

STATE OF OHIO  
STATE PERSONNEL BOARD OF REVIEW

Michael J. Bailey,

*Appellant,*

v.

Case No. 09-IDS-12-0525

Twin Valley Psychiatric System,  
Department of Mental Health,

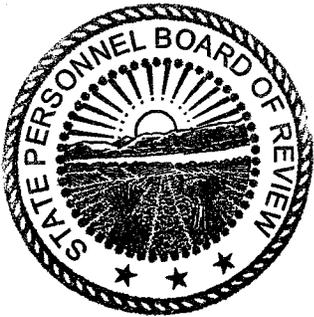
*Appellee.*

**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 Appellee's involuntary disability separation of Appellant be **AFFIRMED**, pursuant to O.R.C. § 124.03.



Lumpe - Aye  
Sfalcin - Aye  
Tillery - Aye

*J. Richard Lumpe*  
J. Richard Lumpe, *Chairman*

**CERTIFICATION**

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

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitute ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, December 13, 2010.

*Michelle Hunsley*  
Clerk

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

DR-10 MH

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

Michael J. Bailey

Case No. 09-IDS-12-0525

*Appellant*

v.

November 16, 2010

Twin Valley Psychiatric System,  
Department of Mental Health

*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 August 10, 2010. Present at the hearing were the Appellant, Michael J. Bailey, appearing *pro se* and Appellee Twin Valley Psychiatric System, Department of Mental Health designee Marsha McKeen, Human Resources Manager, represented by Rory P. Callahan, Assistant Attorney General.

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

Appellant Bailey was involuntarily disability separated from his position of Telecommunications Technician 1, effective December 22, 2009. Appellant Bailey filed a timely notice of his appeal.

**STATEMENT OF THE CASE**

Appellant Bailey applied for disability leave benefits on September 28, 2009, as he broke his right ankle. He had surgery on September 29, 2009 and his last day of work was September 18, 2009. He identified Appellee's Exhibit A as his application for disability leave benefits and stated he has been on disability leave three times due to his ankle injury. Appellant Bailey testified his ankle was put in a cast on September 28, 2009 and it was to be on for three to six months, with no weight bearing for three months and no carrying or walking. He identified Appellee's Exhibit B as his doctor's statement to that effect, dated September 21, 2009.

Appellee's Exhibit C was identified as Appellant Bailey's application for FMLA, signed by him on September 24, 2009 and Appellee's Exhibit D was identified as his approval for disability leave benefits from October 5 through November 16, 2009. Appellee's Exhibit E was identified as his pre-separation notice, dated November 3, 2009, which he received on November 6, 2009. Appellant Bailey testified he attended the hearing and he did not present any evidence on his behalf at the hearing. Appellee's Exhibit F was identified as his position description, which Appellant Bailey testified was accurate. He confirmed that his position required him to perform physical labor, to lift, climb a ladder and move equipment. He testified that he could not perform those duties on December 22, 2009, the effective date of his involuntary disability separation, as on that date, his ankle was still in a cast.

Appellee's Exhibit G was identified as a Physician Assessment form, signed on November 30, 2009, which was after the pre-separation hearing. The form states that "this patient is currently NWB (non-weight bearing) on right ankle/foot; very minimal weight is allowed for short periods of time on his right lower extremity". Appellant Bailey testified he has never seen this form. Appellant Bailey testified he went to the doctor on December 21, 2009 and was told he would be in a cast for six more weeks. Appellee's Exhibit H was identified as the order of involuntary disability separation, which he received on December 12, 2009. Appellee's Exhibit I was identified as Appellant Bailey's employment history. Appellant Bailey testified he was reinstated on May 10, 2010, but he was reinstated to the position of Maintenance Repair Worker 2 and his rate of pay decreased from \$17.22 to \$16.35 per hour. Appellee explained that this was because Appellant Bailey was still in his promotional probationary period when he stopped working on September 18, 2009, so when he was reinstated, he was reinstated to his former position of Maintenance Repair Worker 2.

Appellant Bailey argued that Appellee should have been sent him to see another doctor pursuant to administrative rule 123:1-30-01 of the Ohio Administrative Code. He also stated he applied for the transitional work program sometime prior to December 8, 2009 and the doctor's statement found in Appellee's Exhibit G was in response to his request for transitional work.

### **FINDING OF FACTS**

After thoroughly reviewing the testimony of Appellant Bailey and the documents which were admitted into evidence, I find the following facts:

1. Appellee met all of the procedural requirements of effectuating an involuntary disability separation. Appellee possessed medical evidence that Appellant Bailey could not perform his essential job duties as of December 22, 2009; Appellee timely notified Appellant Bailey of his pre-separation hearing; Appellant Bailey attended the hearing and was given an opportunity to view the medical evidence and an opportunity to present his own evidence; and Appellee notified Appellant Bailey in writing of his involuntary disability separation.
2. By his own admission, Appellant Bailey could not perform the essential duties of his position of Telecommunications Technician 1 on December 22, 2009, as his ankle was still in a cast at that point in time.
3. The doctor statement attached to Appellant Bailey's application for disability leave benefits stated he could not bear weight for three months, he was not to carry anything nor walk. It also stated he could not sit, stand or walk for any hours of an eight hour day and that his condition would prevent him from working for approximately six months.

### **CONCLUSIONS OF LAW**

In order for Appellee's involuntary disability separation of Appellant Bailey to be upheld, Appellee had the burden of proving by a preponderance of the evidence that Appellant Bailey could not perform the essential duties of his position as of the effective date of his involuntary disability separation, December 22, 2009. Appellee has met its burden.

Appellant Bailey testified that he could not perform the essential duties of his position as of December 22, 2009 as his ankle was still in a cast at that time. He argued that Appellee did not send him out for a medical exam as provided in administrative rule 123:1-30-01 of the Ohio Administrative Code. The pertinent part of that rule states as follows:

(A) An employee who is unable to perform the essential job duties of the position due to a disabling illness, injury or condition may be involuntarily disability separated. **An involuntary disability separation occurs when an appointing authority has received substantial credible medical evidence of the employee's disability and determines that the employee is incapable of performing the essential job duties of the employee's assigned position due to the disabling illness, injury or condition.**

(B) An appointing authority shall request that an employee submit to a medical or psychological examination, conducted in accordance with rule 123:1-30-03 of the Administrative Code, prior to the involuntary disability separating the employee unless:

- (1) The employee is hospitalized at the time such action is taken,
- (2) The employee has exhausted his or her disability leave benefits, or
- (3) Substantial credible medical evidence already exists that documents the employee's inability to perform the essential job duties.** (Emphasis added).

As can be seen from reading the above administrative rule, an appointing authority does not have to send an employee out for a medical examination if "substantial credible medical evidence already exists that documents the employee's inability to perform the essential job duties." In this case, Appellee did possess the medical statement attached to Appellant Bailey's application for disability benefits. That medical evidence clearly stated that Appellant Bailey could not walk, sit or stand for any portion of a day, that he could not carry things and he could not engage in any weight bearing activities. Appellant Bailey testified he had a cast on his ankle. Therefore, there was no reason for Appellee to send Appellant Bailey out for another medical opinion when Appellant Bailey's own doctor provided information that he was disabled from his position for a period of approximately six months.

Appellant Bailey also argued that the Appellee should have waited for a longer period of time to place him on involuntary disability separation so that he could have exhausted his leave time first. Appellee is not under any obligation to delay its imposition of an involuntary disability separation to allow an employee to use his or her leave time. When the Appellee possess information that the employee can no longer perform the essential duties of the position, then the Appellee can begin to institute involuntary disability separation proceedings.

Appellant Bailey did not provide Appellee with any medical evidence that he could perform the essential duties of his position as of December 22, 2009. Therefore, Appellee correctly relied on the medical information it had and Appellee did not abuse its discretion in involuntarily disability separating Appellant Bailey.

Appellant Bailey was reinstated on May 10, 2010. This Board does not have any jurisdiction to rule on whether or not he was properly reinstated, as this case involved only the parameters of Appellant Bailey being placed on involuntary disability separation, not being reinstated. If Appellant Bailey was still in a promotional probationary period at the time of his last day worked, and if Appellee probationarily reduced Appellant Bailey back to the classification that he held prior to being promoted to a Telecommunications Technician 1 upon his reinstatement, then it would appear that Appellee properly reinstated Appellant Bailey.

Inasmuch as the evidence has established that Appellant Bailey could not perform the essential duties of his position as of the effective date of his involuntary disability separation on December 22, 2009, it is my **RECOMMENDATION** that Appellee's involuntary disability separation of Appellant Bailey be **AFFIRMED**.

  
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Marcie M. Scholl  
Administrative Law Judge