

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

Brian Fyffe,

*Appellant.*

v.

Case No. 09-REM-05-0266

Franklin County,  
Court of Common Pleas - General Division,

*Appellee.*

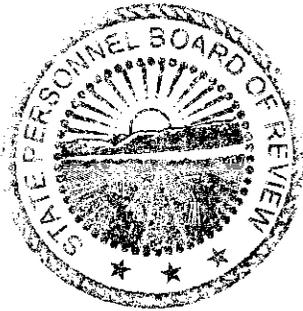
**ORDER**

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 effective May 13, 2009, be **AFFIRMED**, pursuant to O.R.C. § 124.34.

Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye



  
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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, August 4, 2010.

  
\_\_\_\_\_  
Michelle Hunsay  
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**

Brian Fyffe

Case No. 09-REM-05-0266

*Appellant*

v.

June 23, 2010

Franklin County Court of Common Pleas  
General Division

*Appellee*

Marcie M. Scholl  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on February 24, 2010. The record was held open until March 15, 2010 for the submission of closing briefs. Present at the hearing were the Appellant, Brian Fyffe, represented by Daniel H. Klos, Attorney at Law and Appellee Franklin County Court of Common Pleas, General Division designee Jan Goodman, Deputy Court Director, represented by Amy L. Hiers, Assistant Prosecuting Attorney.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code. This matter had been continued several times, so any potential back pay liability has been stayed from the time period of December 9, 2009 to February 24, 2010.

Appellant Fyffe was removed from his position of Intensive Supervision Officer – Sex Offenders, effective May 13, 2009. The pertinent part of the removal order states as follows:

On 03/31/09, Mr. Fyffe plead guilty to Weapon – Use while intoxicated (M1). Mr. Fyffe's conduct and conviction violates multiple Franklin County Common Pleas Court and Adult Probation Department policies. Furthermore, his conduct and conviction do not coincide with the expectations of an employee within the Adult Probation Department whose primary responsibility is supervision of offenders in the community. His actions violated the following policies: Franklin Co. Court policy – Fr. Co. Workplace Expectations Policy, Section II (Policy), Section III. (Standard of Conduct), (A.), Section V. (Employee Responsibility); & Franklin Co. Adult Probation policy – Ethics Policy, Section VI. (Procedure), I. (Ethical Standards), (A), (B) 1.a. (C) 1.a. Section ii (Guidelines of Conduct), (A), (B), 1., e and g., 2., n, w and x.

In accordance with ORC 124.34, Mr. Fyffe's actions resulting in these policy violations constitute: 1. Insubordination, and 2. Acts of Malfeasance.

### **STATEMENT OF THE CASE**

Appellee's first witness was Eric Scott, a Patrol Officer with the Grove City Police Department for approximately twelve years. He stated he typically works third shift, from 11:30 p.m. to 7:30 a.m. and was working that shift on the night of November 1, 2008.

Officer Scott testified he was dispatched with several officers to a residence where there had been reported a domestic situation with a weapon. Upon arriving, Officer Scott testified he saw a female hiding behind a car and the front door to the house was wide open, with a male on the porch and another female standing inside the doorway. Officer Scott testified he told the people on the porch to show their hands and the male appeared to throw a gun from his waist band inside the door. Officer Scott told the male to come off the porch and kneel with his hands on his head. The male then put hands down toward his waist, and as he did so, another officer took him down and handcuffed him. Officer Scott testified there was a firearm found inside the door and it was fully loaded with ten bullets in it. The gun was in the firing position and had a round in the chamber.

Officer Scott testified the woman hiding behind the car was visibly shaking, crying and upset and he later discovered she was the male's girlfriend. Officer Scott stated he had his gun drawn and pointed at the male, who he identified as Appellant Fyffe, giving him commands. Appellant Fyffe began questioning why there was a gun pointed at him as he began to take his hands off his head. Officer Scott identified Appellee's Exhibit A as the police report of the incident, dated November 1, 2008. Page 3 of the report shows Appellant Fyffe had a Smith & Wesson handgun and pages 11 and 12 were identified as Officer Scott's statement and Appellant Fyffe's statement was identified as pages 13 and 14.

Officer Scott testified Appellant Fyffe repeatedly said he did not threaten anyone. Officer Scott described Appellant Fyffe as being very intoxicated and told them he was a probation officer. Appellant Fyffe tested .160 alcohol level at 4:00 a.m., which was a few hours after the call came in at 2:16 a.m.

On cross examination Officer Scott testified he was concerned as he asked Appellant Fyffe to show him his hands and instead, he reached into his waistband and took out the gun and threw it behind him. Officer Scott stated he did not know what Appellant Fyffe was going to do and he was afraid he may have to shoot him. Appellant

Fyffe then knelt down in the grass, a little off the porch, as instructed. The other woman in the doorway stood with her hands in the air.

Appellee's next witness was Erin Dillon, Appellant Fyffe's girlfriend of approximately two years. She testified she has been living with Appellant Fyffe since August 2008 and her six year old son also lives with them. Ms. Dillon testified that on November 1, 2008, a friend of hers from out of town came to visit her. She identified Appellee's Exhibit A, page 2, as her signed statement regarding that night.

Ms. Dillon testified she was stressed and angry that night as Appellant Fyffe kept telling her he was going to leave her and break up with her. She testified she was afraid that night and was shaking. Ms. Dillon stated she cannot actually remember Appellant Fyffe pushing her that night, but if it is in her statement, then he probably did. She testified Appellant Fyffe called her several names that night, such as "cunt", "bitch", "slut" and "whore" and kept yelling at her, so she went outside to get away from him. She knew he had a gun and she heard her friend say Appellant Fyffe was getting his gun and that is when she called the police.

On cross examination Ms. Dillon testified Appellant Fyffe had never verbally abused her prior to the night of November 1, 2008. She stated Appellant Fyffe started going to Alcoholics Anonymous (AA) after the incident and he has not had a drink since that night.

Appellee's next witness was Gayle Dittmer, Chief Probation Officer since June 2001 and with the Appellee since March 1985. As Chief Probation Officer, Ms. Dittmer testified she is in charge of the day to day operations of the department, does the planning and forecasting and supervises the staff of 113 employees. Ms. Dittmer testified Appellant Fyffe began his employ with Appellee in October 2000 and became an Intensive Supervision Probation Officer in April 2007, specializing in sex offenders. She identified Appellee's Exhibit B as the position description for Appellant Fyffe's position. In his position he made recommendations to the court on the disposition of criminal cases and on community control cases. Appellant Fyffe also instructed probationers on conditions of probation and he enforced those conditions. He did searches of offenders' homes, determined appropriate referrals for offenders and arrested those who violated their probation. With the sex offenders, Ms. Dittmer explained there were specialized conditions and Appellant Fyffe would have to walk through their homes to ensure there was nothing in the home that would violate the conditions of probation.

Ms. Dittmer testified Appellant Fyffe was not required to carry a firearm as it was optional. If an employee chooses to carry a firearm, then human resources is notified and maintains a list of those employees. The employee then has to have a note from

their doctor, a psychological evaluation and supervisor approval. The employee must also complete the firearm training and be recertified after one year.

On November 3, 2008, Ms. Dittmer testified she was informed by a manager that another probation officer received a message that Appellant Fyffe was arrested over the weekend and was in jail on Monday morning. She then contacted the Executive Director of the Court and the human resources director. It was discovered that Appellant Fyffe had been charged with assault, domestic violence, carrying a concealed weapon and having a weapon while intoxicated. It was then recommended that Appellant Fyffe be put on administrative leave. Appellee's Exhibit C was identified as the personnel action signed by Ms. Dittmer, placing Appellant Fyffe on administrative leave with pay pending a pre-disciplinary conference. The human resources manager and Appellant Fyffe's manager served him with the notice in jail and he signed a receipt for it.

Ms. Dittmer testified she and others received the police report on Appellant Fyffe and they knew he had been doing field visits on the night of the incident. He had been out making sure the sex offenders were following the condition of their probation, as this is something that is done every year during the trick or treat evenings. Ms. Dittmer explained Appellee wanted to make sure Appellant Fyffe was not in a county car nor had on a county shirt when he was arrested. It was decided to wait until Appellant Fyffe's court date before proceeding with any disciplinary action, so he was brought back to work on a very limited basis. He did clerical duties and had no contact with the sex offenders nor did he make recommendations to the court.

Appellee's Exhibit D was identified as the personnel action form bringing Appellant Fyffe back to work and a memorandum of understanding regarding his duties. His use of a firearm was also suspended. Ms. Dittmer testified they were notified on March 31, 2009 that Appellant Fyffe pled guilty to use of a weapon while intoxicated. Appellee's Exhibit E was identified as the paperwork placing Appellant Fyffe on paid administrative leave and Appellee's Exhibit 6 was identified as the report from the pre-disciplinary hearing. Ms. Dittmer testified she recommend removal of Appellant Fyffe due to the seriousness of the charge and the dangerous situation he created in the community. She stated that type of behavior cannot be tolerated by a probation officer and that he was taught to only draw his gun when his life or that of another was in danger. Ms. Dittmer testified Appellant Fyffe has to make judgment calls in his position and he exhibited very poor judgment on the night of the incident. She stated the decisions he made put two adults and a child at risk. Ms. Dittmer stated he did not take responsibility for his actions, as he only pledd guilty to avoid further embarrassment and she did not see any indication that the behavior may not recur.

On cross examination Ms. Dittmer identified Appellant's Exhibit 6 as the removal order for Appellant Fyffe and stated it was written by the human resources department. Appellant's Exhibits 8 and 9 were identified as the Workplace Expectations and the Ethics statement, respectively.

Appellee's next witness was Jennifer Goodman, Deputy Court Director since January 2008. Prior to holding that position, Ms. Goodman was the Director of Finance and Purchasing for approximately thirteen years. As the Deputy Court Director, Ms. Goodman testified she supervises human resources, IT, finance and special projects. She explained that the human resources position became vacant in March 2009 and she fulfilled that position at that time. She identified Appellee's Exhibit E as the personnel action she signed on April 1, 2009, placing Appellant Fyffe on administrative leave. Appellee's Exhibit F was identified as the pre-disciplinary notice for Appellant Fyffe, which she reviewed. Appellee's Exhibit G was identified by Ms. Goodman as the pre-disciplinary report.

Ms. Goodman testified she attended Appellant Fyffe's pre-disciplinary conference and stated he had little to say. He confirmed he was very drunk and stated he couldn't recall the events, although he stated he did not hit his girlfriend and he knew his actions violated policy. Appellant Fyffe stated he was going to AA and he asked for a second chance. Ms. Goodman explained that it is the Administrative Judge who makes the final decision as to discipline. She stated it was her opinion that the incident was of a serious and violent nature and that the guilty plea involved a weapons charge. Ms. Goodman testified she was concerned about the court's liability in the future and Appellant Fyffe's ability to carry out his work. She testified she talked with Ms. Dittmer and they both agreed to the recommendation of termination.

Appellee's Exhibit H, the disciplinary action form, was identified by and prepared by Ms. Goodman. She identified Appellee's Exhibits I and J as the Workplace Expectations Policy and the Ethics Policy, respectively. Ms. Goodman explained Appellant Fyffe violated the ethics policy by not conducting himself with professionalism as he engaged in threatening and dangerous behavior. She further explained that even though he was not on duty, he mentioned his position as a probation officer several times. Ms. Goodman stated the relationships between their office and law enforcement are very important and Appellant Fyffe disregarded them that night. She testified Appellant Fyffe violated the employee responsibility policy and under the sanctions, termination was warranted since the actions of Appellant Fyffe were of a violent nature and were egregious.

In looking at the Ethics Policy, Ms. Goodman testified Appellant Fyffe violated the policy of demonstrating pride and having high standards of conduct by his disrespect of the police office and his irresponsible use of a firearm. He violated his responsibility to

uphold the law and compromised his relationship with the police. She stated he exhibited insubordination by not abiding by the policies and procedures and he was guilty of malfeasance by doing an act that he should not have done. Appellee's Exhibit K was identified as an email that was sent to all employees, including Appellant Fyffe, in 2004 which included all of Appellee's policies. Appellee's Exhibit L was identified by Ms. Goodman as verification that Appellant Fyffe received training on the ethics policy on November 30, 2000. Appellee's Exhibit M was identified by Ms. Goodman as the cover letter and removal order sent to Appellant Fyffe.

On cross examination Ms. Goodman confirmed that Appellant Fyffe stated three times in his statement to the police that he was a probation officer. She also confirmed that Appellant Fyffe admitted he violated the enumerated policies.

Appellant Fyffe testified he got home at approximately 9:30 or 10:00 p.m. on November 1, 2008 as he had been out checking to make sure that none of the sex offenders he was responsible for were handing out candy that night. There was no one at home when he arrived. He had had his gun with him, so he took it off and put it upstairs in the closet, in a box in the bedroom. He then left with a friend of his to go to a bar. Appellant Fyffe testified he does not know how many drinks he had that night, maybe six or seven. He stated he does not remember much about that night until he got to the police station and he noticed he had cuts and bruises on him. He testified he does not remember getting out his weapon.

Appellant Fyffe testified he went to the same bar every Friday night and he never had the experience of having one drink and then not being able to remember anything after that. He stated that he has not had a drink since that night. Appellant Fyffe testified the reason he kept stating he was a probation officer was because the police officers asked him why he had a gun. He stated he wasn't trying to gain any favors by the statement and that when he wrote out his statement, he was still drunk. Two weeks after his release from jail, Appellant Fyffe testified he enrolled in a six week intensive outpatient treatment plan and attended AA meetings. He stated he provided this information to Appellee two times, once before the pre-disciplinary hearing and again at the hearing.

Appellant's Exhibit 14 was identified as his performance evaluation dated May 2, 2008 and he mostly received acceptable ratings. Appellant Fyffe testified his attorney told him that if he went to a jury trial, the media would get involved and he would lose his job for sure. His lawyer told him if he pled guilty, there would be no media involvement, no embarrassment to the court and he thought he would not lose his job. He stated he pled guilty to a misdemeanor, not a felony and had asked for a second chance at his pre-disciplinary hearing.

On cross examination Appellant Fyffe testified he didn't remember much after that first drink and if he had not been so scared after being arrested, he would have waited for an attorney. Since he was so afraid, he signed the rights waiver and wrote his statement. He testified he completed the AA program in May 2009 and completed the intensive outpatient treatment which consisted of three three hour treatments a week for six weeks, then a three hour treatment once a week for three months.

The parties stipulated to Appellant's disparate treatment documents involving a Ms. Gregory who was arrested in a bar on November 3, 2008. She refused to leave the scene and continued to state she was probation officer. She received a coaching session after having been determined to be guilty of failure of good behavior and malfeasance.

Ms. Dittmer was recalled to the stand and testified that Ms. Gregory reported to her manager the incident she was involved in. There was no charge filed against her. The police officer involved stated Ms. Gregory was uncooperative and was the catalyst of the incident. A counseling session was drawn up for Ms. Gregory and she was told that her actions were not appropriate and that any further action would result in discipline. Ms. Gregory was embarrassed and sorry for the incident. She had no prior discipline and was employed for approximately two years at the time.

### **FINDINGS OF FACT**

After thoroughly reviewing the testimony of the witnesses and the documents entered in evidence, I find the following facts:

1. Appellant Fyffe was employed as an Intensive Supervision Officer – Sex Offenders, at the time of his removal on May 13, 2009. He had been employed by Appellee for approximately nine years and he had no previous discipline.
2. As an Intensive Supervision Officer, Appellant Fyffe worked with sex offenders on probation, ensuring they met the conditions of their probation. He also made recommendations to the court regarding probation and he had to inspect and make searches of the probationers' homes. He was also permitted to carry a gun.
3. Appellant Fyffe received and was aware of the policies and procedures of Appellee.
4. On November 1, 2008 Appellant Fyffe was arrested and charged with various crimes. He eventually pled guilty to a misdemeanor charge of using a weapon while intoxicated.

5. Appellant Fyffe attended AA meetings until May 2009 and he completed a six week intensive outpatient treatment plan.

### **CONCLUSIONS OF LAW**

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

Appellant Fyffe did not dispute the facts which led to his arrest on November 1, 2008 and while Appellant Fyffe did not testify that he pled guilty to a misdemeanor of using a weapon while intoxicated, he did admit to such at the pre-disciplinary conference and he did not present any rebuttal to that testimony. The evidence established that Appellant Fyffe received the workplace policies and ethics policy of the Appellee and that he received training on the ethics policy.

Appellee alleged Appellant Fyffe violated section 124.34 of the Ohio Revised Code by being insubordinate and committing an act of malfeasance. Appellee did not prove that Appellant Fyffe was insubordinate. Typically "insubordination" would be found in the situation of an employee wilfully disobeying a direct order. The definition of the term as found in Black's Law Dictionary, Sixth Edition (1990) is as follows:

Insubordination. State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer.

Appellant Fyffe did not disobey any direct orders of his superiors. A violation of a particular policy is just that, a violation of a policy. That does not constitute insubordination as the term has been historically used and defined. If that were true, than any violation of a policy or rule would be insubordination. Appellee did not meet its burden of proof with respect to showing that Appellant Fyffe was insubordinate.

Appellee also alleged that Appellant Fyffe committed an act of malfeasance. The definition of that term as found in Black's Law Dictionary is as follows:

Malfeasance Evil Doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all or the unjust performance of some act which the party had no right or which he

had contracted not to do. Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties.

Appellant Fyffe did commit malfeasance and Appellee has met its burden of proof on that allegation. Obviously he committed an unlawful act since he pled guilty to a misdemeanor. His acts of the evening of November 1, 2008 were wrongful and unlawful and he should not have done them. Appellant Fyffe did not dispute the facts, as he stated he could not even remember what his actions were that night due to being so intoxicated, but all of the witnesses of his behavior that night testified to basically the same story.

What Appellant Fyffe has argued is that none of his actions were work related and he should not be punished for his off duty behavior when it had no connection to his work. That argument is not persuasive. The connection to his work is his gun. The gun was given to him because of his job as a probation officer. The employer trusted him to use the gun only out in the field to protect himself or others. They did not expect him to use the gun off duty and in a manner in which he could harm others, including his girlfriend and her child, or himself. Appellee certainly did not expect Appellant Fyffe to be handling the gun while he was intoxicated.

Appellee cited numerous policies which Appellant Fyffe allegedly violated. The violations of the Workplace Expectations deal with professionalism. The policy states that "Employees are expected, at all times, to represent the Court with the highest professional attitude of service to the community and to responsibly perform duties that are in the proper scope of his or her employment." Appellant Fyffe's actions of November 1, 2008 were not professional and did not represent a "professional attitude of service to the community". The second half of the policy statement deals with the actual performance of duties. There is no allegation that Appellant Fyffe did not perform his duties with professionalism. Appellant Fyffe argued that since his actions occurred off duty, these rules were not violated. Once again, that argument is not persuasive. The first part of the policy states "Employees are expected, at all times. . ." to be professional. The policy is not limited to the performance of one's duties but is extended beyond that. As an employee of the court, the expectation is that the employee will conduct themselves, on and off duty, with professionalism and to bring no disrespect or embarrassment to the court.

Appellant Fyffe testified he pled guilty to a misdemeanor in order to avoid media involvement and embarrassment to the court. He therefore must have realized that his off duty actions would have had some effect on the perception of the court as his employer and would have embarrassed the court. Thus, he cannot argue that his off duty actions should not be considered to violate work policy or to be connected to his

employment. Clearly, he thought they were connected and testified that he specifically pled guilty to minimize the affect his actions would have had on the court. Appellee has met its burden of proof that Appellant Fyffe did violate the enumerated policies of the Workplace Expectations.

Appellee also alleged Appellant Fyffe violated different sections of the office Ethics Policy and the Guideline of Conduct found in that policy. Once again the Ethics Policy states that employees must conduct themselves with high standards. While this policy is more general in nature, it still points out that employees of the court are working with offenders out in the community and as such, the employees must conduct themselves lawfully and ethically. Specifically, the rules of general conduct prohibit an employee from "Purposely, recklessly, or negligently endangering the well-being of self or others". (Rule n). Appellant Fyffe's actions of November 1, 2008 did endanger the well-being of himself and others and his acts of doing so were purposeful, reckless and negligent. Appellee has sustained its burden with respect to proving the violations of the Ethics Policy and the Guidelines of Conduct.

With respect to the disparate treatment argument of Appellant Fyffe regarding Ms. Gregory, there has been no disparate treatment shown. Ms. Gregory's violations did not involve a gun. While Appellant Fyffe argued that his actions and those of Ms. Gregory were similar in all respects but the gun, the gun once again is the big difference. Appellant Fyffe could have done a lot more damage with his gun than Ms. Gregory did or could have done with her fists. The other difference is that the evidence established that was Ms. Gregory's first offense and as such, she received a counseling session. The evidence established that when Appellant Fyffe had a complaint brought against him in 2004, he also received a counseling session. Therefore, Ms. Gregory and Appellant Fyffe were treated the same with respect to their first behaviors, so there is no disparate treatment.

Appellant Fyffe also argued that the fact that he completed an AA program and also completed an intensive treatment program, should be considered mitigating factors. The evidence established that he presented evidence of those programs being completed at his pre-disciplinary conference and prior to the conference. Therefore, the Appellee did take those actions into consideration when making its decision to terminate Appellant Fyffe. While Appellant Fyffe is to be commended for taking those steps to improve his behavior, the Appellee cannot be found to have abused its discretion in removing Appellant Fyffe from employment. The Appellee's witnesses testified that given the fact that Appellant Fyffe was responsible for ensuring that the people on probation uphold the law and abide by the conditions of their employment, it is imperative that Appellant Fyffe also uphold the law and be able to be trusted to do so. The witnesses testified that they could not be sure that he would not engage in the

same behavior at a future date and that he was no longer a good role model for the probationers he supervised.

While it is unfortunate that the actions Appellant Fyffe engaged in on one night are the reason that his career as a probation officer was ended, the fact remains that those actions were so egregious that termination was warranted. Contrary to what Appellee argued, this administrative law judge is of the opinion that Appellant Fyffe did take responsibility for his actions and took the steps of going through AA and other treatment programs to help prevent another incident similar to that of November 1, 2008. He pled guilty to a misdemeanor charge and regardless of if he took those actions because his attorney suggested he do so, the fact remains he did take those actions. It is hoped that Appellant Fyffe will not repeat the mistakes he made on November 1, 2008 and that he will be able to once again find employment and put this incident behind him. That being said, Appellee cannot be found to have abused its discretion as the factors that it weighed considering Appellant Fyffe's position and his connection with the court as well as with probationers, demand that he abide by the law and be a role model for those probationers. Clearly his actions negated those demands.

Therefore, since Appellee met its burden of proving the allegations in the removal order and did not abuse its discretion, it is my **RECOMMENDATION** that the removal of Appellant Fyffe, effective May 13, 2009, be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.

  
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Marcie M. Scholl  
Administrative Law Judge

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