

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

JENNIFER L. HARPER,

Appellant

v.

Case No. 08-REM-04-0092

OHIO STATE UNIVERSITY,

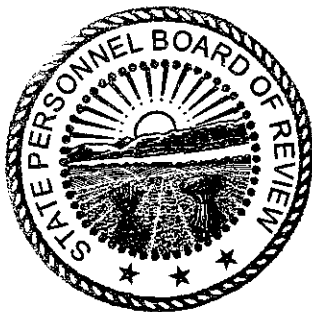
Appellee

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 be **AFFIRMED**, pursuant to R.C. 124.34.



Lumpe - Aye
Booth - Aye
Sfalcin - Aye

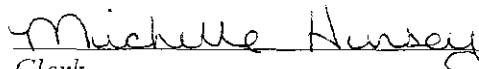


J. Richard Lumpe, *Chairman*

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 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, February 5, 2009.



Clerk

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

2509

**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

Jennifer L. Harper,

Case No. 08-REM-04-0092

Appellant

v.

November 20, 2008

Ohio State University,

Elaine K. Stevenson

Appellee

Hearing Officer

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on September 18, 2008. Appellant was present at the record hearing and appeared *pro se*. Appellee was present at the record hearing through its designee, Shina Hayden, Human Resources Generalist, and was represented by Assistant Attorneys General Brooke E. Leslie and Reid T. Caryer.

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

Appellee removed Appellant from her position as Information Associate, effective March 26, 2008. The particulars of the R.C. 124.34 disciplinary order issued to Appellant are as follows:

drunkenness:

On January 10, 2008, you received a verbal warning for neglect of duty. On February 12, 2008, you were issued a written reprimand for neglect of duty. Since that time, on March 4, 2008, based on the behavior you were exhibiting at work in terms of performance and attendance your manager requested that you submit to a drug and alcohol test. The results showed that you had three illegal substances in your system while at work. Your conduct is in violation of Ohio Revised Code and OSU policy 7.30 Drug Free Workplace.

STATEMENT OF THE CASE

Jennifer L. Harper (Appellant) testified as if on cross examination. Appellant testified that she was employed by Appellee as an Information Associate. Appellant confirmed that she was assigned to the Office of the Registrar. Appellant stated that her job duties included: verification of enrollments; working at the front counter; and answering the telephone. Appellant stated that she was given a copy of Appellee's Employee Handbook. Appellant confirmed that she reviewed Appellee's employee policies and was familiar with Appellee's Drug-Free Workplace Policy. Appellant stated that her work hours were 7:30 a.m. to 4:30 p.m.

Upon further questioning, Appellant confirmed that she was scheduled to start work at 7:30 a.m. on March 4, 2008, but she did not report to work until 12:40 p.m. that day. Appellant recalled that she had been at work for approximately forty-five minutes when her supervisor instructed her to report to Shina Hayden in the Office of Human Resources. Appellant stated that Ms. Hayden informed her that Appellee wanted her to take a drug test. Appellant confirmed that she told Ms. Hayden that if she took such a test, she would test positive for drugs. Appellant further confirmed that Appellee advised her to seek help and referred to Lisa Borrelli. Appellant recalled that she took a drug test, as instructed. Appellant confirmed that she tested positive for four drugs, including methadone. Appellant further confirmed that she did not have any prescriptions for the types of drugs that were found in her system at that time. Appellant also confirmed that she was placed on paid administrative after she took the drug test on March 4, 2008.

Appellant identified Appellee's Exhibit 7 as a copy of the predisciplinary hearing notice that she received. Appellant confirmed that she attended her predisciplinary hearing. When asked if she sought help for her substance abuse problem around the time of her predisciplinary hearing, Appellant stated that she was in the process of enrolling in a drug treatment program at that time. Appellant noted that the enrollment process can take one and one-half months. Appellant stated that she did not remember whether she had contacted Ms. Borrelli before or after her predisciplinary hearing. Appellant confirmed that she was terminated from her employment with Appellee. Appellant identified Appellee's Exhibit 8 as a copy of her letter of termination and a copy of her R.C. 124.34 disciplinary order. Appellant confirmed that she received those documents via certified mail.

Appellant confirmed that she completed an initial six-month probationary period on January 10, 2008. Appellant further confirmed that she received a performance review at the end of her initial probationary period. Appellant identified Appellee's Exhibit 2 as a copy of that performance review. Appellant confirmed that she had attendance and tardiness problems during her employment with Appellee. Appellant identified Appellee's Exhibit 3 as a copy of the verbal corrective action that she received on January 11, 2008. Appellant

identified Appellee's Exhibit 4 as a copy of a written corrective action that she received on February 12, 2008. Appellant confirmed that she received the corrective actions for specific work problems that included conducting personal grooming while on duty, sleeping, surfing the Internet, and other behavioral matters. Appellant identified Appellee's Exhibit 5 as a copy of a letter of warning regarding excessive tardiness and other attendance problems, dated February 20, 2008.

Appellant confirmed that she had a meeting with her supervisors regarding her behavioral problems. Appellant further confirmed that she informed her supervisors that she had a drug problem. Appellant acknowledged that she was given the telephone number of a substance abuse counselor but she did not immediately contact that individual for assistance. Appellant confirmed that she contacted a counselor after her March 4, 2008 meeting with Ms. Hayden and after she took a drug test that day.

Shina Hayden testified that she has been employed by Appellee as a Human Resources Generalist for approximately two and one-half years. Ms. Hayden indicated that she provides support to managers regarding employee relation issues, including employee disciplinary actions. Ms. Hayden stated that disciplinary actions are submitted to her for review. Ms. Hayden confirmed that Appellee has established a Drug-Free Workplace Policy. Ms. Hayden indicated that an employee may be tested for drug use any time that there is a reason for cause to do so. Ms. Hayden identified Appellee's Exhibit 1 as a copy of Appellee's Drug-Free Workplace Policy 7.30.

Upon further questioning, Ms. Hayden stated that Marcia Penrod and Pam Reeder were Appellant's supervisors at OSU. Ms. Hayden recalled that Appellant's supervisors advised her that there were problems with Appellant's behavior during work hours, problems that included tardiness, poor attendance, and falling asleep during staff meetings. Ms. Hayden further recalled that, the week prior to Appellant's March 4, 2008 drug test, there were several incidents of irrational behavior from Appellant that included unreported absences from her desk, confrontations with her supervisor, and tardiness. Ms. Hayden stated that, on the morning of March 4, 2008, she received a call from Pam Reeder. She indicated that Ms. Reeder informed her that Appellant had not reported to work and she had not called in. Ms. Hayden stated that Appellant eventually called her supervisor and explained that she had overslept and was planning on coming to work that day. Ms. Hayden recalled that Appellant arrived very late and appeared nervous. Ms. Hayden stated that Appellant's behavior led her to believe that she might be under the influence of drugs and that she decided to have Appellant undergo a drug test that day. Ms. Hayden recalled that, initially, Appellant stated that she was not using drugs and she indicated that she did not want to take a drug test. Ms. Hayden indicated that Appellant did agree to take a drug test on March 4, 2008. Ms. Hayden confirmed that Appellant disclosed to Ms. Penrod and the witness that if she took a drug test that day she would test

positive for drugs. Ms. Hayden recalled that Appellant went to OSU's Medical Center to have the drug test administered. Ms. Hayden stated that Appellant did not disclose any prescription medications that would cause a positive test. Ms. Hayden stated that Appellant was placed on paid administrative leave pending the results of the drug test. Ms. Hayden indicated that she received the results of Appellant's March 4, 2008 drug test, which showed that Appellant had drugs in her system. Ms. Hayden identified Appellee's Exhibit 6 as a copy of the March 10, 2008 letter from Dr. Paul Kirk regarding the results of Appellant's March 4, 2008 drug test. Ms. Hayden indicated that there were four types of drugs found in Appellant's system.

Upon further questioning, Ms. Hayden recalled that she attended Appellant's predisciplinary hearing on March 19, 2008. Ms. Hayden identified Appellee's Exhibit 7 as a copy of Appellant's predisciplinary hearing notice, and she confirmed that Appellant was given an opportunity to respond to the charges made against her at her predisciplinary hearing. Ms. Hayden indicated that she did not believe that Appellant was serious about getting help for her substance abuse problem at that time, and she noted that Appellant had more than two weeks between her March 4, 2008 drug test and her predisciplinary hearing to enroll in a drug treatment program. Ms. Hayden stated that, to her knowledge, Appellant had not enrolled in such a program. Ms. Hayden stated that she recommended that Appellant's employment be terminated for violation of Appellee's Drug-Free Workplace Policy. Ms. Hayden confirmed that Appellant's termination was consistent with Appellee's Drug-Free Workplace Policy.

Appellant testified that it is difficult to get into a drug treatment program, and she noted that the enrollment process can take more than one month to complete. Appellant stated that she has been drug-free for five months. Appellants acknowledged that her behavior during the last months of her employment with Appellee was erratic. Appellant noted that she is a different person now that she is drug-free. Appellant further noted that, when she first began to work for Appellee, she was a good employee and she was always on time.

Appellant stated that she understands her supervisors' concerns and the reasons why Appellee terminated her employment. Appellant stated that she felt that she needed to come to this hearing so that she could thank her supervisors for helping her get treatment for her drug problem. Appellant acknowledged that she was angry, initially, but now, she is grateful that she is off drugs. Appellant stated that her life has changed for the better. Appellant explained that if she did not come to this hearing she would have regretted it. Appellant stated that, either way, she knows that things will be okay for her in the end. Appellant noted that she did contact the substance abuse counselor she had been referred to both before her predisciplinary hearing and after she was terminated. Appellant noted that, after her predisciplinary, she was accepted into a methadone clinic program. Appellant further noted that she completed the methadone clinic program one month ago.

FINDINGS OF FACT

Based upon the testimony presented and evidence admitted at record hearing, and the entirety of the information contained in the record, I make the following findings of fact:

1. At the time of her removal, Appellant was employed by Appellee as an Information Associate. Appellant was assigned to the Office of the Registrar. Appellant's work hours were 7:30 a.m. to 4:30 p.m. Appellant received a copy of Appellee's Employee Handbook and was aware of the specifics of Appellee's Drug-Free Workplace Policy 7.30.
2. Marcia Penrod and Pam Reeder were Appellant's supervisors. Appellant's immediate supervisors advised her that there were problems with her behavior as an employee, including tardiness, excessive absences, and falling asleep during staff meetings. During her employment with Appellee, Appellant received a verbal corrective action on January 11, 2008, a written corrective action on February 12, 2008, and a letter of written reprimand on February 20, 2008. Those corrective actions provided notice that certain behaviors of Appellant during work hours were unacceptable, behaviors that included being unprepared to begin work at 7:30 a.m., falling asleep during work hours, and tardiness. Appellant received informal counseling sessions and warnings from her supervisor regarding her tardiness, excessive absences, and her other inappropriate behaviors at work. Appellant's supervisor encouraged Appellant to seek professional counseling for her drug abuse problem and she gave Appellant the telephone number of a substance abuse counselor.
3. The week prior to March 4, 2008, there were several incidents of irrational behavior from Appellant while at work, including unreported absences from her desk, confrontations with her supervisor, and tardiness.
4. On the morning of March 4, 2008, Human Resources Generalist Shina Hayden received a call from Pam Reeder. Ms. Reeder informed her that Appellant had not reported to work and she had not called in. Appellant eventually called her supervisor and explained that she had overslept and was planning on coming to work that day. Appellant arrived for work at approximately 12:30 p.m., and she appeared nervous. Appellant's erratic behavior led Ms. Hayden to believe that Appellant might be under the influence of an illegal substance. Ms. Hayden informed Appellant that she needed to submit to a drug test that day. Appellant disclosed to Marcia Penrod and Ms. Hayden that she would test positive for drugs.

5. Appellant was placed on paid administrative leave after taking a drug test on March 4, 2008.
6. On or about March 10, 2008, Ms. Hayden received a letter from Dr. Paul Kirk. Dr. Kirk's letter indicated that the lab detected amphetamines, a sedative, methadone, and marijuana in Appellant's system. Appellant also admitted to Dr. Kirk that she was a heroin user. Appellant provided no information to her supervisors or Dr. Kirk which indicated she had any prescription medications.
7. Appellant received notice of her predisciplinary hearing on March 14, 2008. On March 19, 2008, Appellant attended her predisciplinary hearing, at which time she was notified of the charges made against her and given an opportunity to respond.
8. Appellant was timely served with a letter and an R.C. 124.34 disciplinary order, which notified Appellant that she was being removed from her position with Appellee. Appellant's R.C. 124.34 Order of Removal Appellant states that Appellant was removed for violation of Appellee's Drug-Free Workplace Policy 7.30.
9. Appellant admitted that she was using illegal drugs in March 2004. Appellant admitted that she was more than four hours late for work on the morning of March 4, 2008, and that her behavior that morning gave Appellee reason to believe that she was using drugs. Appellant admitted she tested positive for drugs on March 4, 2008, and that the drug test results indicated that there were four types of drugs in her system, three of which were illegal substances.

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, dishonesty, and violation of any policy or work rule of the employee's appointing authority. In an appeal of a disciplinary action taken pursuant to R.C. 124.34, section (B) of this statute provides that this Board may affirm, disaffirm, or modify the judgment of the appointing authority. 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.

This case presents the Board with two issues to consider. The first issue concerns due process. Due process requires that a classified civil servant who is about to be disciplined receive notice of the charges against him or her and be given an opportunity to respond prior to the imposition of discipline, coupled with post-disciplinary administrative procedures as provided by R.C. 124.34. (See *Seltzer v. Cuyahoga County Dept. of Human Services* (1987), 38 Ohio App.3d 121.) The evidence established that Appellant received notice of her predisciplinary hearing on March 14, 2008. On March 19, 2008, Appellant attended her predisciplinary hearing, at which time she was notified of the charges made against her and given an opportunity to respond. Accordingly, I find that Appellant's pre-termination due process rights were observed. I further find that Appellee complied with the procedural requirements in removing Appellant by properly serving Appellant with an R.C. 124.34 disciplinary order.

The second issue the Board must consider concerns the merits of Appellant's appeal. Appellant was removed from employment for violation of Appellee's Drug-Free Workplace Policy 7.30. Appellant did not present any evidence which contradicted the facts as alleged in her R.C.124.34 Order of Removal. At record hearing, Appellant admitted that she was using illegal drugs in March 2004. Appellant admitted that she was more than four hours late for work on the morning of March 4, 2008, and that her behavior that morning gave Appellee reason to believe that she was using drugs. Appellant admitted she tested positive for drugs on March 4, 2008, and that the drug test results indicated that there were four drugs in her system, three of which were illegal substances. Accordingly, I find that Appellee has met its burden of proof with respect to the charges contained in Appellant's R.C. 124.34 Order of Removal.

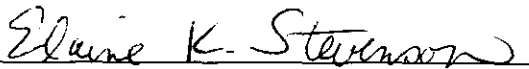
At record hearing, Appellant testified that she did contact a substance abuse counselor after her March 19, 2008 predisciplinary hearing. Appellant noted that the enrollment process for a drug treatment program can take more than one month to complete. At record hearing, Appellant noted that she has been drug-free for five months and she stated that she wanted to thank her former supervisors for helping her to take action regarding her drug abuse problem. Appellant acknowledged that, during the last several months of her employment with Appellee, her behavior at work was erratic and inappropriate. Appellant acknowledged that her excessive tardiness and absences and her confrontational and erratic behaviors were the result of her drug use.

At record hearing, Appellant took full responsibility for her behavior that led to her termination and she exhibited an admirable degree of honesty when discussing her behavior. While Appellant's conduct at record hearing was indeed commendable, this Board must also consider Appellee's authority to take disciplinary action in situations involving the misconduct of one of its employees, pursuant to the provisions set forth in R.C. 124.34. In terms of Appellant's removal action, the evidence established that

Appellee followed all relevant provisions of the Ohio Revised Code and Ohio Administrative Code and all relevant agency policies. Appellant was provided with a copy of Appellee's Employee Handbook, which contains all employee policies, including the Drug-Free Workplace Policy 7.30. During her employment with Appellee, Appellant also received a verbal corrective action on January 11, 2008, a written corrective action on February 12, 2008, and a letter of written reprimand on February 20, 2008. Those corrective actions put Appellant on notice that she was exhibiting unacceptable behavior at work. Appellant also received informal counseling and warnings from her supervisor regarding her tardiness, excessive absences, and her other inappropriate behaviors at work. The testimony established that Appellant's supervisor encouraged Appellant to seek professional counseling for her drug problem. However, Appellant's behavior problems continued and became such a concern on March 4, 2008 that Appellee required Appellant to take a drug test. As previously noted, Appellant tested positive for drugs. While Appellant did eventually seek professional help and overcame her drug abuse problem, Appellant's turnaround did not occur until after Appellee had made the decision to terminate Appellant's employment.

Upon consideration of the seriousness of the rule infraction committed by Appellant and upon consideration of the numerous chances Appellee gave Appellant to improve her behavior at work, I find that removal was an appropriate disciplinary response that should be affirmed by this Board. However, Appellant's efforts to overcome her drug abuse problem and her honesty at record hearing should not be overlooked. If Appellant continues to remain drug-free and decides to apply for another position with Appellee in the future, hopefully Appellee will consider the positive changes Appellant has made in her life when making its hiring decision.

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


Elaine K. Stevenson
Hearing Officer

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