

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

CAROLE A. GAUL,

Appellant.

v.

Case No. 09-REM-10-0428

CLINTON COUNTY AUDITOR,

Appellee.

ORDER

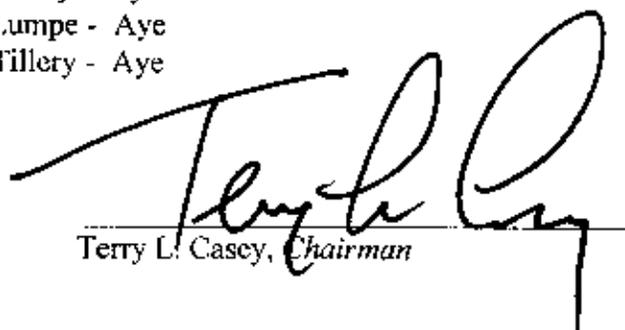
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 from her position of Payroll Clerk be **DISAFFIRMED**, pursuant to R.C. 124.03 and R.C. 124.34.



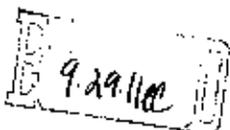
Casey - Aye
Lumpe - Aye
Tillery - Aye


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~~ 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 28, 2011.




Eric E. Conner
Clerk

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

CAROLE A. GAUL,

Case No. 2009-REM-10-0428

Appellant

v.

August 11, 2011

CLINTON COUNTY AUDITOR

Appellee

JAMES R. SPRAGUE
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came to be heard on April 5, 2011. Present at the hearing was Appellant, who was represented by Mark A. Granger, Attorney at Law. Appellee, Clinton County Auditor ("Auditor"), was represented by Jeffrey A. Stankunas, Attorney at Law.

This cause comes as a result of Appellant's timely filing of an appeal from her removal from the position of Payroll Clerk with Appellee. The pertinent Order of Removal was effective September 24, 2009. The parties met numerous times subsequent to the filing of the instant appeal and several times requested that this matter be held in abeyance for extended periods. However, the parties were not able to resolve their differences and the matter went to hearing, as noted, above. By agreement of the parties, the parties timely filed their respective post-hearing briefs on June 27, 2011 and their replies on July 15, 2011. The record was thereafter closed.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The pertinent particulars of the instant R.C. 124.34 Order of Removal read as follows:

... Specifically, you did violate R.C. 124.34 and [Clinton County Personnel Policy] Sect. 6.03, #14 in making, or causing to be made such false statements, verbally and in writing, including your application for use of sick leave dated Sept. 8, 2009, relative to an absence from work that occurred on Sept. 4, 2009. ...

At hearing, Appellee called four witnesses: **Logan Bailey**, Deputy Auditor and Appellant's immediate supervisor; **Penny Brown**, former Risk and Insurance Manager; **Bertha Lowe**, Administrative Assistant (AA) part-time with Insurance & Safety and the Clinton County Solid Waste District (serving as assistant to Penny Brown); and **Wanda Armstrong**, former Auditor of Clinton County, who served as the appointing authority at the time of Appellant's removal.

At hearing, Appellant called three witnesses: **Carole A. Gaul**, Appellant; **Paul Creech**, Ohio State Parks Officer; and **William Gaul**, Appellant's spouse.

Carole A. Gaul, Appellant, has suffered with a right eye condition since December, 2007. By the time of the incident at issue Appellant had undergone multiple surgeries on her right eye related to a detached retina, the latest of which was in August, 2008. Appellant's right eye condition has not been completely solved by the surgeries: silicone oil in her eye causes significant glare from lights; she does not have peripheral vision; and her eye is prone to dryness and scratchiness which requires a regimen of eye drops. Wanda Armstrong (the former Clinton County Auditor and two levels above Appellant in the chain of command) stated if Appellant had an issue with her eye at the time of the incident at issue, it would not necessarily have been out of the ordinary or surprising.

Appellant performed her primary duties as payroll clerk at her own desk. To accommodate Appellant's condition, the fluorescent lighting above her desk was disconnected. When the regular front desk employee was on breaks or out of the office, Appellant and another employee split the duty of covering the front desk in addition to their regular duties. When all three of the employees were out of the office, these duties were covered by Logan Bailey (who served as Deputy Auditor and was Appellant's immediate supervisor).

The fluorescent overhead lights at the front desk bothered Appellant's eyes because of the glare effect she experiences. Appellant testified that the lights did not bother her for short periods of time but that she gets headaches when exposed to them for longer periods. Appellant made this known to Ms. Bailey on several occasions. On at least one occasion the lights at the front desk were temporarily disconnected to accommodate Appellant. However, this was not done for the many times when Appellant was covering the front desk for short periods during employees' breaks. Appellant also suggested to Ms. Bailey that Appellant could work at her own desk and go to the front desk as needed. Appellant testified that generally she was told that she could not sit at her own desk and that she had to be at the front desk for coverage.

There was testimony indicating that there was a sense of animosity or confrontation between Appellant and Ms. Bailey about office rules and protocol. The office personnel manual states, in relevant part: sick leave may be requested for illness or injury of the employee (Appellant's exhibit B at 2 section B.1.); medical or optical examinations or treatment of the employee or member of her immediate family (*id.* at 3

section B.4.); if an employee seeks medical attention for sick leave, that a medical practitioner's statement must be attached to the leave application (*id.* at 4 section C.3.); and sick leave requests for the scheduled workday immediately before a holiday may be thoroughly investigated and only approved with satisfactory documentation or an exemplary attendance record (*id.* at 4 section C.4.).

Prior to September 4, 2009, there was nothing about Appellant's leave requests that gave cause for suspicion. Appellant had never previously called off from work because her eyes were bothering her, time off for eye surgeries and related treatment was always preapproved, and Appellant had an exemplary attendance record.

At some point during the week ending September 4, 2009, Ms. Bailey spoke with Appellant and reminded her that the other two pertinent employees in the office would be on vacation on Friday September 4, 2009 and that Appellant was to report to work at 8:00 AM and cover the front desk. The following week was a payroll week (which meant that Appellant had to complete the payroll work on September 4, 2009) and Monday September 7, 2009 was Labor Day.

There is conflicting testimony about statements made by Appellant regarding her intention to call off of work on September 4, 2009. Bertha Lowe stated that at some point during that week Appellant stated that Appellant would not be coming in to work September 4, 2009. Ms. Lowe alleged that this statement was made to her from the hallway between Ms. Lowe's and Ms. Brown's office in the Administration building, but Ms. Lowe could not recall why Appellant was in the Administration building rather than her workplace in the courthouse.

Penny Brown stated that Appellant told her via telephone that Appellant was going to call off work because Appellant did not want to cover the front desk and Appellant thought it would be amusing for Ms. Bailey to have to cover it in her stead. Ms. Brown recalled that she replied to Appellant "Are you trying to get fired?" but that she did not mean this in a serious way.

Both Ms. Lowe and Ms. Brown testified that they joked around with Appellant. Ms. Armstrong recalled that she was informed of the purported statement by Ms. Bailey, who was told by Brenda Woods, who was told by Ms. Brown. However, in spite of this rather lengthy potential hearsay chain, Ms. Armstrong did not speak directly with Ms. Brown about the statement before Appellant was removed.

William Gaul, Appellant's husband, stated that Appellant never said to him that she did not intend to go to work before September 4, 2009.

Appellant stated at hearing that she intended to come to work on September 4, 2009, did not recall making any statement to the contrary to Ms. Lowe or Ms. Brown, and opined that she would recall such statements to the converse if she had actually made them.

Appellant and Mr. Gaul had reservations at Cowan Lake State Park on September 3, 2009 for Labor Day weekend. After packing, the Gauls each drove a vehicle to the park but Appellant pulled over when they arrived at the campground and told Mr. Gaul that she could not continue driving to the camp site because something got into her eye.

Appellant spent the remainder of the evening in the camper treating her eye with eye drops before going to bed.

On the morning of September 4, 2009, Appellant got ready to go to work from the camp site, as she had done in the past since the camp site is closer to her workplace than the Gaul's home. Yet, she was experiencing so much pain in her right eye that she did not think she would be able to drive. Appellant asked her husband to call in to work for her while she laid in bed and continued treating her eye with eye drops.

Mr. Gaul called the Auditor's office and spoke with Ms. Bailey at about 8:15 AM that morning. Mr. Gaul told Ms. Bailey that Appellant had gotten something in her eye, that they would call the Cincinnati Eye Institute (CEI) to see if Appellant should see a physician there, and that Appellant would not be in to work that morning.

Ms. Bailey did not mention to Mr. Gaul during this phone call that any medical certification of the injury would be needed upon Appellant's return to work. Mr. Gaul then called CEI and left a message with the answering service giving Appellant's name and her condition for a call back.

Mr. Gaul had a pre-surgery appointment at Wilmington Medical with Dr. Satchwell at 11:00 AM that same day. By the time Mr. Gaul had to leave for this appointment, CEI had not yet called back.

Appellant went with Mr. Gaul to his appointment. This was because Wilmington Medical was closer to the expressway than from the campsite. As such, it would take less time to get to CEI from Wilmington Medical if CEI called and needed to see Appellant in person as versus if Mr. Gaul drove back to the camp site to pick up Appellant and then travel to CEI.

While Appellant was waiting during Mr. Gaul's appointment, she spoke with Dr. Satchwell, who had conducted pre-surgery examinations of Appellant in the recent past, and explained that she was waiting for a call from CEI about her eye problem. There is no indication that Appellant sought or received medical treatment at Wilmington Medical.

At about 12:30 PM that day, CEI contacted Appellant and advised her to continue treating with the eye drops and that they did not need to see Appellant unless her vision was going black or she was getting headaches. The record reflects that Appellant had

very recently been in for a follow-up appointment with CEI and, thus, without a worsening of her condition, could treat same with eye drops and bed rest.

Later that afternoon, State Park Officer Paul Creech stopped by the Gaul's camper to visit with Mr. Gaul. Appellant stepped out of the camper to go to the bathroom and explained that she was having trouble with her eye.

Officer Creech noticed that Appellant was wearing wrap-around sunglasses and seemed to be feeling for the steps from the camper with her foot, indicative of her vision problems. At about 7:00 PM, Debbie Gabbard came by the Gaul's camper to see if they wanted to come join her and her husband at their camp fire, but Appellant declined because of the eye problems.

Ms. Bailey completed the top portion of the first page of a sick leave request form for Appellant (Appellant's exhibit F), including: Mr. Gaul called and the time; Appellant would be going to CEI; checked boxes indicating that it was an appointment and that it was family medical leave; left the box indicating personal injury blank; and signed the form. Ms. Bailey placed the form in Appellant's inbox at the office so Appellant could see it when she returned to the office.

Upon returning to the office on September 8, 2009, Appellant found the sick leave request form in her inbox. Appellant recalled that she saw that Ms. Bailey wrote on the form that Appellant should be *going* to CEI although Mr. Gaul said that they would *call*.

Appellant also noticed that the box for an appointment was checked even though Appellant did not have any scheduled appointment. Appellant did not recall seeing a note about needing documentation on the form when she first received it but Ms. Bailey testified that she wrote this note when she filled out the top portion of the form on September 4, 2009. Appellant presented evidence demonstrating that these sick leave request forms were not always filled out correctly or completely.

Ms. Brown testified that when Appellant returned to work on September 8, 2009, she asked Ms. Brown by telephone whether Ms. Bailey had to work the front desk and Ms. Brown replied yes and that it was very busy. It was Ms. Brown's opinion that Appellant's response indicated a sense of glory in the fact that Appellant's plan worked. According to Ms. Brown, Appellant made a second call later that morning and Bertha Lowe answered. Ms. Brown stated that Ms. Lowe put the Appellant on speakerphone and asked Ms. Brown to get the policy manual.

Ms. Brown testified that Appellant said that she was being asked for a doctor's excuse for her absence that past Friday and was not sure as to why. Ms. Brown recalled that she looked up the rule in the policy manual and confirmed that a doctor's excuse was required if an employee calls in sick the day before a holiday weekend.

At this point, Ms. Brown recalled, Appellant commented that she had called the Eye Institute and wondered if that would work. Ms. Brown also recalled another comment by Appellant at that time or some time later that day where Appellant seemed somewhat frantic about getting a doctor's excuse and mentioned a Wilmington Medical visit that she attended with her husband.

Ms. Brown testified that she did not believe Appellant had provided any information about the absence to anyone at that point, including the note from Wilmington Medical. Ms. Lowe stated that she did not recall any conversations with Appellant regarding her absence except for the conversation at the administration building the week prior (please see Ms. Lowe's testimony set forth, above).

Appellant testified that she had a conversation with Ms. Brown on the morning of September 8, 2009 because she found the reports she ran for Ms. Brown still in her inbox along with the sick forms for Ms. Bailey. Appellant recalled that she called Ms. Brown and asked why Ms. Brown did not pick up the reports.

Appellant stated that Ms. Brown said that she came down to the office on September 4, 2009 and Ms. Bailey was covering the front desk and it was chaotic. Appellant stated that Ms. Brown seemed to find this hilarious because Ms. Brown said that Ms. Bailey made a comment that she cannot multitask and do that job at the front desk. Appellant testified that Ms. Brown came to Appellant's desk later that morning of September 8, 2009 and picked up the paperwork, but that there was no further discussion at that time.

Appellant stated that the next conversation Appellant had with Ms. Brown was regarding Mr. Gaul's surgery. Appellant recalled that at that time she was requesting one day off but that Ms. Bailey said that a Family Medical Leave form was needed, so Appellant called Ms. Brown for more information. Appellant stated that she was not aware of anyone else being involved in the conversation or being on speakerphone. Appellant testified that she did not discuss her September 4, 2009 absence with Ms. Brown until the week after Appellant was terminated and that she did not ask Ms. Brown if the office could require a medical certification for her absence.

Appellant wrote at the bottom of page 1 that she had a problem with her eye, she needed to hold her eye still to stop irritation, and checked the box indicating that the problem affected her ability to perform her job. On page 2 Appellant wrote that she was requesting eight hours of sick leave, signed the form, and dated it. Appellant stated that she put the form on Ms. Bailey's desk at about 8:45 AM that morning.

Appellant testified that Ms. Bailey approached her at about 10:00 AM that morning and told Appellant that she needed documentation from CEI because the leave was for a day before a holiday. Appellant recalled that she told Ms. Bailey that Appellant did not have to go to CEI and was told to manage her condition at home, but that she went to a medical facility for her husband's pre-op appointment at Wilmington Medical.

According to Appellant, Ms. Bailey told Appellant to obtain some documentation from Wilmington Medical. Appellant testified that she further explained to Ms. Bailey that the visit to Wilmington Medical was not for her eye condition. Appellant further explained to Ms. Bailey that she only went with her husband because she would not have been able to drive herself and it would put her closer to the expressway to get to CEI faster, if CEI called during Mr. Gaul's appointment.

According to Appellant, Ms. Bailey replied that it did not matter and that Appellant had to get something from Wilmington Medical. Appellant stated that when the form was first signed and submitted to Ms. Bailey, Wilmington Medical was not identified and the date and time of the appointment were not listed.

Appellant contacted Wilmington Medical at about 10:15 AM that morning and had a form letter signed by Dr. Satchwell faxed to her stating that Appellant was at the facility that day (Appellant's exhibit G). Appellant then wrote a note on the bottom of the letter to make clear that she was at Wilmington Medical but did not have a doctor perform any exam.

Appellant stated that she intended to make it clear through this note that her presence at Wilmington Medical had nothing to do with her reason for being absent. Appellant testified that she wrote the note at the bottom of the Wilmington Medical excuse form because Appellant wanted Ms. Bailey to know that Appellant was not treated there.

Appellant testified that she only put the date and time at Wilmington Medical on the sick leave request form because Ms. Bailey told Appellant to get something from the medical facility where Appellant was physically present on September 4, 2009. Appellant recalled that she did not list a physician's name because no physician saw Appellant. Appellant testified that she stapled the papers together and put them on Ms. Bailey's desk before lunch on September 8, 2009. Appellant testified that she did not have any further discussions with Ms. Bailey about the form that day.

Ms. Bailey testified that on the following Tuesday, September 8, 2009, she came back to her desk at 1:00 PM and found Appellant's completed sick form on the chair *for the first time*. Ms. Bailey recalled that Appellant wrote that she went to Wilmington Medical, listed the date and time, had attached a letter from Wilmington Medical (Appellee's exhibit 4), and Appellant wrote at the bottom of the letter that she received no treatment at Wilmington Medical but was present at that office.

Ms. Bailey stated that she later called Wilmington Medical about the note to certify Appellant's illness and to obtain more information such as whether Appellant saw a doctor or whether the note was obtained after the fact, but Ms. Bailey did not speak with Appellant about the form at all that day.

Ms. Bailey testified that she brought the form to Appellant the following day (September 9, 2009) and asked Appellant to elaborate on whether there was any additional information that Appellant could provide that would show that Appellant had actually seen a physician that would excuse the injury. According to Ms. Bailey, Appellant indicated that she was at Wilmington Medical for Mr. Gaul's appointment, not her own, and that she was unable to provide anything else at that time. Ms. Bailey stated that the conversation continued until Appellant told Ms. Bailey not to pay her for that day, at which time Ms. Bailey walked away.

Appellant testified that Ms. Bailey told Appellant on September 10, 2009 that the front of the sick leave request form was contradictory and asked if there was something else Appellant could provide. Appellant recalled that she told Ms. Bailey that she could not obtain anything else because Wilmington Medical did not do anything for Appellant. Appellant stated that she interpreted Ms. Bailey's request to mean that she needed something more from Wilmington Medical.

Ms. Bailey testified that she had no reason to dispute the truth of the assertion that Appellant was present at Wilmington Medical or that Appellant was genuinely injured or unable to work. Ms. Bailey testified that the information in the doctor's notes was contradictory to other information Appellant provided, but was not inaccurate. Ms. Bailey testified that she did not find the statements in the doctor's notes, the statement written by Appellant on the Wilmington Medical note, or the statement that Appellant was suffering from an eye injury on the day at issue to be false.

Ms. Armstrong did not dispute the accuracy or truth of the statements on the form by Appellant that Appellant had a problem with her eye, that the personal injury involved Appellant holding her eye still to avoid irritation so eye drops would work, or that there was an appointment at Wilmington Medical on September 4, 2009 at 11:00 AM. Concerning the note from Wilmington Medical (Appellant's exhibit G), Ms. Armstrong stated that she had no reason to dispute the truth that an illness was reported to Wilmington Medical by Appellant on September 4, 2009 and that Appellant was not actually seen by a physician.

Ms. Armstrong testified that by September 14, 2009 she had received and reviewed this leave form and the note from Wilmington Medical and disapproved the request and noted "conflicting information" (see *id.*, at 3). According to Ms. Armstrong, the conflicting information was the fact that the sick leave request form did not say anything about Appellant's husband and it appeared that the appointment at Wilmington Medical was for Appellant.

Appellant stated that there were no further discussions about the leave request form until Monday September 14, 2009. Appellant recalled that Ms. Bailey informed her that Ms. Bailey and Ms. Armstrong were waiting for a decision about the form from the prosecutor's office because the form looked deceptive and dishonest. Appellant testified that she told Ms. Bailey that Appellant filled out the form the way Ms. Bailey told her and

provided the information that was requested. Appellant testified that she then told Ms. Bailey to forget it and not to pay Appellant for the day because the payroll work had to be done.

On September 15, 2009, Appellant was given a notice of pre-disciplinary conference by Ms. Bailey. *Ms. Armstrong testified that the reason for the pre-disciplinary hearing was to give the parties a chance to figure out exactly what happened so that a proper determination could be made.*

The notice stated that the conference would be held on September 18, 2009 (Appellee's exhibit 5) and that Appellant was accused of making a "false or inaccurate report concerning an absence from work," which is classified in the policy manual as a Group III offense which could be punished by action up to and including termination (See Appellant's exhibit C, page 9 section G.).

Appellant indicated that she had questions, but Ms. Bailey directed her to speak with the hearing officer, Deanne Whalen, about any questions. Appellant stated that she called Ms. Whalen and was told to bring in any documentation to the hearing to substantiate what Appellant did and not to turn anything in before then.

Appellant testified that she called CEI on September 15, 2009 and asked for the instructions given to her on September 4, 2009 to be faxed to her. Appellant recalls that she received the faxed letter on September 17, 2009.

Appellant, Ms. Whalen, and Ms. Bailey were present at the pre-disciplinary hearing on September 18, 2009. Ms. Bailey tape recorded the pre-disciplinary hearing on September 18, 2009 and provided Appellant with a copy of the tape the next day.

It is noted that the beginning of the pre-disciplinary hearing was not included in the recording and this incompleteness is reflected in the version Appellee had typed and presented at the record hearing before this Board.

Appellant produced additional documents at that time. These included: written statements from persons who had seen Appellant on September 4, 2009; a letter from CEI stating that Appellant had called their office on September 4, 2009; and the instructions that Appellant was given (Appellant's exhibit H). Ms. Bailey testified that this was the first time she had seen the letter from CEI. Ms. Armstrong testified that she had no reason to dispute the truth of the statements in the letter from CEI submitted at the predisciplinary hearing.

Ms. Bailey recalled that during this conference Appellant stated that Mr. Gaul was able to go to the appointment himself, but that at the time Appellant was waiting to hear back from CEI and that it would be a closer commute to CEI for an appointment, if Appellant simply went with Mr. Gaul to his appointment at Wilmington Medical.

Appellant recalled that Hearing Officer Whalen primarily wanted to look at the front page of the sick form for the purposes of the hearing. According to Appellant, Ms. Whalen did not make a recommendation during the hearing and said that just looking at the front page of the leave request form there appeared to be a conflict.

The Hearing Officer clearly believed that her authority was extremely circumscribed. Perhaps as a result, the inquiry put forth at the pre-disciplinary conference was hardly probative regarding the facts and activities that occurred in this matter.

Ms. Bailey stated that she came to understand what happened in terms of Appellant's treatment or physical presence at CEI by the time of the pre-disciplinary conference and, that if the CEI documentation had been seen from the beginning, Appellant would not have had any problems.

Ms. Bailey also stated that by the end of the hearing, Ms. Bailey did not, and no longer had an opportunity to, recommend discipline short of termination although Ms. Bailey did speak with Wanda Armstrong about the situation afterward.

Ms. Armstrong made the ultimate decision to terminate Appellant on September 24, 2009 (as noted on the termination notice, see Appellee's exhibit 9).

Ms. Armstrong stated that when this decision was made, she was aware of the letter from CEI, the note from Wilmington Medical, and the sick leave request form filled out by Appellant.

Ms. Armstrong stated that by September 24, 2009 she clearly understood Appellant's reason for leave but recommended Appellant's termination because the information was conflicting and was not forthcoming at the beginning.

Ms. Armstrong testified that Appellant was terminated for dishonesty and trying to get paid sick time without proper documentation and when she was not off for an approved sick reason, thus cheating the taxpayers.

Ms. Armstrong explained that honesty is especially important in the Auditor's office because that office is the final stop for any and all expenditures in the county and that the office is responsible for making sure that all other departments are spending money properly. Ms. Armstrong stated that the office needed to know that its employees were upholding the rules and regulations and that the office cannot have someone who is willing to lie working for them.

Ms. Armstrong testified that one of the reasons that termination was recommended for Appellant was that Ms. Armstrong did not want to set a precedent in the office for dishonesty, false statements, or receiving sick time when not out for an

approved sick reason. Ms. Bailey agreed that that county policy preferred progressive discipline.

Appellant recalled that there was no further discussion about the absence until about 4:00 PM on September 24, 2009. According to Appellant, Ms. Bailey told Appellant that Ms. Armstrong needed to talk to Appellant in Ms. Armstrong's office. Ms. Armstrong handed Appellant her termination papers and told Appellant that she needed to sign them. Appellant recalled that she started asking a question but Ms. Armstrong stopped her, told Appellant to read the second page of the papers, sign them, and give them back.

Ms. Armstrong testified that had Appellant stated that on September 4, 2009 Appellant called CEI, went to Wilmington Medical because her husband had an appointment that day, and CEI told Appellant not to come in to their office but conversely to manage the condition at home in Appellant's request for leave, Appellant would not have been terminated.

Based upon the testimony presented and evidence admitted at hearing and upon the post-hearing briefs filed by the parties, I make the following Findings:

First, I note that I incorporate, herein, any finding set forth above, either express or implied.

Next, I find that Appellant filled out her sick leave form as best she could under the circumstances. This included having a fluid medical situation arise and having to marry same with a form that, to put it charitably, is confusing and flawed. While this Board will should not penalize Appellee for its subsequent redesign of this form, the appointing authority, herself, admitted that the form that Appellant was forced to utilize was confusing.

No one involved in this matter questioned Appellant's genuine medical condition, her course of treatment, or the veracity of the documentation she provided. As will be shown below, if Appellant has been more prescient, she could probably have anticipated how Appellee would view her submission. However, until prescience is listed as an essential job duty, Appellant cannot be held to such a high standard.

CONCLUSIONS OF LAW

For Appellee to prevail in a disciplinary appeal before this Board, Appellee must demonstrate the validity of a sufficient number of the factual allegations contained in the pertinent R.C. 124.34 Order to justify its discipline of the pertinent employee. In the instant appeal, Appellee has not met its burden.

R.C.124.34 provides for the removal of a classified employee for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of R.C. Ch. 124. or the rules of the director of administrative services or of a pertinent civil service commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

The main thrust of Appellee's argument is that Appellant was dishonest in relation to her request for sick leave for September 4, 2009. Appellee asserts that Appellant provided information about the Wilmington Medical visit that was false in order to obtain sick leave. Based on the findings, above, and for the reasons below, this Board should conclude that Appellee has failed to prove that this was the case.

First, and as found, above, the testimony presented and evidence admitted show that Appellant suffered from an eye injury that caused her to be unable to work on September 4, 2009. Appellant provided corroborating and uncontroverted evidence of this fact. The record thus established that Appellant was entitled to sick leave for such an injury.

Secondly, there is no testimonial or other evidence to support an allegation that Appellant made a false oral statement regarding the reason for her absence on September 4, 2009. Although there is some disagreement on the exact date and time of the first conversation between Ms. Bailey and Appellant about the sick leave request form, it is undisputed that Appellant explained that the visit to Wilmington Medical was for her husband and not related to her eye injury and that she never made an oral statement to the contrary.

Thirdly, the accusation that Appellant wrote Wilmington Medical, the date, and the time of the visit on the sick leave request form with the intent of dishonestly obtaining sick leave is completely without merit. Moreover, Appellant provided several examples of approved sick leave request forms that were not filled out incompletely or accurately, thus demonstrating that this particular incident did not deserve the attention it received.

Fourthly, if the leave request form is indeed the only deciding factor when determining whether an employee was dishonest when requesting sick leave, Ms. Bailey's conversation with Appellant after reviewing the final submitted form and the pre-disciplinary hearing would have afforded Appellant absolutely no opportunity to explain the "conflict" and satisfy Appellee's concerns.

Finally, Appellee terminated Appellant in a manner inconsistent with its own policies. It is undisputed that Appellee's office policy favors progressive discipline; rather than the quantum leap here to termination for an alleged first offense that, at its very worst, could only be described as unintentional and non-egregious.

Appellant was employed by Appellee for nearly a decade. Further, Appellant had what was described as an exemplary attendance record prior to this incident.

Certainly, Appellee has a legitimate interest in discouraging false information on leave request forms. Yet, this interest is not so strong that a minor omission (here Mr. Gaul not being named on the form or the attached letter) warrants the most severe of penalties, especially when Appellant was forthright about the circumstances of her absence upon every subsequent inquiry.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISAFFIRM** Appellee's **REMOVAL** of Appellant from her position of Payroll Clerk, pursuant to R.C. 124.03 and R.C. 124.34.



JAMES R. SPRAGUE
Administrative Law Judge