

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MELVIN STRETCHBERY,

Appellant,

Case Nos. 11-IDS-07-0253
11-MIS-07-0254

v.

DEPARTMENT OF REHABILITATION AND CORRECTION,
TOLEDO CORRECTIONAL INSTITUTION,

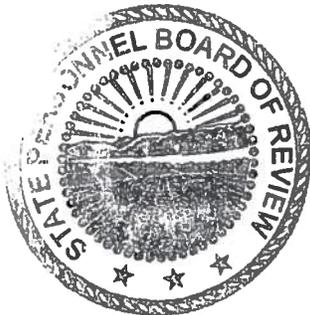
Appellee.

ORDER

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

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 denial of Appellant Stretchberry's reinstatement request be **AFFIRMED**, pursuant to Ohio Administrative Code § 123:1-30-04.



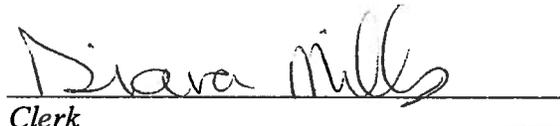
Casey - Aye
Lumpe - Aye
Tillery - Aye


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)~~ 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, October 11, 2012.


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**

Melvin Stretchbery,

Appellant

v.

Dept. of Rehab. & Corr.,
Toledo Correctional Inst.,

Appellee

Case No. 11-IDS-07-0253

Case No. 11-MIS-07-0254

May 16, 2012

Christopher R. Young
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on January 19, 2012. Present at the hearing were the Appellant, Melvin Stretchbery, who was represented by Terry J. Lodge, Attorney at Law, and Kim Beasley, a Human Capital Management Senior Analyst. Personnel Manager, who was represented by Joseph N. Rosenthal, Senior Assistant Attorney General.

The subject matter jurisdiction of this Board was established pursuant to section 124.03 the Ohio Revised Code from a denial of reinstatement that had been issued to the Appellant, Melvin Stretchbery, on or about June 14, 2011, which he timely appealed to this Board on July 5, 2011, which was stipulated. Additionally, Case number 11-MIS-07-0254 is also consolidated under and into Case number 11-IDS-07-0253, as well for purposes of this record hearing.

PROCEDURAL BACKGROUND INFORMATION

This instant case arose out of a ruling which had taken place on a proceeding case noted as Melvin Stretchbery, Appellant v. Department of Rehabilitation and Correction, Toledo Correctional Institution, Case No. 10-IDS-12-0337. In that case, the Appellant, a Corrections Officer, was injured subduing a combative inmate who had attacked the Appellant's supervisor. Thereafter, the Appellant underwent extensive rehabilitation that included surgery and physical therapy.

The record reflected that Appellant was delayed in obtaining this surgery because of the unexpected retirement of the surgeon whom the Bureau of Workers' Compensation (BWC) had authorized to perform Appellant's surgery and because BWC had to then re-authorize surgery with an alternate surgeon. Further, during the course of Appellant's recovery period, an agent of Appellee, on whose guidance Appellant could reasonably rely, provided Appellant with information that, we find, constructively extended the cutoff time for Appellant to file his request for reinstatement.

Additionally, it appears that Appellant's reinstatement request contained medical information that, at a minimum, would have required the initiation of pre-reinstatement proceedings. Accordingly, the Appellee was ORDERED either to 1) reinstate Appellant to a Corrections Officer position at Toledo Correctional Institution or 2) initiate the pre-reinstatement process by sending Appellant for an Independent Medical Examination, the cost of which is to be borne by Appellee.

Thereafter, the Appellee initiated the pre-reinstatement process by sending the Appellant to an independent medical examination, the cost of which was borne by the Appellee. The Appellee after having reviewed the independent medical examination and after conducting a pre-reinstatement proceeding denied the Appellant's reinstatement. As a result, the Appellant then filed the instant appeal from his denial of reinstatement.

In order for the Appellee's involuntary disability separation denial of reinstatement of the Appellant Stretchbery to be upheld, the Appellee has the burden of proving by a preponderance of the evidence that the Appellant could not perform the essential duties of his position as of the effective date from a denial of reinstatement that had been issued to the Appellant, Melvin Stretchbery, on or about June 14, 2011.

STATEMENT OF THE CASE

Appellee's first and only witness was Ms. Kimberly Beasley, the Personnel Manager at the Toledo Correctional Institution (TCI), a position she has held since 2009, although she had been working for the department in one capacity or another since September 1987. When questioned as to her duties, Ms. Beasley stated that she manages the human resource functions at the institution, that included handling payroll services, all paperwork, any and all human resource

related items such as discipline, promotions, unemployment compensation and involuntary disability separations. When asked about involuntary disability separations, Ms. Beasley explained that once a person is off active work status he or she has two years in which to heal themselves, to get back to work in a non-disciplinary fashion. Moreover, the witness explained that she is familiar with the reinstatement process surrounding involuntary disability separations, as well. Additionally, the witness testified that TCI is an all male institution housing level 3 and 4 inmates, and noted that the next level would be maximum-security. Further, the witness testified that there are approximately 1500 inmates at TCI, along with 377 employees, and that inmates are housed in cells from one to two people.

Next, the witness identified Appellee's Exhibit 2 as an EHO or employment history on computer of Mr. Melvin Stretchbery, wherein it was noted by the witness that the last entry dated November 1, 2009, revealed that he was terminated due to a disability separation, as of that date. When asked if she is ever met Mr. Stretchbery, the witness testified in the affirmative, but only through this process, as she did not directly work with them prior to his separation, but acknowledged that she understood his position to be a Corrections Officer. Further, when questioned, the witness testified that she is familiar with a Corrections Officer's duties, as they manage the inmates in the institution, all while holding a variety of posts wherein they can do a number of different jobs, including but not limited to, searching for contraband, writing reports as needed and stopping fights. When asked if there are any physical requirements necessary for a person holding a Corrections Officer's position, the witness testified that before one can become or hold a Corrections Officer's position they have to attend classes at the training Academy, along with passing certain physical requirements and tests, including classes in unarmed self-defense. The witness then identified Appellee's Exhibit 3 as an older but accurate position description of a Corrections Officer, the position which Mr. Melvin Stretchbery held.

The witness then identified Appellee's Exhibit 4 as a May 5, 2011, letter/notice to Ms. Stehura, Chief of Personnel for the Department of Rehabilitation and Correction, signed by Keith a Smith, Warden of TCI, which the witness explained that she drafted this letter requesting to approve an Independent Medical Examination (IME), for Mr. Melvin Stretchbery. The witness explained that this letter was drafted as result of the State Personnel Board of Review's order, identified as Appellee's Exhibit 1. Further, the witness explained that Ms. Stehura setup the doctor's appointment, the time and date for the IME. The witness identified pages 2

and 3 on Appellee's Exhibit 4 as Ms. Stehura's May 10, 2011 letter to Joan Donahue, MLS Group of Companies, Inc. requesting that a complete physical examination be conducted to determine officer Stretchbery's fitness for duty, and specifically given the requirements of his position and the unique safety and security issues associated with working in an environment of a prison was requested to answer seven specific questions, in determining his fitness for duty. The witness stated that the seven questions that needed to be answered as part of the IME were as follows;

- Can the employee now, or in the foreseeable future, run a distance of up to three quarters of a mile and respond to a man down alarm if needed?
- Can the employee now, or in the foreseeable future demonstrate agility?
- Can the employee now, or in the foreseeable future, lift and carry up to 50 pounds a distance of at least 25 feet?
- Can the employee now, or in the foreseeable future, take, qualify and re-qualify in unarmed self-defense?
- Can the employee now, or in the foreseeable future taking qualify for firearms training?
- Can the employee now, or in the foreseeable future taking qualified for CPR training, while kneeling of both knees?
- In the employee now, or in the foreseeable future, work more than eight hours one day?

When questioned, the witness explained the significance of each and every question that needed to be answered to determine one's return to work or fitness of as a corrections officer.

The witness then identified its pages 5 through 31 of Appellee's Exhibit 4 as a series of reports and documents which they had in their possession which they sent to the doctor's office conducting the IME on Mr. Stretchbery. With respect to page 5 of said exhibit the witness testified that this was Mr. Stretchbery's initial request for reinstatement dated August 21, 2010, stating that he had been released to return to work by Dr. Patrick McCormick and Dr. Huntington. However, the witness testified that at that time, the August 21, 2010, the Appellant's request for reinstatement was passed and/or was beyond the deadline that was permitted for filing such a request. Page 6 of said exhibit was identified by the witness as Dr.

Huntington's August 19, 2010 release to return to full duty work. The witness then identified page 7 of said exhibit as a simple return to work slip for Mr. Stretchbery to begin on August 23, 2010, almost a year prior to being sent out on the IME, and noted that this note itself only provided the bare minimum substantial, credible and reliable medical evidence that is required for their office to consider. The witness then identified page 8 as a document denoting a return to work for August 23, 2010, that does not list any work/non-work capabilities. Next, the witness identified page 9 of said exhibit as a letter dated June 9, 2010, from Dr. Patrick McCormick as a plan that calls for the patient to finish out his physical therapy wherein she stated that she needed more information and clarification regarding this report. The witness then identified page 10 of said exhibit as a Wood County Hospital report regarding Mr. Stretchbery for a visit dated February 9, 2011 which was sent to the Bureau Worker's Compensation, which they were copied on May 3, 2011. The witness then identified page 12 of said exhibit as a Wood County Hospital report dated April 7, 2011, or a Ready Works Report generated for Mr. Stretchbery's Bureau Worker's Compensation claim, wherein it was noted on the document that he was not the lift any weight greater than 20 pounds frequently, occasionally up to 30 pounds, no lifting greater than 30 pounds, and no above shoulder level work with the right arm. Ms. Beasley testified that these limitations noted on the document above could place Mr. Stretchbery at a significant disadvantage in the performance of his job as a corrections officer, specifically with respect to his unarmed self-defense, firearm readiness and CPR requirements. Next, the witness identified page 13 of said exhibit as a Physician's Report of Work Ability report dated April 7, 2011 wherein it was noted that Mr. Stretchbery could return to work with restrictions. The report stated that Mr. Stretchbery could not lift 50 or more pounds at all, occasionally 21 to 50 pounds, 11 to 20 pounds frequently and up to 10 pounds continuously. When questioned, Ms. Beasley testified that only individuals been separated from work for 90 or less days are eligible to return to work with restrictions, but that was not available to Mr. Stretchbery, as of that date he had been separated from service for over two years.

The witness then identified pages 15 through 20 on Appellee's Exhibit 4 as a Compmanagement Health Systems Initial Rehabilitation Assessment Report dated October 21, 2010, regarding Mr. Stretchbery. The witness explained that this document appeared to be a standard intake preparation report noting that Mr. Stretchbery was scheduled to see his physician of record on November 1, 2010, and that he has an injured worker is feasible for vocational rehabilitation. The witness then identified pages 20 through 31 on Appellee's Exhibit 4 as a May 5,

2011, Individualized Vocational Rehabilitation Plan and/or an amendment to his rehabilitation plan wherein it was noted that he had not had any improvement from his previous April 7, 2011 assessment, only being able to lift 30 pounds occasionally.

When questioned, the witness identified Appellee's Exhibit 5 as a letter dated May 16, 2011 from the MLS Group of Companies, scheduling Mr. Stretchbery's IME for May 19, 2011. Further, the witness identified Appellee's Exhibit 6 as the actual IME fitness for duty exam dated May 27, 2011, performed and written by Dr. Sushil M. Sethi, which indicated after reviewing the report that Mr. Stretchbery was not fit to return to work. The witness then identified page 5 through 8, of Appellee's Exhibit 6, which outlined the Clinical Impression of Dr. Sushil M. Sethi's answers to the questions that were asked to be answered. The witness indicated that the doctor stated in his report that "after a thorough physical examination today it is my medical opinion Mr. Stretchbery is capable of working probably in the upper medium labor where he can stand four hours, sit four hours and walk four hours. He can carry 25-30 pounds frequently, 50 pounds occasionally. I do not think he is capable of working as a department corrections officer as noted in the job description." When reviewing the conclusions by Dr. Sushil M. Sethi, the witness testified that because of the Appellant having a substantial moderate degenerative disease of the thoracic spine most all of the questions that were required in the fitness for duty exam were answered in the negative, with a finding that he could not perform the demands of a corrections officer. Specifically, the witness testified that Dr. Sushil M. Sethi stated that Mr. Stretchbery was not fit for duty or capable of performing the essential functions of the corrections officer position at Toledo Correctional Institution. The witness testified that she took Dr. Sushil M. Sethi's statement as a credible one.

When questioned, the witness testified that when she received the above mentioned report she sent this to the Warden, who in turn explained to her that he wanted to deny reinstatement and to go ahead and schedule a pre-reinstatement hearing for Mr. Stretchbery. The witness explained that a pre-reinstatement hearing was scheduled and Mr. Stretchbery was allowed to speak on his own behalf regarding the report, but that he did not submit any additional medical documentation, or updated medical documentation on his own behalf, other than the information that he had previously submitted back in August 2010. The witness identified Appellee's Exhibit 7 as a copy of her June 14, 2011 pre-reinstatement hearing written notes. The witness testified that Mr. Stretchbery took approximately an hour and a half to methodically go through the nine page report noted above

wherein he noted numerous statements that he felt were in error, but that he did not present any medical evidence to contradict those findings. However, the witness did state that Mr. Stretchbery did present at the pre-reinstatement hearing an August 19, 2010, Huntington Chiropractic and Wellness documentation (page 6 of Appellee's Exhibit 7), one that they already had in their possession and a Work Hardening/Conditioning Program Progress Report dated January 20, 2011, wherein it shows that Mr. Stretchbery rates his own pain as 5/10, and him being at 60 – 65% of normal, that he complains of decreased endurance, but feels he would be able to complete all the tasks required for the training Academy. When questioned, the witness testified that the above noted documents did not persuade the department to return him to work. The witness also identified page 8 of Appellee's Exhibit 7, as a doctor's return to work slip dated November 1, 2010, a document which the Appellant reintroduced at his hearing, and stated that this was not considered substantial credible medical evidence as a was not complete, and did not address the essential job functions of his position as a corrections officer. Further, the witness testified that in spite of Mr. Stretchbery's rebuttal, it was the belief that Dr. Sushil M. Sethi's report is overall an accurate accounting of Mr. Stretchbery's current physical condition and that he is unable to return to his position of corrections officer, as was noted on page 5 of Appellee's Exhibit 7

The witness then identified Appellee's Exhibit 8 as a June 22, 2011 letter to Mr. Stretchbery denying him reinstatement to his position as a corrections officer at TCI, along with informing him of his appeal rights to the State Personnel Board of Review.

On cross-examination, Ms. Beasley, when questioned, testified that Mr. Stretchbery's last active day of work was July 21, 2008. The witness then identified Appellee's Exhibit 7, page 8 and noted that the doctor's return to work slip with no restrictions dated November 1, 2010, was not persuasive, as did not include substantial credible medical evidence. Further, the witness identified Appellee's Exhibit 4, page 7 as another doctor's return to work slip, with no indications regarding restrictions, dated August 9, 2010, and testified that this slip was not persuasive, as it did not include substantial credible medical evidence, as well. After identifying Appellee's Exhibit 4, page 13, a physician's report of work ability, dated April 7, 2011, and explained that under the work/non-work capabilities she did not question lifting or carrying the weights for frequency thereof. Additionally, the witness testified that there are more medical files, regarding the Bureau of Worker's Compensation file that are not included in this exhibit book. Moreover, when

questioned, the witness testified that current employees who may have been injured at home or at work can participate in a return to work hardening program, with a 90 day limitation, but that one can't participate in this program if that person had become separated from service.

The witness then identified Appellee's Exhibit 6 as Dr. Sushil M. Sethi's May 27, 2011, medical report regarding Mr. Stretchbery's ability to return to work and noted that she was not certain how the doctor came to his conclusions or whether what tests were run to reach those conclusions, as well. When questioned, the witness testified that the various questions that were outlined in the report are not contradiction of each other, as a report indicates that Mr. Stretchbery cannot return to perform the demands of a Corrections Officer position. When questioned, the witness testified that they did not contact the doctor's office after the hearing for any further information. Further, the witness testified that at the pre-reinstatement hearing the Warden was not in attendance as she was his sole representative.

The witness then identified Appellee's Exhibit 4, page 12 as a Wood County Hospital Ready Works Report dated April 7, 2011, and testified that under the plan it was noted as temporary restrictions, and on page 28 of said exhibit under a Individualized Vocational Rehabilitation Plan dated the same day was not aware that there was a billing issue wherein Mr. Stretchbery had missed out on an additional month of requested unsupervised conditioning, a concern which she did not consider as relevant. The witness then identified Appellee's Exhibit 7, page 7, a Work Hardening/Conditioning Program Progress Report and explained that she considered this document into his pre-reinstatement hearing wherein it revealed that he could lift 50 pounds, but it did not say that he could carry it at least 25 feet, although he did state that he could lift 50 pounds for a distance of 25 feet 10 times, but that no medical documentation was supplied to back up that fact. Upon further questioning, the witness testified that the only medical documentation that Mr. Stretchbery presented at the pre-reinstatement hearing were pages 6, 7 and 8 of Appellee's Exhibit 4.

Moreover, when questioned, the witness testified that she met with the Warden and it was his decision not to reinstate Mr. Stretchbery. The witness stated that she gave the Warden her notes and he reviewed those notes to see whether or not Mr. Stretchbery could perform the duties of a Corrections Officer. The witness recalled that the answers to both questions eight and nine of Appellee's Exhibit 6 wherein the Dr. Sushil M. Sethi stated that Mr. Stretchbery was not fit for duty or

capable of performing the essential functions of a corrections officer and that he could not return to work to any occupation weighed heavily upon the Warden's decision not to reinstate Mr. Stretchbery.

The Appellant's first and only witness was the Appellant, Melvin Stretchbery, as called on direct examination. When questioned, the witness testified that he is 56 years old and married and currently living in Bowling Green, Ohio. Further, the witness testified that he is currently employed at Hinkle Manufacturing, a temporary job which has lasted currently two weeks, and prior to that he was employed for 7 1/2 months at the Northwest Corrections Treatment Center (a private institution) a low to medium security institution working the second and third shift as a Residence Specialist. Moreover, the witness when questioned testified that he had worked at TCI for approximate seven years, up until November 2009 when he was medically separated. However, the witness recalled that he was injured on the job in October 2007 securing an inmate. The witness testified that he applied for Ohio injury leave, which he didn't receive, wherein he then applied worker's compensation, which he started to receive approximate three months later. The witness testified that he then returned to work, light duty in June of 2008, and that he took off work in July 2008 for a previously scheduled surgery, only to find out that his doctor did not return from his vacation for that schedule surgery. The witness explained that the surgery, a C6 and C7 fusion of the neck vertebrae, along with a herniated disc, was then rescheduled with Dr. McCormick for April 2009. The witness explained that after he had his surgery his recovery time was approximate 3 1/2 months, and that he continued to receive Worker's Compensation during this period.

The witness testified that as part of his recovery plan he saw Dr. Heather Huntington, a chiropractor in her physical therapy clinic. The witness explained that as part of his recovery plan he ran on a treadmill 34 times a week on a 3.8 setting/15% incline anywhere from 30 to 45 minutes, along with working out with 25 pound weights utilizing repetitions of 12 sets each. The witness then identified Appellant's Exhibit B as a schedule of exercises that he was to be performing in his recovery plan from Huntington Chiropractic and Wellness dated July 23, 2010. It was noted that although the witness explained that he obtain these levels, there is nothing from Dr. Huntington signing off that that was actually done. The witness then identified Appellant's Exhibit C as a letter dated August 19, 2010; from Dr. Huntington noting that Mr. Stretchbery had underwent 18 postsurgical physical therapy visits with her. The witness testified that is after he received this letter he applied for reinstatement in August 2010 with the institution. The witness identified

Appellee's Exhibit 4; page 5 was the letter he sent in to the institution on August 21, 2010 requesting reinstatement. The witness testified that he was not reinstated.

The witness then identified Appellee's Exhibit 1, as the State Personnel Board of Review's order, dated April 12, 2011 requesting that the institution reinstate the Appellant or send the Appellant out for independent medical examination, and noted that from August of 2010 up to April 2011 he was still under Worker's Compensation continued care wherein he was assigned a Rehabilitation Specialist, and that he went to Wood County Hospital to harden himself off physically. The witness testified that every other day for two to three hours he speed walked two miles, picked up a box filled with weights totaling 50 pounds 10 times a day and carried it 25 feet, picked up a box with 35 pounds of weights beginning at his waist and lifted it over his head 20 times a day and dead lifted a box filled with 65 pounds of weight up to his waist, as well. However, it was noted by the undersigned administrative law judge that no medical documentation verifying these facts were submitted. To the contrary, when re-identifying Appellee's Exhibit 7, page 7, the Work Hardening/Conditioning Program Progress Report dated January 20, 2011, it shows that the floor to knuckle lift of 65 pounds, the knuckle to shoulder lift with 65 pounds and the shoulder to overhead lift a 50 pounds could only be performed one time maximum. Further, the witness identified Appellant's Exhibit F as a work conditioning evaluation dated November 23, 2010, signed by Mary Bostelman, PT which indicated his maximum capabilities tested at that time, wherein the witness testified that he exceeded these capabilities, but that was not part of the medical record or documentation. Moreover, the witness re-identified Appellant's Exhibit D as Dr. McCormick's ready to return to work slip, with no restrictions dated November 1, 2010. The witness then identified Appellant's Exhibit E as a chart note dated November 1, 2010, from Dr. McCormick's office, wherein it was noted by the undersigned administrative law judge that a Dr. McCormick's opinion the Appellant would need to undergo some additional work conditioning to be able to return to work.

When questioned, the witness testified that he did not bring any medical documentation to his independent medical examination on May 13, 2011. When questioned, the witness testified that the doctor never asked him to lift any weights and when he asked him if he could run, he told him that he could. Further, the witness testified that the doctor never put them on a treadmill, but he did check his range of motion of his neck. Furthermore, the witness testified that the doctor did ask them to squat and touch his toes, but not from a crouching position.

Additionally, the witness testified that the doctor did ask him about his physical therapy and strength conditioning, wherein he told them that it had been about 95% successful.

The witness then re-identified Appellee's Exhibit 4, page 12; a Ready Works dated April 7, 2011, and explained that he went to Wood County Hospital ready works because he felt like he had a bruise under her shoulder blade at that time, that was near his herniated disc and that there could be some complications at that time. With respect to the plan on said exhibit, the witness testified that he was to start of unsupervised conditioning with no lifting greater than 20 pounds frequently, occasionally up to 30 pounds, and no lifting greater than 30 pounds, and no above shoulder level work with the right, with him still remaining on temporary restrictions at that time. When asked if he went to his unsupervised reconditioning the witness testified that he did not because of cost.

The witness then when questioned about his reinstatement hearing which was held on June 14, 2011, testified that Ms. Beasley, along with a couple other corrections officers on his behalf were present in which he gave approximately an hour and one half rebuttal of the doctor's fitness for duty report. Further, the witness testified that he provided Appellee's Exhibit 7, pages 7 and 8, and Appellant's Exhibit B, the exercises which he had performed at the reinstatement hearing. The witness testified that Ms. Beasley did not ask for any additional medical documentation. Further, the witness testified that he received Appellee's Exhibit 6, the fitness for duty exam approximately one week after May 27, 2011, along with stating that he was receiving working wage loss benefits from the state as a supplement to his reduced wages. Upon further questioning, the witness testified that after he received Appellee's Exhibit 6, the fitness for duty exam, he went back to his doctor, although he did not have any medical documentation from that doctor stating the same. Additionally, the witness testified as far as he knows he has not been placed on any weight lifting restrictions by the Bureau of Worker's Compensation, but then explained that his April 7, 2011 visit to the Ready Works Program revealed that there were imposed restrictions regarding weightlifting, along with stating that he's not seen any Bureau of Worker's Compensation doctor since that time.

On cross-examination, the witness again reiterated that the last doctor he saw was in April 2011, but later change that statement after identifying Appellee's Exhibit 9, a May 5, 2011, Physician's Report of Work Ability, wherein it was

identified that he could only return to work with restrictions, specifically regarding lifting of weight.

FINDING OF FACTS

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

Appellee met all of the procedural requirements of effectuating a pre-reinstatement hearing. Appellee possessed medical evidence that Appellant Stretchbery could not perform his essential job duties as of June 14, 2011, the effective date from the denial of his reinstatement; Appellee timely notified Appellant Stretchbery of his pre-reinstatement hearing; Appellant Stretchbery 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 Stretchbery in writing of his denial of reinstatement, which he timely appealed.

I find that the Appellee relied heavily on Appellee's Exhibit 4 pages 5 through 31 as a series of reports and documents which they had in their possession which they sent to the doctor's office when conducting the IME on Mr. Stretchbery, and which they considered at the Appellant's pre-reinstatement hearing. In those reports and documents both Dr. Patrick McCormick and Dr. Huntington in August 2010 had released Mr. Stretchbery return to work full duty. However, I also find that these releases were simple return to work slips submitted almost a year prior to being sent out on the IME provided only the bare minimum substantial, credible and reliable medical evidence that the Appellee is required to consider. It was noted that page 8 of Appellee's Exhibit 4, a document denoting a return to work for August 23, 2010, did not list any work/non-work capabilities of the Appellant. It was noted by the undersigned administrative law judge that while the Appellant testified that he could perform the essential functions of his job as a corrections officer he did not submit any medical documentation to rebut the Appellee's documentation which neither was submitted after the

IME or the medical information they had been copied on by the Appellant's Bureau of Worker's Compensation claim.

I find that the Appellee relied on a series of reports and documents generated by Mr. Stretchbery's Bureau of Worker's Compensation claim which they were copied on dated as late as April and May of 2011 wherein it was noted on the documentation that he was not to lift any weight greater than 20 pounds frequently, occasionally up to 30 pounds, no lifting greater than 30 pounds, and no above shoulder level work with the right arm. The testimony of Ms. Beasley indicated that these limitations could have placed Mr. Stretchbery at a significant disadvantage in the performance of his job as a corrections officer, specifically with respect to his unarmed self-defense, firearm readiness and CPR requirements.

I also find that when reviewing the conclusions by Dr. Sushil M. Sethi, the doctor who performed the IME fitness for duty exam on Mr. Stretchbery on May 27, 2011, that Mr. Stretchbery was not fit to return to work, as he was found that he could not perform the essential functions of the corrections officer position or the demands of a corrections officer position.

The medical evidence revealed that Appellant Stretchbery could not perform the essential duties of his position of Corrections Officer as of June 14, 2011.

CONCLUSIONS OF LAW

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

Although Appellant Stretchbery testified that he could perform the essential duties of his position as a corrections officer as a June 2011, and that he supplied two doctors releases go back to work which dated back to August 2010, that did not overcome the medical evidence provided by the Appellee which stated he was not fit for duty to return to work as a corrections officer, all of which were submitted within a couple of months prior Mr. Stretchbery's IME and April and May 2011.

Administrative rule 123:1-30-04 of the Ohio Administrative Code outlines the procedures and rights to reinstatement. The pertinent part of that rule states as follows:

(B) Requirements for reinstatement. The employee's request for reinstatement shall be accompanied by substantial, credible medical evidence that the employee is once again capable of performing the employee's essential job duties. Upon receiving this evidence, the appointing authority shall either reinstate the employee or require the employee to submit to a medical or psychological examination in accordance with rule 123:1-30-03 of the Administrative Code.

(C) Initial determination. The appointing authority will review the substantial credible medical evidence submitted by the employee or the results of a medical or psychological examination conducted in accordance with rule 123:1-30-03 of the Administrative Code and make an initial determination of whether or not the employee is capable of performing the essential duties of the employee's position. If the appointing authority initially determines that the employee is once again capable of performing the essential job duties, the appointing authority shall reinstate the employee. If the appointing authority initially determines that the employee remains incapable of performing the essential job duties, the appointing authority shall institute a pre-reinstatement hearing.

(D) Pre-reinstatement hearing. An employee shall be provided written notice at least seventy-two hours in advance of the pre-reinstatement hearing. If the employee does not waive the right to a hearing, then at the hearing the employee has a right to examine the appointing authority's evidence of continuing disability, to rebut

that evidence, and to present testimony and evidence on the employee's own behalf.

(E) Determination. The appointing authority will weigh the testimony presented and evidence admitted at the pre-reinstatement hearing to determine whether the employee is able to perform the essential job duties of the employee's assigned position. If the appointing authority finds the employee capable of performing essential duties, then the appointing authority shall reinstate the employee. If the appointing authority finds the employee incapable of performing essential duties, then the appointing authority shall not reinstate the employee.

Administrative rule 123:1-30-01 of the Ohio Administrative Code outlines the procedures of an Involuntary Disability Separation. 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.

As can be seen from reading the above administrative rules, an appointing authority must consider whether the substantial credible medical evidence of the employee's disability and determine that the employee is incapable of performing the essential job duties of the employee's assigned position in a disability separation hearing, as well as in a reinstatement hearing.

In reviewing the conclusions by Dr. Sushil M. Sethi, the doctor who performed the IME fitness for duty exam on Mr. Stretchbery on May 27, 2011, the doctor concluded that Mr. Stretchbery was not fit to return to work, as he was found that he could not perform the essential functions of the corrections officer position or the demands of a corrections officer position. Additionally, I conclude that the Appellee relied on a series of reports and documents generated by Mr. Stretchbery's Bureau of Worker's Compensation claim which they were copied on dated as late as April and May of 2011 wherein it was noted on the documentation that he was not the lift any weight greater than 20 pounds frequently, occasionally up to 30 pounds, no lifting greater than 30 pounds, and no above shoulder level work with the right arm. Moreover, the testimony of Ms. Beasley indicated that these limitations could have placed Mr. Stretchbery at a significant disadvantage in the performance of his job as a corrections officer, specifically with respect to his unarmed self-defense, firearm readiness and CPR requirements.

However, in this case, Appellee did possess the medical documentation from both Dr. Patrick McCormick and Dr. Huntington that stated in August 2010 they had released Mr. Stretchbery return to work full duty. However, I also found that these releases were simple return to work slips which were submitted almost a year prior to being sent out on the IME and that provided only the bare minimum substantial, credible and reliable medical evidence that the Appellee considered. It was noted that page 8 of Appellee's Exhibit 4, a document denoting a return to work for August 23, 2010, did not list any work/non-work capabilities of the Appellant. It was noted by the undersigned administrative law judge that while the Appellant testified that he could perform the essential functions of his job as a corrections officer he did not submit any medical documentation to rebut the Appellee's documentation which

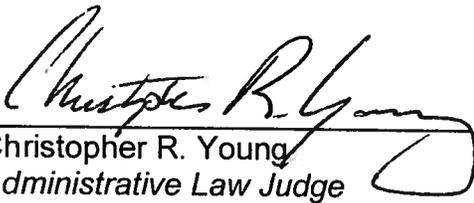
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neither was submitted after the IME or the medical information they had been copied on by the Appellant's Bureau of Worker's Compensation claim.

Thus, I conclude after consideration of all of the medical evidence that was submitted, that Appellant Stretchbery could not perform the essential duties of his position of Corrections Officer as June 14, 2011.

RECOMMENDATION

Inasmuch as the evidence has established that Appellant Stretchbery could not perform the essential duties of his position as a Corrections Officer as of the effective date of his agreed-upon reinstatement request, I respectfully **RECOMMEND** that Appellee's denial Appellant Stretchbery's reinstatement request be **AFFIRMED**.


Christopher R. Young
Administrative Law Judge

CRY:

