

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

STACEY B. COE,

Appellant.

v.

Case No. 09-WHB-12-0518

OHIO STATE RACING COMMISSION.

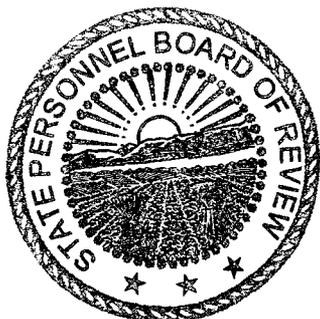
Appellee

ORDER

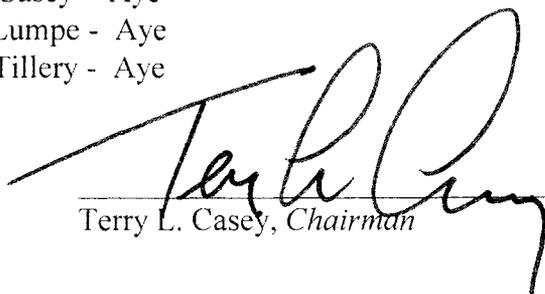
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including 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 Appellee's removal of Appellant from her position of Investigation Supervisor 1 is **AFFIRMED**, due to Appellant's failure to demonstrate a causal connection between her filing of the requisite whistleblower reports and her probationary removal from her position, pursuant to Ohio Revised Code Section 124.341(D).



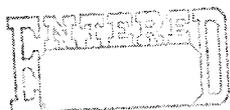
Casey - Aye
Lumpe - Aye
Tillery - Aye


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 constitutes ~~(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, January 20, 2012.




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**

STACEY B. COE,

Case No. 09-WHB-12-0518

Appellant

v.

November 8, 2011

OHIO STATE RACING COMMISSION,

JAMES R. SPRAGUE

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on December 6, 2010, July 6, 2011 and July 7, 2011. A status conference was also held on August 3, 2010. Present at hearing was Appellant, who was represented by Daniel H. Klos, Attorney at Law. Appellee, Ohio State Racing Commission (OSRC), was present through its designee, John Izzo, then-Deputy Director and Legal Counsel for OSRC, at Day One of hearing. Appellee had no designee at Days Two and Three of hearing. Appellee was represented at various times during the development of the instant record by several Assistant Attorneys General including: Michael C. McPhillips; Timothy M. Miller; Rema A. Ina; Nicole S. Moss; and Philip L. Judy.

By agreement of the parties, all post-hearing briefs were filed on or before October 31, 2011 and the record was thereafter closed.

This matter comes on due to Appellant's timely filing of an appeal from her removal from her position of Investigation Supervisor 1 with the OSRC. Because Appellant was still serving in her probationary period at the time of her removal, Appellee provided Appellant with her notice of removal in the form of a letter from OSRC's Then-Executive Director and then-Appointing Authority, Tom Fries, Jr.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.341.

Unfortunately, the development of the instant record has taken a considerable amount of time, to date. There are a number of reasons why this has occurred.

This case concerns an appeal from a *probationary removal* with Appellant asserting she was removed as a result of filing various whistleblower reports. This Board lacks jurisdiction over probationary removals under R.C. 124.34 but can consider them in the context of a whistleblower appeal under R.C. 124.341.

Thus, considerable time was spent in discovery regarding this matter. Further, Appellee's designee from Day One (then-Deputy Director and Legal Counsel John Izzo) unexpectedly received a 30-day suspension and, so, the remaining days of hearing needed to be re-scheduled. To further complicate the matter, Mr. Izzo (Appellee's then-designee) and Mr. Fries (Appellee's then-Appointing Authority) were both removed with the quadrennial transition of state government. Additionally, there was an unusual amount of transition in Appellee's counsel. As well, the transcript requested by the parties was delayed due to external intervening circumstances. Finally, respective counsel needed several extensions of time to file their briefs, due in part to the complex subject matter involved in this case.

It should be noted that counsel for both parties performed well in this case and are to be commended. This is particularly so, given the complex subject matter of this case and given the other variables that seemed to arise with some frequency during the pendency of this appeal.

Of note is that *none* of the four principal players in this matter still work for the OSRC. Those four principal players are: Appellant; Nicolasa (Nikky) Roberts, a Racing Inspector, one of Appellant's subordinates and her principal antagonist; John Izzo, former Deputy Director, Legal Counsel and Appellant's supervisor); and Tom Fries, former Executive Director and former Appointing Authority).

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, seven witnesses testified.

Stacey B. Coe, Appellant, was called by both sides to testify. Appellant served as an Investigation Supervisor 1 with OSRC from her hire until her removal during her probationary period. Appellant claims the actual reason for her removal was because she reported various alleged violations to management in the OSRC.

Tom Fries served as Executive Director of the OSRC and as its Appointing Authority during the term of Appellant's employment. As noted, Mr. Fires was subsequently removed with the quadrennial transition.

Steve Zapar served as ORC's Chief Inspector during the term of Appellant's employment with the OSRC and also served, to some degree, as Appellant's functional supervisor.

John Izzo served as Deputy Director and Legal Counsel for the OSRC during the term of Appellant's employment and served as Appellant's formal supervisor. As noted, Mr. Izzo was also removed during the transition. Mr. Izzo was also called by both sides to testify.

Rick A. Conteen served as a Racing Inspector during the term of Appellant's employment with the OSRC and was another of Appellant's subordinates.

John Winkel served as a Racing Inspector Supervisor during the term of Appellant's employment with the OSRC.

Doug Thomas served as a member of the OSRC Administrative Staff during the term of Appellant's employment with the OSRC.

Following extensive discovery, it was determined that Appellant appeared to have met her *prima facie* burden regarding the procedural and substantive components set forth in R.C. 124.341. Accordingly, this matter proceeded to three days of record hearing.

In order to review the facts and application of the law to those facts in this case, it is necessary to establish and review the OSRC environment in which Appellant found herself.

Appellant has a law enforcement background, has served as a Police Officer for a number of years, and is apparently fluent in Spanish. Appellant was also a horse aficionado who both owned and regularly rode a horse.

The OSRC generally regulates the thorough bred and standard bred racing industries in Ohio. This includes both racing with jockeys and with riders on sulkies. The OSRC works in conjunction with track owners. The OSRC also works in

conjunction with judges and associated personnel who oversee the adjudication of the races themselves and the qualifications of the horses and jockeys/riders, *et cetera*. Both the OSRC and the industry regulators oversee various additional personnel associated with the industry. The OSRC regulates horse racing at commercial racetracks and at county fairs. The record reflects that a number of personnel at Ohio's tracks utilize Spanish as their first language.

The record establishes that OSRC has in the past accepted that its role is not to police the industry but to assist in its regulation. To that end, there appears to be a significant reliance on industry personnel becoming comfortable and friendly with OSRC personnel and, consistent with that relationship, there is an expectation that tips will be passed on to OSRC personnel regarding perceived violations. These include tips regarding "blood gassing" of race horses with bicarbonate of soda – resulting in an improper increase in stamina, use of the "DEA Schedule 1" drug Aminorex on horses, or of other improper medications or enhancements administered to horses before races or regarding the presence of improper equipment that might be used to administer same.

However, the record also reflects that the OSRC can neither abdicate its duties nor be too lax and amiable with its regulated constituencies. In other words, the record reflects that a natural tension exists between those regulating and those regulated and this tension likely cannot be eliminated without adversely impacting the regulatory mission of the OSRC.

Appellant's position was classified as an Investigation Supervisor 1. Appellant's Position Description regarding that position was identified as Appellee's Exhibit A. The Job Duties section of the Position Description delineates Appellant's duties in order of importance, as follows.

Rank One constitutes a suggested 50 percent of Appellant's time and states:

Maintains surveillance of track operations relative to the legality of operations. Investigates and reports to supervisor and/or Presiding Officials any violations of rules and regulations committed by an official, employee or other personnel licensed by the Ohio State Racing Commission. Directs and assists investigations, searches involving racing matters. Prepares case material and evidence for hearings and Commission meetings. Assists in maintaining penalty

and fingerprint files for violators of Commission laws, rules and regulations.

Rank Two constitutes a suggested 35 percent of Appellant's time and states:

Supervises Commission employees at a commercial racetrack or county fair. Supervises the licensing of and assists in the licensing of all participants at commercial racetracks and county fairs. Establishes standards of job performance and coordinates the activities of racing inspectors. Monitors work of inspectors in the field, formulates and implements new or revised forms and reports to improve quality of information obtained and maintained. Sees that the Commission office at each track and fair is provided with all necessary forms, supplies, and equipment to perform their duties.

Rank Three constitutes a suggested 15 percent of Appellant's time and states:

Represents appointing authority at commercial racetracks and county fairs. Assumes responsibility and prepares necessary documents and data required for the Attorney General's Office relative to Commission hearings and meetings. Collaborates with all local police agencies regarding investigations involving Commission licensees. Participates in sensitive and/or complex investigations involving court action. Testifies in administrative hearings and court when necessary.

The final paragraph of the Job Duties section states:

Requires overnight travel. May work weekend, holidays and flexible hours. May have split and/or rotating days off. May be exposed to hostile or violent persons or animals; unsanitary conditions; and/or adverse weather conditions.

In Appellant's Position Description, her position is listed as supervising two Racing Inspector positions. Appellant's direct supervisor is listed as a Deputy Director 3, being John Izzo, who, during Appellant's tenure, was both OSRC's Deputy Director and Legal Counsel.

I find that Appellant's written reports regarding the activities of Appellant's subordinate Nikky Roberts, a Racing Inspector, qualify as whistleblower reports.

These reports detailed the requisite alleged illegal or improper activity and were timely delivered to the requisite personnel who could rectify the problem or violation, as contemplated in R.C. 124.341.

Further, Appellant's reporting of Ms. Roberts' apparent violations cannot be minimized as a supervisor merely reporting the acts or omissions of a subordinate, in the ordinary course of the supervisor's duties. Appellant reinforced this component of her case at hearing, thus bolstering her plausible argument that she was removed for rocking the boat with OSRC management (and also, by implication, with Ms. Roberts' union).

Soon after Appellant began her employment with the OSRC, Deputy Director John Izzo, who served as Appellant's formal supervisor, expressly tasked Appellant to "watch" Ms. Roberts, including Ms. Roberts' comings and goings. Further, Chief Inspector Steve Zapar, who, at times, served as Appellant's functional supervisor, asked Appellant to "keep an eye" on Ms. Roberts' timekeeping and on her activities.

The level of scrutiny that Appellant reasonably expected she was to utilize, combined with a multi-year history of Ms. Roberts' lax timekeeping or apparent abuse of her time (prior to Appellant's coming to OSRC), also took this matter out of the realm of ordinary supervisory observation and reporting.

Appellant's surveillance of Ms. Roberts and the means to which she thought she was authorized to go to accomplish same ruffled some feathers. It would appear that Appellant and Ms. Roberts had an acrimonious relationship. No doubt Appellant's keeping tabs on Ms. Roberts perhaps for the first time in Ms. Roberts' OSRC career enhanced the friction between Appellant and Ms. Roberts.

Moreover, the record reflects that the Office of Collective Bargaining (OCB) was seen as extremely reluctant to take on Ms. Roberts and her collective bargaining agent over Ms. Roberts' time keeping issues, unless OCB was given essentially insurmountable proof of Ms. Roberts' abuse of her time. Thus, OSRC management appears to have been put in an unpalatable position when Appellant provided OSRC management with troubling evidence regarding Ms. Roberts' acts or omissions that clearly merited further review.

This situation may offer some context to Ms. Roberts reporting to her superiors and to her cohorts that Appellant was at times too heavy-handed in Appellant's dealings with various racing personnel or even that Appellant may have utilized an inappropriate race-based identification of a youth at the track.

Thus, Appellant established a solid *prima facie* case regarding her claim that she was removed for "blowing the whistle". Appellant also offered evidence before and during hearing that, overall, she put in a solid performance as an Inspection Supervisor 1. Further, Appellant offered evidence that she was well received by some in the racing community and that she authored contemporaneous documentation regarding several of the incidents at issue, herein, that bolster her assertion that she performed her job in a professional and even-tempered manner.

However, Appellee presented credible evidence into the record that some problem may have existed with Appellant's performance and with her comportment/demeanor around OSRC personnel and around the various personnel regulated by the OSRC.

Appellee also presented some troubling, albeit somewhat hearsay based, evidence that Appellant may also have had improper or questionable contact with her subordinate Rick Conteen concerning text messages outside of business hours for non-business reasons that may, or may not, have been misconstrued.

Further, some evidence was presented that there *may* have been a problem with Appellant utilizing the phrase "Mexican boy" on one occasion.

Some evidence was also presented that Appellant may have over-construed her instruction to keep an eye on Ms. Roberts and may have utilized too much time and, on one occasion, left the track to tail Ms. Roberts, when Ms. Roberts left the track but was apparently still on the clock.

Based on the testimony presented and evidence admitted into the record and upon the post-hearing briefs submitted by the parties, I make the following findings.

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

Next, I note that all pertinent evidence submitted by the parties and not previously expressly excluded is admitted into the record; in order to ensure the establishment of a full and fair administrative record.

Further, I reiterate that Appellant was able to establish and bolster all the elements of her *prima facie* case. I also find that it appears from a factual standpoint that the OSRC was able to justify its assertion that it removed Appellant during her probationary period for a legitimate, non-pretextual reason (namely, for "unsatisfactory service" during her probationary period). Finally, I find that it appears from a factual standpoint that Appellant was ultimately unable to establish, by a preponderance of the evidence, that a causal connection existed between Appellant's filing of her whistleblower reports and the OSRC's removal of Appellant from her position, as required by R.C. 124.341.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether this Board should affirm the actions of an appointing authority, where its employee has met her *prima facie* burden under R.C. 124.341 yet where the appointing authority has also satisfied the minimal threshold necessary to uphold a probationary removal under R.C. 124.27? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the affirmative; since, in this case, Appellant has failed to establish, by a preponderance of the evidence, that a *causal* connection existed between her filing of whistleblower reports and her removal from her Investigation Supervisor 1 position.

It is clear from the record that Appellant met the procedural and substantive requirements to establish her *prima facie* case. We may see as a mixed question of fact and law whether Appellee met its burden to rebut Appellant's *prima facie* case. We may also see as a mixed question of fact and law whether Appellant was successful in ultimately demonstrating a causal connect between her filings and her removal.

I have found, above, that the facts in this matter appear to bear out that Appellee rebutted Appellant's *prima facie* case. However, there may also be a

question of law present that must be reviewed. That is, what level of dissatisfaction must an appointing authority have, in order to find that its probationary employee has exhibited “unsatisfactory service”?

The General Assembly has not permitted employees who are probationarily removed under R.C. 124.27 to appeal to this Board. Thus, we may reasonably conclude that the level of dissatisfaction that the appointing authority must have to effectuate a probationary removal need only be at a *de minimus* level or slightly higher.

To put this another way, the evidence necessary to justify a probationary removal for “unsatisfactory service” *is simply not comparable* to the level of dissatisfaction (and corresponding proof) that an appointing authority would have to have, in order to justify the removal of a classified employee who *had* successfully completed his or her probationary period.

Still, even for a probationary removal, the appointing authority must meet some threshold, when the appointing authority is a party to a whistleblower appeal timely filed with this Board.

In this case, the OSRC has demonstrated its dissatisfaction with Appellant’s service in several areas (please see Consolidated Statement of the Case and Findings of Fact at p. 7, *infra*). Appellee’s proof regarding Appellant’s alleged acts and omissions clearly would not withstand the requisite level of proof Appellee would need in a removal appeal of a classified certified employee.

Yet, it appears at least sufficient to justify some discipline of Appellant and that appears to be the only level that Appellee must meet. Therefore, I find, as a matter of law, that Appellee has met its burden of production and successfully rebutted Appellant’s *prima facie* case.

The burden of production thus shifts back to Appellant. A question of law is also posed regarding what quantum of evidence Appellant must put forth to overcome Appellee’s now successful case-in-chief.

Appellee’s burden of production during its case-in-chief was met merely by successfully showing that it removed Appellant for “unsatisfactory service” through demonstrating deficiencies in Appellant’s performance that met that low threshold.

Appellant already had an opportunity to attack Appellee's evidence of Appellant's alleged "unsatisfactory service" both during Appellant's case-in-chief and during Appellee's case-in-chief. Accordingly, for Appellant to meet Appellant's burden of production at this point and, so, also meet her burden of proof, Appellant must demonstrate, by a preponderance of the evidence, that Appellee removed Appellant *because* Appellant filed her whistleblower reports.

Unfortunately, for Appellant, she was unable to demonstrate same. It is true that Appellant certainly demonstrated that Appellant's filing caused Appellee consternation. Yet, it is equally true that Appellee demonstrated that it believed (and proved) that it had sufficient reason to find Appellant's service to be "unsatisfactory".

Because Appellee met its burden of production and because Appellant did not prove that Appellee removed her for filing her reports, Appellant failed to meet her burden of proof in this case. Thus, this Board should affirm Appellee's action, in accordance with the provisions set forth in R.C. 124.341 (D).

To put this matter in perspective, this Report and Recommendation should not be seen as adverse to the OSRC. The OSRC has a difficult job to perform under the best of circumstances. Further, the OSRC faces the daily battle of balancing the need for regulation and enforcement with the need to be sensitive to the viewpoints of its regulated base.

Additionally, the OSRC has an understandable need to foster and maintain amicable relations with its collective bargaining employees and with their requisite collective bargaining agent. As well, the OSRC has rather a unique circumstance of regulating both those of considerable wealth and those who are of more humble means. Finally, the OSRC performs in a regulatory environment populated both by highly degreed professionals (e.g. licensed Doctors of Veterinary Medicine) and by highly experienced laborers who may sometimes lack extensive formal education.

We may also glean from the record that the horse racing industry, itself, has faced both recent economic downturns and the changing passions of its constituent supporters. These changing circumstances likely put additional pressure on all concerned, including on the OSRC and on its regulated constituencies.

Nor should this Report and Recommendation be seen as adverse to Appellant. The record reflects that Appellant did exhibit professionalism, an enthusiasm for her position, and a dedication to the enforcement components of her job.

Had Appellant been given additional time during her probationary period to better understand the nuances of enforcement and regulation in the horse racing environment, it may have been that Appellant could have kept the commendable components of her performance and could have remediated the components with which the OSRC took issue.

At bottom, however, the quantum of evidence necessary to satisfy R.C. 124.27's threshold of "unsatisfactory service" during a probationary period is slight. Given this threshold, Appellee has met same, has successfully rebutted Appellant's *prima facie* case, and has withstood Appellant's attempts to refute Appellee's case-in-chief. Accordingly, Appellant has failed to meet her burden of proof and, so, this Board should affirm Appellant's removal, pursuant to R.C. 124.341 (D).

RECOMMENDATION

Therefore I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's **REMOVAL** of Appellant from her position of Investigation Supervisor 1, due to Appellant's failure to demonstrate a causal connection between her filing of the requisite whistleblower reports and her probationary removal from her position, pursuant to R.C. 124.341(D).



JAMES R. SPRAGUE
Administrative Law Judge

JRS: