

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Sharon Young,

Appellant,

v.

Case No. 08-REM-01-0011

Montgomery County Board of Commissioners,

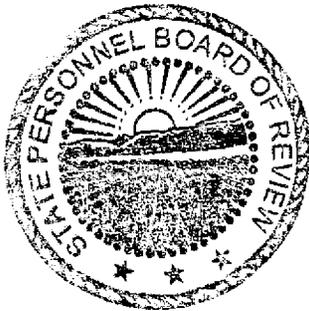
Appellee.

ORDER

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

After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellant's removal effective January 29, 2008, be **AFFIRMED**, pursuant to O.R.C. § 124.34.



Lumpe - Aye
Sfalcin - Aye
Tillery - Aye

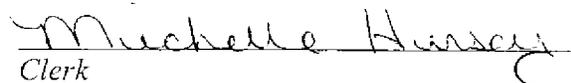


J. Richard Lumpe, *Chairman*

CERTIFICATION

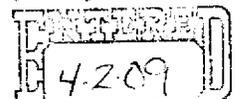
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto 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, April 2, 2009.



Michelle Hunsay
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**

Sharon Young,

Case No. 08-REM-01-0011

Appellant

v.

February 18, 2009

Montgomery County Board of Commissioners,

Appellee

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On or about January 3, 2008, the Montgomery County Board of Commissioners, Appellee herein, served an order of removal, in accordance with Ohio Revised Code Section 124.34, upon the Appellant Sharon Young, a Social Program Specialist. That order alleged the following:

This will notify you that you are removed from your position of Social Program Specialist effective January 29, 2008.

The reason for this action is that you have been guilty of Specifically: The reason for this removal is your continued inappropriate behavior and insubordination. A pre-disciplinary meeting was held November 1, 2007, for which you were a no show. You previously received a 10-day suspension on January 14, 2008, a 5-day suspension on May 31, 2007, and a 3-day suspension on 5/10/07, for the same infraction.

Thereafter, on or about January 8, 2008, a timely appeal from this order was filed by the Appellant. Further, prior to going onto the record, the jurisdiction of this Board was established and stipulated too, as well. The record hearing in this case was held on October 3, 2008. The Appellant, Sharon Young appeared *pro se*. The Appellee, the Montgomery County Board of Commissioners, was present through its designee, Catherine Shearer, a Human Resource Coordinator, and was represented by Robert L. Guehl, an Assistant Prosecuting Attorney.

The 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 with any order filed under Ohio Revised Code Section 124.34 within ten (10) days after having received the same with the State Personnel Board of Review.

Further it should be noted that previously on July 31, 2008, the Appellee did file a motion for summary judgment and for sanctions which the undersigned deemed that the motion for summary judgment should be a motion for an affirmance of the order. The Appellant did not file any memorandum in opposition to Appellee's motion, but the undersigned held the motion for summary affirmance of the order in abeyance while overruling the motions for sanctions.

Further, it should be noted that the Appellant also filed two other cases before this Board, Case No. 08-WHB-01-0012 and Case No. 08-INV-01-0013, which she withdrew prior to going on to the record in this matter.

STATEMENT OF THE CASE

Appellee's first witness to testify was Ms. Sharon Young, Appellant herein, as if on cross-examination. The Appellant identified Appellee's Exhibit V as a response to admissions which was prepared in the presentation of this case. On or about in response to the admissions the Appellant agreed that on April 20, 2007, she was employed by the County. Further, the witness while admitting that she did have a medical crisis on Friday April 20, 2007, denied that the exhibit attached to the response to admissions known as MC Exhibit B was not an accurate description of the events. The witness explained there were numerous inaccuracies existing in the report. When questioned about if during the April 20, 2007, meeting with a Supervisor, Ms. Olsvig, that she did begin to breathe heavily, grasping her chest and went to her knees on the floor when she was experiencing what she deemed to be a heart attack, testified in the affirmative. The witness testified it was her belief that she was brought to this meeting without any notice or without any legal representation, a meeting with a Supervisor Ms. Olsvig and her Manager Lonnie Bowen. The witness stated that the individuals in question in the room ignored her request to stop the meeting as she was having chest pains and when she dropped to her knees she began to pray and that they did not do anything to help her out. However, the witness stated it was true that they had called the downstairs front desk and had an ambulance sent there to pick her up and take her to the hospital.

The witness testified she did in fact go to the hospital that day and that she was discharged that afternoon, as well. Further, the witness stated she did not in fact have a heart attack, but she had an anxiety stress attack. The witness explained there were two documents that had disappeared that they wanted her to sign that afternoon, but that she could not recall exactly what they were. Further, the witness testified they had emailed her to be at the meeting wherein she testified she emailed them back requesting to get this postponed for her to obtain the services of an attorney, wherein they stated no, but again the witness did not produce those documents for review.

The Appellant testified there were no disciplinary actions issued against her as a result of her becoming ill on April 20, 2007.

When reviewing the response to admissions question number four, the witness admitted that prior to October 15, 2007, several attempts were made to have Sharon Young attend scheduled physical examinations and a psychological examination, all which she did not attend. Under question five, the Appellant admitted that on or about October 15, 2007, a letter was sent via certified and regular mail to notify her to attend a psychological examination and a physical examination on October 19, 2007. Regarding question number six, the witness testified and admitted that on October 19, 2007, she failed to attend a scheduled physical examination. With regards to the answer on the response to admissions number seven; the witness admitted that on October 19, 2007, she failed to attend a scheduled psychological examination. With regards to the Appellant's response to question number eight, the witness explained that on or about October 24, 2007, a letter was sent via certified and regular mail to her notifying her to attend a predisciplinary meeting on November 1, 2007, which she admitted and testified to. Further, the Appellant testified to that she admitted on the response to admissions that on November 1, 2007, she failed to attend the scheduled predisciplinary hearing, as well.

With respect to the tenth question on the response to admissions, the witness denied that prior to November 1, 2007 she had been disciplined for insubordination for failure to attend medical and psychological examinations, with a three-day May 10, 2007, a five-day May 31, 2007, and a ten-day January 14, 2008 suspensions imposed previously. However, upon cross-examination, the Appellant did state that she did receive all of the above suspensions, all for failing to attend previous medical and psychological examinations. With respect to question eleven on the

response to admissions, the witness admitted she did receive a letter January 3, 2008, from Ms. Wiedeman to herself notifying her of her removal, along with the order of removal dated January 3, 2008, along with the Commissioner's Resolution no. 08-0028 and the personnel action, approving said removal and signing for the certified mail receipt by herself on January 7, 2008.

Ms. Young testified she was basically contesting the ordering of any medical or psychological evaluations upon herself as it was simply perpetual in nature to build their case to remove her and that Montgomery County was in violation of her civil rights, mainly her right to privacy in so doing this.

Appellee's next witness to testify was Ms. Catherine Shearer, the Human Resource Coordinator for the Montgomery County Department of Job and Family Services, a position that she has held since May 12, 2008. Ms. Shearer testified that prior to this time she held the position of Personnel Officer 1 on or about April 20, 2007 and that she was also the Interim Director of Human Resources from May 23, 2007 through May 12, 2008. Along this line of questioning, Ms. Shearer testified she is very familiar with Ms. Young's case, via the positions which she has held at the agency. The witness testified that on October 15, 2007, a letter was sent to Ms. Young explaining to her the need to attend a medical and psychological examination on or about October 19, 2007, which Ms. Young received and which she did not attend. The witness also stated that on or about October 24, 2007, Ms. Young was notified to attend a predisciplinary hearing which was scheduled for November 1, 2007, which she received notice of, which was for her failure to attend the previously notified medical and psychological examinations when she was notified by letter on October 15, 2007. Ms. Shearer testified Ms. Young did not attend the predisciplinary hearing. The witness then identified Appellee's Exhibit T as the instant order of removal, which was issued to the Appellant on or about January 3, 2008, which was effective January 29, 2008. The witness then identified Appellee's Exhibit U as a copy of the certified receipt and/or service that the Appellant signed off on for the instant order of removal on or about January 7, 2008.

On cross-examination, when questioned about the purpose of scheduling the Appellant for any medical or psychological examinations, Ms. Shearer testified that they were scheduled to assess the Appellant's fitness for duty and, specifically for whether or not she was able to perform the duties of her position as she in April 2007, upon becoming ill at the office, gave rise to the agency there may be some

problem with the Appellant. Ms. Shearer testified that the agency does adhere to a progressive disciplinary policy and explained that the issuances of the previous suspensions (the 3, 5, and 10 day) were given to the Appellant to have her be notified to understand the necessity of complying with the orders which the agency was trying to put forth. The witness explained that all employees, including Ms. Young, were given a personnel manual where it was explained to all of the employees of Montgomery County that they had to adhere to a progressive disciplinary policy.

On re-direct examination, Ms. Shearer in Appellee's Exhibit V identified the critical incident report, which was filled out by her supervisor regarding the medical crisis which occurred on or about April 20, 2007. The witness testified when something like that occurs at work it is the supervisor's responsibility to make sure that this paperwork is to be filled out. Again, the witness explained this paperwork was filled out by Lonnie Bowen as concerns were brought up by you having this medical crisis at work.

On re-cross examination, the witness questioned what in the critical incident report required her to attend a psychological examination, stated that when she asked to have the meeting stopped because she "feared her health could not stand the stress" gave rise to the employer to send Ms. Young out for a psychological examination at that time.

The Appellant began her case-in-chief wherein she stated that she had held the position of Social Program Specialist for approximately only ten weeks at the time of her removal and that prior to that she was employed as a volunteer coordinator from approximately February 1999 through January 2007. The witness made several statements concerning her removal and the pretext allegations that they were psycho social harassment, invasion of her privacy, mistreatment and maltreatment of her and her statements regarding discrimination charges she had filed against Stephanie Eckles, the Human Resource Director approximately two years before the incident in questions took place.

Next, the Appellant went over her exhibits 1 through 31, each and all were discussed, but were deemed essentially irrelevant by the undersigned as they related not to the instant discipline, but to letters and emails she had gone back and forth, some dating two or three years before the incident in question took place and/or various allegations of harassment or psycho social harassment and/or

discrimination in the workplace, all which is not in the realm of this forum, especially in light of the fact that prior to the record hearing in this matter the Appellant had previously filed an investigation and a whistleblower appeal which she withdrew at the start of the hearing prior to taking evidence under case numbers 2008-WHB-01-0012 and 2008-INV-01-0013.

FINDINGS OF FACT

Based upon the testimony presented and evidence submitted at the record hearing, I make the following findings of fact:

1. During the time period in question, the Appellant, Sharon Young, held a position with the Montgomery County Department of Job and Family Services, classified as a Social Program Specialist.

2. At a meeting on April 20, 2007 with her immediate supervisor, Ms. Olsvig and another management employee, Lonnie Bowen, the Appellant at the meeting grasped her chest and started breathing heavily wherein she got down on the floor and appeared to be in sever pain as if she was having a heart attack and to which she stated she began praying. The evidence revealed that the agency then called 911 to have an ambulance sent in regards to the medical crisis and that the paramedics eventually transported the Appellant to a local hospital. The Appellant was released from the hospital that same day. The Appellant did not provide any medical documentation in this hearing that she had any prior health concerns, nor did she supply any information from the release from the hospital that afternoon. As a result of the meeting on April 20, 2007 the Appellant's physical and mental health was called into question, as well as her ability to perform her job duties.

3. The Administrative Law Judge took administrative notice of the previous ten-day order of suspension which was heard by Ms. Elaine K. Stevenson, Hearing Officer, by the State Personnel Board of Review issued on July 24, 2008 which was affirmed by the Full Board on September 9, 2008, to which no appeal was filed.

4. The Appellee scheduled the medical and psychological examinations for Ms. Young on or about October 15, 2007 for October 19, 2007 which the Appellant failed to appear.

5. The Appellee scheduled the Appellant on October 24, 2007 to attend a predisciplinary hearing for November 1, 2007, which the Appellant failed to attend which would have addressed the failure to appear the attending the medical and psychological examinations and/or insubordinate actions thereof.

6. As a result, the Appellee issued to the Appellant an order of removal on or about January 3, 2008, for her continued inappropriate behavior and insubordination.

7. The Appellee, proved by a preponderance of the evidence, the allegations contained within the instant order of removal.

8. The Appellant did not offer any evidence regarding disparate treatment.

9. The Appellee did show that the Appellant had previously been disciplined for a 3, 5, and 10-day suspensions all in relation to have the Appellant attend psychological and/or medical examinations which she continued to refute.

CONCLUSIONS OF LAW

The issues before this Board of Review are whether the Appellant violated or was guilty of inappropriate behavior and/or for insubordination for her continued failure of being required to attend psychological and medical examinations as requested by the County. Further, this Board must also consider whether the Appellant's removal of employment was too harsh considering the circumstances and/or it constituted disparate treatment. The Appellee believes the Appellant's removal was necessary and appropriate considering that the Appellant had been on at least three previous times had been notified to attend scheduled medical and psychological examinations which she refused to attend wherein she cited various concerns of harassment and/or unwarranted invasions of her privacy. However, the Appellee believed that the Appellant's removal was necessary considering that they had on a least three previous occasions under Ohio Administrative Code Section 123:1-30-03(D) regarding medical and psychological examinations wherein the employee's failure to appear for the examination and/or an employee's refusal to submit to an examination or the unexcused failure to appear for an examination amounts to insubordination, punishable by the imposition of discipline up to an including removal. Further, an employee is also to be held responsible for the costs

associated with an unexcused failure to appear at a scheduled examination, as well. In this case, the Appellant had previously had three prior examinations which she failed to attend which she received discipline and this being the fourth, which she failed to attend.

The Appellee in its Ohio Revised Code Section 124.34 order of removal, charged the Appellant with insubordination for failing to attend a psychological and medical examination as required under Ohio Administrative Code Section 123:1-30-03(D).

In the instant appeal, the Appellee did prove, by a preponderance of the evidence, the charge set forth in the Appellant's order of removal.

As was revealed by the testimony, by a preponderance of the evidence, the Appellant after having been notified of being required to attend a medical and/or psychological examination failed to attend and in this case, for the fourth time. The Appellant in this matter had been previously disciplined three times regarding similar circumstances and regarding similar notifications of attendance wherein she failed to attend and therefore she was on constructive notice that she was going to have to attend or she was going to have discipline levied against her. The evidence showed that the County adhered to a progressive disciplinary track and that the Appellant had previous notice of the county's personnel policy and manual, as well.

It the order of removal issued to the Appellant in this proceeding could be decided based upon the intentions of the Appellant, and the Appellant's testimony 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 an order of removal is not the issue upon which 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 is more concerned with whether the alleged misconduct occurred and if so what disciplinary action reasonably attaches to the proven misconduct.

Ohio Revised Code Chapter 124. nowhere defines "insubordination". However, Black's Law Dictionary does define "insubordination" to mean:

. . . . state of being insubordinate; disobedient to constituted authority. Refusal to obey some order which a superior officer is entitle 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 at page 801 (Deluxe 6th Edition 1990).

For the Appellee to establish that the employee committed an act of insubordination, the Appellee had to show that the employee refused to obey an order which a superior officer was entitled to give and have obeyed and/or a willful or intentional disregard of unlawful and unreasonable instructions of the employer were not followed.

As was revealed by the testimony, the Appellee did prove by a preponderance of the evidence, that the Appellant was insubordinate by not following the instructions of attending a psychological and medical examination as previously indicated. The appointing authority under Ohio Administrative Code Section 123:1-30-03(A) an appointing authority may require that an employee submit to a medical or psychological examination for purposes to determining disability separation or reinstatement from a disability separation. Further, the employer under 123:1-30-03(D) may issue discipline up to and including removal for the employee's failure to appear for said examination as well. In the instant appeal the employer not only gave the Appellant three prior notices which she failed to attend in which discipline was issued, but that she was given one more time to adhere to the law in following a lawful order for her to attend a psychological and medical evaluation especially after the fact that she had a "medical crisis" on April 20, 2007. Further, there was no evidence by the Appellant offered in any shape, manner or form as to why she did not attend these scheduled psychological examinations when required to do so by law. However, it should be noted that the Appellant did offer her statements that her attendance to these examinations were unwarranted and a violation of her civil rights, a statement which was not persuasive to the undersigned.

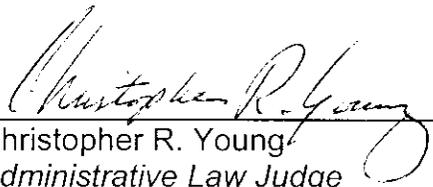
In the instant appeal, the documentary evidence and testimonial evidence revealed that the Appellant knew of an established standard of conduct which she was required to maintain in the performance of her job as a Social Program Specialist, along with having been previously disciplined on three prior occasions regarding her failure to attend and the necessity of her to attend these medical examinations. 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.

However, there remains a question of whether the discipline imposed should be sustained. The undersigned recommends that the evidence presented at the record hearing, taking the totality of the circumstances into account is sufficient to support the removal of the Appellant. The undersigned in reviewing the evidence regarding the Appellant's continued insubordinating acts which resulted in a 3, 5 and 10 day suspensions believes that the Appellant was simply being obstinate in not allowing the Appellee agency to access whether or not the Appellant was ready, willing and able to perform her job duties after she had this "medical crisis" after she had stated that she feared that she could not handle the stress of the workplace. The undersigned recommends that the removal be upheld is made in the hope that such disciplinary action will impress upon the Appellant and others, the necessity of complying with the violated rule of not being insubordinate.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the instant order of removal issued to the Appellant, effective January 29, 2008 be **AFFIRMED**.



Christopher R. Young
Administrative Law Judge

CRY:dIm