

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MARK BLACKWELL,

Appellant,

v.

Case No. 11-REM-08-0261

FRANKLIN COUNTY SHERIFF,

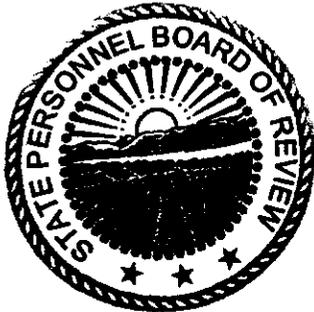
Appellee

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 the removal of Appellant is **AFFIRMED**. A review of all evidence and testimony presented reveals that Appellee has demonstrated by a preponderance of evidence that just cause existed for Appellant's removal and that Appellant's removal was effectuated in accordance with Ohio Revised Code section 124.34



Casey - Aye
Lumpe - Aye
Tillery - Aye

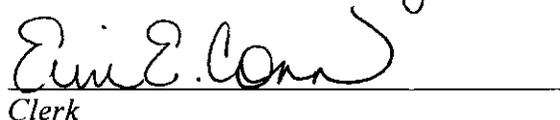

Terry L. Casey, *Chairman*

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 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, May 24, 2012.




Erin E. Connors
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**

Mark Blackwell,

Case No. 11-REM-08-0261

Appellant,

v.

January 24, 2012

Franklin County Sheriff,

BETH A. JEWELL

Appellee.

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 his July 5, 2011, removal from employment with Appellee. A record hearing was held on October 26, 2011. Mark Blackwell, Appellant, was present at the record hearing and was represented by Daniel H. Klos, Attorney at Law. Appellee was present at record hearing through its designee, Patrick F. Garrity, Director of Management Services; and was represented by Denise DePalma, Assistant Prosecuting Attorney.

On July 5, 2011, Appellee, Sheriff Zach Scott, notified Appellant of his removal from the position of Deputy Sheriff. The Order of Removal explained the reasons for Appellant's removal as follows:

For violating regulations 102.2 Obedience to Laws and Ordinances for pleading guilty, on May 9, 2011, to a violation of Ohio Revised Code Section 2911.211 Aggravated Criminal Trespass, a misdemeanor of the first degree, which had been reduced from Abduction a felony of the fourth degree and pleading guilty, on May 9, 2011, to a violation of Ohio Revised Code Section 2923.24 Possession of Criminal Tools, a misdemeanor of the first degree, which had been reduced from Menacing by Stalking, a felony of the fourth degree; 114.4.9 Sheriff's Personnel Responsibilities for having engaged in criminal behavior both on and off duty resulting in criminal convictions out of the Franklin County Common Pleas Court; and 102.29 Unbecoming

Conduct for continuing criminal behavior to the point of being charged criminally for failing to adhere to your restrictions of bond and maintaining a professional decorum to the point of your actions being detailed in several media forums.

STATEMENT OF THE CASE

Appellee called three witnesses in its case in chief: Management Services Director Garrity, Assistant Prosecutor Jennifer Rausch, and Sheriff Zach Scott. Appellant testified in his case in chief and called Deputy Sheriff David Aurigemma to testify as a witness. References to witness testimony are indicated parenthetically below. References to Appellant's Exhibits in the record are indicated parenthetically by "Exh.," followed by the exhibit number(s). References to Appellee's Exhibits in the record are indicated parenthetically by "Exh.," followed by the exhibit letter(s). The testimony and exhibits form the basis for the Findings of Fact set forth below.

FINDINGS OF FACT

Appellant became employed by Appellee as a Deputy Sheriff in 2004. On February 17, 2004, Appellant signed a written acknowledgment of his receipt of Appellee's Rules of Conduct. (Exh. H)

In 2010, Appellant was arrested and subsequently indicted, in Franklin County Common Pleas Court Case No. 10CR-4912, for Abduction, a third-degree felony violation of R.C. 2906.02, and in Case No. 10CR-5218, for Menacing by Stalking, a fourth-degree felony violation of R.C. 2903.211. The charges arose out of incidents during the summer of 2010 involving Appellant and Lori Mikesell, Appellant's former girlfriend. Appellant, represented by legal counsel Sam Shamansky, entered a plea of guilty on May 9, 2011, in Case No. 10CR-4912, to the stipulated lesser included offense of Aggravated Criminal Trespass, a first-degree misdemeanor and a violation of R.C. 2911.211, and was found guilty of that charge by the court. Also on May 9, 2011, Appellant entered a plea of guilty in Case No. 10CR-5218 to the stipulated lesser included offense of Possession of Criminal Tools, a first-degree misdemeanor and a violation of R.C. 2923.24, and was found guilty of that charge by the court. Appellant was sentenced to six months in the Franklin County Corrections Center and the payment of court costs in both cases, with the sentences to run consecutively. The Court went on to order that the execution of the confinement portion of the sentence be suspended and that Appellant be placed on probation for 18 months. (Exh. I)

Appellant's arrest, indictment, guilty plea, and sentencing were covered extensively by the local news media, including The Columbus Dispatch and several local broadcast news channels, including 4, 6, 10, and 28. (Exh. G)

On May 9, 2011, Lieutenant Stephanie Klumpp submitted an Internal Affairs (IA) Investigation Report regarding Appellant's indictments. On May 27, 2011, following written notice to Appellant, Director Garrity convened a Pre-Termination Conference. (Exh. A) Appellant's attorney at the conference, Robert Byard, argued that Appellant had not been interviewed by the IA Investigator. Director Garrity then concluded the conference and recommended that IA interview Appellant.

Appellant was interviewed on June 2, 2011; Attorney Byard also attended the interview. During the interview, Appellant did not contest the fact that he had entered guilty pleas to the two misdemeanor violations outline above.

Thereafter, a notice of pre-termination conference was issued on June 15, 2011, scheduling a pre-termination conference for June 28, 2011. (Exh. B) Appellant attended the pre-termination conference and was represented by Attorney Byard and Deputy Jim Cassidy. Appellant was afforded the opportunity to present evidence and argument and he did so, through his representatives. Thereafter, on June 28, 2011, Director Garrity prepared a memorandum summarizing the pre-termination conference. (Exh. C) In May 2011, Appellant also had a pending charge in Franklin County Municipal Court, Case No. 2011CR B 000703, for Violation of Protection Order, R.C. 2919.27, a first-degree misdemeanor; this charge was pending at the time of the May 27, 2011 conference, but had been dismissed at the time of the June 28, 2011 conference. Director Garrity noted in his June 28, 2011 memorandum that the Violation of Protection Order charge had been dismissed. (Exhs. B, C)

At the June 28, 2011 conference, Attorney Byard asserted on behalf of Appellant that Appellant's guilty pleas were "Alford pleas." The phrase, "Alford plea," is derived from the case of *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, and means that Appellant's guilty plea is his acknowledgment that the State of Ohio had sufficient proof in each case that a judge or jury could find him guilty, while maintaining his claim of innocence. Attorney Byard also emphasized that Appellant reported for work every day, and Deputy Cassidy presented favorable performance evaluations for the years 2004-2011. At the Pre-Termination Conference, neither Appellant nor his representatives discussed the underlying factual events that led to Appellant's arrest, indictment, and guilty pleas.

Following the June 28, 2011 Pre-Termination Conference and the issuance of his written report, Director Garrity recommended to then-Sheriff Steve Martin, and subsequently to Sheriff Scott, who took office on July 1, 2011, that Appellant be terminated. Director Garrity provided Sheriff Scott with the documentation contained in Appellee's Exhibits B and C. Director Garrity recommended termination because the criminal convictions were not in doubt, because the Sheriff's Office had endured adverse media coverage because of the criminal proceedings, and because the types of crimes Appellant had pleaded guilty to reflected behavior that does not comport with the expectations of a person holding the position of Deputy Sheriff. Neither Director Garrity nor Sheriff Scott viewed Appellant's entering of "Alford pleas" as a mitigating factor, as the result remained that Appellant was found guilty of two first-degree misdemeanors.

ANALYSIS, DISCUSSION, AND CONCLUSIONS OF LAW

Appellee's Burden and Evidence

Appellee must prove that Appellant's due process rights were observed, and Appellee must prove that in administering the discipline, it substantially complied with the procedural requirements of the O.R.C. and O.A.C. Due process requires that a classified civil servant who is about to be disciplined receive oral or written notice of the charges against him, 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.

Appellee must prove that Appellant committed one or more of the enumerated infractions listed in R.C. 124.34 and the disciplinary order.

For each infraction, Appellee must prove the following:

- a. That Appellee had an established standard of conduct;
- b. That the standard was communicated to Appellant;
- c. That Appellant violated that standard of conduct; and
- d. That the discipline imposed upon Appellant was an appropriate response.

In weighing the appropriateness of the discipline imposed upon Appellant, the SPBR will consider the seriousness of Appellant's infraction, Appellant's prior work record and/or disciplinary history, Appellant's employment tenure, any evidence of mitigating circumstances presented by Appellant, and any evidence of disparate treatment of similarly situated employees presented by Appellant.

Based upon the evidence in the record, and for the reasons that follow, Appellee has sustained its burden of proof, and Appellant's removal should be affirmed.

All due process elements have been satisfied. Prior to implementing discipline, Appellee provided written notice to Appellant of the charges against him, through Exhibit B, the Notice of Pre-Termination Conference. Attached to Exhibit B was the report of the IA Investigator, detailing Appellee's evidence against Appellant. The Pre-Termination Conference held on June 28, 2011, Appellant had an opportunity to be heard.

Appellee proved that it had an established standard of conduct that was communicated to Appellant. Appellant acknowledged in writing his receipt, in 2004, of Appellee's Rules of Conduct. The removal order reads that Appellant violated Rules of Conduct 102.2, 114.4.9, and 102.29, which provide as follows:

102.2 Obedience to Laws and Ordinances

Personnel will obey the United States and Ohio Constitutions, all federal and state laws, laws and ordinances of the City of Columbus and other municipalities, where applicable.

114.4.9

Personnel shall conduct themselves in accordance with high ethical standards, both on and off duty.

102.29 Unbecoming Conduct

Personnel will conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably upon the Office. Unbecoming conduct will include that which brings the Office into disrepute or reflects discredit upon the individual as a member of the Office, or that, which impairs the operation, or efficiency of the Office or the individual.

Appellee proved that Appellant plead guilty to, and was convicted of, Aggravated Criminal Trespass and Possession of Criminal Tools, two first-degree misdemeanor violations of the laws of the State of Ohio. These convictions violate all three Rules of Conduct quoted above. While a third criminal charge against

Appellant regarding violation of a civil protection order was dismissed, Appellant's arrest, above guilty pleas, and conviction received significant media coverage that did not reflect favorably upon the sheriff's office.

Appellant's Defenses

Appellant's lengthy testimony at record hearing about the events of June 11, 2010, leading up to his arrest for Abduction can be summarized as follows: On that evening, Appellant was unable to log into his email account. He believed that his former girlfriend, Lori Mikesell, was hacking into his email and changing his password. He called her twice to ask her what was going on, and she hung up on him, so he went over to her house, as she lives quite close by. When Appellant knocked on her glass door, he cut his fingers. After Appellant showed Ms. Mikesell that he was bleeding, Ms. Mikesell let Appellant into her home. Appellant asked Ms. Mikesell why she was still bothering him. According to Appellant, Ms. Mikesell "got violent" with him and they argued for an hour; after the "violence subsided," the two continued to yell at each other. Appellant claims that Ms. Mikesell then started pulling out bottles of medicine and threatening to harm herself; she then went to sleep. Appellant remained in her home and "let her sleep" for two hours. When she awoke, he asked her if she wanted him to leave. She said "yes," and he went home. Appellant testified that Ms. Mikesell then got into his email again; he started getting worried about her and returned to her home to ask her if she was okay. She said "yes," and he went home again. The next day she called and they agreed to leave each other alone. Appellant asserts that he has not heard from her since. He was arrested two days later.

Appellant also testified to his description of the events underlying the Menacing by Stalking charge, which arose out of photographs taken in the summer of 2010 and a film taken at an August 23, 2010 "meet the teacher" night at the elementary school that both Appellant's daughter from another relationship and Ms. Mikesell's children from another relationship attend. Appellant claims that he filmed Ms. Mikesell for documentation purposes while he was exiting the school event, because he and Ms. Mikesell were not supposed to be in each other's presence under the terms of a civil protection order. At record hearing, Appellee displayed the video taken by Appellant and entered it into evidence as Exhibit K. Exhibit J contains several photographs taken during the summer of 2010 of Ms. Mikesell's home, yard, children, dogs, and car; Appellant claims these were taken by his parents to demonstrate that Ms. Mikesell was not afraid of him, and that he

cautioned his father not to film Ms. Mikesell.¹ The video does not support Appellant's claim that he filmed Ms. Mikesell merely for documentation for the civil protection order. Exhibit K indicates that the camera was trained on Ms. Mikesell for several minutes while she was talking on her cell phone and not making any eye or other contact with Appellant. During the time period captured on the camera, Exhibit K indicates that Appellant was talking loudly and zooming the camera in on Ms. Mikesell.

Appellee submits that Appellant's testimony at record hearing about the events underlying his arrest and subsequent conviction does not affect or change the fact that Appellant entered two guilty pleas to first-degree misdemeanor offenses. The guilty pleas constitute the basis for his removal for violation of the above-referenced Rules of Conduct. Moreover, Appellee challenges the credibility of Appellant's version of the events, and points out that even Appellant's version of the events reveals Appellant's exercise of poor judgment and unbecoming conduct.

Appellee's arguments are persuasive. Appellant's version of the events of June 11, 2010, lacks credibility and raises more questions than answers. If Appellant suspected that Ms. Mikesell was hacking into his email, why did he not contact law enforcement authorities to investigate a potentially serious criminal offense? His choice to go to her home to confront her after she hung up on him twice is questionable. Moreover, how hard did Appellant knock on Ms. Mikesell's glass door to have cut his fingers on it? Appellant appears to claim that because of a motorcycle injury sustained earlier in 2010, he was in a weakened condition. Why, then, did he not leave Ms. Mikesell's home when she "got violent" with him or contact local authorities for assistance? Why did he remain in her home and continue arguing with her, and then continue to remain in her home while she slept? Why, if he was concerned for her well being after she threatened to harm herself, did he not contact local resources for mental health assistance?

Attempting to show disparate treatment, Appellant presented at record hearing evidence regarding Sheriff Scott's September 2011 discipline by of Deputy David Aurigemma, who received a one-day suspension for violating regulations 102.2 Obedience to Laws and Ordinances and 102.29 Unbecoming Conduct for violating R.C. 4511.21(D)(2) Speeding by driving 90 miles per hour in a 65 mile-per-hour zone while also not wearing his seatbelt on April 8, 2011, and pleading guilty to both offenses in Morrow County Municipal Court; and violating regulations 102.29,

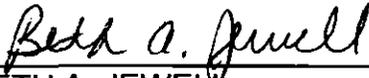
¹ Appellant lives with his parents; their home is quite close to Ms. Mikesell's and some of their property is adjacent to Ms. Mikesell's. Her backyard is visible from inside Appellant's parents' home.

102.9 Neglect of Duty and 102.43 Unauthorized Absenteeism by leaving work 16 minutes early on August 3, 2011. (Exh. 1)

Appellee argues persuasively that Deputy Aurigemma is not similarly situated, as the traffic offenses Deputy Aurigemma entered guilty pleas to, and his conduct in leaving work 16 minutes early on one occasion, bear no relation to the guilty pleas made by Appellant. It should be noted that R.C. 4511.21 provides that speeding is a minor misdemeanor. No evidence is present in the record that Deputy Aurigemma's conduct received media attention. While certainly speeding is not an offense to be condoned for a deputy sheriff, and is indeed a violation of the laws of the State of Ohio, Appellee meted out discipline to Deputy Aurigemma in the form of a one-day suspension. This distinction in level of discipline is commensurate with the distinction in the types of crimes at issue in the two cases.

Appellant was represented by legal counsel throughout his criminal proceedings, and he made the decision to enter guilty pleas to two first-degree misdemeanor offenses. Appellant's arrest and subsequent criminal proceedings received significant media attention and reflected poorly on the sheriff's office. Appellee's assertion that Appellant's conduct was contrary to the expectations and requirements of the sheriff's office, as laid out in the rules of conduct quoted above, is amply supported by the record, as is Appellee's conclusion that Appellant's conduct warranted his removal. Director Garrity testified that Appellant's work history and tenure of service, seven years, did not serve as mitigating factors, as the sheriff's office has low turnover and many employees of lengthy service; Appellant's history of prior discipline, including a written reprimand in 2006 and a one-day suspension in 2009, were not factors of import in Appellant's removal.

A review of all evidence and testimony presented reveals that Appellee has demonstrated by a preponderance of the evidence that just cause existed for Appellant's removal and that Appellant's removal was effectuated in accordance with R.C. 124.34. Therefore, it is respectfully **RECOMMENDED** that the State Personnel Board of Review **AFFIRM** the removal of Appellant.



BETH A. JEWELL
Administrative Law Judge

BAJ: