

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Leslie Terry,

Appellant,

v.

Case No. 2013-REM-01-0052

Hamilton County Developmental Disabilities Services

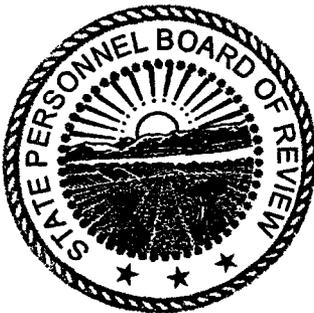
Appellee.

ORDER

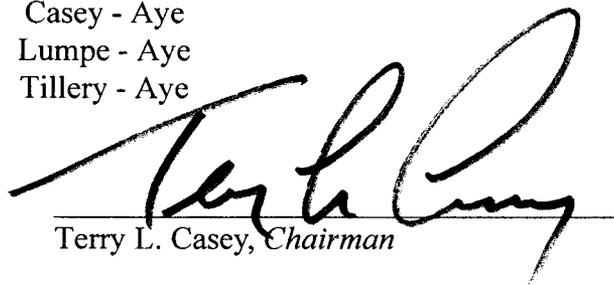
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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

Wherefore, it is hereby **ORDERED** that Appellee's removal of Appellant Terry is **AFFIRMED** pursuant to Section 124.34 of the Ohio Revised Code.



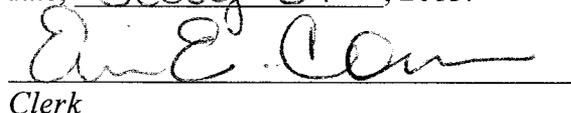
Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

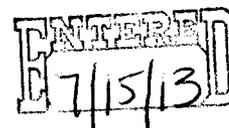
CERTIFICATION

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, July 31, 2013.


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**

Leslie Terry

Case No. 13-REM-01-0052

Appellant

v.

June 25, 2013

Hamilton County Developmental
Disabilities Services

Appellee

Marcie M. Scholl
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 6, 2013. Present at the hearing were the Appellant, Leslie Terry, represented by Jon B. Allison, Attorney at Law and Appellee Hamilton County Developmental Disabilities Services designee Kim Hauck, Program Services Director, represented by Kathleen H. Bailey, Assistant Prosecuting Attorney.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Terry was removed from her position of Instructor Assistant, effective January 25, 2013. The pertinent part of the removal notice states as follows:

. . . it has been alleged that from January 10 through January 17, 2013, you were absent from work without approval (your supervisor, Cindy Meinking specifically informed you that your absence for this period was not approved and thus, you were directed to return to work). You admitted that you did not appear for work and did not have approval for your absence. Therefore, you are guilty of insubordination.

Appellant Terry filed a timely appeal of her removal with this Board.

STATEMENT OF THE CASE

Appellee's first witness was Cindy Meinking, Principal of Fairfax School for eleven years. She explained that Fairfax is a school for children ages five to twenty-two with intensive needs. The school is operated by Appellee. Her immediate supervisor is Kim Hauck. Ms. Meinking testified she knows Appellant Terry, as she worked as an Instructor Assistant at Woodlawn, which is a satellite classroom. Ms. Meinking stated she was Appellant Terry's direct supervisor.

Ms. Meinking identified Appellee's Exhibit 1 as a personnel action form appointing Appellant Terry to a full-time permanent Instructor Assistant position on February 19, 2004. Appellee's Exhibit 2 was identified as the position description for Appellant Terry's position and Ms. Meinking testified it was an accurate description of her duties of assisting the classroom teacher.

Appellee's Exhibit 3 was identified by Ms. Meinking as a series of emails between her and Appellant Terry regarding Appellant Terry's request for time off. She explained Appellant Terry called her sometime in June, 2012, to talk about the renewal of her license and then asked her for two weeks off in January to go to New Zealand for a religious convention. Ms. Meinking stated she told her that was an unusual request for time off, as teachers are expected to work 185 days a year and to plan their vacations during the school breaks or summer. Ms. Meinking testified that during her tenure, no other employee has ever requested that many days off. She also stated that school employees do not get vacation days due to the number of holidays and school breaks they have.

Ms. Meinking testified she asked Appellant Terry to put the request in writing and the first email she received from her was dated June 18, 2012. The email states Appellant Terry would like off work from January 3 through 17, 2013, to attend an International Religious Convention in New Zealand. Ms. Meinking stated she then contacted her supervisor, Kim Hauck, and asked for her guidance since this was such an unusual request. Ms. Hauck then told Ms. Meinking to approve Appellant Terry for three days as emergency leave and three days for religious leave, for a total of six days. Ms. Meinking related this information to Appellant Terry on July 16, 2012, in an email. The email also states "Please note that any additional days past the 6 will be considered absence without approval and will result in discipline."

Appellant Terry did not return to work upon the expiration of her six days of approved absence, so when she returned to work on January 18, 2013, she was placed on Directed Leave with pay. Ms. Meinking identified Appellee's Exhibit 4 as the notice to Appellant Terry placing her on Directed Leave and informing her of a pre-disciplinary conference scheduled for January 24, 2013. Appellee's Exhibit 5 was identified by Ms. Meinking as the Pre-Disciplinary Conference report, dated January 24, 2013. Ms. Meinking identified Appellee's Exhibit 5A as the notice of Pre-Disciplinary Report which was hand delivered to Appellant Terry; Exhibit 5B as a letter dated November 27, 2012 from Appellant Terry to Ms. Meinking again requesting time off from January 3 to 17, 2013 and Ms. Meinking's response, dated December 5, 2012, wherein she states she is only approving six days off for her and "You need to understand that discipline could be dismissal from employment."; and Exhibits 5C-F as Appellant Terry's requests for leave.

Ms. Meinking explained that an employee must be in paid status the day before or after a holiday in order to get paid for the holiday. If Appellant Terry had been in a no-pay status on January 3, 2013, she would not have been eligible to be paid for the winter break. Additionally, if she was not in paid status on January 18, 2013, she would not be eligible for pay for the holiday of Martin Luther King Day on January 21, 2013. It was for these reasons, that Ms. Meinking approved Appellant Terry's special emergency days as January 3, 4, and 18, 2013, so she was in a pay status before or after a holiday, thus enabling her to get paid for her winter break and for Martin Luther King Day.

Ms. Meinking testified she was present at the pre-disciplinary conference. Appellant Terry stated during the conference that she was required to be in New Zealand from January 10 to the 15th, 2013, which is a total of four work days. Ms. Meinking stated Appellant Terry could have been there with the six days that she was approved to be off work. Appellant Terry then stated she was on vacation in Australia prior to going to New Zealand, although none of her requests for leave ever mentioned Australia, only New Zealand. Appellee's Exhibit 6 was identified by Ms. Meinking as emails between her and Superintendent Alice Pavey regarding Appellant Terry's pre-disciplinary conference statements and her time off request. Appellee's Exhibit 7 was identified as a written warning issued to Appellant Terry on February 24, 2012, for telling a student in her assigned classroom to "shut up".

Upon cross examination Ms. Meinking stated Appellee was not concerned with any time off in December 2012, as that was Appellant Terry's winter break. The first day back from winter break was January 3, 2013 and that day and the next were approved as emergency leave. Ms. Meinking explained she could not tell Appellant Terry that she was definitely going to be fired before she left on her leave as she had not yet done anything wrong. If she would have returned upon the expiration of her leave, then no discipline would have been warranted. Ms. Meinking testified Appellant Terry was charged with violating a Group 2 and 3 offense as defined in the discipline section of the Personnel Policy and Procedures, identified as Appellee's Exhibit 8. She explained those two offenses are Unauthorized Absence and Insubordination. Ms. Meinking also testified a substitute was hired to fill in for Appellant Terry while she was gone. She also stated she does not have the authority to fire any employee as the only person who can do so is Superintendent Pavey.

Appellee's next witness was Kim Hauck, Program Services Director for approximately one and a half years and employed by Appellee for approximately twenty-three years. She reports to Superintendent Pavey and is the direct supervisor of Ms. Meinking.

Ms. Hauck testified Ms. Meinking called her sometime in the summer asking her about Appellant Terry's request for leave. Ms. Hauck stated she researched the convention on-line and found that it was scheduled for three days over a weekend, so after speaking with Superintendent Pavey, she approved Appellant Terry for six days of leave time. Ms. Hauck testified she attended the pre-disciplinary conference for Appellant Terry and at the conference, Appellant Terry stated she could not fly home from vacation in Australia and then fly back to New Zealand for the religious event. Ms. Hauck recalled Appellant Terry saying two times that she was on vacation during the relevant time period.

In looking at Appellee's Exhibit 8, the Personnel Policy and Procedure Manual, section 4.4, Ms. Hauck testified it states that school staff are not eligible for vacation. She stated this is especially so when teaching disabled students, as they need consistency in their programming. Ms. Hauck testified that the granting of a leave of absence is discretionary and the only times she has approved leaves of absence have been for medical issues. She stated she felt Appellee was generous in granting Appellant Terry religious holiday leave, as her request was not due to a religious holiday.

Ms. Hauck identified Appellee's Exhibit 9 as the training sessions Appellant Terry attended. The most recent training on the policies and procedures of the Appellee took place on January 17, 2012 and take place every year. Appellee's Exhibit 10 was identified as the removal order given to Appellant Terry. Ms. Hauck testified she recommended removal to Superintendent Pavey, as her reasoning was that progressive discipline is used when an employee does not understand the infraction, but in this case, she felt Appellant Terry was blatantly insubordinate as they had worked hard to approve her leave time and she was told repeatedly that students struggle with transitions. The time that was taken off came after a long winter break even though Appellant Terry knew the days she was approved for, she took more time off and was dishonest in her request, as she never mentioned until the pre-disciplinary conference that she was also going on vacation.

Appellant Terry testified she was hired by Appellee in February, 2004, as an Instructor Assistant. She identified Appellant's Exhibit 2 as her position description and stated that it accurately described her duties. She stated she worked in the classrooms at Woodlawn and Hilltop and would have a maximum of six students with one to two Instructor Assistants. Appellant Terry testified she requested time off from January 3 to January 18, 2013 and also stated she would take six days as unpaid or as a leave of absence. She stated she knew the policy allows for a maximum of six months leave of absence so she felt she should have been approved for six days leave of absence.

Appellant Terry testified she felt that at the most, she would receive a verbal reprimand, as she was a ten year employee and considered to be a good worker. She testified she left her home on December 24 and arrived in Sydney, Australia on December 27, 2012. She spent two weeks in Australia and arrived in New Zealand on January 9, 2013. The convention began on January 10 and she was in Christ Church, New Zealand until January 13, 2013. She stated her entire trip was for a religious purpose and she denied using the word "vacation" during her pre-disciplinary conference.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. Appellant Terry had been an employee of Appellee for approximately nine years as an Instructor Assistant when she was removed from her position, effective January 25, 2013. Her previous discipline consists of a written warning in February, 2012 for telling a student in her classroom to "shut up".
2. As an Instructor Assistant, Appellant Terry worked in classrooms assisting the teachers. The students in the classroom were disabled students.
3. As an Instructor Assistant, Appellant Terry was not eligible for vacation leave, as the Appellee's policies state that due to the extended breaks in the teaching schedule (winter, spring and summer); vacation leave was not accrued, as employees were expected to schedule their vacations during the break times.
4. On approximately June 14, 2012, Appellant Terry requested time off from January 3-18, 2013 to attend an International Religious Convention in New Zealand. This time period immediately followed winter break with school resuming on January 3, 2013.
5. Appellant Terry was approved for a total of six (6) days leave and was specifically told that any additional days off past the six (6) days would not be approved and would be considered as absence without approval, subject to discipline.
6. Appellant Terry was absent from her job for the time period of January 3 to 18, 2013 with only six (6) of the days being approved for leave.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Terry to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the removal order. Appellee has met its burden.

Appellant Terry was removed for violating the provisions of section 124.34 of the Ohio Revised Code, namely that she was insubordinate. The evidence has established that she was indeed insubordinate. As early as July 16, 2012, Appellant Terry was told that she was only approved for six (6) days of leave and that any days beyond those "...will be considered absence without approval and will result in discipline." (Appellee Exhibit 3). In Appellant Terry's original email dated June 14, 2012, but sent on June 18, 2012, Appellant Terry does not even ask for time off work, instead she essentially states she is going and informs Ms. Meinking of the days she will be gone. The email states as follows:

Hello Cindy, This is a written letter that I wanted to express to you about a Special event that is going to be (sic) take place. The event is an International Religious Convention, in the county of New Zealand, the event takes place in January 2013.

This once in a life time experience has been extended to me. As you know, I am one of Jehovah's Witnesses. My family and I have excepted (sic) this special honor, to be among the thousands worldwide that will be gathered there in Christchurch New Zealand.

Therefore in writing, I wanted to let you know that I will need to be off from work on January 3-18, 2013 to attend this very special spiritual convention. I am aware that I do have three days for religious holidays, three days for special/emergency leave. So looking at that, there are seven days that I would like to respectfully request to use as unpaid leave days, or to be made up at your discretion.

I appreciated you giving this request the proper consideration in view of my pass (sic) eight years of quality service with the county.

As was pointed out by Appellee, Appellant Terry's request makes no mention of going to Australia, only to New Zealand. When Appellant Terry re-submitted her request along with her leave request forms on November 27, 2012, Ms. Meinking responded on December 5, 2012, and specifically told her she was not approving any leave beyond the already approved six (days) and also specifically told her that if she uses any days beyond the six days, she will be disciplined and the discipline could be dismissal. Ms. Meinking's response states as follows:

12/5/12

Leslie – I have approved your 3 Special Emergency Days and your 3 Religious days as per policy. I am not approving your 6 unpaid days. We spoke about this in June 2012 and at that time I told you that I would not approve unpaid days for travel during your scheduled work calendar. As a result, discipline will be administered upon your return. You need to understand that discipline could be dismissal from employment.

Despite being told she was only approved for six (6) days leave time, Appellant Terry was gone from January 3 to January 18, 2013, which was more than the six days she was approved for. It was not until her pre-disciplinary conference that she mentioned she was in Australia for a vacation. While Appellant Terry denies stating she was on vacation, her testimony on that issue is not credible, as the other witnesses' testimony establish that she did state such. Also, the information Appellee found regarding the conference states the conference was held from Friday, January 11 through Sunday, January 13, 2013 in New Zealand. All of Appellant Terry's emails do not mention Australia, only New Zealand, and it was not until the pre-disciplinary conference that anyone even knew she had been in Australia. Realizing her error, Appellant Terry then tried to justify being in Australia as part of the convention so that it would not appear that she had not been completely honest in her request for leave.

Appellee's policies, which the evidence established Appellant Terry was aware of and had been trained on, specifically states in section P4.4, (Appellee's Exhibit 8) that "Pay for vacation credit for school-year staff is incorporated into their 26 biweekly pay plans which are determined by the number of days worked, legal holidays, and days for vacation for which they are eligible. Therefore, **school-year staff may not take vacation time off or carry it over to the next year.**"

(Emphasis added). The policy also provides, in section P4.9 that leaves of absence without pay may be granted upon approval and “is solely a matter of administrative discretion...”. Appellant Terry argued that due to her employment of approximately nine years, her early request for time-off and the possibility of obtaining a substitute for her, she should have been granted a leave of absence to cover the time off beyond her six days of approved leave.

The policy is very clear that a leave of absence is granted at the sole discretion of the administration and the testimony of Ms. Hauck was that given the fact that Appellant Terry had just been off work for a number of days over the winter break, that she had been given six days approved leave, that the students she was assisting needed consistency in their programming and that staff is not entitled to vacation leave, the denial of a leave of absence was not an abuse of discretion. The testimony also established that a leave of absence was usually only granted for medical reasons or in one instance, in 2008 or 2009, for an employee dealing with damage from hurricane Ike. Appellee had absolutely no requirement to grant a leave of absence to Appellant Terry.

Appellant Terry also argued that she was never told she would be removed from employment if she did not return to work upon the expiration of her six days of leave. While she may not have been told she would definitely be removed, she was certainly put on notice of that possibility. In Ms. Meinking’s response to her leave requests on December 5, 2012, she was specifically told that discipline could be “dismissal from employment”. As Ms. Meinking testified, no one could tell her before she left that she would be removed, as she had not violated any policies until she did not return after the expiration of her leave time. Also, the only person who could make the determination of removal is the Superintendent, and that decision can only be made after holding a pre-disciplinary conference.

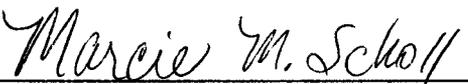
Appellee went out of their way to approve leave time for Appellant Terry in the amount of six days. The Religious Holidays provision is to grant employees days off for religious holidays. The attending of a convention is not a religious holiday but Appellee gave Appellant Terry a bone and granted the three days of Religious Holiday leave. They also made sure they approved January 3, 2013 as an approved leave, as according to Appellee’s policy, if that day was not an approved day, then Appellant Terry would not have been paid for her entire winter break. They also approved the day before the holiday of Martin Luther King Day so that she would get paid for that holiday. While that may have been confusing since the

days in-between January 9 and January 18 were not approved, nevertheless Appellee was trying to ensure payment of salary for Appellant Terry. The fact that Appellee approved those days was not a message to Appellant Terry to go ahead and take off the unapproved days.

Ms. Hauck testified she recommended removal of Appellant Terry to Superintendent Pavey even though her only other discipline was a written warning because she felt Appellant Terry understood what she was doing wrong, but did it anyway, thinking her punishment would not be very strong. Also, she was told repeatedly that if she did not return upon the expiration of six days leave, she would be disciplined. Appellant Terry also did not take into account the effect her absence had on her students, the fact she had just been off on winter break and the fact that she was dishonest about going on vacation in Australia.

Appellant Terry was dishonest and insubordinate. She had been off on a winter break of several weeks prior to the time she requested off. As Appellee argued, with the six days leave she was given, she could have gone to New Zealand only for the conference and complied with her approved leave time. Sometimes as adults, there are things that must be put off or missed due to commitments made, such as work schedules and the following of policies and procedures. Appellant Terry chose to ignore those commitments and policies and procedures and instead she did exactly as she pleased, figuring she would receive only a reprimand, although she was repeatedly warned of what the consequences could be. That is the definition of insubordination.

Therefore, it is my **RECOMMENDATION** that Appellee's removal of Appellant Terry be **AFFIRMED** pursuant to section 124.34 of the Ohio Revised Code.



Marcie M. Scholl
Administrative Law Judge

:mms