09-REM-03-0174

Cuyahoga County Board of Commissioners,

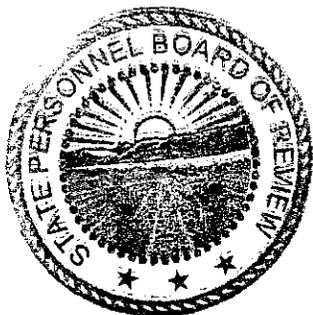
Appellee.

ORDER

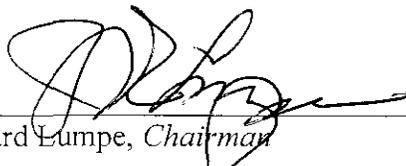
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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

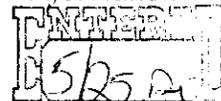
The State of Ohio, State Personnel Board of Review, ss:

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, May 25, 2010.



Diana Mills
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**

Thomas Brown, IV,

Case No. 09-REM-03-0174

Appellant

v.

March 30, 2010

Cuyahoga County Board of Commissioners,

Appellee.

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard on February 9, 2010. Present at the hearing was Appellant, who was represented by Emily E. Warren, Attorney at Law. Appellee, Cuyahoga County Board of Commissioners (CCBOC), was present through its designee, Dale F. Pelsozy, Assistant Prosecuting Attorney in the Civil Division for Cuyahoga County. By agreement of the parties, post hearing briefs were filed on or before March 19, 2010, after which the record was closed in this matter.

This cause comes on due to Appellant's March 22, 2009 timely filing of an appeal from his removal on March 12, 2009 from the position of Manager of Network Engineering with Cuyahoga County Child and Family Services. Appellant served in this position for approximately two years and two months.

Appellant received the pertinent R.C. 124.34 Order of Removal on March 5, 2009 and that Order was effective on March 13, 2009.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and R.C. 124.34.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant's R.C. 124.34 Order of Removal reads, in pertinent part:

Since early 2008, you have been observed repeatedly by co-workers and supervisors sleeping while on duty. Further, on June 18, 2008, you indicated on your time sheet that you left the office at 6:00PM, while witnesses reported that you were not at work past 5:15PM on that day. [There appears to be a typographical

error in the Order of Removal. This is because, both before and during the hearing, Appellee presented evidence related to June 12, 2008, not June 18, 2008.] In addition, you repeatedly drove your personal vehicle on county business in 2007 and 2008 without a valid driver's license. During a pre-disciplinary conference (PDC) held on December 8, 2008, and in your written response submitted subsequently, you denied knowing that your driver's license was suspended. During a PDC held on February 12, 2009 on the issue of your dishonesty, and in your subsequent written response, you again asserted that you never knowingly drove on county business without a valid driver's license. You admitted that you drove on county time and business on numerous occasions before your driver's license was reinstated on August 6, 2008[.] Court records revealed that after you were hired by the County, you appeared personally in court and you were found Guilty of *No Driver's License* on two separate occasions, in two different municipalities, and you paid fines for these offenses.

You were given notice of, and attended pre-disciplinary conference on July 16 and December 9, 2008 and on February 18, 2009, during which you were given a full opportunity to respond to the allegations of misconduct. At the July 2008 conference, you admitted sleeping on the job, but asserted that you only did so during your breaks, lunch or after hours. You further asserted that you suffer from sleep apnea, for which you need surgery [.] With regard to the questions about the discrepancies of your time sheets, you asserted that they were accurate "unless I made a mistake."

During the December 2008 conference, you asserted that you never knowingly drove on county business while your license was under suspension, and whenever you became aware of any issues with your driver's license that you "took care of them in a timely manner." In your written response to the February 2009 conference, you again asserted that you were unaware of your driver's license being suspended and claimed that you were the victim of repeated harassment and retaliation. Your assertions were not persuasive [.] Your conduct, as described above, constitutes Failure of Good Behavior and Dishonesty.

At hearing, Appellee called two witnesses: **Matthew Hawes**, Employment Relations Manager for the CCBOC and **Appellant, Thomas Brown, IV**, as if on cross.

At hearing, Appellant called one witness: **Appellant, Thomas Brown, IV**, to testify on direct and re-direct off as if on cross.

BACKGROUND, WITNESS TESTIMONY, AND ANALYSIS

Appellant began his career with Cuyahoga County Job and Family Services on January 22, 2007 as the Manager of Network Engineering. Appellant's driver's license was revoked by the Ashland Municipal Court on April 4, 2006. It is undisputed that Appellee did not specifically ask Appellant for proof of a valid driver's license during the hiring process. Appellant finally had his license reinstated on August 6, 2008. Between April 4, 2006 and August 6, 2008, Appellant appeared in various courts throughout Northeast Ohio for charges related to his revoked driver's license.

Specifically, Appellant received a ticket for not having a driver's license in Cleveland on March 16, 2007 to which he initially pled not guilty, but later changed his plea to no contest and partially paid his fine. The Cleveland Municipal Court gave Appellant until October 1, 2007 to pay the balance of his fine. Appellant failed to meet this deadline and the Clerk issued a *capias*. Notice of such was sent to Appellant on October 2, 2007. After not receiving any word from Appellant for sixty days, the Cleveland Municipal Court issued a warrant block to the Bureau of Motor Vehicles on December 11, 2007. The next entry in this particular docket is not until August 1, 2008 when Appellant finally paid the balance of his fine.

That was Appellant's experience with one court system. He received a ticket on March 23, 2006 for driving under a suspended or revoked license and appeared in Ashland Municipal Court for that violation. He also received a ticket on May 17, 2007 for not having a driver's license and appeared in Elyria Municipal Court for that infraction. Appellant also has several driving infractions on his record unrelated to his revoked license; according to this driving record, between August 2, 2005 and March 16, 2007, he was cited for a total of eleven infractions and in one instance, was stopped and cited twice in fewer than two weeks.

In regard to the allegations that Appellant left work early on June 12, 2008, the "6:00" written in the slot for his time out that day is scribbled or marked over. One cannot determine if this scribble covers a different time out for that day. It could be, as Appellant pointed out during hearing, the result of a faulty pen. Appellee contends that several employees saw Appellant leave work early on that day. None of these employees was specifically identified at hearing.

The evidence is in equipoise as to the origin of the scribbling. Appellant explained that, in many instances, he would leave his office to go retrieve something from his car.

Appellee offered no evidence showing that Appellant was not on such a trip when he was seen leaving his office at 5:15 p.m. on June 12, 2008.

Finally, Appellee alleges Appellant regularly slept during work hours "since early 2008." Appellant does not dispute sleeping while at work; he admits he did so to combat the symptoms of his now-corrected sleep apnea condition. Appellant contends he only slept during non-work hours such as breaks or before or after clocking out. CCBOC Employment Relations Manager Matthew Hawes confirmed that a supervisor may allow a subordinate to nap in the subordinate's office during breaks. Pictures of Appellant sleeping at work are not time-stamped and Appellee did not offer any evidence indicating a set break schedule. Therefore, the evidence is in equipoise as to whether or not Appellant napped during paid time.

Findings of Fact

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

First, I note that I incorporate herein, by reference, any findings set forth, above, whether express or implied.

Next, I note that Appellant had ample notice that his driver's license was suspended from April 4, 2006 to August 6, 2008. This included: (1) an FRA suspension on November 14, 2006; (2) a ticket received in Cleveland in March of 2007 to which Appellant eventually pleaded no contest and requested an extension of time to pay the remaining balance of his fine; (3) a trip to Elyria Municipal Court on May 17, 2007 in response to a ticket to which he pleaded no contest; (4) a *capias* sent to Appellant on October 2, 2007 in regard to failure to pay the balance of his fine to the Cleveland court; and (5) a warrant block issued on December 11, 2007 by the Cleveland court. Appellant was employed by the Cuyahoga County Board of Commissioners from January 22, 2007 through March 23, 2009.

Appellant had sufficient notice and time to get his driver's license reinstated prior to his employment with Appellee. Instead, he waited until August of 2008, approximately twenty months into his employment, to take the necessary steps to reinstate his driver's license. Appellant asserted at hearing that he did not receive notice of his revoked license because he moved four times in a short time span.

Appellant was notified during the December 2008 PDC and the February 2009 PDC that failure to tell the truth during those proceedings constituted a removable offense.

During both proceedings, Appellant testified that he never knowingly drove his vehicle on county business while his license was revoked. Appellant focused on the modifier “knowingly” during both proceedings, arguing that he was not on notice his license was revoked during any times he drove on county business.

Appellant does not contest that he slept at work; he avers he slept during breaks or other times similarly off-hours. Pictures exist that depict Appellant sleeping in his office; however Appellee was not able to prove these naps were taken during compensable work time. Appellee conceded that there was no formal office policy against sleeping while on non-compensable break time and supervisors may allow subordinates to nap at their respective desks during breaks.

Appellant’s clock-out time for June 12, 2008 does appear scribbled. However, Appellee failed to prove, and direct evidence does not indicate, the scribbling was intentionally done by Appellant to alter his clock-out time. As Appellant testified, it is just as likely that the pen he was using on that particular instance was low on ink. Indeed, other markings on that week’s sheet contain similar scribbles, further indicating nothing more than a pen low in ink.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant had knowledge of the suspended status of his driver’s license when he made trips related to his work for the county in his own vehicle? If so, Appellant’s testimony to the contrary during his December 2008 PDC constituted a failure of good behavior and dishonesty. Further, this Board must consider whether or not Appellant falsified his time sheets and also slept during compensable work time. Based upon the findings set forth above, and for the reasons set forth below, this Board should find that Appellant committed not only failure of good behaviors but also dishonesty and that these behaviors justify his removal.

Sleeping at work during compensable time

and

Falsifying time sheets

Preliminarily, I find that the evidence as to these two allegations against Appellant is

in equipoise.

Appellee was unable to rebut Appellant's arguments, namely that none of Appellee's evidence as to his sleeping habits at work indicated Appellant napped during compensable time. It is undisputed that Appellant suffered from sleep apnea during this time and that his naps helped to combat the symptoms of his condition.

Appellee was similarly unable to rebut Appellant's argument in regard to his leaving early on June 12, 2008. It is plausible Appellant left his office momentarily for some legitimate reason and the scribbles on his timesheet could easily be due to a faulty pen. As such, Appellee has failed to meet its burden regarding the allegation that Appellant falsified timesheets.

Driving on county business while under suspension

and

Repeatedly denying the above behavior in official settings

Appellant's several court appearances and various fines and reprimands provided him with notice that his driver's license was revoked since before the beginning of his employment with Appellee through August of 2008. At hearing, Appellant was presented with a document of his own creation dated September 4, 2008, wherein he avers that in the six months prior to the date of the document he travelled to "an independent adoption agency, training in Westerville Heights, a family outreach center, two other agencies, county jail, juvenile court at least eight times, the [inaudible] building, [inaudible] at least four times, [and] [inaudible] at least eight to ten times."

It is nonsensical to believe that Appellant made all these trips in only the time span from August 8, 2008 (when his license was reinstated) to September 4, 2008, the date of the document. The September 4, 2008 document was not offered into evidence. By Appellant's own admission in this document, however, he made numerous trips in his vehicle related to work during the period where he had knowledge of his suspended license. It strains logic to believe that Appellant had no notice of his suspended license during the first twenty months of his employment with Appellee and his testimony to the contrary is not convincing. Appellant knew at the time of the December 2008 PDC that he had driven on county time without a license.

Appellant alleges he changed residences four times during the period at issue and

this resulted in his failure to receive any notice from any court system that his license was invalid. I find this argument unpersuasive.

Appellant was present at several courts in Northeast Ohio for proceedings related to his suspended license. Surely his presence at such proceedings placed him on notice that his license was revoked. Appellee's Exhibit 3 includes a statement signed by Appellant acknowledging that, if he failed to pay the balance of his remaining fines to the Cleveland Municipal Court by October 1, 2007, his license would be forfeit. Appellant failed to pay the remainder of his balance by October 1, 2007. This alone put Appellant on notice that his license was invalid as soon as he failed to pay the balance of his fines.

As will be shown, below, then, Appellant's driving on county business while under suspension constitutes a failure of good behavior. As will also be shown, below, Appellant's lying about this behavior in official settings constitutes both a failure of good behavior and dishonesty.

Black's Law Dictionary defines "failure of good behavior" to mean:

As enumerated in statute as ground for removal of a civil service employee, means behavior contrary to recognized standards of propriety and morality, misconduct or wrong conduct. *State ex rel. Ashbaugh v. Bahr*, 68 Ohio App. 308, 40 N.E.2d 677, 680, 682. (Black's Law Dictionary, Deluxe 6th Ed. p. 594)

As can be seen, Appellant's consistent driving on county business while under suspension and then lying about that behavior in several official settings constitute acts that are clearly outside the bounds of ordinary propriety and accepted behavior. Thus, Appellant committed several acts of failure of good behavior.

Black's Law Dictionary defines "dishonesty" to mean:

Disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness; disposition to defraud, deceive or betray. (Citations omitted). (Black's Law Dictionary, Deluxe 6th Ed. p. 468)

As can be seen, Appellant's lying in several official settings about his consistent driving on county business while under suspension also clearly constitutes dishonesty.

In summary, Appellant's actions regarding driving on county business while under suspension and then repeatedly lying about same in official settings constitute both a failure of good behavior and dishonesty. Further, the degree of misbehavior and the extreme extent of dishonesty exhibited argue for a severe penalty. Thus, removal is an entirely proper response for Appellee to take in the instant case.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's removal, pursuant to R.C. 124.03 and R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge