VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 62-00-041110-011-01-09
and	*	
	*	Jada Mullins, Grievant
OHIO BOARD OF REGENTS	*	Removal

APPEARANCES

For the Ohio Civil Service Employees Association:

Lori Collins, Staff Representative
Ohio Civil Service Employees Association

For the Ohio Board of Regents:

Steve Little, Assistant Manager of Labor Relations
Joe Trejo, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on August 4, 2005, at the offices of the Ohio Office of Collective Bargaining in Columbus, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Board of Regents (the "Board") was Jane Fullerton, Associate Vice Chancellor. Testifying for the Ohio Civil Service Employees Association (the "Union") were Krista Shaw, former Secretary, and the Grievant, Jada Mullins. Also in attendance were Director of Human Resources and Fiscal Services Mary Harriel and Steward Cornelius McGrady. A number of documents were entered into evidence: Joint Exhibits 1-3, Management Exhibits 1-5 and Union Exhibit 2. The oral hearing was concluded at 2:25 p.m. whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

This case concerns the removal of a secretary employed by the Ohio Board of Regents. The Grievant was hired into this position on September 20, 1999, and terminated November 12, 2004, for violation of the Board's August 1, 2003 Time and Attendance Policy.

The Grievant's record as submitted in arbitration begins on November 15, 2001, when the Board agreed to a schedule change to accommodate her childcare needs. On November 27, 2002, she received written Job Performance and Work Expectations focusing on professional behavior. On May 8, 2003, she received notice of pattern abuse of leave time citing 13 of 31 working days late or absent between March 6 and April 17 and warning her of discipline. Additional schedule changes to her starting time occurred between June 25 and July 25, 2003, but despite this, on August 1 of that year, she received an oral reprimand for pattern

abuse/tardiness and a second one on August 26 for the same reason. On September 16 she was again allowed to change her starting time. The Grievant was off work on disability from October 27, 2003 through February 12, 2004. When she returned she almost immediately began to have difficulty coming in on time and had other attendance problems for which she received a written reprimand on March 17, 2004. Of the twelve incidents cited, eight involved tardiness. On March 22 she changed her starting time again, this time to 8:30 a.m. Two months later, on May 17, she was in trouble again for similar incidents and for which she received a 30-working-day suspension. This was later reduced to 10 days in a grievance settlement. On the day she returned to work, June 29, 2004, she was placed on "Job Performance and Work Expectations" which built on the work expectations agreed to on November 27, 2002. Among the time expectations set forth in this document are:

- Any arrival time beyond 8:30 a.m. will be considered as a late arrival and the employee will be expected to complete a leave form immediately upon arrival.

- All planned requests for leave should be made in advance and approved by the appropriate staff person. Emergency situations will be tolerated, with appropriate documentation, but such emergency situations are not expected to occur often. (Joint Ex. 4:1-2)

Thereafter she accumulated the four incidents of tardiness cited by the Board in the pre-disciplinary meeting officer's report and that ultimately led to her removal:

July 7, 2004	6 minutes late per the Board 2 minutes late per the Grievant 0.1 hours personal leave approved for pay purposes only.
August 5, 2004	6 minutes late. 0.1 hours personal leave approved for pay purposes only.
August 24, 2004	6 minutes late. 0.1 hours leave without pay approved for pay purposes only.

August 26, 2004	6 minutes late. 0.1 hours leave without pay approved for pay purposes only.

During this period she was also absent August 16-August 19, the bulk of which was covered with sick leave, personal leave and vacation. This period of absence was not at issue in the predisciplinary process or in this arbitration.

These incidents were investigated by Ray Mussio of the Ohio Office of Collective Bargaining whose report was issued on September 13. A predisciplinary meeting was duly held after which the meeting officer found just cause for discipline. The Grievant was removed as aforesaid on November 12. The removal letter cites "a pattern of tardiness on multiple occasions after a 30-working day suspension" constituting Failure of Good Behavior under ORC 124.34. This action was timely grieved and fully processed to arbitration as aforesaid, free of procedural defect, where it presently resides for final and binding decision on the issue of: *Was the Grievant, Jada Mullins, removed from her position as a Secretary for the Ohio Board of Regents? If not, what shall the remedy be?*

In arbitration the Grievant testified she never saw the Time and Attendance Policy until a predisciplinary conference in early 2004. With respect to the 2002 Job Performance and Work Expectations, she said she saw them at a meeting involving other employees who had asked her to attend as steward because they felt they would be disciplined. As a steward, she had been trained in 2000 and 2003 but stated she did not fully understand everything and not many grievances were filed. Moreover, she did not get the work expectations with items directed to time until June 29, 2004, when she came back from her 30-day suspension. She testified she knows it is not right to be late for work and has never been late by more than 15 minutes except when ill. As for the other shorter tardy incidents, she has personal issues that have interfered with her ability to get to work on time. Some of her tardiness is related to her children: day care, school, missed buses, suspensions and illnesses. Others revolve around herself as a victim of domestic violence including having her car taken from her against her will. She has also had

other transportation problems and has had to wait for the elevator in her office building. A number of her schedule changes of which at least one was offered by her employer relate to childcare issues. She thought her employer was sympathetic, but then "they changed" and she does not know why. She even brought her children to work, but that seemed to be an embarrassment to them. Her supervisor, Associate Vice Chancellor Jane Fullerton, was aware of her issues (on a confidential basis) but has never discussed EAP with her. After she told Ms. Fullerton and Vice Chancellor Jon Tafel, Director of Human Resources and Fiscal Services Mary Harriel called her about the EAP program. She told Ms. Harriel she was interested in applying and was told it was in her best interest to take leave because of the threat to others in the workplace. In her opinion the policy is not evenly applied because she sees others – including her supervisor – coming in late, has made note of it and brought it to Management's attention during the course of her case. Furthermore, there is no standard clock. She was only 2 minutes late – probably because of the elevator – on July 7, but was written up for 6 minutes. She believes she is being singled out in retaliation for having reported Board of Regents' wrongdoing to the Inspector General in June of 2004. Finally, she points out that the Ohio Office of Unemployment Compensation approved benefits for her, finding the Board lacked just cause for her removal.

Former co-worker Krista Shaw testified in support of the Grievant, saying that she (Ms. Shaw) never got work expectations or the Time and Attendance Policy. Ms. Shaw testified she was late about five times in two years because of traffic and was allowed to make it up. She has seen other employees, including senior service staff come in late. She thinks the policy is not applied evenhandedly and that the Grievant has been watched. She, herself, has been warned to stay away from the Grievant and other certain people. When she ignored the warning, she stated, she was disciplined and so she left the employ of the Board.

III. ARGUMENTS OF THE PARTIES

Argument of the Board

The Board points out that the parties agreed to progressive, corrective discipline. Here, though, the Grievant left management no choice but removal. Even a 30-day suspension without pay did not correct her behavior, for as she herself admitted, she did not go even a full pay period after her return before reverting to old habits. The Board admits it agreed to reduce the 30 days to 10 on the eve of that suspension's arbitration but says it did so in the belief that any arbitrator would agree that ten days, like thirty, is a major suspension which, it points out, is followed in Article 24 by termination.

Management has not rushed to judgment, it asserts. The Grievant was placed on notice, had her starting time changed three times, was disciplined twice, and then had her starting time changed again. When she returned from disability leave she was disciplined a third and then a fourth time. Then, the day she came back from her suspension, she was counseled again. Management has gone to extremes here, it claims, lumping infractions instead of progressing on each, donating leave, allowing her to bring her children to work, and even changing her start time after the fact and not charging her with her tardiness on that date. Despite all this, she continued her pattern of tardiness.

As for the Union's case, the Board points out that the only witness testifying on the Grievant's behalf is a former employee who did not report to the same supervisor as the Grievant, and who left the Board after she was disciplined. The Board submits that she had an axe to grind and had no proof of her allegations.

For all these reasons the Board asks that the Arbitrator uphold the removal and deny the grievance in its entirety.

Argument of the Union

The Union argues that there was no just cause for removal. The Grievant was a good employee who constantly kept Management aware of her childcare and abuse issues, and who

recognized her obligations to her employer, but received only leave as a solution even when she sought EAP assistance.

In the Union's view, removal is not progressive because the prior 10-day suspension was not broken down by infraction. Moreover, there are a number of mitigating factors. For one, there is no standard time clock. What is used is merely "observation" and computer clocks. For another, the elevators in the office tower are not efficient and frequently keep employees waiting. Time and attendance policies are not provided to employees and they are not applied even-handedly. The Grievant was the only person under scrutiny. No one else got work expectations but her. Others could make up the time or cover it with vacation, but not the Grievant. As testified by the Grievant and Ms. Shaw, management employees were late, too, but suffered no ill consequences. Requests for time off are supposed to be approved if the employee has leave on the books, but not in the Grievant's case. She did have leave to cover her absences of August 24 and 25, 2004, and this was later adjusted, but she had to ask for it.

The Union contends that the Grievant's removal was punitive in retaliation for having reported the Board to the Inspector General. Then it retaliated against Ms. Shaw for being her friend.

In conclusion the Union asks that the grievance be granted, and the Grievant reinstated with full back pay and leave balances, and made whole.

IV. OPINION OF THE ARBITRATOR

At the outset it must be acknowledged that one cannot fail to have sympathy for someone who is a victim of domestic violence. The Union portrays the Board as entirely lacking in such sympathy and turning a cold shoulder to the Grievant's childcare issues as well. The evidence more than suggests otherwise. Management changed the Grievant's supervisor, changed her starting time repeatedly upon request, donated leave and allowed her to bring her children to work on at least two occasions. Contrary to what the Grievant would have me believe, after declaring that her supervisor never raised EAP with her, she admitted on cross-examination that the human

resources director did so after being informed by the Grievant's supervisor. If the Grievant took the leave that also came up in that conversation and never followed up on EAP, that was her decision.

The Union contends that the Board was partially at fault in other ways, too, not providing a standard time clock and policies to all employees, and not taking the inadequate elevators into account. However, the Grievant admitted she was late on all four days, only quarreling about how late she was in the first incident, so it is hard to see how a standard time clock would have helped her. She also cannot claim to be ignorant of the rule she is charged with violating because she indisputably received the Time and Attendance Policy before the incidents cited and was otherwise on notice through her counseling, work expectations, pattern abuse notice and previous disciplinary actions. As for the elevators, if they routinely made employees late, the Grievant would have known this and should have routinely made allowance for it as one does for rush hour traffic on the streets.

The Union also contends that the Grievant has been unfairly singled out, at least in part because of her report to the Inspector General. This explanation for disparate treatment is utter nonsense because the Grievant went to the Inspector General after she was suspended for thirty days for, amongst else, earlier infractions of the same rule which were also tardies of a few minutes each. In fact, the sequence of events makes it more likely that the Grievant's report was retaliatory than the removal was. As for being singled out, the Board was justified in giving her clearly written work expectations, requiring her to report her time of arrival, not allowing her to make up lost time and the like because it was trying to change her behavior such that it could rely on her to be consistently ready to work at her starting time. An employer has the right to expect its employees to reliably and consistently report to work on time and to take corrective measures when they fail to do so. Employees who only occasionally are tardy may be treated differently than those who make it a practice to be so. Also, an employer need not apply the same rules to senior staff and other exempt employees who are expected to work whatever hours are necessary

for the job, although it may have expectations of regularity even for them. Furthermore, the evidence brought by the Union does not show them to be similarly situated to the Grievant, nor does the Board's investigation of this claim (Joint Ex. 4:9-1). Then there is the matter of her leave balances. Yes, her balances had to be corrected after she came back from disability and her requested leave was approved for pay purposes only, but I can attach no impure motive to either. The one appears to have been an error which was corrected and the other merely indicates that the employer did not excuse the tardiness but only approved payment of earned time off.

Finally there is the question of whether discipline was corrective and progressive, coming as it did on the heels of a 10-day suspension for violations of more than one rule. I cannot precisely determine how many of the ten days of the immediately prior discipline were assessed because of tardiness and pattern abuse, but the instant case is her fifth and follows a significant suspension. What is particularly disturbing is that the Grievant was actually out for thirty working days, i.e. six weeks (because her grievance had not yet been settled), yet within days of returning to work was tardy and thereafter regressed to her former pattern.[1] To be sure, she was late by only a few minutes on each occurrence and her second tardy in the series of four came a month after the first, but the fact remains that she was unable to amend her behavior even though by then she knew or should have known that her job was at stake. Moreover, even in this arbitration where she asks for her job back, she took no responsibility whatsoever for her failure nor did she admit that her employer has a right to expect her to show up on time. As such, like the Board, I have no expectation that a suspension of any length will prove corrective. For this reason, under the bargained for just-cause standard of the Contract, I sustain the removal and deny the grievance.

[1]She was late 3 of the 12 days she came to work from August 5 through August 26.

V. AWARD

The Grievant, Jada Mullins, was removed from her position as Secretary for the Ohio Board of Regents for just cause. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
September 23, 2005

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