

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

BRYAN PACK,

Appellant,

v.

Case No. 09-MIS-11-0470

DEPARTMENT OF PUBLIC SAFETY,
STATE HIGHWAY PATROL,

Appellee

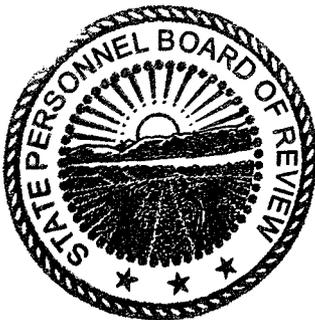
ORDER

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

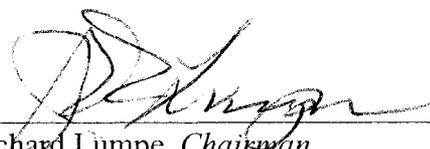
After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Findings of the Administrative Law Judge but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

It is noted that when an employee appeals an appointing authority's denial of the employee's request for reinstatement from a disability separation, it is the employee who bears the burden of proof in that appeal. Thus, in the instant case, Appellant bears the burden to demonstrate that he can, once again, perform the essential duties of his position. Based on the evidence in the record, Appellant failed to meet this burden. Appellant's evidence simply fails to establish, by a preponderance, that Appellant was psychologically fit to perform the essential duties of an Ohio State Highway Patrol (OSHP) Trooper. Most specifically, the evidence in the record does not support the contention that Appellant could safely carry a handgun, an essential duty of an OSHP Trooper. Since Appellant failed to demonstrate that he could perform the essential duties of his position, Appellee's denial of Appellant's application for reinstatement must be affirmed.

Wherefore, it is hereby **ORDERED** that Appellee's **DENIAL** of Appellant's application for reinstatement to his position of Ohio State Highway Patrol Trooper be **AFFIRMED**.



Lumpe - Aye
Tillery - Aye



J. Richard Lumpe, *Chairman* 1/7/11mmH

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, January 7, 2010.

Michelle Haney
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**

Bryan Pack,

Case No. 09-MIS-11-0470

Appellant

v.

November 5, 2010

Department of Public Safety,
State Highway Patrol,

Appellee

Jeannette E. Gunn
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on due to Appellant's timely appeal of his October 22, 2009, denial of reinstatement from a voluntary disability separation. A record hearing was held in the instant matter on June 16, 2010. Appellant was present at record hearing and was represented by Herschel M. Sigall, attorney at law. Appellee was present at record hearing through its designee, Jennifer Tipton, and was represented by Rory P. Callahan, Assistant Attorney General.

STATEMENT OF THE CASE

Appellant testified that prior to taking a voluntary disability leave from his employment with Appellee, he was assigned to Appellee's Gallipolis post as a State Highway Patrol Trooper. He recalled that he began his leave on June 12, 2008, which was his last date in active pay status. Appellant confirmed that he applied for and was granted temporary disability benefits through the Ohio Department of Administrative Services (DAS), and acknowledged that he received benefits for approximately six months. He stated that he also applied for permanent disability retirement through the Ohio State Highway Patrol (OSHP) Retirement System, but was denied based upon a determination made by Dr. Marjorie Gallagher, a psychiatrist, who concluded that Appellant was not totally or permanently incapacitated. Appellant indicated that he received notification of that denial in June 2009.

Appellant noted that he subsequently applied for reinstatement to his position with Appellee on or about July 16, 2009. He recalled that he submitted his letter requesting reinstatement to Director Henry Guzman, along with a copy of a letter from his physician, Dr. Aaron Karr, which indicated that he was physically able to perform his job duties. Appellant acknowledged that Dr. Karr's letter noted that Appellant is on medication for a psychiatric condition.

Appellant recalled that he was also examined by Appellee's independent medical examiner, Dr. Nick Marzella. He confirmed that at the time he was examined by Dr. Marzella he had not been taking his psychiatric medications for a period of several months. Appellant testified that he believed he provided a copy of Dr. Marjorie Gallagher's report, upon which the denial of his OSHP retirement was based, to Dr. Marzella. He indicated that he subsequently received a copy of the report prepared by Dr. Marzella and had an opportunity to examine that report prior to his pre-reinstatement hearing.

Appellant recalled that his representative, Mr. Sigall, attended the pre-reinstatement hearing with him and spoke on his behalf. He testified that he had provided Mr. Sigall with a copy of Dr. Gallagher's report prior to the pre-reinstatement hearing, and that Mr. Sigall submitted a copy of that report to the hearing officer at the pre-reinstatement hearing. Appellant stated that his request for reinstatement was denied by Appellee on or about October 22, 2009.

Jennifer Tipton testified that she is presently employed by Appellee as a supervisor in its Human Capital Management/Benefits division. She confirmed that she is familiar with Appellant's request for reinstatement and was the hearing officer who conducted Appellant's pre-reinstatement hearing. The witness stated that her role as hearing officer was to ask standard questions and take evidence.

Ms. Tipton testified that she recalled Appellant submitting a report reflecting a denial of the extension of Appellant's disability leave benefits through DAS (Appellant's Exhibit 1), but did not recall Appellant or his representative submitting anything else at the pre-reinstatement hearing. The witness further testified that although she recalled Appellant's representative discussing the retirement process, she did not recall that he specifically referenced Dr. Gallagher's report. She confirmed that she has seen both the DAS report and the medical evaluation prepared by Dr. Gallagher, as they were part of Appellant's disability file.

Ms. Tipton explained that she took notes during the hearing and provided those notes to a representative from the Legal division, who was also present at the pre-reinstatement hearing. She noted that the Legal division forwards information to the Director, who makes the decision as to whether or not reinstatement should be granted. The witness testified that her hearing notes are not forwarded to the Director for his consideration and that she did not know if he had any information regarding Appellant's application for disability retirement or the subsequent denial of that application. Ms. Tipton indicated that she believed the Director did have copies of the March 4, 2009, disability separation letter provided to Appellant; Appellant's July 16, 2009, letter requesting reinstatement; the July 20, 2009, letter provided to Dr. Marzella scheduling Appellant's examination; Dr. Marzella's July 28, 2009, evaluation; and the August 11, 2009, notice provided to Appellant regarding his pre-reinstatement hearing.

FINDINGS OF FACT

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

Appellant took voluntary disability leave from his employment with Appellee as a State Highway Patrol Trooper assigned to Appellee's Gallipolis post in June 2008. His last date in active pay status was June 12, 2008. Appellant applied for and was granted temporary disability benefits through the Ohio Department of Administrative Services (DAS), and received benefits for approximately six months. He also applied for permanent disability retirement through the Ohio State Highway Patrol (OSHP) Retirement System. That retirement was denied, based upon a determination made by psychiatrist Marjorie Gallagher, M.D., who concluded that Appellant was not totally or permanently disabled.

Appellant subsequently applied for reinstatement to his position with Appellee on or about July 16, 2009. He submitted his letter requesting reinstatement to Director Henry Guzman, along with a copy of a letter from his physician, Aaron Karr, D.O., indicating that he was able to perform his job duties. Dr. Karr's letter noted that Appellant was taking medication for a psychiatric condition.

As part of the reinstatement process, Appellant was examined by Appellee's independent medical examiner, psychologist Nick Marzella, Ph.D. At the time he was examined by Dr. Marzella, Appellant had not been taking his psychiatric

medications for a period of several months. Dr. Marzella concluded that Appellant was psychologically unable to perform his job duties as a Trooper.

Appellant and his representative received notice of and attended a pre-reinstatement hearing conducted by Hearing Officer Jennifer Tipton. At that hearing, Appellant and/or his representative had an opportunity to present additional information. Appellant's request for reinstatement was denied by Appellee on or about October 22, 2009, based upon Appellee's conclusion that Appellant was not able to perform the essential job duties of his position. Appellant subsequently filed an appeal with this Board.

CONCLUSIONS OF LAW

Prior to the record hearing, it was determined that Appellant had presented sufficient evidence to establish a *prima facie* case by demonstrating that he had applied for reinstatement to his position with Appellee in a timely fashion and had provided Appellee with substantial credible medical or psychological evidence indicating that he was capable of performing the essential duties of the position. Appellee had the burden of production at record hearing to rebut Appellant's evidence.

Testimony and evidence admitted at record hearing presented this Board with the opinion of three medical and/or mental health practitioners. Dr. Marjorie Gallagher, a psychiatrist, concluded that Appellant was not permanently incapacitated to perform specific job duties and responsibilities in the employ of the patrol, based upon her psychiatric evaluation, and recommended continued psychiatric treatment. Dr. Aaron Karr, a doctor of osteopathic medicine, while acknowledging that Appellant was taking medication that might affect his ability to work, indicated that Appellant could return to work without restrictions as of July 13, 2009. Dr. Nick Marzella, a psychologist, stated that Appellant was psychologically unable to complete the duties of a trooper in an unrestricted manner. None of the individuals who examined Appellant attended the record hearing to offer testimony beyond the written information contained in their reports.

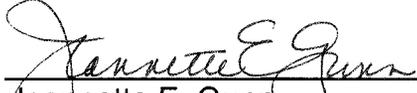
Based upon my examination of the medical or psychological evidence presented, I find that Appellant has demonstrated that he was able to perform the essential job duties of his position at the time he applied for reinstatement. Both of the medical doctors who examined Appellant concluded that he was able to perform

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the duties of his position. While Dr. Gallagher's evaluation was not conducted solely for the purpose of determining immediate fitness for duty, she expressly indicated in her report that Appellant had no impairment that would render him unable to perform specific job duties and responsibilities. Dr. Karr certified that as of July 13, 2009, Appellant was able to return to work without restrictions. I find that the weight of the evidence in favor of Appellant's ability to return to work is sufficient to prevail over Dr. Marzella's concerns regarding Appellant's psychological condition at the time of his examination.

I further find that evidence contained in the record and presented at record hearing was sufficient to indicate that Appellee complied with the procedural requirements of the reinstatement process, as outlined in Ohio Administrative Code Section 123:1-30-04.

Therefore, based upon a review of all of the information contained in the record, I respectfully **RECOMMEND** that Appellant be **REINSTATED** to his position as Highway Patrol Trooper with Appellee.



Jeannette E. Gunn
Administrative Law Judge

JEG: