

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

Roland M. Alvarez,

Appellant.

v.

Case No. 10-REM-06-0160

Department of Rehabilitation and Correction,
Ohio Reformatory for Women,

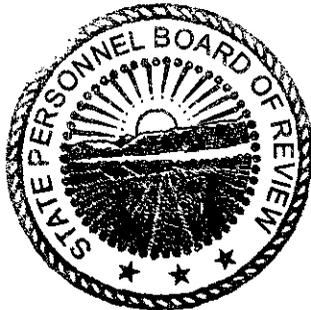
Appellee.

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 from his position of Lieutenant, be **AFFIRMED**, pursuant to O.R.C. § 124.34.



Lumpe - Aye
Tillery - Aye

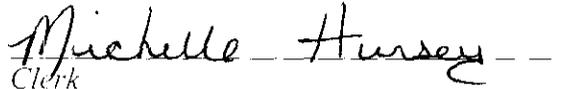


J. Richard Lumpe, *Chairman*

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, January 7, 2011.



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**

ROLAND M. ALVAREZ,

Case No. 10-REM-06-0160

Appellant

v.

December 1, 2010

DEPARTMENT OF REHABILITATION AND CORRECTION,
OHIO REFORMATORY FOR WOMEN,

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on October 14, 2010 and October 15, 2010. Present at the hearing was Appellant, who was represented by James J. Leo, Attorney at Law. Appellee, Department of Rehabilitation and Correction (DR and C), Ohio Reformatory for Women (ORW), was present through its designee, Labor Relations Officer (LRO) David Lundberg, and was represented by Michael C. McPhillips and Lisa G. Whitaker, Assistant Attorneys General. By agreement of the parties, simultaneous post hearing briefs were filed on or before November 22, 2010, after which the record was closed.

This cause comes on due to Appellant's June 17, 2010 timely filing of an appeal from his removal as a Lieutenant (Lt.) at ORW, which removal was effective June 17, 2010. The pertinent R.C. 124.34 Order of Removal was also signed on June 17, 2010 and delivered on that date.

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

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The allegations set forth in the instant R.C. 124.34 Order of Removal read as follows:

On 4/28/2010 at around 1:05 – 1:10 p.m. you called in to use a CSD day or emergency leave with the Captain's office, then the Major's office, then you were connected to the DWO. You were denied this request, but were told you could call in sick and it would be considered a late call and you would be subject to discipline. You came into the institution and were called into the DWO's office because several staff noticed that you seemed intoxicated and a smell of alcohol odor was detected. You were instructed that you were being sent for a reasonable suspicion testing according to 31-SEM-03. You stated, "Fuck that..." and you got up and left. You were stopped and informed that you [were] being placed on administrative leave pending an investigation for refusing a reasonable suspicion test on 4/28/2010. On 4/4/2008 you were placed on a Last Chance Agreement (LCA) for a period of five (5) years. The LCA requires that you comply with all of the provisions outlined in Department policy 31-SEM-04. Any refusal for a reasonable suspicion alcohol testing is considered positive and violates the LCA and rules 47-B and 50.

At hearing, seven witnesses testified. **Roland Alvarez, Appellant**, served as a Lieutenant at ORW until the instant removal. Appellant testified on as if on cross examination and also on direct examination. **Kathy Putt** has served as the Administrative Captain (Capt.) for ORW since July 2009. **Ginine Trim** has served as the Warden for ORW since August 2009 and, prior to that time, served as ORW's Deputy Warden of Operations (DWO). **Todd Crowe** has served as a Captain at ORW since 2009 and served as Appellant's Shift Captain on April 28, 2010, the date of the incidents in question. **Dennis McHugh** currently serves as the DWO at the Madison Correctional Facility and, as of April 28, 2010, served as DWO for ORW. **David Lundberg** has served as the Labor Relations Officer (LRO) for ORW for the last four years and also served as Appellee's designee at hearing. **Robert King** serves as a Corrections Officer (CO) with ORW and, prior to job cuts due to a shortage of funds, served as a Training Officer 3 for 13 years.

Background: Last Chance Agreement and Reassignment

On April 4, 2008, Appellant was placed on a Last Chance Agreement for a period of five years and his removal was held in abeyance at that time. Appellant was placed on the LCA for violating DR and C's substance abuse policy.

This was because Appellant reported for duty in an intoxicated state on March 28, 2008. Appellant was thereafter tested and received results indicating that Appellant's blood alcohol level was at approximately .225 percent at the time of the test. (By comparison, an operator of a motorized vehicle in Ohio is considered impaired, as a matter of law, with a blood alcohol content of .080 percent).

Among the provisions of the LCA were that Appellant must submit to six Random Drug Tests during the following year and receive a negative result on all of these tests. Appellant was also required to successfully complete the pertinent Employee Assistance Program.

Another provision of the LCA was that, if Appellant failed to fulfill the conditions of the LCA or otherwise violated DR and C's Random Drug Testing policy, then Appellant would be removed. The LCA further specified that, if Appellant were so removed, then, on appeal, Appellee need only demonstrate that Appellant violated the LCA.

Warden Trim served as ORW's DWO at the time Appellant's Last Chance Agreement was implemented. She participated with then-Warden Sheri Duffey in discussions with Appellant at that time concerning Appellant's life situation prior to effectuation of Appellant's LCA.

Warden Trim stated at hearing that Appellant was placed on the LCA because it was determined that Appellant was a good worker but that he had a disease with which he needed to contend. Accordingly, she averred, Appellee extended to Appellant an opportunity to rehabilitate himself and the requisite working conditions that would support and facilitate same.

Warden Trim elaborated that Appellant was given the Special Duty Transportation Lieutenant post, which principally services first shift (8:00 a.m. to 4:00 p.m. / 6:00 a.m. to 2:00 p.m.). Thus, she noted, Appellant could more easily make his appointments and he would be more visible; accordingly, if Appellant needed support, that support would be more readily available. Further, she averred,

since this position worked Mondays through Fridays, it allowed Appellant to have weekends off.

Warden Trim added that Appellant's peers were upset by this reassignment and that it was not popular. She offered that she was precluded from offering Appellant further special assistance following his actions of April 28, 2010; because doing so would have made her treatment of Appellant disparate relative to her treatment of her other employees.

Appellant testified at hearing that, when he was tested on the date of his first incident that led to his April 2008 LCA, Appellant had extreme difficulty sleeping and had been up 52 hours. He conceded that at that time he was under the influence of alcohol and Ambien and has been two hours into his shift when he was called in.

Appellant successfully completed all the provisions of the LCA as they would have run as of the June 17, 2010 effective date of Appellant's instant removal. Obviously, the five-year span of the LCA was still in effect as of the effective date of the instant removal.

Subsequent to the expiration of the initial one-year period of the LCA, ORW management required Appellant to submit to one Reasonable Suspicion Test, for apparent intoxication/impairment at work. Based on the results of that test, Appellant's blood alcohol content at that time was not considered significant enough to initiate the disciplinary process regarding Appellant.

Appellee's Posture Regarding April 28, 2010 Incident

On April 28, 2010, Appellant was instructed to submit to *Reasonable Suspicion* (not Random Drug) Testing. Reasonable Suspicion Testing is not specifically referenced in Appellant's LCA.

Because Reasonable Suspicion Testing it is not specifically covered in the LCA, Appellee concedes that Appellant did not violate the *terms* of the LCA on April 28, 2010.

However, Appellee is asserting that, on April 28, 2010, Appellant violated:

DR and C Policy Number 31-SEM-03 (Drug-Free Workplace);

DR and C Standards of Employee Conduct (SEC) Rule 47 (B.) et seq. by impeding the test process; and

SEC Rule 50. for violating R.C. 124.34.

Policy Number 31-SEM-03, Section IV. contains the "Definitions" section of the Policy and defines "Reasonable Suspicion" as follows:

The process of sending an employee for a drug or alcohol test when there is reasonable suspicion to believe that the employee, when appearing for duty or on the job, is under the influence of, or his/her job performance is impaired by, alcohol or other drugs.

SEC Rule 47 is entitled "Drug Tests – Applicable to both Random and Reasonable Suspicion Process ...". **Rule 47 (B)** specifically deals with: "Impeding the test process, either random or reasonable suspicion including an employee who does not immediately report to the collection site."

SEC Rule 50 indicates that "Any violation of R.C. 124.34 ... " also constitutes a violation of the Standards of Employee Conduct.

Appellee is further asserting that Appellant violated the *spirit* of the LCA by coming to work in what was, to some, an apparent state of intoxication or impairment. For this reason, it is included as an asserted ground for removal.

Finally, Appellee argues that Appellant was on notice that he had an issue with substance abuse. As such, Appellee argues, Appellant should have been particularly sensitive to the appearance of same and should also have been, at a minimum, cooperative and facilitative of any request to have Appellant submit to Reasonable Suspicion Drug Testing.

Appellant's Posture Regarding April 28, 2010 Incident

Conversely, as will be explained, below, Appellant asserts that he committed no violation of the LCA in any form.

Appellant averred that he was not impaired on April 28, 2010. He declared that he had not consumed any alcohol since the evening before his 2:00 p.m. start-of-shift on the day in question.

He further averred that he was under stress from the job based in part on a perceived desire of management to fire him or to get him to quit. Perhaps more importantly, he offered, there was a genuine and significant issue regarding arranging for someone to get his severely disabled son off the bus on the day in question. This was because, Appellant offered, his wife had been held up at work and he had called in prior to his shift but had been denied permission to take either a Cost Savings Day or Emergency Leave on that day.

Appellant confirmed that he could have but did not use Sick Leave that day because he was not sick and saying so, he declared, would have been a lie. Appellant indicated that he could have covered this absence with his available Sick Leave balances, had he been sick.

He noted that he did use Sick Leave fairly frequently and was on an approved FMLA plan for his son. Appellant averred that he, himself, has experienced problems with his White Count and that he also suffers from a Vitamin D deficiency. Appellant offered that these conditions may have been brought on by Appellant's gastric bypass surgery.

Appellant stressed that he did not refuse to take a Reasonable Suspicion Test but merely needed to cool off. He averred that it was mere minutes from when he exited the DWO's office to let off steam to when he agreed to take the test and headed back to the administrative area in the company of several management representatives including DWO McHugh.

He testified that the only thing that prevented him from being tested that day was the decision by Warden Trim that Appellant had refused or impeded the test and, so, would not be allowed to take the test.

Further Testimony Regarding April 28, 2010 Incident

A distillation of the testimony offered at hearing reveals the following.

Sometime within 90 minutes of Appellant's 2:00 p.m. start-of-shift on April 28, 2010, Appellant called in regarding taking either Emergency Leave or a Cost Savings Day for the stated reason that Appellant's wife had been delayed at work and there was no one at home to assist Appellant's disabled son when he got off the bus from school. Appellant's request to take either leave was initially denied.

Cost Savings Days could only be taken on dates ORW had previously established. These dates were established by canvassing employees of the institution and thereafter establishing an institution-wide protocol based on that canvassing and on other statewide policies regarding utilization of same. Testimony also reflected that a procedure was in place whereby Appellant needed to have approval of the pertinent Major or higher authority in the Major's absence for other types of leave.

The Major was at an in-service training at that time and was not available. So, that decision would have gone to the DWO. Testimony also reflected that a call-in occurring fewer than 90 minutes prior to the start-of-shift subjected the employee to potential discipline. Finally, testimony indicated that Emergency Leave can be granted for particular reasons if the pertinent paperwork is also supplied. One such reason given is if the employee is in a vehicular accident on the way to work and, as a result, must report to shift late or not at all.

When Appellant was informed that his leave requests were initially denied, but that he could take a Sick Day and be subject to discipline for a call-in of fewer than 90 minutes prior to the start-of-shift, Appellant indicated that he would report to his shift. Appellant then came into the institution and, as permissible for Lieutenants, clocked in slightly early.

As a result of Appellant's apparent slurred speech and apparent memory lapses during the course of Appellant's initial conversation with Capt. Crowe on this date, Capt. Crowe had suspected that Appellant was under the influence and reported same to Administrative Capt. Putt. This information was then reported to DWO McHugh, who indicated that Appellant was to report to the administrative area upon Appellant's arrival to ORW that day.

Once Appellant arrived at the administrative area, he was informed that he would need to submit to a Reasonable Suspicion Test. Further testimony was

offered that the odor of alcohol was present on Appellant at this time and that it was strong.

When Appellant was informed of the need for the testing, Appellant uttered words to the effect of "Fuck that. This is bullshit. I shouldn't have to go through this."

Thereafter, Appellant left the administrative area and headed for the exit of the building. DWO McHugh then told Administrative Capt. Putt and Capt. Crowe to go after Appellant. They caught up with Appellant shortly thereafter. In the meantime, DWO McHugh informed the Warden of the most recent developments.

Both Administrative Capt. Putt and Capt. Crowe reported that, when Appellant left the administrative area, he encountered and passed inmates, inmates' families, and various ORW personnel. These personnel included COs who would have been under Appellant's supervision and who were preparing for the shift change.

Accordingly, the Captains reported, they had to be circumspect in their pursuit of Appellant and in their discussions with Appellant. This was the case, they offered, to avoid exposing any of the above-referenced persons to Appellant's issues and to a management concern at the time.

Testimony also indicated that, after several minutes of conversation with the Captains near the exit door, Appellant agreed to return and take the test. He reiterated this upon DWO McHugh's arrival at the conversation shortly thereafter and DWO McHugh indicated that Appellant was to return to the administrative area/Warden's area to sign the paperwork to initiate the Reasonable Suspicion Test.

When the group arrived at the administrative area, the DWO had a brief discussion with Warden Trim, who had been kept up to date on developments with Appellant on this date. Based on Appellant's initial refusal or delay in taking the test, the Warden informed the DWO that Appellant would not be allowed to take the test and was to be placed on Administrative Leave with Pay pending initiation of the disciplinary process for refusing or impeding the test, as would any other employee.

DWO McHugh informed those present of same and arrangements were made for CO Robert King to drive Appellant home; as management questioned

Appellant's state of sobriety. CO King testified that he did not detect any odor of alcohol on Appellant during the ride to Appellant's home.

Warden Trim testified that, in her opinion, Appellant was on notice as to his substance abuse problem, had been given every reasonable opportunity and the support needed to address that problem, and could not be treated dissimilarly to any other employee who refused or impeded appropriate and justifiable Reasonable Suspicion Testing, pursuant to Policy Number 31-SEM-03 and Rule 47 (B).

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

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

Next, I find that Appellant impeded a Reasonable Suspicion Test on April 28, 2010, based on the following three reasons.

First, we note that Appellant was under a duty to comply with Policy Number 31-SEM-03 and Rule 47 (B).

Secondly, Appellant was on notice of and understood the need to comply with same. Indeed, by virtue of Appellant's LCA, Appellant either was or should have been particularly sensitive to the need to avoid coming to work impaired and the need to comply in a timely and efficacious manner with an instruction to submit to Reasonable Suspicion Testing.

Finally, Appellant impeded his testing. He did so by being disrespectful to management, by storming out of the administrative area, by potentially exposing a variety of people to the discord that Appellant was causing, and by only returning after being cajoled by his two Captains and, to a lesser degree, by DWO McHugh.

Clearly, then, Warden Trim had good cause to place Appellant on Administrative Leave with Pay and to initiate disciplinary proceedings against Appellant. It is equally clear that Appellant violated both Policy Number 31-SEM-03 and Rule 47 (B), and I so find. Finally, by violating both of these provisions, Appellant has engaged in a violation of R.C. 124.34 (failure of good behavior and

violation of applicable work rules). As such, Appellant has also violated Rule 50, and I so find.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether a Lieutenant who was under a Last Chance Agreement for substance abuse, who received a preferred reassignment to assist his recovery, and who violated DR and C Policy Number 31-SEM-03 and Rule 47 (B), should be removed from his position? Based on the Findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the affirmative and, so, should affirm Appellant's removal.

DR and C's Standards of Employee Conduct contain a disciplinary grid for each Rule therein. The grid for Rule 47 (B) suggests removal as the only appropriate penalty for a violation of this provision. The grid for Rule 50 suggests a range of appropriate penalties for a violation of the Rule, listing removal as a viable penalty for a first, second, third, or fourth offense.

Thus, removal is clearly contemplated for a combined violation of Rule 47 (B) and Rule 50. Further, Appellant's Last Chance Agreement, which was, after all, still in effect on April 28, 2010, provided Appellant with additional advanced notice to be particularly careful regarding full and timely compliance with all of DR and C's pertinent substance abuse testing requirements.

Appellant essentially ignored these requirements, and his special notice to comply with same; when he metaphorically threw them in the face of most of his chain of command and had to be pursued and convinced to come back to the Warden's area.

Even if Appellant had not been on an LCA and had not been on special preferred assignment, his behavior would still have been unacceptable. Even under these circumstances, his behavior would likely have violated Rules 47 (B) and 50 and would have potentially justified removal.

Yet, Appellant was, in fact, on an LCA for substance abuse - holding a previous removal in abeyance. Further, Appellant had, in fact, already received a special preferred assignment. Thus, Warden Trim's removal of Appellant, while an unfortunate result, was certainly justified.

We would be remiss if we were not to acknowledge that Appellant presents a sympathetic figure facing significant life challenges. Appellant appears to be a very caring and devoted parent of a special needs child. Appellant appears to be fighting the disease of alcoholism. Appellant has his own additional health challenges, including issues with his White Count and a potentially chronic Vitamin D deficiency.

Appellee has clearly tried to work with Appellant to address his life situation. Appellant was given an LCA in lieu of removal. Appellant was given a special, preferred posting. Appellant's FMLA for his son was approved. Appellant was given considerable time off to deal with his and his family's various issues.

Yet, in the end, Warden Trim has a Correctional Institution to administer. As such, she has a right to expect that all of her staff, and especially her supervisory staff, will come to work unimpaired, will follow DR and C's policies and rules, and will show management staff the respect they are due.

Clearly, Warden Duffey and Warden Trim offered Appellant both the opportunity and the support to rehabilitate himself. Thus, had Warden Trim not removed Appellant following the events of April 28, 2010, she could have appeared disparate in her treatment of Appellant in relation to her other staff and could have potentially compromised the good order of her institution as a result thereof.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's **REMOVAL** from the position of Lieutenant, pursuant to R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge