

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Sharon Young,

Appellant,

v.

Case No. 08-SUS-01-0007

Montgomery County Board of Commissioners,

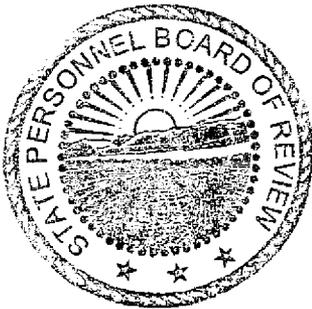
Appellee.

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 ten-day suspension be **AFFIRMED**, pursuant to O.R.C. §§ 124.03 and 124.34.



Lumpe - Aye
Booth - Aye
Sfalcin - Aye

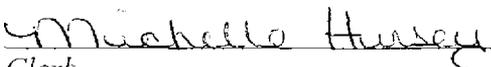


J. Richard Lumpe, *Chairman*

CERTIFICATION

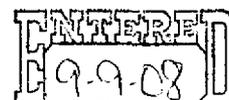
The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, September 9, 2008.



Michelle Hussey
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-SUS-01-0007

Appellant

v.

July 24, 2008

Montgomery County Board of Commissioners,

Elaine K. Stevenson
Hearing Officer

Appellee

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 9, 2008. Appellant was present at the record hearing and appeared *pro se*. Appellee was present at the record hearing through its designee, Human Resources Director Stephanie R. Echols, and was represented by Montgomery County Assistant Prosecuting Attorney Robert L. Guehl.

This Board's subject matter jurisdiction over this proceeding was established, pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant was suspended for ten days from her Social Program Specialist position with Montgomery County Department of Job and Family Services, Children Services Division.¹ The particulars of the R.C. 124.34 disciplinary order issued to Appellant are as follows:

This serves as notice of a ten day suspension from your position of Social Program Specialist. This will become part of your personnel record.

A pre-disciplinary meeting was held on Friday August 3, 2007 to discuss your failure to appear for scheduled medical

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Appellant also filed a "whistleblower" appeal alleging that the ten-day suspension she received was because of her "whistle blowing" activities. Pursuant to this Board's March 18, 2008 procedural order, the record hearing scheduled for May 9, 2008 was to address both Appellant's ten-day suspension, SPBR Case No. 08-SUS-01-0007, and Appellant's related "whistleblower" claim, SPBR Case No. 08-WHB-01-0009. The March 18, 2008 procedural order set forth the burden of proof and order of presentation of evidence with respect to each appeal. After testimony and evidence was presented and the parties rested in SPBR Case No. 08-SUS-01-0007, Appellant's presentation of her "whistleblower" case was to begin. Appellant stated on the record that she wanted to withdraw her "whistleblower" appeal SPBR Case No. 08-WHB-01-0009. On May 9, 2008, Appellant filed a notice of withdrawal of SPBR Case No. 08-WHB-01-0009.

evaluations as directed. You did not attend the pre-disciplinary meeting. You have active three-day and five-day suspensions for the same infraction currently on your record. Your continued failure to comply with management's directives is wholly unacceptable and can not (*sic*) be tolerated. Further infractions will result in progressive discipline up to and including removal.

STATEMENT OF THE CASE

Appellee called Appellant as if on cross examination. Appellant identified Appellee's Exhibit S as a copy of the letter and the R.C. 124.34 disciplinary order regarding her ten-day suspension. Appellant identified Appellee's Exhibit U as a copy of the certified mail return receipt for her ten-day suspension letter and R.C. 124.34 Order of Suspension. Appellant confirmed that the certified mail return receipt indicates that she received those documents on July 5, 2008. Appellant stated that she did not recall receiving notice of the pre-disciplinary hearing scheduled for August 3, 2007. Appellant acknowledged that her prior discipline includes a three-day suspension and a five-day suspension for the same type of infraction for which she received a ten-day suspension.

Upon further questioning, Appellant confirmed that she requested an administrative transfer in April 2007, but her request was denied. Appellant confirmed that she requested the administrative transfer because her work situation was affecting her health. Appellant further confirmed that she had prior medical problems and that she notified her supervisor of these problems. Appellant stated that she took a four-week leave in March 2007.

Upon further questioning, Appellant confirmed that, on April 20, 2007, she attended a meeting at work. Appellant further confirmed that she sent her supervisor e-mails on or about April 20, 2007, advising her supervisor that her work situation was impacting what she described as her "already fragile health condition." Appellant stated that she was not aware that the April 20, 2007 meeting was a pre-disciplinary meeting. Appellant recalled that she was presented with two letters that were inaccurate, and she indicated that she informed her supervisor that she did not have legal representation and that the meeting needed to end. Appellant indicated that she did not recall how long the April 20, 2007 meeting lasted, but she did recall becoming ill during the meeting. Appellant explained that she believed she was having a massive heart attack, and she indicated that when she began exhibiting symptoms the meeting ended. Appellant recalled that the sheriff was called to the office to assist with her medical crisis, and she indicated that the sheriff waited with her until paramedics arrived and took her to the hospital. Appellant confirmed that she was evaluated at the hospital and was released after being told she was suffering from

stress. Appellant indicated that she contacted her supervisor to let her know that she had been released from the hospital. Appellant identified Appellee's Exhibit B as a copy of Appellee's Critical Incident Report regarding the events that occurred during the April 20, 2007 meeting. Appellant stated that the Critical Incident Report contained inconsistencies. Upon further questioning, Appellant acknowledged that at some point during the meeting she was on the floor on all fours and appeared to be in severe pain. Appellant explained that she was on the floor practicing a deep-breathing technique for heart attacks. Appellant stated that she did not provide the hospital report because she was not asked to provide such a report.

Appellant identified Appellee's Exhibit C as a copy of the letter that she received from Human Resources Director Stephanie Echols. Appellant confirmed that Ms. Echols' letter to her advised her that she was being placed on paid administrative leave and that two appointments had been scheduled for her with Medical Evaluators, Inc. to assess her ability to perform her job duties. When questioned regarding the letter, Appellant confirmed that she understood that the purpose of the two scheduled medical appointments was to assess her ability to perform her job duties. Appellant stated that she did not attend the scheduled appointments on April 24, 2007 and April 27, 2007 because she was shocked at the way she was being treated and felt that such appointments were intrusive and a violation of her civil rights. Appellant acknowledged that she fully understood the contents of the letter identified as Appellee's Exhibit C, including the sentence which advised that the appointments were mandatory and failure to appear would be considered insubordination.

Appellant identified Appellee's Exhibit E as a copy of the April 27, 2007 letter that notified her of a scheduled pre-disciplinary meeting for insubordination due to her failure to attend the medical appointments scheduled for April 24, 2007 and April 27, 2007. After several questions regarding her attendance at the pre-disciplinary meeting, Appellant confirmed that she did attend the meeting. Appellant confirmed that Appellee's Exhibit G contains the pre-disciplinary hearing notes and she indicated that these notes are basically accurate. Appellant acknowledged that she received a three-day suspension but she stated that she did not know the reason for the discipline. Appellant identified Appellee's Exhibit K as copy of the May 8, 2007 letter which notified her that she was suspended for three days. Appellant confirmed that the May 8, 2007 letter explains that the suspension was for insubordination due to her failure to attend the medical evaluation appointments that were scheduled for April 24, 2007 and April 27, 2007.

Appellant identified Appellee's Exhibit H as a copy of the May 3, 2007 letter from Medical Evaluators, Inc., which notified Appellant that a medical evaluation had been scheduled for her for May 8, 2007. Appellant indicated that she could not remember if she received the May 3, 2007 letter, and she stated that if she received the letter she is not

sure when she received it. Appellant explained that she was going through a great deal of medical testing in May 2007, and her memory regarding documents she received was unclear.

Upon further questioning, Appellant acknowledged that she did not appear at any of the medical or psychological appointments that Appellee scheduled for her.

Appellant was referred to Appellee's Exhibit P (May 23, 2007 letter regarding Appellant's five-day suspension). Appellant stated that she did not recall receiving the letter. Appellant was asked if she recalled attending the May 11, 2007 pre-disciplinary meeting regarding the five-day suspension. Appellant stated that she did not recall attending that meeting. Appellant acknowledged that she appealed her five-day suspension to this Board. (Appellee's Exhibit Q - Appellant's response to this Board's questionnaire regarding five-day suspension.)

Appellant was referred to three personnel/payroll action forms marked as Appellee's Exhibit R. Appellant confirmed that her initial ten-day suspension action was rescinded and the involuntary disability separation action was rescinded. Appellant confirmed that she was placed on paid administrative leave and she was given pay for the rescission of the ten-day suspension.

Appellant was referred to Appellee's Exhibit S (January 3, 2008 letter and R.C. 124.34 disciplinary order reissuing Appellant's ten-day suspension). When asked if she received notice of and attended the August 3, 2007 pre-disciplinary meeting, Appellant stated that she did not recall if she received notice of the meeting.

Testimony regarding the circumstances surrounding discrimination claims filed by Appellant with the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission was not summarized as such testimony is irrelevant to the R.C. 124.34 disciplinary action that is the subject of this appeal.

Upon further questioning, Appellant stated that it is her belief that the medical and psychological evaluations she was directed to undergo were retaliatory actions and not justified. Appellant stated that after her medical crisis during the April 20, 2007 meeting, she was permitted to submit a medical statement from her personal physician regarding the medical need for a transfer from her current supervisor, Josie Olsvig. Appellant stated that she did not recall the contents of the medical statement nor did she have a copy of the statement. Upon further questioning, Appellant acknowledged that, after she submitted the medical statement, she was notified that more detailed information was needed and that she would be required to undergo medical and psychological evaluations that were scheduled by Appellee. Appellant confirmed that she refused to appear at the medical and psychological evaluations that were scheduled by Appellee.

Appellee called Stephanie R. Echols as its second witness. Ms. Echols testified that she is employed by Appellee and currently holds the position of Montgomery County Human Resources Director. Ms. Echols indicated that her previous position was Human Resources Director of Montgomery County Department of Job and Family Services, and, prior to that, she held the position Human Resources Director of Montgomery County Children Services.

Ms. Echols testified that she was the Human Resources Director of Montgomery County Department of Job and Family Services at the time of the incidents that formed the basis for Appellant's ten-day suspension. Ms. Echols stated that she did not supervise Appellant. Upon further questioning, Ms. Echols confirmed that she has seen the Critical Incident Report marked as Appellee's Exhibit B, and she indicated that the report was sent to the Human Resources Office. Ms. Echols confirmed that she signed the letter marked as Appellee's Exhibit C. Ms. Echols further confirmed that the purpose of the letter was to notify Appellant that she had been scheduled for medical and psychological evaluations to assess her ability to perform her job duties. Ms. Echols also confirmed that Appellee made the decision to send Appellant for medical and psychological evaluations because of Appellant's behavior during the April 20, 2007 meeting. Ms. Echols stated that she was aware of the January 3, 2008 letter that was sent to Appellant regarding her ten-day suspension. (Appellee's Exhibit S)

Upon further questioning, Ms. Echols confirmed that the medical and psychological evaluations had been scheduled and rescheduled and that Appellant also failed to appear for the medical and psychological evaluations scheduled for July 17, 2007 and July 19, 2007. Ms. Echols confirmed that a pre-disciplinary meeting was scheduled for August 3, 2007 to address Appellant's failure to appear at the medical evaluations scheduled in July 2007. Ms. Echols indicated that Appellant failed to attend the August 3, 2007 pre-disciplinary meeting. Ms. Echols confirmed that Appellant also has a three-day suspension and a five-day suspension on her record for the same type of infractions for which she received the present ten-day suspension. Ms. Echols identified Appellee's Exhibit R as copies of personnel/payroll action forms related to the rescission of the initial ten-day suspension due to a procedural defect, the rescission of the involuntary disability separation, and the placement of Appellant on paid administrative leave. Ms. Echols confirmed that the documents labeled as Appellee's Exhibit U show that the ten-day suspension was reissued to Appellant and that Appellant was served with the suspension order before the effective date of the reissued ten-day suspension.

On cross examination, Ms. Echols stated that Appellee has a formal grievance procedure which the county routinely follows. Ms. Echols was asked to review Appellant's Exhibits 14, 15, and 16. Ms. Echols confirmed that she was copied on the April 19, 2007

e-mail from Appellant marked as Appellant's Exhibit 14. Ms. Echols stated that she did not consider the April 19, 2007 e-mail to constitute a formal grievance. With respect to Appellant's Exhibit 15, Ms. Echols indicated that she did not know how those individuals who received the e-mail contained in this exhibit viewed the contents of the e-mail in terms of the formal grievance procedure. Ms. Echols stated that Appellant's e-mails appear to be questioning work advisories given to Appellant by her supervisor. Ms. Echols reviewed Appellant's Exhibit 16 and identified the exhibit as e-mails from Appellant to her supervisor. Ms. Echols stated that Appellant's e-mails are not formal filings of grievances. Ms. Echols was asked to read a portion of Appellee's policy regarding the grievance process.

Upon further cross examination, Ms. Echols stated that Appellee mandated that Appellant undergo medical and psychological evaluations because of Appellant's behavior during the April 20, 2007 meeting with her supervisor when she became anxious, fell to the floor clutching her chest and shouting. Upon further questioning, Ms. Echols was referred to Appellant's Exhibit 22 (May 2, 2007 Interoffice Memorandum from the witness to Appellant). Appellant asked Ms. Echols to read the memorandum. Ms. Echols was asked if she recalled the substance of the medical statement mentioned in her May 2, 2007 Memorandum. Ms. Echols stated that she did not recall the content of the medical statement. Ms. Echols asked if Appellant could provide her with a copy of the medical statement to refresh her memory and Appellant responded that she did not have a copy.

Upon further cross examination, Ms. Echols testified that Appellee was never able to establish Appellant's fitness for duty because Appellant never attended any of the medical and psychological evaluations scheduled for her by Appellee.

On redirect examination, Ms. Echols confirmed that Appellant's April 19, 2007 e-mail to her contains Appellant's statement regarding her "already fragile health." (Appellant's Exhibit 14) Ms. Echols further confirmed that Appellant's April 20, 2007 e-mails contain Appellant's statement regarding her "already fragile health." (Appellant's Exhibit 16) In referring to the witness's May 2, 2007 memorandum labeled as Appellant's Exhibit 22, Ms. Echols stated that Appellant did not provide the information requested in the memorandum.

On re-cross examination, Ms. Echols stated that Appellee took immediate action after the April 20, 2007 incident by directing Appellant to undergo medical and psychological testing. Ms. Echols confirmed the chronology events and reiterated that Appellant's behavior during the April 20, 2007 meeting confirmed for management that there was health concern. Ms. Echols noted that, following the April 20, 2007 incident, a letter was issued to Appellant directing her to appear for medical and psychological evaluations in order to determine if she was medically and psychologically fit to perform her job duties.

On redirect examination, Ms. Echols identified Appellee's Exhibit D as a copy of a letter to Dr. Mark Reynolds from Appellant's supervisor, Josie Olsvig. On cross examination, Ms. Echols stated that she did not know how long Ms. Olsvig had been Appellant's immediate supervisor when she wrote the letter to Dr. Reynolds.

Appellee called Catherine Shearer as its final witness. Ms. Shearer testified that she is employed by Appellee and has held the position of Interim Director of Human Resources for approximately one year. Ms. Shearer was a Personnel Officer during the time period relevant to this proceeding.

Upon further questioning, Ms. Shearer confirmed that, as a Personnel Officer, her job duties at the time included scheduling medical and psychological evaluations for Montgomery County employees. Ms. Shearer identified Appellee's Exhibit X as a condensed copy of four business documents pertaining to the July 17, 2007 psychological evaluation appointment and the July 19, 2007 medical evaluation appointment scheduled for Appellant with Medical Evaluators, Inc. Ms. Shearer confirmed that Appellee's Exhibit X contains a copy of the letter she sent to Appellant which notified Appellant that she had been rescheduled for a psychological evaluation on July 17, 2007 and a medical evaluation on July 19, 2007. Ms. Shearer confirmed that her letter to Appellant is dated July 12, 2007. Ms. Shearer indicated that Appellee's Exhibit X also contains a copy of her July 17, 2007 e-mail regarding the information she received from Medical Evaluators, Inc. Ms. Shearer explained that Medical Evaluators, Inc. notified her that they had spoken with Appellant on July 16, 2007 to confirm her appointment and Appellant had told them she did not know of the appointment or who scheduled the appointment and she would not appear for the appointment. Upon further questioning, Ms. Shearer indicated that her July 12, 2007 letter to Appellant regarding the two July 2007 rescheduled appointments was sent by regular mail and certified mail.

On cross examination, Ms. Shearer stated that Medical Evaluators, Inc. contacted her regarding the appointments scheduled for Appellant. Ms. Shearer indicated that she did not know the practices of Medical Evaluators, Inc. with respect to confirming appointments with individuals. Ms. Shearer indicated that the July 16, 2007 communication between Medical Evaluators, Inc. and Appellant was the first instance she reported regarding contact between Medical Evaluators, Inc. and Appellant.

Ms. Shearer was referred to Appellant's Exhibit 22. Ms. Shearer testified that she has never seen the medical statement of Appellant's physician. When asked the purpose of scheduling Appellant for medical and psychological evaluations, Ms. Shearer stated that they were scheduled to assess Appellant's fitness for duty, specifically, whether she was able to perform the job duties of her position. Ms. Shearer noted that, in July 2007, she was a Personnel Officer and would not have been privy to the specific reasons Appellee

wanted Appellant to undergo medical and psychological evaluations. Ms. Shearer stated that, as a Personnel Officer, she was simply instructed to schedule these types of appointments. Ms. Shearer noted that Appellee repeatedly directed Appellant to appear for rescheduled medical and psychological evaluations, but Appellant failed to comply.

Appellant took the stand in her case-in-chief in her suspension case and made several statements. No other witnesses were called. Appellant stated that it was unlikely that she spoke with any individual from Medical Evaluators, Inc. because it is her habit to leave her telephone ringer off and to screen all of her calls. Appellant further stated that she had no recollection of receiving a telephone call from Medical Evaluators, Inc. and she was not exactly sure why that statement was made. Appellant further stated that Appellee never communicated to her the reason for requiring her to submit to a fitness for duty evaluation, and she indicated that she was unaware of any employee prohibited from returning to work because the employee did not have an exam of any kind.

Upon questioning from Appellee's representative, Appellant acknowledged that she has seen Appellee's Exhibit D. Appellant also acknowledged that she received discipline and was told it was insubordination to refuse to follow management's directives. Appellant stated that it is her understanding that failing to follow an illegal and unlawful order is not insubordination. Appellant stated that she did not understand that Appellee was contemplating placing her on an involuntary disability separation. Appellant reiterated that Appellee did not explain its reasons for its directive to her to undergo medical and psychological testing. Appellant stated that she did not recall receiving any notice of medical appointments scheduled for her in July 2007.

FINDINGS OF FACT

Based on the testimony presented and evidence admitted at the record hearing, the entirety of information contained in the record, and upon taking administrative notice of Montgomery County's Personnel Policies, including Chapter 34, I make the following findings of fact:

1. During the time period relevant to this proceeding, Appellant held a position with Montgomery County Department of Job and Family Services, Children Services Division, classified as Social Program Specialist.
2. After receiving e-mails from Appellant on April 19, 2007 and April 20, 2007 that indicated she was in fragile health, and as a result of Appellant's alarming behavior during an April 20, 2007 meeting with her immediate supervisor and another management employee, Lonnie Bowen, Appellee became concerned that

Appellant's physical and/or mental health was compromising her ability to perform her job duties. During the April 20, 2007 meeting, Appellant held her chest and breathed heavily. Appellant got down on the floor on all fours and appeared to be in severe pain. The agency sheriff was called to assist in the medical crisis and paramedics were called to transport Appellant to the hospital. Appellant was released from the hospital that same day. Appellant provided no medical documentation that provided specific medical information regarding her fragile health condition or the medical crisis that occurred on April 20, 2007.

3. On or about April 20, 2007, Appellee's Human Resources Director Stephanie R. Echols issued a letter to Appellant. That letter notified Appellant that she was being placed on paid administrative leave beginning April 23, 2007, and ending April 30, 2007. Appellee's letter further notified Appellant that Appellee had scheduled medical and psychological evaluations for her on April 24, 2007 and April 27, 2007, that attendance was mandatory, and that failure to appear for the scheduled evaluations would be considered insubordination. Appellant failed to appear for the April 24 and 27, 2007 evaluations.
4. On April 30, 2007, Appellant submitted a medical statement to her supervisor from "Dr. Fujimura." The statement indicated that Appellant should be transferred to a new supervisor due to stress. On May 2, 2007, Human Resources Director Stephanie Echols issued an Interoffice Memorandum to Appellant, advising Appellant that the information in Dr. Fujimura's statement was inadequate to provide her with a transfer. Ms. Echols' memorandum provided detailed instructions regarding obtaining the proper medical information concerning limitations or restrictions on Appellant's ability to perform her job duties.
5. On May 8, 2007, Appellee issued a letter to Appellant imposing a three-day suspension for insubordination due to Appellant's failure to appear for the medical evaluations that were scheduled for April 24, 2007 and April 27, 2007. The three-day suspension letter issued to Appellant notified Appellant that further infractions would result in progressive discipline up to and including removal.
6. Appellee rescheduled the medical and psychological evaluations for May 8, 2007 and May 10, 2007. On May 3, 2007, Appellee issued a letter to Appellant that notified her of the rescheduled medical and psychological evaluations. Appellant failed to appear for the rescheduled medical and psychological evaluations. On May 23, 2007, Appellee imposed a five-day suspension on Appellant for insubordination due to Appellant's failure to appear for the rescheduled medical and psychological evaluations. The five-day suspension letter issued to Appellant notified Appellant that further infractions would result in progressive discipline up to

and including removal. Appellant also timely received an R.C. 124.34 disciplinary order for her five-day suspension.

7. Appellee again rescheduled the medical and psychological evaluations for July 17, 2007 and July 19, 2007. Appellee notified Appellant of the rescheduled medical and psychological evaluations via a letter dated July 12, 2007 and sent via regular mail and certified mail.
8. On or about July 16, 2007, Medical Evaluators, Inc. notified Personnel Officer Catherine Shearer that during a telephone call with Appellant to confirm her July 17, 2007 appointment, Appellant indicated that she had no knowledge of the appointment and would not appear for the appointment.
9. Appellant failed to appear for the medical and psychological evaluations that had been rescheduled for July 17, 2007 and July 19, 2007.
10. Appellee scheduled a pre-disciplinary hearing for August 3, 2007 to address Appellant's failure to appear at the medical and psychological evaluation appointments rescheduled for July 17, 2007 and July 19, 2007. Appellant failed to appear at the August 3, 2007 pre-disciplinary hearing. Appellee imposed a ten-day suspension upon Appellant for her failure to appear for the psychological and medical evaluations that were rescheduled for July 17, 2007 and July 19, 2007.
11. Appellee attempted to serve Appellant with her R.C. 124.34 Order of Suspension for the above-cited rule infractions. Appellee was unable to serve Appellant with her R.C. 124.34 Order of Suspension on or before the effective date of the ten-day suspension. Appellee validly rescinded the R.C. 124.34 Order of Suspension and paid Appellant wages for the ten-day suspension.
12. In accordance with O.A.C. 124-3-03(C), Appellee issued another R.C. 124.34 Order of Suspension based on the same allegations. The following dates are the effective dates of Appellant's ten-day suspension: January 14, 15, 16, 17, 18, 22, 23, 24, 27, and 28, 2008. Appellant received the R.C. 124.34 Order of Suspension on January 5, 2008. Appellant timely filed her appeal of her ten-day suspension.

CONCLUSIONS OF LAW

R.C. 124.34(A) provides that the tenure of every employee in the classified service of the state shall be during good behavior and efficient service, and no classified civil service employee shall be reduced in pay or position, fined, suspended, or removed,

except for one or more of the enumerated grounds listed in this statute, grounds that include but are not limited to insubordination, violation of any policy or work rule of the employee's appointing authority, violation of R.C. Chapter 124. or the rules of the director of administrative services, any other failure of good behavior.

Pursuant to O.A.C. 124-3-06, the appointing authority must prove, by a preponderance of the evidence, the factual allegations contained in a disciplinary order. Failure to prove all of the allegations contained in an order does not, as a matter of law, require disaffirmance of an order.

* * * *

Appellant received a ten-day suspension for failing to appear for psychological and medical evaluations that were scheduled by Appellee for Appellant on July 17, 2007 and July 19, 2007, and for failing to appear for her scheduled pre-disciplinary meeting on August 3, 2007. After the valid rescission of the initial R.C. 124.34 disciplinary order due to a procedural defect, Appellee timely and properly served Appellant with another R.C. 124.34 disciplinary order stating the grounds for her ten-day suspension. That order is the subject of the instant appeal.

Appellant did not present any evidence which contradicted the allegations contained in her suspension order. Appellant admitted that she did not appear at the July 17, 2007 psychological evaluation appointment and she did not appear at the July 19, 2007 medical evaluation appointment. Appellant also admitted that she failed to appear at her August 3, 2007 pre-disciplinary meeting. Therefore, Appellee has met its burden of proof with respect to proving the allegations contained in the R.C. 124.34 disciplinary order issued to Appellant. This Board must now consider whether the ten-day suspension imposed upon Appellant was appropriate discipline.

Ohio's civil service law permits an appointing authority to place a civil service employee on an involuntary disability separation. The procedures for implementing such an action are outlined in O.A.C. 123:1-30 *et seq.* Pursuant to R.C. 124.14(G)(1), Montgomery County has established a County Personnel Department and promulgated its own administrative policies and procedures. Pursuant to O.A.C. 124-9-10, this Board takes administrative notice of Montgomery County's Personnel Policy Section 34-01, which provides, in pertinent part:

(A) An appointing authority, with the approval of the County Personnel Department, may require that an employee submit to a medical or psychological examination. Such examination shall be conducted by a licensed practitioner approved in advance by the County Personnel Department. . . .

(B) Employee's failure to appear for examination. *An employee's refusal to submit to the examination, the unexcused failure to appear for an examination, or the refusal to release the results of the examination amounts to insubordination, punishable by the imposition of discipline up to and including removal. . . .* (Emphasis added.)

The testimony and evidence presented at the record hearing established that Appellant notified Appellee via April 19 and 20, 2007 e-mails that she was suffering from an "already fragile health condition." On April 20, 2007, Appellant exhibited alarming behavior during a meeting with her supervisor, specifically, Appellant held her chest and breathed heavily. Appellant got down on the floor on all fours and appeared to be in severe pain. The agency sheriff was called to assist in the medical crisis and paramedics were called to transport Appellant to the hospital. Appellant was released from the hospital that same day. Appellant provided no medical documentation that contained specific medical information regarding her fragile health condition or the medical crisis that occurred on April 20, 2007. Appellant's behavior caused Appellee concern as to whether Appellant's health condition compromised her ability to perform the job duties of her position. Accordingly, as the first step in the possible involuntary disability separation of Appellant, Appellee ordered Appellant to appear for the above-mentioned psychological and medical evaluations. Appellant refused to comply with Appellee's directives and as a result she was disciplined.

In her closing argument, Appellant presented five arguments in support of her position that her ten-day suspension should be disaffirmed by this Board. First, Appellant argues that she did not receive notification of the psychological and medical evaluation appointments scheduled for July 17, 2007 and July 19, 2007. This argument is not supported by the testimony presented at the record hearing, in that Appellant testified that she did not *recall* receiving the letter notifying her of the appointments scheduled for her for July 17 and 19, 2007. Moreover, Appellant repeatedly testified that she did not recall receiving letters presented by Appellee regarding previous attempts to have her comply with directives to undergo psychological and medical evaluations. Appellant also testified that she did not recall receiving a number of letters and documents related to her three-day and five-day suspensions. In considering the entirety of Appellant's testimony, I find that Appellant's testimony with respect to her receipt of letters and documents issued by Appellee to be unreliable. Catherine Shearer, who was the Personnel Officer responsible for scheduling the psychological and medical evaluations for Appellant, had a clear recollection of scheduling the July 17 and 19, 2007 appointments. Ms. Shearer identified a copy of the July 12, 2007 letter she mailed to Appellant that notified Appellant of the psychological and medical evaluations scheduled for her with Medical Evaluators, Inc. for

July 17 and 19, 2007. No evidence was presented indicating that the July 12, 2007 letter mailed via regular mail to Appellant was returned as undeliverable or that Appellant had moved and was not receiving her mail. Therefore, I find that the evidence is sufficient to support a conclusion that Appellant received notice of the July 17 and 19, 2007 appointments scheduled for her.

Second, Appellant argues that she provided Appellee with a medical evaluation from her personal physician. Appellant did not submit a copy of that medical evaluation. Instead, Appellant submitted a copy of the May 2, 2007 Interoffice Memorandum that she received from Human Resources Director Stephanie Echols. The May 2, 2007 Memorandum appears to reference a statement from "Dr. Fujimura," in which he recommends that Appellant be transferred to a new supervisor due to stress. It is important to note that the May 2, 2007 Interoffice Memorandum advised Appellant that the information in Dr. Fujimura's statement was inadequate to provide her with a transfer. The May 2, 2007 Memorandum also provided detailed instructions regarding the proper medical information that must be submitted concerning limitations or restrictions on Appellant's ability to perform her job duties. At record hearing, Appellant admitted that she did not obtain the medical information requested by Ms. Echols in her May 2, 2007 Interoffice Memorandum.

Third, Appellant argues that Appellee never explained its rationale for ordering her to undergo psychological and medical evaluations. The evidence indicates that Appellee did not cite Chapter 34 of Montgomery County's Personnel Policies or O.A.C. 123:1-30 *et seq.* in its letter directing Appellant to attend scheduled psychological and medical evaluations. I note, however, that Appellee's July 12, 2007 letter advised Appellant that the purpose of the evaluations was to assess her ability to perform her job duties and that attendance was mandatory. Given Appellant's April 2007 e-mails regarding her fragile health condition and given Appellant's alarming behavior during the April 20, 2007 meeting, Appellee's concern over Appellant's ability to perform her work was understandable. In addition, Appellant received notice that failure to appear at the scheduled psychological and medical evaluation appointments would be considered insubordination which would result in progressive discipline up to and including removal. On May 8, 2007, Appellant received a three-day suspension for failure to appear for scheduled medical evaluations. On May 23, 2007, Appellant received a five-day suspension for failure to appear at the rescheduled medical evaluations.

Fourth, Appellant argues that Appellee's order to submit to psychological and medical evaluations was unlawful and therefore she was not required to comply. As noted previously, O.A.C. 123:1-30 *et seq.* and Montgomery County Personnel Policy Section 34-01 permit an appointing authority to require an employee to submit to a medical or a psychological examination for purposes of disability separation or a reinstatement from disability separation. Those policies also provide that an employee's refusal to submit to

an examination, the unexcused failure to appear for an examination, or the refusal to release the results of the examination amounts to insubordination, punishable by the imposition of discipline up to and including removal.

Fifth, Appellant argues that her ten-day suspension constitutes disparate treatment. O.A.C. 124-9-11 provides that an employee may introduce evidence of disparate treatment between the employee and other similarly situated employees of the same appointing authority for the purpose of evaluating the appropriateness of the discipline imposed. At the record hearing Appellant asserted that she received disparate treatment; however, Appellant did not identify any employees that were similarly situated to her in either position or circumstance or present any type of evidence that would constitute disparate treatment within the meaning of O.A.C. 124-9-11.

With regard to the August 3, 2007 pre-disciplinary hearing, I note that Appellant testified that she did not recall receiving notice of the August 3, 2007 pre-disciplinary hearing. No testimony or documentary evidence was presented at the record hearing establishing that Appellee issued a pre-disciplinary hearing notice for the August 3, 2007 pre-disciplinary hearing.

In conclusion, Appellee gave Appellant a number of chances to comply with its order to undergo psychological and medical evaluations scheduled in accordance with Montgomery County Personnel Policy Section 34-01 and O.A.C. 123:1-30 *et seq.* Appellant received a three-day suspension and a five-day suspension for failure to appear at scheduled appointments. Those prior disciplinary actions put Appellant on notice that her conduct in failing to appear for scheduled medical and psychological evaluation appointments was unacceptable and that further infractions would result in progressive discipline. Appellant continued to refuse to comply with Appellee's orders in this regard. As a result, Appellee imposed a ten-day suspension upon Appellant. I find that Appellant's refusal to comply with Appellee's order to undergo a psychological evaluation scheduled for July 17, 2007 and a medical evaluation scheduled for July 19, 2007 constitutes insubordination and that such conduct warrants a ten-day suspension.

Based on the foregoing, I respectfully **RECOMMEND** that Appellant's ten-day suspension be **AFFIRMED**, pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.



Elaine K. Stevenson
Hearing Officer

EKS:/