STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

KENNETH S. MATTIE,

Appellant,

v. Case No: 99-REM-02-0024

OHIO DEPARTMENT OF NATURAL RESOURCES,

Appellee.

ORDER

This matter came on for consideration this 13th day of July, 1999, upon the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

Having reviewed the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been filed, as well as the entirety of the record, the Board hereby adopts the Recommendation of the Administrative Law Judge .

Wherefore, it is hereby **ORDERED** that the Appellant's appeal be denied and that the Appellant's removal be **AFFIRMED**.

STATE PERSONNEL BOARD OF REVIEW

Tracy - Aye
Hamilton - Aye
Batta - Aye

Roger W. Tracy, 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 the foregoing is (~~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, the 13th of July, 1999.

Clerk

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

ENTERED

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kenneth S. Mattie,

Appellant,

v.

Ohio Department of Natural Resources,

Appellee.

Case No: 99-REM-02-0024

May 25, 1999

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on April 16, 1999, upon the appeal of the Appellant, Kenneth S. Mattie, from a removal order which was served upon the Appellant on or about January 25, 1999. Thereafter, on or about January 25, 1999, the Ohio Department of Natural Resources (hereinafter ODNR), Appellee herein, served an order of removal, in accordance with Ohio Revised Code section 124.34, upon Kenneth S. Mattie, a Building Maintenance Superintendent 1, and Appellant herein. That order alleged the following:

> This will notify you that you are removed from your position of Building Maintenance Superintendent 1 effective January 25, 1999.
>
> The reason for this action is that you have been guilty of insubordination and failure of good behavior in the following particulars, to wit: Specifically: you violated the last chance agreement you entered into on March 19, 1998, when you tested positive for marijuana during a random drug test conducted on or about November 12, 1998.

Thereafter, on February 2, 1999, a timely appeal from this order of removal was filed by the Appellant. The Appellant, Kenneth S. Mattie, appeared at the hearing and was represented by Russell M. Pry, Attorney at Law. The Appellee, ODNR, was present through its designee, Shelly Ward, a Labor Relations Officer, and was represented by Kevin L. Murch, Assistant Attorney General.

This hearing was conducted by the State Personnel Board of Review in accordance with Ohio Revised Code Section 124.34, which specifically provides that an employee may file an appeal of any order filed under Ohio Revised Code Section 124.34, within ten (10) days of the filing of such order with the State Personnel Board of Review. Further, the parties, prior to going on the record, entered into a joint stipulation as to the jurisdiction of this Board.

FINDINGS OF FACT

The Appellee's first witness was Kenneth S. Mattie, as if on cross examination. When questioned, the witness testified he is currently employed at South Akron Awning and has only been there for approximately four weeks and that has been his only job since he was removed from employment with ODNR. Mr. Mattie testified when he was employed with ODNR he held the position of Building Maintenance Superintendent 1 within the Division of Water with the headquarters located in Akron. Mr. Mattie testified his job duties included, but were not limited to, maintaining the hydraulic control systems of the Ohio Erie Canal and Portage Lake systems. Further, when questioned, the witness testified he has been employed by the ODNR for approximately the last twenty and one-half years.

Mr. Mattie then identified Appellee's Exhibit A as a position description for his old position of Building Maintenance Superintendent 1. When questioned, the witness testified that the position description accurately reflected the duties that he performed at work. Specifically, the witness testified that approximately ten percent of his job duties included the driving and operation of various pick-ups, back hoes, mowers, and trailers. Further, the witness testified that he did have a commercial drivers license, although not a requirement of his position. Moreover, the witness testified that as a result of having a commercial driver's license he was aware that he was subject to drug testing at his place of employment.

Next, the witness identified Appellee's Exhibit K and L as a Drug-Free Workplace Program and Testing Act and his signature evidencing having received the same on or about January 11, 1995. When questioned, how does the drug test work, the witness replied that he would give urine samples, but would not know ahead of time when. Further, the witness testified that it was his understanding that the Division Chief's assistant would fax the test time to his supervisor who in turn would tell him to go to the test site within an hour or so, of having been notified. Additionally, the witness testified that he would place this urine in a cup and the

sample would be sealed into two separate samples and that he would sign for the same.

Mr. Mattie testified that in February 1998, he had tested positive for marijuana being in his system. Further, the witness testified that after the pre-disciplinary hearing was held, ODNR through Ms. Shelly Ward explained that the Department was ready to remove him at that time or that he could enter into what is called a "Last Change Agreement". The witness identified Appellee's Exhibit I as the Last Chance Agreement which he signed on or about March 19, 1998. The above noted last chance agreement read as follows:

* * *

> Kenneth Mattie (hereafter the employee) hereby acknowledges that his position as Building Maintenance Superintendent 1 with the Ohio Department of Natural Resources (hereafter employer), is a "Safety Sensitive" position, as defined by the Federal Omnibus Transportation Employee Testing Act.
>
> The employee affirms that he has been charged with violating the employer's Drug Free Work Place Policy and received a pre-disciplinary conference on these charges. The employee also agrees that the alleged offense is in violation of the above Act and the Department's work rules; to wit, the employee produced a positive drug test taken on February 11, 1998, and that, absent this agreement, the Department would otherwise recommend the discipline of removal.
>
> The parties agree that this discipline will be held in abeyance contingent upon the employee's successful completion of the following requirements:
>
> 1. The employee will be referred to a Substance Abuse Professional by himself (EAP or self). The Substance Abuse Professional shall be qualified under the provisions of the Federal Omnibus Transportation Employee Testing Act and the employee will submit to and cooperate in a substance abuse evaluation by that individual.

2. The employee must complete a substance abuse treatment program and be approved to return to safety sensitive duties by the Substance Abuse Professional. Said program of treatment will be prescribed by the Substance Abuse Professional and he must certify the successful completion of that program to the employer in writing.

3. The employee must agree to execute any and all release of medical and other information required by the Ohio EAP and/or the employer which are necessary for the employer to review and evaluate the employee's substance abuse evaluation and treatment program and the employee's participation in same. Any subsequent revocation of such releases by the employee may be considered by the employer as a breech of this agreement.

4. The employee must pass a post treatment drug and/or alcohol test which has been identified as such to the employee prior to being permitted to return to safety sensitive duties.

5. After his return to safety sensitive duties, the employee must continue to strictly follow all directives and substance abuse treatment programs required by the Substance Abuse Professional.

6. The employee must not violate any departmental rules or policy relating to drugs and alcohol, or any other terms of this agreement for five years. Due to the nature of the employee's position, the parties agree that the employee shall continue to perform only non-safety sensitive duties as directed by the employer while the employee awaits re-certification to perform safety sensitive duties. Should the employee fail to properly be certified to return to safety sensitive duties by the Substance Abuse Professional and return to such

> duties within 180 calender days, he shall be terminated from employment. Should the employee not cooperate fully with the directives of the Substance Abuse Professional or fail to return to safety sensitive duties, the employer may terminate his employment.

The employee further understands and agrees that upon his return to safety sensitive duties, he will be subject to not less than six random drug and/or alcohol tests for up to one year that further random drug and/or alcohol testing may be ordered by the Substance Abuse Professional or the Ohio Office of Drug-free Workplace.

It is agreed by all the parties that if the employee violates this Last Chance Agreement or any subsequent agreement made between the employee and the Substance Abuse Professional or the EAP, or if the employee is found in violation of the employer's drug and alcohol policies during the time the employee is required to maintain a CDL, but not more than five years, the employee will be subject to termination of employment. Although the employee will be charged separately for this second offense and afforded a pre-disciplinary meeting before the imposition of discipline, it is understood by the employee that any grievance arising out of his discipline shall have the scope of the arbitration limited to the question of whether or not the employee did indeed violate the conditions set forth above and the parties acknowledge the waiver of the contractual due process rights to the extent contained herein.

Signed and Dated:

Department of Natural Resources 4/20/98

Kenneth S. Mattie 3/19/98

* * *

When questioned, the witness testified if he tested positive again he knew he would be removed from employment as he understood that he was subject to approximately six (6) tests within a twelve (12) month period. Moreover, Mr. Mattie understood and acknowledged that his position at the ODNR was a "safety sensitive" position as defined by the Federal Omnibus Transportation Employee Testing Act. Moreover, the witness testified that after he had tested positive for

marijuana use in February 1998, he was not allowed to drive, or was precluded to drive as a requirement for having signed the last chance agreement. Mr. Mattie testified that in April 1998, he had tested negative for marijuana use, after which the witness explained that returned to his safety sensitive duties with ODNR.

The next line of questioning centered around a drug test which was performed on the Appellant on November 12, 1998. Mr. Mattie explained on the date in question, he had reported to the central office in Columbus, Ohio at Fountain Square, at which time he was notified to go to a Worthington Collection site to give a sample of his urine. Mr. Mattie explained that when he arrived to the Worthington lab, called PharmChem, the employees at the lab were all at lunch as he noticed they were eating pizza in a backroom. Further, Mr. Mattie testified that he told the individual who came up to the counter to greet him that he had to leave as soon as possible as he was with other staff and had to go back to the Akron office. When questioned, the witness testified that the lab attendant didn't wash her hands, nor did he see her seal the sample or take the temperatures of the same. However, the witness identified Appellee's Exhibit O, page 5, as Pharmchem's, Chain of Custody Information Sheet wherein Mr. Mattie signed the donor certification and consent form. Moreover, the donor certification and consent form read as follows:

> I certify that the specimen accompanying this form is my own and that I provided it to the collector. Further, I certify that the specimen container was sealed with a tamper proof seal in my presence and that the information provided on this form and on the label is correct. Also, I consent to the analysis of the specimen accompanying this form by the laboratory and to the release by the laboratory of the results of the analysis as well as the information recorded on this form to the organization and/or individual listed on the form.
>
> _____
> Kenneth S. Mattie

When questioned, the witness testified that the signature on this form is, in fact, his. Additionally, when questioned, the witness testified that this was, in fact, a follow-up test, one of the six tests to be completed within the twelve month period as per the last chance agreement. Further, Mr. Mattie agreed that Sample A of said

test, tested positive for marijuana in his system. However, the witness testified that he was not offered a re-test although he retested himself the following day after receiving the results on November 17, 1998. Mr. Mattie testified on November 17, 1998, he found out the results of the positive test around 10:00 p.m. that evening from a telephone call from some facility in California. After which, the witness testified on the 18th of November, 1998, he proceeded to have another test conducted on himself separate and apart from the sample which he gave on November 12, 1998. Further, the witness testified that based upon the November 12, 1998, positive test results for marijuana usage in violation of the last chance agreement which he signed, the agency initiated disciplinary procedures against him. The witness identified Appellee's Exhibit N as a letter dated November 11, 1998, regarding his pre-disciplinary hearing and noted that it was, in fact, continued at his request until December 8, 1998. When questioned, the witness testified that he was ultimately removed as a result of violating his Last Chance Agreement. Along this line of questioning; the witness identified Appellee's Exhibit G as a letter notifying him on or about January 20, 1999, of agency's intent to remove him from his position as Building Maintenance Superintendent 1, and Appellee's Exhibit F as the instant order of removal.

Appellee' s next witness to testify was Mr. Paul Lanham, who is employed at the Department of Administrative Services as the Administrator of the state of Ohio's Drug-Free Workplace. Mr. Lanham testified that he is responsible for the coordination of various state and federal regulations regarding drug testing to ensure the accountability that the federal guidelines are met. When questioned how the drug-free workplace policies are implemented, Mr. Lanham testified that the state agency in question prepares lists of their respective employees PCN or Position Control Numbers which are subject to testing. When asked how it is determined that which positions are subject to testing, Mr. Lanham testified that the federal regulations determine this and specifically that all commercial driver's license holders throughout the state must be included in random drug testing. Moreover, the witness testified that even if a position does not require a CDL, that person is still subject to random drug testing under the federal guidelines as a matter of state policy, if in fact he has one. The witness then identified Appellee's Exhibit H as a drug testing manual which the Department of Administrative Services distributes to all of the agencies which are subject to drug testing. Mr. Lanham testified that the random list is generated by the Department of Administrative Services computer and is eventually given and passed on to each individual agencies drug-free coordinator. The witness identified Appellee's Exhibit D as a part of a Department of Administrative Services Human Resources random position

control number drug test list, generated by the Department of Administrative Services computer. Mr. Lanham stated at the time the list is generated the individuals name and social security number are then put on a list under the federal testing cycle. Moreover, the witness testified that the above mentioned list is one that was generated from January 1998, during the drug test cycle for the ODNR and that once the names are pulled up, the individuals listed on said random list are to submit to a test within thirty (30) days after receipt. The witness explained that although the above listed exhibit only contains two individuals, a more inclusive document is given to him and that he gives the entire list to department and it is eventually broken down. Mr. Lanham testified that the agency's department drug-free coordinators then give their individual coordinators who directly supervise the individuals the information to have those individuals listed tested. Further, Mr. Lanham testified that there are approximately one hundred and ten collection sites around the state and that typically the closest site is used, as well as all have the same procedures under the federal guidelines to be implemented. When questioned, the witness testified that when an individual goes into be drug tested a photo ID must be shown as a requirement for submitting to the test. Moreover, the witness testified that if those signatures are not present or if a seal is broken or something to the like, the Chain of Custody of said test would be broken and would considered to be "No Test". Additionally, the witness testified that every test contains a split sample with an "A" sample with 30 ml and a "B" sample with 15 ml, and that only the "A" sample is tested and that the "B" sample is tested on upon a retest request. If in the event of a negative test, the witness explained that there is approximately a seventy-two hour turnaround time. However, the witness noted that if there was a positive test, typically within seventy-two hours, there can be a confirmation test requested up to a two week period. The witness explained that the results whether a negative or positive come to him as the Administrator of the Drug-Free Workplace, and that these results are logged in at his agency and eventually faxed to the individual agency in question. If by chance there was a positive result found within the test, Mr. Lanham explained that he would also call and tell the individual agency's supervisor of the same. Moreover, the witness explained that the medical review officer handling the drug test, if upon a positive result, would in fact call the individual and question as to if there was any medical reason or drugs that he was taking that would interfere with the test and that that individual is to explain that an individual could request a retest, within seventy-two hours of knowing these results. Along this line of questioning, the witness testified that in February 1998, Kenneth Mattie, had tested positive for marijuana in his system and that he entered in to a Last Chance Agreement with the Ohio Department of Natural Resources, which is normal for agencies to do this.

The witness identified Appellees Exhibit E as a document which he prepared on or about November, 1998 requesting a follow-up test for Mr. Kenneth Mattie. The witness explained pursuant to the federal drug test act, individuals who have tested positive and enter into last chance agreement's have to submit to approximately six tests within a twelve month period of time. Additionally, the witness testified that Mr. Mattie was subject to a follow-up test and was so tested on November 12, 1998. Moreover, the witness testified that Linda Sutherland at the Ohio Department of Natural Resources is the federal drug testing coordinator for the agency and opined that is the reason he faxed this memorandum to herself regarding the follow-up test of Mr. Kenneth Mattie and James Long.

Next, the witness identified Appellee's Exhibit J, as a confidential memorandum from National Medical Review Office's, located in California, regarding Kenneth Mattie's follow-up drug test dated November 12, 1998, which came back positive. When questioned, the witness testified that Mr. Mattie did not request a retest within seventy-two hours, but did state that he wrote a letter to the agency requesting that Mr. Mattie be retested after he had received confirmation of the same. Appellee's Exhibit M was identified by the witness as another positive test of Ken Mattie's drug test from a different testing facility. Further, the witness identified Appellee's Exhibit P as a letter dated November 30, 1998, from himself to the National Medical Review offices in California requesting a retest of the positive specimen for State of Ohio employee Kenneth Mattie.

The witness then identified Appellee's Exhibit O, page 4 as Pharchem's lab report regarding Mr. Kenneth Mattie's specimen sample which tested positive for "THC Metabolite" or for marijuana being in his system. The witness noted that on said document the specimen seal was intact and there was a split specimen received and noted no fatal flaws which would have made this a "no test". On page 5 of said exhibit, the Chain of Custody for drug analysis was noted by the witness of having ensured that the temperature was okay, that this was a split same test as a follow-up, and signed by Mr. Mattie under the donor certification and consent.

When questioned regarding alcohol tests and their procedures thereof, Mr. Lanham testified that individuals could be tested just before and after their duty having been performed. However, with drug testing being random and/or follow-up, these drug tests can be at anytime and that they must be unannounced to meet the federal guidelines. Upon further questioning, the witness testified that it was his understanding that Mr. Mattie after having received notice form the Medical Review Office, went on his own volition to a test site to be retested. However, the witness

noted that the time factor is a critical component of these drug test and that any test that is delayed thirty-two hours after having a prior test performed, is considered flawed. Consequently, the witness testified that if his agency was to accept Mr. Mattie's independent test, his agency would be in violation of the federal rules and regulations.

On cross-examination, the witness testified that he is held his present position as Administrator for the Drug-Free Workplace since 1992. Upon further questioning, the witness testified that since he has held his position only about ten times has he seen a positive test result come back that were eventually contested and asked for a retesting. Additionally, the witness testified that Ohio Administrative Code Chapter 123: 1-76 is in place for the drug-free workplace program and drug testing procedures. Specifically, Ohio Administrative Code Section 123: 1-76-05 which began in November, 1992 is in place for the collection and handling of drug test specimen.

However, the witness testified that in January, 1995, the state rules and regulations for drug testing mirrored that of the federal drug testing standards. The witness identified Appellee's Exhibit H as a drug testing manual which is sent out to all the agencies whose employees are subject to drug testing. Mr. Lanham identified on page eight of said exhibit under what types of tests are required under the federal program, stated that the act requires pre-employment drug test and reasonable suspicion, post-accident, random, return to duty, and follow-up tests for both alcohol and drugs as requirements under the federal guidelines. Moreover, the witness testified that Mr. Mattie was covered under these federal regulations while he held the commercial driver's license. The witness then testified on page ten of Appellee's Exhibit H under how are each of the types of tests administered, commented that although not mentioned in this exhibit, federal guidelines do call for follow-up testing.

The witness then identified Appellee's Exhibit J as information received from national medical review offices marked confidential regarding Mr. Mattie's test of his specimen that was collected November 12, 1998. When questioned, the witness testified that the reason return to duty and non DOT, was marked incorrectly on this facsimile sheet. Upon questioning, the witness identified Appellant's Exhibit 2 as a state form indicating the Chain of Custody number 024010378 as a previous specimen sample which was marked as a DOT Chain of Custody. However, after the witness identified Appellee's Exhibit O regarding the explanation to the documents in this data package, explained that the real and only difference

between the Federal Chain of Custody and the State Chain of Custody forms are that the federal are 8 ply or 8 copies and the state utilizes a three ply or a 3 copy method. Further, the witness explained that the lab in question did not know that this specimen was under federal regulations or state regulations, but opined the state collection is exactly like the federal guidelines for collection since 1995, and all collections are done exactly the same. Moreover, the witness testified if there was a failure to follow any collection method it would have been marked a "no test" regardless of whether it was marked DOT or Non DOT.

Mr. Lanham then identified Appellee's Exhibit P as a letter he wrote in reference to Mr. Mattie's retest and his non objection to the same. When questioned, the witness testified that the Medical Review Officer when notifying one of one's results should tell the employees of their right to retest if a positive test is issued. Further, the witness opined that there must have been extenuating circumstances on Mr. Mattie's side because if the agency had been at fault by not notifying him properly he most likely would have censored them. However, the witness testified that in the past they have had complaints that past Medical Review Officers did not tell employees of their right to retest and opined this maybe the reason why he may have allowed Mr. Mattie's retest to go outside of the seventy-two hour rule. Moreover, the witness testified that the Medical Review Officer should inquire if one is on certain medications to see if it may have skewed the results.

Further, when questioned, the witness testified that the state of Ohio contracts with Pharmchem and that Pharchem contracts with the national medical review offices out in California to conduct these tests.

On redirect examination, the witness identified Appellee's Exhibit J and O and noted that the Chain of Custody control number 0245217225 are both one and the same on both documents.

The Appellant began his case-in-chief by calling Hung Thai, a Natural Resource Engineer for the Ohio Department of Natural Resources to the witness stand. When questioned, Mr. Thai testified that his job duties included, but were not limited, to managing the hydraulic operations of the Erie Canal. Further, the witness testified that he began employment with ODNR in 1991 and that he is Mr. Mattie's supervisor located in the Columbus Office. When questioned, the witness testified that at various times he had an opportunity to review Mr. Mattie's work and

would rate his work as excellent and that he has no disciplinary problems with him whatsoever during his tenure.

Next, the witness identified Appellant's Exhibit 7 as a performance evaluation of Mr. Mattie which was completed in 1996 and acknowledged that this performance evaluation of Mr. Mattie is an excellent review. Moreover, the witness testified that Mr. Mattie is the Assistant Manager of the Hydraulic Operations and supervises the repairs of the projects along the Erie Canal in the Akron, Ohio area. Further, the witness when questioned, explained that Mr. Mattie has always been very capable and an excellent worker from his personal observations and never has he been seen to be under the influence of any drugs or alcohol while at work, to the best of his knowledge.

When questioned, the witness testified although Mr. Mattie was removed from his position on or about January 1999, there was a brine contamination of the water in the Portage Lake System in early February 1999, while Ron Gray, his subordinate and Mr. Mattie's supervisor was on vacation. The witness explained that Mr. Mattie, although he had been released from his duties, aided the agency in going to work that day to help dilute the water to avoid further contamination of the water.

On cross-examination, the witness testified that he was not with Mr. Mattie at the drug test facility when he took the instant drug test at issue, or with him at the original test back in February 1998.

Appellant's next witness to testify was Mr. Ron Gray, the Manager and or Superintendent of the Office of the Ohio Erie Canal, Division of Water within ODNR. Mr. Gray explained that he has been a manger of the above noted operations for approximately fourteen to fifteen years and that he directly supervises five employees underneath him. Further, the witness explained that Mr. Mattie has worked with him specifically for the last sixteen years and reasoned that he was more or less his assistant while working at the Akron headquarters.

The witness testified that he has had on occasion to personally observe Mr. Mattie on a daily basis and indicated that he had never seen Mr. Mattie under the influence of drugs and/or alcohol which would prohibit his ability to perform his work. Moreover, the witness testified that he would rate Mr. Mattie as an excellent and

devoted worker as he had never had an occasion to discipline Mr. Mattie. Furthermore, the witness testified that although it was not a requirement of his position, Mr. Mattie carried a commercial driver's license, much like himself so they could offset and help alleviate any distractions from work if an equipment operator had called in sick that day or was on vacation.

No cross-examination of the witness was elicited at the record hearing.

The last witness to testify at the hearing was Mr. Kenneth Mattie as if on direct examination. When questioned, the witness testified that he was first hired in 1978 as a Welder with ODNR and held that position for approximately five years. Afterwhich, the witness testified he did work and hold the position of Building Maintenance Superintendent 1 for the next fifteen years until he was removed in January 1998. Further, when questioned, the witness testified that his duties included, but were not limited to, the oversight of the field operations and office duties of the Akron office within the Division of Water. When questioned, the witness testified that in his position of Building Maintenance Superintendent 1 he was on a twenty-four hour call basis seven days a week as a normal course of business. Further, the witness testified that over his years of employment with the Ohio Department of Natural Resources he always tried to better his performance. The witness identified Appellant's Exhibits 14 through 18 as Certificates of Accomplishments which he was awarded during his tenure as well as Appellant's Exhibits 8 through 13 as letters of accomplishment he also was awarded during his tenure. Moreover, the witness testified that prior to the instant discipline he has not had a prior discipline history.

The next line of questioning then centered around the February 1998 random drug test which Mr. Mattie took. Mr. Mattie explained that after taking said test he did test positive for marijuana usage which he admitted at the record hearing to have smoked the same at a poker game. Further, the witness testified that the agency after his pre-disciplinary hearing then agreed to give him a last change agreement to which he signed and acknowledged. Moreover, the witness testified he knew he could have lost his job as a result of the first drug test which he tested positive for marijuana usage. Mr. Mattie also explained that after he tested positive for marijuana usage in February 1998 he did seek counsel in a substance abuse program. Moreover, the witness testified that he knew when he signed the last chance agreement that he was going to be tested approximately six more times within the next twelve months and that prior to the November 1998 test which he tested positive for he had had three negative tests up to that point.

The witness then identified Appellant's Exhibit 6 as specimen ID number 016687332 collected on or about February 11, 1998 that being a DOT test in which he had tested positive for marijuana usage. Mr. Mattie explained that upon completion of the employee assistance program which he had entered into after testing positive, he was also tested again and identified that paperwork marked as Appellant's Exhibit 5. The witness explained that as was noted on the exhibit that the reason was return to duty and that his test was negative. Further, the witness identified Appellant's Exhibit 3 as a random drug test which he took on July 1, 1998, which resulted in a negative finding. The witness also identified Appellant's Exhibit 2 as another test which he took on or about October 6, 1998, which the results were negative, as well.

The next line of questioning then centered around the events which occurred on or about November 12, 1998, surrounding the test in question. Mr. Mattie explained on the date in question he was in Columbus at meetings in the Fountain Square facility. While he was there, the witness explained that around 10:45 a.m. he was notified by his supervisor Mr. Thai that he was going to have to report to a Worthington facility to be tested at 1:00 p.m. that afternoon. Mr. Mattie testified that he reported to the drug lab at around 1:00 p.m. and that upon arrival he did not see anybody in the facility. However, the witness testified that after a little while someone came out from a backroom and asked him if he could please wait while they were finishing up lunch. Mr. Mattie testified that at that time he said that he didn't have time to wait as people were waiting in the car for him to head back to the Akron facility. Mr. Mattie further explained that it appeared as though the individual who had requested him to wait appeared upset when he said he could not. However, the witness testified that he did go back with her soon thereafter to a backroom to give the sample in question. Mr. Mattie testified that he gave the sample, sat the sample down and turned around to get his picture id out of his wallet and when he turned around the samples were already sealed and that she had already wrote the temperature down. When questioned, the witness explained that at the other labs where he had been tested at in the Akron area they made him stand and watch while they performed the temperature test and sealed the same.

Mr. Mattie then testified that on or about November 17, 1998, at approximately 10:00 p.m. his wife received a telephone call from a medical review office upon which his wife wrote the number down. Approximately thirty minutes later the witness explained that he returned the phone call to a doctor on the other end of the line who explained that he had tested positive for marijuana although he tried to explain that he had not been around marijuana as well as that he was on

certain antihistamines and inquired that this may have effected the test. The witness testified that the doctor at that time told him that he did not really care about that and then soon finished the conversation. On or about November 18, 1998, following the evening in which he found out from the medical review office that he had tested positive for marijuana usage, Mr. Mattie explained that he went to the lab that he had been to previously to be tested. The witness explained that the test which was given to him the following date resulted in a negative finding, but however, never submitted any documentation to evidence the same. Further, the witness testified that on or November 20, 1998 he was told by Ron Gray of the results of his test upon which he requested a retest to prove his innocence.

On cross examination, the witness reiterated that the only time that he smoke marijuana was on or about February 1998 and acknowledged that he understood the Last Chance Agreement which he had signed after he originally had tested positive for marijuana usage. Moreover, the witness testified that eventually, several days later, the retest was done on the November 12, 1998 sample B which resulted also in a positive finding, as well.

CONCLUSIONS OF LAW

The issues before this Board of Review are what the Appellant violated or was guilty of failure of good behavior and insubordination and whether the Appellant's removal was to harsh under the circumstances and/or constitutes disparate treatment. The Appellant believes his treatment was too harsh considering the circumstances of an inaccurate test and that he had not been disciplined previous in his past twenty-one years of employment with ODNR. However, the Appellee believes that the Appellant's removal was necessary and appropriate considering the Appellant's Last Chance Agreement which he signed on or about March 19, 1998.

The Appellee, in its Revised Code Section 124.34 Order of Removal, charged the Appellant with failure of good behavior and insubordination for his actions surrounding the violation of a Last Chance Agreement which he entered into on or about March 19, 1998, when he tested positive for marijuana usage during a random drug test.

In the instant appeal, the Appellee did prove, by a preponderance of the evidence, the charges set forth in the Appellant' s Order of Removal. If the Order of Removal issued to the Appellant in this proceeding could be decided based upon the intentions of the Appellant, and if the Appellant's claim about a lack of culpable intent were to be believed, such a defense could be employed to disaffirm or modify the disciplinary action imposed. The intention of the Appellant, however, in participating in the alleged misconduct within the Order of Removal is not the issue upon this removal order rests. In this removal action, as well as in all disciplinary cases, the finder of fact is less concerned with the intention of the accused and more concerned with whether the alleged misconduct occurred and, if so, what disciplinary action reasonably attaches to the proven misconduct.

For the Appellee to establish that the employee violated and/or was guilty of failure of good behavior, the Appellee must demonstrate that he behavior in question was contrary to the recognized standard of propriety and morality.

Revised Code Chapter 124. nowhere defines "failure of good behavior". However, Black's Law Dictionary defines "failure of good behavior" to mean:

> . . . behavior contrary to recognized standards of propriety and morality, misconduct or wrong conduct. (Further citations omitted) Black's Law Dictionary, p. 594 (Dlx. 6th Add. 1990).

Furthermore, for the Appellee to establish that the employee was insubordinate, the Appellee must demonstrate that either a direct oral command or a specific set of instructions were willfully and/or intentionally violated and that the employee had knowledge of those commands or written instructions prior to violating them.

Like "failure of good behavior", Revised Code Chapter 124. nowhere defines "insubordination". However, Black's Law Dictionary does define "insubordination" to mean:

> . . . refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer. (Further citations omitted) Black's Law Dictionary, p. 801 (Dlx. 6th Add. 1990).

In determining whether the Appellant had violated or was guilty of failure of good behavior and/or insubordination, the Appellee clearly established, by a preponderance of the evidence, that Mr. Mattie violated his Last Chance Agreement which he signed on or about March 19, 1998, for having previously tested positive for marijuana usage.

Although the Appellant did testify that his treatment was harsh considering the circumstances, Mr. Mattie did not introduce any evidence of disparate treatment of any other employee in a similar situated position, who had done the same act of misconduct by violating a Last Chance Agreement who was not removed in the presentation of his case.

In the instant appeal, the documentary and testimonial evidence revealed that the Appellant knew of an established standard of conduct which he was required to maintain in the performance of his job duties and as a carrier of a commercial driver's license was subject to random drug testing. Further, the evidence was introduced and established that the standard of conduct was, in fact, communicated to Mr. Mattie which he had signed off for. Moreover, the evidence revealed that the Appellant violated such standards of conduct by in fact violating his Last Chance Agreement which he had signed. Consequently, I conclude that the Appellant's actions, or inactions as the case may be, did violate and constitute an actual violation under Ohio Revised Code Section 124.34 for insubordination and/or failure of good behavior.

However, there still remains a question of whether the discipline imposed should be sustained. Considering the totality of the circumstances, it is the recommendation of the undersigned Administrative Law Judge that the removal order issued to the Appellant be affirmed.

The undersigned in making this recommendation based his decision on the Appellant having signed a Last Chance Agreement, having given time to correct his behavior, and had not. Although, this may seem a harsh result for an employee who had relatively no disciplinary actions taken against him in the past twenty-one years of employment, coupled with the fact that his supervisor testified as to the quality of his work product, let it be known that individuals who violate Last Chance Agreements are what they mean "A Last Chance" for them to correct their behavior. A decision contrary to this could undermine the integrity of having individuals sign these documents in the first place.

Therefore, I respectfully **RECOMMEND** that the Appellant's appeal be denied and that the Appellant's removal be **AFFIRMED**.

Christopher R. Young
Administrative Law Judge

CRY:kat