[Cite as *Mayer v. Ohio Dept. of Rehab. & Corr.*, 2012-Ohio-948.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John Mayer,	:	
Appellant-Appellant,	:	
		No. 11AP-380
v.	:	(C.P.C. No. 10CVH-10-14514)
Ohio Department of Rehabilitation and Correction, Parole and Community Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on March 6, 2012

Cassandra J.M. Mayer, for appellant.

Michael DeWine, Attorney General, and *Drew C. Piersall*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P. J.

{¶1} Appellant, John Mayer, appeals from the judgment of the Franklin County Court of Common Pleas affirming an order of the State Personnel Board of Review ("SPBR"), in which the SPBR overruled appellant's objections to the report and recommendation of the administrative law judge ("ALJ"). In the report and recommendation, the ALJ recommended that the SPBR affirm appellant's removal from his position with the Ohio Department of Rehabilitation and Correction ("ODRC"), appellee. Appellant has also filed a motion to supplement the record.

{¶2} Appellant worked for ODRC, Adult Parole Authority ("APA"), since 1991. He was a parole office supervisor for ODRC and classified civil servant at the time of the pertinent events herein. As a supervisor, appellant also assisted his subordinate officers with supervision of parole offenders and court probation offenders.

{¶3} Appellant married Jennifer Leech on June 24, 2007, and the two divorced August 18, 2008. During their marriage appellant learned that Leech, who had a young daughter from a prior relationship, had associated with Edwin Griffeth. In September 2004, Griffeth had pled guilty to two counts of sexual battery in an unrelated matter and was incarcerated until he was granted judicial release in November 2006. After Griffeth's judicial release from prison, Russell Daubenspeck was eventually assigned as Griffeth's parole officer. Daubenspeck was supervised by appellant. Upon Griffeth's release, appellant personally informed Griffeth of his conditions of supervision, which imposed a curfew from 10:00 p.m. to 5:00 a.m., and prohibited him from consuming alcohol or entering liquor establishments, cohabitating with another person without the permission of his parole officer, having unsupervised contact with children under 18, forming a relationship with a woman with a child, and driving or riding in a motor vehicle with females without permission from his parole officer.

{¶4} In February or March 2008, Leech informed appellant that she had seen Griffeth at a local ski resort, Snow Trails, on December 31, 2007. In September 2008, after Leech and appellant divorced in August 2008, appellant determined that Griffeth and Leech had traveled to Florida together in early August, just prior to the finalization of the divorce. In October 2008, appellant followed Leech in her automobile to Vanderbilt Road, where Griffeth and his mother lived.

{¶5} On November 20, 2008, appellant drove by Leech's home at approximately 5:00 a.m. and claims he saw Griffeth's vehicle parked in front of Leech's home, which Leech denied at trial. Appellant then went to an exercise facility and subsequently reported to work at 7:30 a.m. He then left work early, at about noon, citing personal problems. Leech testified that appellant followed her during the afternoon to various locales.

{¶6} Around 4:30 or 5:00 p.m., appellant met David Leitenberger, his former boss and chief probation officer in Richland County at a bar, the Red Fox. He also spoke

with Bambi Couch-Page, the chief criminal assistant in the Richland County prosecutor's office, while at the bar. Appellant claims he drank four beers. Appellant left the bar at about 6:00 p.m. and returned home. After about one or two hours, appellant drove back to Vanderbilt Road, although Leech claimed appellant followed her to Vanderbilt Road from her workplace after she left work at 8:00 p.m. After arriving at Griffeth's, Leech ran to Griffeth's vehicle, and appellant parked his vehicle at the end of Griffeth's driveway. At that time, Griffeth and Leech drove past appellant and onto the roadway. Appellant followed the two in his vehicle and telephoned the sheriff's department to report that Griffeth was in violation of his release terms. They all eventually ended up back at the home of Griffeth's mother, at which point all involved exited their vehicles. Leech testified that she and appellant engaged in a verbal argument.

{¶7} A patrolman from a local police department arrived at the scene, pursuant to appellant's phone call, and appellant told the officer that he wanted Griffeth arrested, at which point the officer took Griffeth to jail. Appellant arrived at the jail after completing a "hold order" for Griffeth, although police at the jail did not allow appellant to drive home due to his apparent intoxication.

{¶8} At 8:00 a.m. on Friday, November 21, 2008, appellant met with Dave Lomax, his supervisor. Lomax told appellant to have no further contact with Griffeth or his case due to his conflict of interest. Lomax told appellant that Laura Richert, an administrative assistant with the APA, would now be handling the case.

{¶9} On the morning of Monday, November 24, 2008, appellant arranged a meeting with Judge James DeWeese, who had authority over Griffeth's judicial release and expected parole personnel to meet with him on the first day after an arrest of a parolee. Judge DeWeese made several orders with respect to Griffeth. Richert, who intended to meet with Judge DeWeese herself that day, telephoned the office on her way to work and was "shocked" to learn from appellant that he had already handled the matter.

{¶10} After an investigation, ODRC terminated appellant from his position, effective April 2, 2009. Appellant appealed his termination to the SPBR. On August 19, 2010, the ALJ issued a report and recommendation recommending that appellant's removal be affirmed. The SPBR adopted the ALJ's recommendation on September 17,

2010. Appellant appealed the SPBR's order to the Franklin County Court of Common Pleas. On March 18, 2011, the trial court issued a judgment affirming the SPBR's order and dismissing appellant's appeal. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE COMMON PLEAS COURT ERRED WHEN IT AFFIRMED MAYER'S REMOVAL AS SAME IS CONTRARY TO THE PROGRESSIVE DISCIPLINE POLICY SET FORTH IN THE ODRC'S STANDARDS OF EMPLOYEE CONDUCT BECAUSE THE FOUR VIOLATIONS FOUND BY THE SPBR DO NOT AUTHORIZE REMOVAL FOR THE FIRST OFFENSE.
>
> [II.] FURTHER, THE COMMON PLEAS COURT ERRED WHEN IT AFFIRMED THE DECISION OF THE SPBR FINDING THAT MAYER INTENTIONALLY VIOLATED FOUR OF THE STANDARDS OF EMPLOYEE CONDUCT SET FORTH IN ODRC'S POLICY MANUAL.
>
> [III.] MOREOVER, THE COMMON PLEAS COURT ERRED IN FINDING MAYER'S ARGUMENT REGARDING DISPARATE TREATMENT TO FAIL, AS WHEN COMPARING DISCIPLINE OF OTHER ODRC EMPLOYEES, AS PROFFERED AT THE HEARING BEFORE THE ALJ, FOR SUBSTANTIALLY MORE EGREGIOUS CONDUCT THEN MAYER IS ACCUSED OF, THESE EMPLOYEES WERE ACTUALLY, ARRESTED FOR, CITED FOR AND/OR CONVICTED OF ACTUAL CRIMINAL OFFENSES, INCLUDING FELONIES, BUT WERE NOT REMOVED, DESPITE CLEAR VIOLATION OF THE STANDARDS OF EMPLOYEE CONDUCT AS SET FORTH BY THE ODRC.

{¶11} Before addressing appellant's assignments of error, we must address appellant's motion to supplement the record with pleadings and documents filed in *Leech v. Mayer*, case No. 1:10-CV-2645, in the United States District Court, Northern District of Ohio. R.C. 119.12 provides, in pertinent part, "Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency." R.C. 119.12 does permit a court to grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency. However, "newly discovered" evidence under R.C. 119.12 pertains to evidence that existed

at the time of the administrative hearing; the term does not refer to newly created evidence, such as evidence created after the hearing. *Golden Christian Academy v. Zelman*, 144 Ohio App.3d 513, 517 (10th Dist.2001), citing *Cincinnati City School Dist. v. State Bd. of Edn.*, 113 Ohio App.3d 305, 317 (10th Dist.1996). Here, the documents from the Federal court case with which appellant seeks to supplement the record were filed in July 2011, long after the hearing before the SPBR. Therefore, appellant's motion to supplement the record is denied.

{¶12} Appellant argues in his first assignment of error that the common pleas court abused its discretion in affirming his termination because it was contrary to the progressive-discipline policy set forth in the ODRC's standards of employee conduct in the employee manual, which does not authorize removal for the first offense for any of the violations in this case. In an administrative appeal, pursuant to R.C. 119.12, the common pleas court reviews an agency's order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Klaiman v. Ohio State Univ.*, 10th Dist. No. 03AP-683, 2004-Ohio-1137, ¶ 7. In performing this review, the court may, to a limited extent, consider the credibility of the witnesses as well as the weight and probative character of the evidence. *Id*. This standard of review permits the common pleas court to substitute its judgment for that of the administrative agency; however, the court must give due deference to the administrative resolution of evidentiary conflicts. *Id*., citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108 (1980).

{¶13} An appellate court's review is more limited than that of the common pleas court. *Klaiman* at ¶ 8. Unlike the common pleas court, an appellate court does not weigh the evidence. *Id*. Rather, review by the court of appeals is limited to a determination of whether or not the common pleas court abused its discretion in determining that the agency's order is supported by reliable, probative, and substantial evidence. *Id*., citing *Hartzog v. Ohio State Univ.*, 27 Ohio App.3d 214 (10th Dist.1985). An abuse of discretion implies that a decision is both without a reasonable basis and is clearly wrong. *Id*., citing *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App.3d 159 (10th Dist.1983). Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the administrative agency or the common pleas court. *Provisions Plus, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-670, 2004-Ohio-592, ¶ 8, citing *Pons v. Ohio State*

Med. Bd., 66 Ohio St.3d 619 (1993). However, on questions of law, the common pleas court does not exercise discretion and the court of appeals' review is plenary. *Klaiman* at ¶ 8, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339 (1992).

{¶14} At issue in the present case are the following four violations of the standards of employee conduct for which the ALJ found there existed sufficient evidence to support: (1) insubordination; (2) failure to immediately report a violation of any work rule, law or regulation; (3) failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment; and (4) failure to follow post orders, administrative regulations, policies or directives. Appellant maintains that his violations were all first offenses, and the disciplinary grid in the employee manual does not call for termination for first offenses of any of these particular violations.

{¶15} In addressing appellant's argument that the sanction imposed by ODRC was in violation of its progressive-discipline policy, the common pleas court found that appellant failed to establish that the progressive-discipline policy was mandatory. The court also found that termination was a permissible sanction for the offenses pursuant to R.C. 124.34(A), and there is no statutory mandate that progressive steps be taken for appellant's infractions. The court also found that termination was a lawful sanction under ODRC's disciplinary guidelines.

{¶16} Appellant first asserts that "the Employee Handbook, notably through the Standards of Employee Conduct and the extensive progressive discipline policy set forth in the manual, created a contract of employment, requiring ODRC to adhere to the progressive discipline grid which sets forth no provision for termination for violation of any of the four violated sections on the first offense." Thus, appellant claims, "the Standards of Employee Conduct and the progressive disciplinary grid evidence an implied contract for employment."

{¶17} We first note that nowhere in the proceedings before the common pleas court or SPBR did appellant ever raise this argument. A litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶ 74 (10th Dist.) citing *Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶ 10 (4th Dist.). Thus, a court of appeals cannot

consider the issue for the first time without the trial court having had an opportunity to address the issue. *State v. Peagler*, 76 Ohio St.3d 496, 501 (1996). Thus, we could reject appellant's argument on this basis.

{¶18} Notwithstanding appellant's failure to raise the implied contract issue before the SPBR and trial court, even if we were to address the issue, we would find the argument without merit. "A public officer or public general employee holds his position neither by grant nor contract, nor has any such officer or employee a vested interest or private right of property in his office or employment." *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499 (1948), paragraph one of the syllabus. It has been called a "universal rule" that a public employee does not hold his office ex contractu (that is, pursuant to contract in the sense of an agreement or bargain between him and the public), but ex lege (as a matter of law, or pursuant to statute). *Fuldauer v. Cleveland*, 32 Ohio St.2d 114 (1972); *Gordon*; *Jackson v. Kurtz*, 65 Ohio App.2d 152 (1st Dist.1979). In the absence of new law, the discipline of an employee in the classified civil service is governed exclusively by statute. *See Anderson v. Minter*, 32 Ohio St.2d 207 (1972). Thus, "[i]t is clear that, as a civil service employee, plaintiff in no way holds his position or the right to his position pursuant to contract." *Fish v. Ohio Dept. of Transp.*, 10th Dist No. 88AP-355 (Sept. 29, 1988). Therefore, we find that appellant's position at ODRC was not controlled by contract, specifically, the employee handbook.

{¶19} Furthermore, even if the employee manual could be considered an implied contract between appellant and ODRC and controlled the rights and duties of the parties, the ODRC's progressive-discipline policy specifically indicates that the penalties are guidelines only:

> The purpose of these work rules is to provide a measure of consistency in application and progression of disciplinary actions. This consistency, however, does not require that the Employer must administer the exact same level of disciplinary action specified in the Standards of Conduct the same way in each and every instance. Each instance of a violation of the Standards turns on its own facts and distinguishing variables such as prior disciplinary history, length of time since the last discipline and mitigating or aggravating circumstances.

Therefore, it is clear that not even the progressive-discipline policy guaranteed that appellant would be subject to a lesser level of discipline than termination. Importantly,

this court has before found that agencies' progressive-discipline grids that do not contain language that they are mandatory are discretionary and need not be followed. *See, e.g., Macon v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-1036, 2009-Ohio-3229, ¶ 27 (the Ohio Department of Job and Family Services' disciplinary grid serves as a recommendation for discipline, but is not mandatory, and there may be mitigating or aggravating circumstances that alter how the grid is followed); *Gaither-Thompson v. Ohio Civ. Rights Comm.*, 176 Ohio App.3d 493, 2008-Ohio-2559 (5th Dist.) (the Ohio Civil Rights Commission was not required to follow the rules of progressive discipline in its own disciplinary grid). For this reason, we agree with the trial court's conclusion that termination was within the realm of permissible discipline for any of the violations.

{¶20} Furthermore, appellant's conduct was grounds for termination pursuant to R.C. 124.34. "R.C. 124.34 describes the procedures governing an agency's termination of an employee in the classified civil service." *Gaither-Thompson* at ¶ 22. R.C. 124.34 provides, in pertinent part:

> (A) The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, **except** as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, **dishonesty**, drunkenness, immoral conduct, **insubordination**, **discourteous treatment of the public**, neglect of duty, **violation of any policy or work rule of the officer's or employee's appointing authority**, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

(Emphasis added.) Appellant does not contest that R.C. 124.34 provides removal for his behavior and does not require progressive discipline. We agree, and other courts, including our court, have before concluded the same. *See, e.g., Swigart v. Kent State Univ.*, 11th Dist. No. 2004-P-0037, 2005-Ohio-2258, ¶ 27 (R.C. 124.34, which describes the procedure and the grounds on which an employee in classified service may be

removed, does not impose an obligation of progressive discipline on a state employer); *Carmichael v. State Personnel Bd. of Review*, 10th Dist. No. 92AP-1707 (June 10, 1993) (R.C. 124.34 contains no requirement that rules of progressive discipline be followed). Therefore, we find appellant's conduct subjected him to possible termination from his employment pursuant to both R.C. 124.34 and the ODRC disciplinary guidelines. Appellant's first assignment of error is overruled.

{¶21} Appellant argues in his second assignment of error that the trial court erred when it affirmed the decision of the SPBR finding that he intentionally violated four standards of employee conduct set forth in ODRC's employee manual, as there existed insufficient evidence to support these violations. With regard to the first violation for insubordination, and the third violation for failing to carry out a work assignment or the exercising of poor judgment in carrying out an assignment, the SPBR found that appellant violated a direct order from Dave Lomax to have no further involvement with Griffeth's case. Appellant acknowledges that, on Friday November 21, 2008, Lomax told him that he was no longer to be involved in Griffeth's case. However, appellant contends that his subsequent actions were justified because Lomax's statement to him was never reduced to writing or shared with other officers in the unit; Lomax never told him who was to take over Griffeth's case; no one from ODRC spoke with appellant that Friday, Saturday or Sunday about who was to meet with Judge DeWeese to discuss Griffeth's case; Lomax never told anyone except Laura Richert that she was to takeover Griffeth's case; when he arrived at work on Monday, appellant discovered no one had yet spoken to Judge DeWeese about Griffeth; appellant made contact with Judge DeWeese Monday morning because it was required by the contract between ODRC and the common pleas court, and he was still the supervisor on Griffeth's case; appellant made no decisions and did nothing active regarding the case; and he was merely following up with Judge DeWeese as a diligent, conscientious employee would do, and if he had not, he would have been liable for discipline for failing to carry out his job duties.

{¶22} These arguments are unavailing. The violations for insubordination, failing to carry out a work assignment, and exercising poor judgment in carrying out an assignment were based upon uncomplicated grounds. Lomax, who was appellant's supervisor, told appellant to have no further involvement with Griffeth's case. Appellant

disobeyed his order. Appellant's later rationalizations are immaterial. The responsibility for any subsequent violation of the contract between ODRC and the common pleas court would have fallen upon Lomax. Lomax was also not required to inform appellant of whom he was appointing to handle Griffeth's case, although Richert testified that Lomax did tell appellant that she would be handling the matter. At this point, it was Lomax who was responsible for the matter, not appellant. Clearly, once Lomax told appellant to have no further involvement in the matter, he could not be subject to discipline for failing to speak with Judge DeWeese, as he claims. Therefore, we find the violations for insubordination, exercising poor judgment, and failing to obey a work assignment were supported by sufficient evidence.

{¶23} With regard to the second violation for failing to immediately report a violation of any work rule, law or regulation, as well as the third violation for exercising poor judgment in carrying out an assignment, the SPBR found that appellant failed to immediately report his conflict of interest in the Griffeth case. The SPBR found appellant became aware of a potential conflict of interest before the incidents on November 20, 2008, and was aware of a clear conflict by that evening. Appellant argues that he discovered the conflict at the same time that he was confronted and nearly run down by Griffeth on November 20, 2008. Appellant points out that at no time did Griffeth or Leech inform him or any other ODRC employee of their relationship.

{¶24} However, we agree with the SPBR that appellant was aware of at least a potential conflict of interest in September 2008 when he determined that Griffeth and Leech had traveled to Florida together. Although he was not certain that the two were in a relationship based upon this alone, appellant testified that Leech's brother also told him Leech was dating someone named Ed. Furthermore, appellant admitted that the reason he continued to follow Leech on numerous occasions was to find out if Griffeth was in an "unauthorized relationship" with Leech. Appellant testified that, in October 2008, he followed Leech in his automobile, as Leech drove to Vanderbilt Road, upon which Griffeth and his mother lived. He also saw Leech drive down Vanderbilt Road on another occasion. Thus, appellant was aware of a potential conflict of interest at this time and should have reported his suspicions to his superiors. Lomax agreed, testifying that appellant should have notified him immediately "if he had any inclination" of a conflict.

Furthermore, on November 20, 2008, appellant drove by Leech's home at approximately 5:00 a.m. and saw Griffeth's vehicle parked in front of Leech's home. At this point, when viewed in conjunction with the evidence he previously gathered in September and October 2008, appellant could be fairly certain that a conflict existed. However, appellant still failed to report the conflict to his supervisor. Instead, appellant chose to continue to follow Leech throughout the day, at least according to Leech's testimony. Couch-Page testified that when she saw appellant at about 5:30 p.m. that day, appellant was visibly upset and told her he believed that Leech was having an affair with someone she had prosecuted, specifically naming Griffeth. At about 8:00 p.m., appellant then saw Leech in the driveway of Griffeth's home. Still, despite the overwhelming evidence by this time that the two were in some sort of relationship, appellant continued his pursuit and confronted Griffeth and Leech in Griffeth's driveway instead of contacting his supervisor first to discuss the situation. We concur with the common pleas court's assessment that appellant had a duty to report his conflict of interest as of September 2008, and, at the latest, he knew there was a conflict as of the morning of November 20, 2008.

{¶25} With regard to the third violation for exercising poor judgment in carrying out an assignment, the SPBR also found appellant exercised poor judgment in returning to his job duties after his consumption of alcohol. Appellant maintains he was not intoxicated, citing to the testimony of Leitenberger and Couch-Page that he did not drink much and showed no signs of impairment. He also points to the testimony of Bert Skeen, an officer with the Bellville Police Department, who was at the scene of the arrest and testified appellant was not under the influence of alcohol and showed no signs of consumption or impairment.

{¶26} Skeen testified he saw appellant "briefly," approximately two to three minutes. He did not observe him staggering or falling over. His behavior raised no concerns that he was intoxicated. Couch-Page testified that appellant was drinking a Bud Light when he sat down at her table at the bar, and it was the only beer she saw him drink. She said he was talking more than drinking. She has never seen him drink liquor, although she has seen him at many social events over the years. Couch-Page said appellant did not look impaired at all, and he was not intoxicated when he left the bar around 6:00 p.m. Despite appellant's reliance upon the testimony of Leitenberger,

Leitenberger gave no testimony either as to how much appellant drank at the bar on the night of November 20, 2008, or whether appellant showed signs of consumption or impairment.

{¶27} James Sweat, a patrol supervisor with the Richland County Sheriff's Office, testified that appellant arrived at the police station on November 20, 2008, between 10:00 and 10:30 p.m. Sweat said that when he spoke to appellant it was "obvious" that appellant had been consuming alcohol and was intoxicated and under the influence of alcohol. He had a strong odor of alcohol about his person and breath, and his eyes were bloodshot and glassy. The smell was consistent with liquor, not beer. Appellant's words were slightly slurred, and he was beyond the point of being able to operate a motor vehicle, although he was not to the point at which he could not talk or walk. Sweat spoke with appellant about 15 to 20 minutes. He did not allow appellant to drive himself back home from the police station because of his intoxication.

{¶28} Lomax testified that appellant should not have performed any work duties whether he was "intoxicated" or not. Lomax said that appellant admitted he had consumed beer, and, in Lomax's opinion, even after a single beer, appellant should not have performed any work-related activities. Lomax testified that appellant should have called him or the APA officer assigned to Griffeth before taking any action after having consumed alcohol.

{¶29} Both Leech and Griffeth testified that appellant smelled like alcohol, and Griffeth believed he was intoxicated.

{¶30} Appellant testified that he arrived at the Red Fox between 4:30 and 5:00 p.m., and consumed "approximately" four beers with Leitenberger, and left at about 6:00 p.m. He testified he had nothing to drink before going to the Red Fox. He drove home, fed his cats, ate something, watched television, and then left around 8:00 p.m. He said he did not drink any alcohol after leaving the Red Fox. He also said he did not have any alcohol from the time he left the scene of the incident on Vanderbilt Road, until he went to the police station and talked to Sweat.

{¶31} Notwithstanding Lomax's opinion that appellant should not have performed any work-related activity after consuming alcohol irrespective of whether he was intoxicated, the testimony raises two readily apparent issues. The first issue is that Sweat

testified that he believed appellant had been drinking liquor, while the testimony was that appellant had only been drinking beer and had nothing to drink after leaving the Red Fox. The second issue is that Sweat believed appellant to have been under the influence of alcohol as of 10:30 p.m., while Skeen saw no indication appellant was intoxicated as of about 8:45 p.m., and Couch-Page did not believe appellant was intoxicated when he left the Red Fox at 6:00 p.m. These are issues of credibility. The ALJ found appellant had been under the influence of alcohol as of the time he intentionally drove to Griffeth's house to check on him and Leech. Although there were two witnesses who testified appellant was not intoxicated, and three who said he was intoxicated, neither the ALJ's determination nor our review can be guided by raw numbers. Where the only evidence on a factual issue is the differing testimony of witnesses, the trier of fact is left with only credibility to guide its factual determinations. We have no reason to disbelieve Couch-Page and Skeen, but we also have no reason to doubt Sweat. Given their possible bias, Leech's and Griffeth's testimony would be subject to greater scrutiny. In the end, the ALJ found appellant exhibited poor judgment in performing his job duties approximately two hours after consuming four beers in about one and one-half hours. We have no reason to alter this finding. Likewise, we have no reason to question Sweat's testimony that appellant was intoxicated when he arrived at the police station after Griffeth's detainment. The ALJ was in the best position to make any credibility determinations. Therefore, this argument is without merit.

{¶32} With regard to the fourth violation for failing to follow post orders, administrative regulations, policies or directives, the SPBR found that appellant violated the firearms policy and vehicle pursuit policy during the events of November 20, 2008. With regard to the firearms policy, APA policy 104-TAW-01(C) provides, in pertinent part:

> **Firearms Access**:
>
> 1. All employees authorized to carry a firearm shall have immediate access to their authorized firearms at all times during the normal workday.
>
> * * *

> 3. When an employee is in, or is likely to be in, face-to-face contact with an offender, the firearm must be carried on the person unless prior approval was obtained from the immediate supervisor to not carry the firearm. When carried, firearms will be fully loaded.
>
> * * *
>
> 8. Pursuant to the approval of their supervisors, APA employees are subject to being called at any time, day or night, to perform their job duties. * * * Employees are cautioned to use good judgment, common sense and discretion in carrying authorized firearms while off-duty.

{¶33} Appellant argues that, pursuant to subsection (C)(3), the "[w]hen carried" language acknowledges that there are times in which an officer who is not carrying a gun and has face-to-face contact with an offender is not in violation of the policy, and his situation was an example of such. He also contends that, consistent with (C)(8), he was using common sense and good judgment by not carrying his firearm with him at the time of the incident in question.

{¶34} We disagree with appellant's views on both counts. We believe the "[w]hen carried" language merely acknowledges that there are circumstances in which a firearm will not be carried and do not read it as the broad, vague exception appellant wishes it to be. We do agree that there are times when an officer may have face-to-face contact with an offender and is not in violation of the policy. Two such situations specifically delineated in (C)(3) are (1) when the employee was not likely to be in face-to-face contact with the offender, and (2) when the employee is in, or is likely to be in face-to-face contact with an offender, but his/her immediate supervisor has granted prior approval to not carry the firearm. Neither of these situations are present here; thus, (C)(3) does not aid appellant's argument.

{¶35} Even assuming for the sake of argument that appellant did not follow Leech home from work on the evening of November 20, 2008, and his intention was not to arrest Griffeth, he did admit that he intentionally drove to Vanderbilt Road, where Griffeth lived, because he "wanted to see if – because earlier that day I thought I saw his car there, the white car. I thought if I'd drive by and see his car or her car there that would verify that it would be a violation behavior, then I would inform Dave Lomax and Russ

Daubenspeck." He explained he "was hoping that if I seen [sic] the car there, then I would verify the rumors that were going on, then I would inform Dave and Russ the next day." He testified that when he drove onto Vanderbilt Road, he saw Griffeth and Leech driving down the driveway, and he exited his car to tell Griffeth he was in violation of his supervision terms.

{¶36} Appellant's testimony reveals his clear intent was to perform work duties that evening. He specifically went to Griffeth's house to determine whether he was in violation of his release terms. There was a distinct possibility that Griffeth would be outside his home or in his car when appellant drove by his residence. As appellant's actions later proved, he intended face-to-face contact with Griffeth if he encountered him in violation of his release terms. In voluntarily undertaking these actions under these circumstances, he was "likely" going to have face-to-face contact with Griffeth, and he did. "[G]ood judgment" and "common sense," under subsection (C)(8) would have also required appellant to carry his firearm in this situation. Therefore, we find there was sufficient evidence to support the ALJ's determination that appellant violated the APA's firearms policy.

{¶37} Appellant also argues that there is no evidence that he violated the APA's vehicle pursuit policy because his conduct did not fit the definition of "pursuit," as defined in the manual. APA policy 100-APA-02, provides, in pertinent part:

> H. **VEHICULAR PURSUIT**: The pursuit by a law enforcement officer of a person fleeing or attempting to avoid a lawful arrest when both parties are in motor vehicles.
>
> V. **POLICY**:
>
> * * * [I]t is the policy of the Adult Parole Authority that no employee while operating a personal motor vehicle or motor vehicle owned by the Adult Parole Authority may engage in the vehicular pursuit of any offender who has violated federal, state, or local laws and ordinances, conditions of probation, parole or other supervised release, or a sanction of community control or post release control.

{¶38} As for appellant's argument that his actions did not constitute "vehicular pursuit," appellant fails to explain his basis for believing so. According to the above definition, "vehicular pursuit" contains the following elements: (1) pursuit; (2) of a person

fleeing or attempting to avoid a lawful arrest; and (3) when both parties are in motor vehicles. Appellant was clearly following Griffeth, whom appellant believed to be attempting to "abscond" possibly out of Mansfield, and both appellant and Griffeth were in motor vehicles. Although appellant argues that Lomax and Ron Nelson, the assistant chief with the ODRC's Bureau of Adult Detention, admitted that the APA policy does not prohibit an APA employee from following an offender for the purpose of giving information to law enforcement, that distinction is irrelevant here. Appellant specifically admitted that he wanted Griffeth to stop in the driveway, he followed Griffeth for the purpose of bringing about his apprehension because he may be absconding, and he continued to follow Griffeth on several roads, until Griffeth eventually circled back to his house. These actions fall within the definition of "vehicular pursuit." Furthermore, despite appellant's argument that the APA policy requires him to immediately call law enforcement when an offender flees in a motor vehicle and to provide a description of the vehicle, it requires him only to give a description "if possible." There is no requirement that he must follow the vehicle in order to provide the description or that he must follow the vehicle to provide a continuous location of the vehicle. He admitted that, even after calling law enforcement, he continued to follow Griffeth. In addition, Leech testified that appellant was following them so closely that they could not see the front end of appellant's vehicle, and Griffeth said appellant was driving erratically. We cannot find the SPBR or trial court erred in finding appellant's actions rose to the level of "vehicular pursuit." For these reasons, appellant's second assignment of error is overruled.

{¶39} Appellant argues in his third assignment of error that the trial court erred when it found he was not treated disparately as compared to other ODRC employees for their conduct. Pursuant to Ohio Adm.Code 124-9-11(A), the SPBR "may hear evidence of disparate treatment between the appellant and other similarly situated employees of the same appointing authority for the purpose of determining whether work rules or administrative policies are being selectively applied by the appointing authority or to determine whether the discipline of similarly situated employees is uniform." Ohio Adm.Code 124-9-11(B) provides that "[e]vidence of disparate treatment will be considered in evaluating the appropriateness of the discipline which was imposed."

{¶40} The issue of whether employees are similarly situated sufficiently to merit consideration as evidence of disparate treatment is for the trier of fact, i.e., the SPBR. *Swigart* at ¶ 37, citing *Ohio Dept. of Mental Retardation & Dev. Disabilities v. Moore*, 4th Dist. No. 98 CA 1 (June 18, 1998). Although the SPBR has discretion to consider evidence of disparate treatment in evaluating the appropriateness of discipline, the Ohio Administrative Code does not mandate absolute uniformity of discipline. " 'An employee's discipline must stand or fall on its own merits.' " *Id*. at ¶ 38, quoting *Green v. W. Res. Psychiatric Habilitation Ctr.*, 3 Ohio App.3d 218, 219 (9th Dist.1981).

{¶41} On the issue of disparate treatment, the common pleas court here found that appellant failed to proffer before the ALJ or attach to his brief before the common pleas court evidence of any incident similar to the facts in his case, and the documents presented did not "remotely" reflect the charges against appellant. The court also found that it could not find any incident in the proffered evidence in which a parolee or member of the public was adversely affected by the actions of the employee; i.e., the cases did not support abuse of power and insubordination claims as found in the present case.

{¶42} Appellant argues that his proffered evidence demonstrates disparate treatment regarding the discipline imposed on other ODRC employees for substantially more egregious conduct, including felony offenses and violations of standards of employee conduct, than he is accused of committing. In his brief before this court, appellant presents a specific argument as to only the case of Rick Sebulsky as evidence of disparate treatment. In the case of Rick Sebulsky, a parole services supervisor, Sebulsky pled guilty to driving while intoxicated, was sentenced to six months in jail, with five months suspended, and given a three-year license suspension. Sebulsky was found to have violated the standards of employee conduct in that he committed an act that would bring discredit to the employer, and he violated R.C. 124.34 for failing to exhibit good behavior. There was also evidence that, during his arrest, Sebulsky was belligerent and obnoxious to police. Appellant here complains that, for this conduct, including Sebulsky's inability to work for 30 days while he was in jail, Sebulsky received only a 16-hour reduction in vacation leave.

{¶43} We agree with the common pleas court that the facts in Sebulsky's case differ from those in appellant's case. Appellant takes issue with the conclusion of the

common pleas court that, in the present case, there was an adverse effect on Griffeth or a member of the public. Appellant asserts the only person harmed was himself. We disagree with appellant's view. Appellant engaged in activities that eroded the public's trust in the ODRC in general. Appellant continued to work on a matter despite an apparent conflict of interest, engaged in work activities after consuming alcohol, and pursued a parole violator without his issued firearm. Also, unlike Sebulsky's case, he defied a direct order from his superior. Sebulsky's actions were not work-related, unlike appellant's actions, which all involved violations committed while carrying out his duties for the ODRC. Furthermore, although appellant objects to the finding that his actions had an adverse effect on Griffeth or a member of the public, the events of the night in question obviously adversely affected both Griffeth and Leech, despite the fact that Griffeth was in violation of his probation terms and properly subject to arrest. The testimony reveals clearly that appellant's intertwining of professional and personal matters had an emotional impact on Griffeth and Leech. None of these issues were present in Sebulsky's case. Therefore, we find that the disparate treatment cases relied upon by appellant, specifically the Sebulsky case, are inapposite. Appellant's third assignment of error is overruled.

{¶44} Accordingly, appellant's first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed. Appellant's motion to supplement the record is denied.

Motion denied;
judgment affirmed.

TYACK and DORRIAN, JJ., concur.
