

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Dana Maschari,

*Appellant,*

v.

Case No. 09-REM-10-0446

Department of Rehabilitation and Correction  
Lorain Correctional Institution,

*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. § 124.34.

Casey - Aye  
Lumpe - Aye  
Tillery - Aye

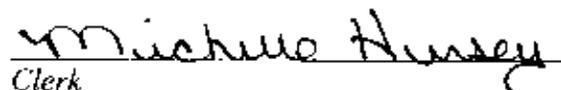


  
Terry L. Casey, *Chairman*

**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 5, 2011.

  
*Michelle Hussey*  
Clerk

**NOTE:** Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.

4-5-11mH

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

Dana Maschari,

Case No. 09-REM-10-0446

*Appellant*

v.

February 9, 2011

Department of Rehabilitation & Correction,  
Lorain Correctional Institution,

*Appellee*

Jeannette E. Gunn  
*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of her October 6, 2009, removal from employment with Appellee. A record hearing was held in the instant matter on May 24, 2010. Appellant was present at record hearing and was represented by Frank J. Groh-Wargo and Mark S. Ondrejch, attorneys at law. Appellee was present at record hearing through its designee, Labor Relations Officer Rich Shutek, and was represented by Michael C. McPhillips and Komlavi Atsou, Assistant Attorneys General.

The R.C. 124.34 Order of Removal provided to Appellant listed as grounds for her removal:

#49 – Any violation of ORC 124.34 - ...and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections of the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. On June 25, 2009, when you were on duty as a Correctional Food Service Manager 1, three correctional Food Services Coordinators (CFSC) were mandated to the afternoon shift, 12:00 P.M. to 8:00 P.M. When one of the mandated employees complained and stated they wanted to be able to leave at 12:30 P.M., their normal quitting time, you stated you would allow them to leave if they paid you fifty dollars. The CFSC who made the complaint gave you fifty dollars cash and

you permitted him to leave. Another CFSC promised to pay you and you allowed him to leave. This CFSC wrote you a check for fifty dollars on July 1, 2009, and presented it to you. You accepted the check and deposited it. These acts of personal gain through your position as a public employee are a direct violation of the Department on Ethics 31-SEM-01, as well as the Ohio Ethics Law, for which you have received training and guidance on maintaining compliance as a public employee.

The parties stipulated to the jurisdiction of the Board, pursuant to R.C. 124.03(A) and 124.34.

#### **STATEMENT OF THE CASE**

Appellant testified that she began her employment with Appellee in 1987 and held the position of Food Service Manager 1 at the Lorain Correctional Institution (LorCI) at the time of her removal. She confirmed that as a Food Service Manager 1, she was responsible for supervising, scheduling, and evaluating the job performance of Food Service Coordinators, and could recommend discipline for them when necessary.

Appellant acknowledged that she was familiar with Appellee's Standards of Conduct. She confirmed that she received "in service training" on an annual basis and that she had attended ethics training in October 2007 and 2008. Appellant agreed that the gist of the ethics training (Appellee's Exhibit E) and Appellee's ethics policy (Appellee's Exhibit F) was that a public employee cannot accept anything of value, other than their salary, for performing their job duties, but stated that the training had only stressed that employees were not supposed to do things for inmates.

Appellant indicated that the kitchen at LorCI operated on two shifts; first shift began at 4:30 a.m. and ended at 12:30 p.m., and second shift began at 12:00 p.m. and ended at 8:00 p.m. She recalled that in late June 2009, several new Food Service Coordinators were doing on-the-job training. Appellant noted that she was working with them as their job coach on June 25, 2009, and that her hours were 8:00 a.m. to 4:00 p.m. that day.

Appellant testified that Mr. Carriere, Ms. Strong and Mr. Andress had been mandated by Mr. Kay to work overtime on June 25, 2009, due to a shortage of staff on the second shift. She explained that a supervisor typically first asks for volunteers to work overtime, but has the authority to "freeze over" employees when there are no volunteers. Appellant recalled that her direct supervisor, Joe Kay, told her that if she was willing to stay to supervise the Food Service Coordinator trainees, they could work the overtime hours and Mr. Carriere, Ms. Strong and Mr. Andress could go home.

Appellant stated that she initially told Mr. Kay she would get back to him later to confirm whether or not she was available to work the overtime hours on June 25, 2009. She noted that she had kids at home and needed to see if someone could watch them. Appellant confirmed that she did ultimately work overtime that day and was paid time and a half for the hours she worked over her regular eight-hour shift (Appellee's Exhibits BB and CC).

Appellant stated that she did not demand any money from Mr. Andress, Mr. Carriere, or Ms. Strong in exchange for agreeing to work overtime, but confirmed that both Mr. Andress and Mr. Carriere paid her fifty dollars and she accepted the money from both of them. She noted that she had already told Mr. Kay she would stay and work when Mr. Carriere said he would give her fifty dollars to work for him. Appellant testified that she did not recall Mr. Andress saying either that he would make it worth her while if she let him go home or that he would give her a check later.

Appellant noted that employees sometimes buy lunch for each other to show their appreciation for things and noted that on at least one occasion Mr. Kay bought pizza for the warehouse employees. She testified that she did not tell any other employees or inmate employees that she had made money off Mr. Carriere and Mr. Andress that day for working overtime in their place.

Appellant recalled that she was placed on administrative leave on July 31, 2009, and subsequently received notice of and participated in a pre-disciplinary hearing. She noted that she was removed from her position as Food Service Manager 1 effective October 6, 2009 and received an R.C. 124.34 Order of Removal at that time; she confirmed that she received an amended Order of Removal by certified mail in February 2010.

Rich Shutek testified that he has been employed by Appellee at LorCI as Labor Relations Officer since April 2005. He indicated that he is responsible for administering three union contracts, overseeing the disciplinary process for the Warden, advising the Warden on due process and disciplinary procedures, and maintaining disciplinary and non-disciplinary employee personnel files.

The witness recalled that when Governor Strickland took office in 2007, he mandated ethics training for all state employees. Mr. Shutek observed that he has personally served as an instructor for in-service ethics training and identified Appellee's Exhibit G as a copy of the presentation that has been used in Appellee's ethics training sessions since 2007. He noted that hypothetical questions related to employees "selling" vacation days to other employees are commonly asked at training sessions, but did not recall any that posed exactly the same fact pattern as the incident upon which Appellant's discipline was based.

Mr. Shutek testified that he does not know of any employee, other than Appellant, who has been disciplined for accepting money from another employee for working their mandated overtime, or for paying another employee to work overtime in their place. He confirmed that neither Mr. Andress nor Mr. Carriere have been disciplined for giving Appellant \$50 to cover their overtime for them. The witness noted that he believed there was a policy violation even if Mr. Andress and Mr. Carriere voluntarily gave Appellant money without her soliciting their payment.

Joseph Kay testified that he is presently employed by Appellee at the Lorain Correctional Institution and occupies a position classified as Correctional Food Service Manager 2. He indicated that he has held that position for approximately 10 years, and has worked at LorCI in the Food Service area since 1996.

The witness confirmed that Appellant typically worked second shift and reported directly to him. Mr. Kay indicated that Appellant was responsible for supervising her shift employees, scheduling them, evaluating them and, when necessary, recommending discipline. He noted that Appellant put in a lot of overtime and was a good employee for him.

Mr. Kay recalled that on the morning of June 25, 2009, he told Mr. Andress, Ms. Strong and Mr. Carriere that they were mandated to work overtime that day. He noted that the department had been short staffed during that period and the overtime roster had been exhausted. The witness indicated that they were training

four new Food Service Coordinator employees that week and schedules were a little different than normal; he observed that the trainees and the coaches, Appellant and Mark Bostick, were working a training shift from 8:00 a.m. to 4:00 p.m.

The witness testified that he informed Mr. Andress, Ms. Strong and Mr. Carriere around 9:00 or 9:30 a.m. that he was going to check the policies to see if he could offer the overtime to the trainees. Mr. Kay recalled that when he determined that he was able to do so, if a coach stayed with them, he asked Mark Bostick if he could stay. He indicated that neither he nor Mr. Bostick wanted to stay, so he asked Appellant if she was willing to do so. The witness stated that he first asked her around 10:00 a.m. and she said she would get back to him; he asked her again around 11:00 a.m. and received the same response. Mr. Kay confirmed that Appellant eventually told him around 12:00 p.m. that she would stay with the trainees.

Mr. Kay recalled that Mr. Andress, Ms. Strong and Mr. Carriere checked with him throughout the day and each time he told them that he was waiting for Appellant to tell him if she would stay with the trainees. He confirmed that they knew Appellant would have to agree to stay in order for them to go home. The witness stated that after Appellant agreed to stay with the trainees, he released Mr. Andress, Ms. Strong and Mr. Carriere from their mandated overtime.

Mr. Kay confirmed that employees can be disciplined for refusing to work mandated overtime, depending on the circumstances that prevent them from doing so. He acknowledged that employees sometimes cover for each other on overtime assignments when there are family issues or similar circumstances, but testified that he was not aware of any employee paying another employee for changing the schedule or exchanging time. The witness testified that he was not aware that either Mr. Andress or Mr. Carriere had paid Appellant to stay with the trainees.

Michael Andress testified that he is presently employed by Appellee as a Food Service Coordinator at LorCI. He indicated that he is responsible for monitoring, assisting and training inmates in food preparation and service. The witness noted that when he was first hired he worked second shift, but presently works first shift and was working that shift on June 25, 2009. Mr. Andress stated that he has been supervised by both Appellant and by Mr. Bostick during his employment at LorCI.

The witness recalled that he was informed on June 24 that he would be mandated to work overtime on June 25, 2009. He noted that he has been "frozen" before and that an employee cannot refuse to work overtime when they are mandated to do so. Mr. Andress indicated that Ms. Strong and Mr. Carriere were also mandated to work overtime on June 25, 2009; he confirmed that they ultimately did not do so because three trainees and Appellant agreed to work the overtime hours.

Mr. Andress testified that when Mr. Kay first told him that the overtime hours could be offered to the trainees if Appellant agreed to stay with them, he told Appellant "if you stay, I'll make it worth your while." He confirmed that he initiated the conversation some time between 11:00 and 12:00 in the staff office. The witness noted that he later passed Appellant on the line and told her that he would pay her fifty dollars to stay.

Mr. Andress confirmed that he gave Appellant a check for fifty dollars to let him go home that day (Appellee's Exhibit Z). He recalled that Appellant was in the office with Ms. Tomlin and he motioned to her to come out into the kitchen because he did not want to make his payment in public. The witness noted that Appellant accepted the check he gave her.

The witness stated that, to his knowledge, Mr. Kay did not know anything about his payment to Appellant.

Paul Carriere testified that he is presently employed by Appellee at LorCI as a Food Service Coordinator and has held that position for approximately two years. He recalled that he worked first shift on June 25, 2009, from approximately 4:28 am to 12:44 pm. The witness noted that although he was mandated to work overtime on June 25, 2009, he ultimately did not do so.

Mr. Carriere testified that Appellant told him that if he gave her fifty dollars she would stay with the trainees to work the overtime hours. He stated that Appellant initiated the conversation around 11:30 a.m. outside the staff office. The witness noted that he is an avid golfer and had golf league that afternoon, so he gave her fifty dollars in cash some time before 12:30 p.m. that day.

He testified that, to his knowledge, Mr. Kay did not know about his payment to Appellant.

Tracey Strong testified that she is presently employed by Appellee at LorCI as a Food Service Coordinator and has held that position since February 2008. She recalled that she worked first shift on June 25, 2009, and that she was informed that she was being "frozen over" for overtime that day. The witness noted that she ultimately did not work overtime that day, and that Appellant stayed to work the overtime hours along with three Food Service Coordinator trainees.

Ms. Strong observed that neither she nor Mr. Carriere wanted to work overtime on June 25, 2009. The witness recalled that she and Mr. Carriere were in the chow hall when Appellant came to them and said she would be willing to stay to work overtime with the trainees if someone gave her money to do so. She noted that Appellant did not demand the specific sum of fifty dollars from either her or Mr. Carriere, but just made a general statement.

The witness testified that Mr. Carriere took his wallet out and gave Appellant a fifty dollar bill. Ms. Strong indicated that she did not carry cash with her and would not have given it to Appellant if she had it. She noted that although she did not know if Appellant ultimately kept Mr. Carriere's money, she did not see Appellant hand it back to him while she was there.

Shannon Bier testified that she has been employed by Appellee at LorCI for approximately six years as a Corrections Officer. She noted that she works as a relief officer and is assigned to different areas within the institution as needed.

Ms. Bier recalled that on June 25, 2009, she, Appellant, and another employee were taking a break in the Officers dining area. She stated that Appellant reached into her pocket and pulled out a fairly thick wad of cash, then made a kind of bragging statement along the lines of "if you want to leave you've got to pay." Ms. Bier indicated that Appellant did not make a reference to specific employees and did not state specifically where the money had come from.

Edwin Diaz testified that he is presently employed by Appellee as a Food Service Coordinator at LorCI and noted that he has held that position for almost one year. He recalled that in June 2009 he participated in on the job training (OJT) for a forty-hour period as part of a training group that also included Mr. Adams, Ms. Hammer and Mr. Cherry. The witness noted that Appellant was his coach for OJT.

Mr. Diaz stated that he worked overtime while he was a trainee and confirmed that he did so on June 25, 2009. He recalled that Appellant told him and the other members of his training group that there were overtime hours available and that he, Mr. Cherry and Ms. Hammer accepted the hours. The witness testified that Appellant told him during a conversation that day that she had made money as a result of them working overtime; she stated that Mr. Carriere and Mr. Andress had paid her fifty dollars each. Mr. Diaz indicated that he believed that Appellant was bragging about it because she repeated it several times.

### **FINDINGS OF FACT**

Based upon the testimony presented and evidence admitted at record hearing, I make the following findings of fact:

Immediately prior to her termination from employment with Appellee, Appellant occupied a position classified as Food Service Manager 1 at the Lorain Correctional Institution. Appellant was placed on administrative leave on July 31, 2009, and subsequently removed from employment effective October 6, 2009. Prior to her termination, Appellant received notice of and participated in a pre-disciplinary hearing. She received an R.C. 124.34 Order of Removal at the time of her termination and also received an amended Order of Removal by certified mail in February 2010.

Appellant was familiar with Appellee's Standards of Conduct; she received "in service training" on an annual basis and attended ethics training in October 2007 and 2008. She was aware that Appellee's ethics policy prohibits a public employee from accepting anything of value, other than their salary, for performing their job duties.

On June 25, 2009, Appellant was training several new Food Service Coordinators. Due to a shortage of staff on second shift, first shift employees Paul Carriere, Tracey Strong and Michael Andress were mandated by Food Service Manager 2 Joseph Kay to work overtime on that day. Mr. Kay told Appellant that if she was willing to stay to supervise the trainees, they could work the overtime hours and Mr. Carriere, Ms. Strong and Mr. Andress could go home.

Appellant agreed to work overtime that day to supervise the trainees on second shift and was paid time and a half for the hours she worked over her regular eight-hour shift. Appellant also accepted fifty dollars each from Mr. Address and Mr. Carriere in exchange for agreeing to work overtime.

### **CONCLUSIONS OF LAW**

As in any disciplinary appeal before this Board, Appellee bears the burden of establishing by a preponderance of the evidence, certain facts. Appellee must prove that Appellant's due process rights were observed, that it substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in administering Appellant's discipline, and that Appellant committed one of the enumerated infractions listed in R.C. 124.34 and on the disciplinary order.

With regard to the infraction(s) alleged, Appellee must prove for each infraction that Appellee had an established standard of conduct, that the standard was communicated to Appellant, that Appellant violated that standard of conduct, and that the discipline imposed upon Appellant was an appropriate response. In weighing the appropriateness of the discipline imposed upon Appellant, this Board will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, and any evidence of mitigating circumstances or disparate treatment of similarly situated employees presented by Appellant.

Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to be heard prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121. Information contained in the record indicates that Appellant was notified of and had the opportunity to participate in a pre-disciplinary hearing. Appellant had notice of the charges against her and an opportunity to respond to those charges. Accordingly, I find that Appellant's due process rights were observed. I further find that Appellee substantially complied with the procedural requirements established by the Ohio Revised Code and Ohio Administrative Code in removing Appellant.

This Board's scrutiny may, therefore, proceed to the merits of the charges made against Appellant. Appellant's removal was based upon an allegation that she improperly accepted money from Mr. Carriere and Mr. Andress in exchange for agreeing to work overtime on June 25, 2009, thereby violating Appellee's ethics policy 31-SEM-01, the Ohio Ethics Law and R.C. 124.34, which is referenced by Appellee's Standards of Employee Conduct Rule #49. Appellee's ethics policy specifically states in Section IV(D)(2)(f) that employees are prohibited from accepting any compensation other than that allowed by law for performing any public duty or responsibility. That section further notes that the prohibition "[m]eans you can only be paid by DRC for performing your duties as a DRC employee."

Appellant confirmed through her testimony that she was familiar with Appellee's Standards of Employee Conduct. She further testified that she had participated in ethics training and was aware that Appellee's ethics policy prohibited a public employee from accepting anything of value, other than their salary, for performing their job duties. As such, I find that Appellee had an established standard of conduct, and that the standard was communicated to Appellant.

Appellant testified that she accepted fifty dollars each from Mr. Carriere and Mr. Andress but argued, disingenuously, that they simply gave it to her and she never asked them for the money. Mr. Andress stated that he approached Appellant with the offer of payment in exchange for her agreement to work overtime on June 25, 2009, while Mr. Carriere indicated that Appellant came to him and told him that she would stay that day if he gave her fifty dollars. The record further indicates that Appellant was paid by Appellee for the time she worked on June 25, 2009. Accordingly, I find that there is sufficient evidence contained in the record to establish that Appellant accepted money from Mr. Andress and Mr. Carriere in addition to the compensation she was paid by Appellee for performing the duties of her position as Food Service Manager 1 at the Lorain Correctional Institution. I further find that Appellant's actions constitute a violation of Appellee's ethics policy.

Information contained in the record indicates that Appellant had a lengthy disciplinary history prior to June 2009, including a previous removal in 1998 for dishonesty, which was modified by this Board to a four-month suspension. Appellant presented insufficient testimony and/or evidence to mitigate the severity of Appellee's disciplinary response. Taking into account Appellant's prior disciplinary

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history and the serious nature of her conduct in this instance, I find that removal was an appropriate disciplinary response.

Therefore, based upon the foregoing analysis, I respectfully **RECOMMEND** that Appellant's removal from employment be **AFFIRMED**.

  
Jeannette E. Gunn  
Administrative Law Judge

JEG: