

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

Diana Jones,

*Appellant,*

v.

Case No. 2011-MIS-09-0329

Montgomery County Engineer,

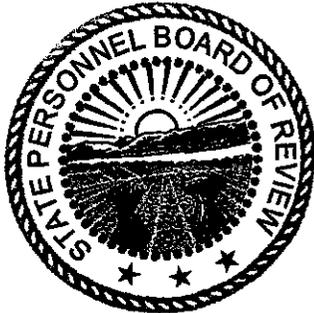
*Appellee,*

**ORDER**

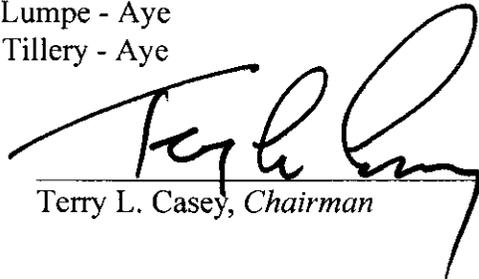
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 denial of Appellant's February 2011 request for reinstatement is **DISAFFIRMED**.



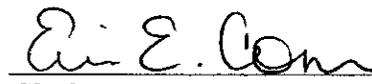
Casey - Aye  
Lumpe - Aye  
Tillery - Aye

  
\_\_\_\_\_  
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, June 18, 2014.

  
\_\_\_\_\_  
*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**

Diana Jones,

Case No. 2011-MIS-09-0329

*Appellant*

v.

May 14, 2014

Montgomery County Engineer,

Jeannette E. Gunn

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on pursuant to an appeal filed by Appellant of her denial of reinstatement from a disability separation. Three days of record hearing were held in the instant matter on July 16, November 15 and December 13, 2013. Appellant was present at all three days of record hearing and was represented by Frank M. Payson, attorney at law. Appellee was present at all three days of record hearing through its designee, Montgomery County Engineer Paul Gruner, and was represented by Julie A. Droessler, attorney at law.

**STATEMENT OF THE CASE**

Paul Gruner testified that he has held the office of Montgomery County Engineer since July 1, 2011; he was employed by the prior Montgomery County Engineer, Mr. Joseph Litvin, as Chief Deputy Engineer from February 2010 through July 1, 2011. He stated that he was aware that Appellant was employed by Appellee and had been placed on disability leave prior to the start of his own employment and recalled that she requested reinstatement to her position in December 2010.

The witness indicated that he became involved in Appellant's reinstatement process when he assumed the post of Montgomery County Engineer in July 2011. He noted that he had an opportunity to review the information submitted by Appellant along with her request for reinstatement and recalled that Appellant provided a letter from her treating psychologist, Dr. Hershberger, who expressed his opinion that she was able to perform the duties contained in the job descriptions for Survey Review Technician II and Survey Review Technician III.

Mr. Gruner testified that Appellee notified Appellant that she would be required to submit to an independent medical and/or psychological examination prior to reinstatement and requested that she execute a medical release granting the independent examiner access to her medical records. He recalled that Appellant did not execute the medical release and no independent medical and/or psychological examination was scheduled or conducted.

The witness stated that a pre-reinstatement hearing was subsequently scheduled to take place on August 19, 2011, and notification of the hearing was provided to Appellant's counsel. Mr. Gruner confirmed that he denied Appellant's request for a continuance of the pre-reinstatement hearing; she did not appear at the hearing on August 19, 2011, and submitted no additional information to support her request for reinstatement.

The witness testified that he denied Appellant's request for reinstatement based upon his determination that the supporting documentation she had provided was not substantial, credible medical evidence that she was capable of performing the essential functions of her job. He observed that the document submitted by Dr. Hershberger did not specify either the psychological condition for which Appellant had been examined or the specific job duties considered by Dr. Hershberger. Mr. Gruner explained that the job description for the position formerly occupied by Appellant had been updated while she was on leave and Dr. Hershberger did not indicate in his letter whether he reviewed the description effective at the time Appellant went on leave or the revised description effective at the time Appellant requested reinstatement. The witness noted that he further found that Appellant had been insubordinate when she failed to comply with the Engineer's request for a medical release.

Paul Hershberger testified that he is a board-certified, licensed psychologist and is presently employed as a faculty member in Wright State University's School of Medicine. Dr. Hershberger stated that he has been a licensed psychologist since 1990. He indicated that Appellant was referred to him by her primary care physician in 2009 and he has treated her since that time.

Dr. Hershberger recalled that in 2011 Appellant asked him to render an opinion about her ability to return to work at the Montgomery County Engineer's Office. He stated that he reviewed two job descriptions dated November 2000 that Appellant provided to him. The witness indicated that he rendered his opinion based on his relationship with Appellant as a client, his knowledge of her symptoms and their severity

at the time, and the extent to which he believed those symptoms would affect Appellant's ability to perform the job duties contained in the job descriptions he reviewed.

Dr. Hershberger stated that as of February 2011 he believed that Appellant was capable of performing the duties of a Survey Review Technician.

Jeffrey Jones testified that he was employed by Appellee from May 1991 through November 2007 and held the position of Senior Surveyor immediately prior to leaving employment with the Engineer's Office. He recalled that he supervised Appellant in that position; they married in February 2008.

Mr. Jones stated that he supervised Appellant from her initial employment in 2002 until the date his employment ended in 2007. He confirmed that Appellant worked well with the public and with other staff during that time and noted that he considered her to be an exceptional employee.

Appellant testified that she began her employment with Appellee in August 2002 and was involuntary disability separated from the position of Survey Review Technician II in August 2009. She stated that she requested information regarding reinstatement policies and procedures in December 2010, and applied for reinstatement in February 2011.

Appellant confirmed that she requested a letter regarding her ability to return to work from Dr. Hershberger and provided him with a copy of the Survey Review Technician II and Survey Review Technician III job descriptions, both effective as of November 2000. She indicated that Dr. Hershberger gave her a letter stating that she was capable of performing the duties of those positions as of February 8, 2011, and she sent the letter to Appellee along with her formal request for reinstatement.

Appellant acknowledged that Appellee asked her to sign a medical release, but that she never did so. She stated that she believed the request was inappropriate and that it had been requested simply to delay the reinstatement process. Appellant recalled that no independent medical examination was ever scheduled by Appellee, but that a pre-reinstatement hearing was scheduled for August 19, 2011. She testified that because she was not available on that date, her attorney requested that the hearing be rescheduled, but it was not.

Appellant testified that Appellee never requested any other specific information from her regarding her request for reinstatement. She confirmed that Appellee denied

her reinstatement request on August 19, 2011, and provided a copy of its Order to her attorney.

### **STIPULATIONS AND FINDINGS OF FACT**

The parties entered into the following stipulations prior to the commencement of testimony on the first day of record hearing:

On December 28, 2010, Diana Jones requested reinstatement policies and procedures of the Montgomery County Engineer's Office by way of a personal memorandum.

On February 16, 2011, the Montgomery County Engineer's Office received a formal written request for reinstatement from Diana Jones' attorney, Frank Payson, attaching a letter from Dr. Paul J. Hershberger.

On March 2, 2011, the Montgomery County Engineer's Office acknowledged receipt of Diana Jones' request for reinstatement by letter to Frank Payson. The Montgomery County Engineer requested signed medical releases for purposes of obtaining an Independent Medical Examination pursuant to OAC 123:1-23-03 & 123:1-30-04 and the Engineer Policy Manual 3:16.

On April 12, 2011, Diana Jones, by letter and through Attorney Frank Payson, informed Appellee that she believed she was not required by law to provide a medical release. Appellant requested that the Engineer advise her if a medical examination was necessary and to provide her with possible dates for an exam.

On or about August 18, 2011, the Montgomery County Engineer's Office, through its attorney, received a request from Attorney Frank Payson to reschedule the August 19, 2011, pre-reinstatement hearing. The pre-reinstatement hearing was not rescheduled.

On August 19, 2011, the Montgomery County Engineer signed an Order denying Diana Jones' request for reinstatement. That Order was mailed to Diana Jones' attorney, Frank Payson, on August 22, 2011.

Based on the testimony presented and evidence admitted at record hearing, I further find that a pre-reinstatement hearing was held on August 19, 2011. Appellant did not appear at the pre-hearing in person, by telephone, or through her attorney. No

written documentation was submitted by Appellant to support her request for reinstatement other than the initial letter from Dr. Hershberger.

### **CONCLUSIONS OF LAW**

Ohio Administrative Code Section 123:1-30-04(B) provides that when an employee makes a request for reinstatement from a disability separation, the request must:

. . . 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.

In the matter at hand, Appellant asserts that she provided Appellee with substantial, credible medical evidence that she was able to perform the duties of her former position. Evidence contained in the record indicates that Appellee did not reinstate Appellant and did not schedule an independent medical examination. Appellee argues that it was under no obligation to take either of these actions, because the evidence provided by Appellant did not constitute substantial, credible medical evidence. Appellee states specifically that the evidence provided by Appellant was deficient because the letter written by Dr. Hershberger and submitted by Appellant along with her formal request for reinstatement did not reference any specific medical or psychological condition, and did not indicate which job descriptions were reviewed by Dr. Hershberger. Mr. Gruner further noted that Dr. Hershberger was a psychologist, rather than a physician, and questioned the sufficiency of his letter as "medical" evidence.

Neither the Ohio Revised Code nor the Ohio Administrative Code provides that the medical evidence submitted with an employee's reinstatement request be provided by a particular type of licensed practitioner, or even by a practitioner who has provided treatment to the affected employee. O.A.C. Chapter 123:1-30-03 refers to both medical and psychological examinations as appropriate methods by which evidence to evaluate a request for disability separations or a reinstatement from disability separation may be obtained; accordingly, I find that the language "substantial, credible medical evidence" is inclusive of evidence provided by a licensed psychologist. Appellee's objection to Appellant's evidence on the grounds that Dr. Hershberger did not provide "medical" evidence is not persuasive.

Appellee's argument that Appellant's medical evidence was not substantial and/or credible due to the failure of Dr. Hershberger's letter to reference any specific medical or psychological condition, or to indicate which job descriptions were reviewed must also fail. These factors might properly be considered in assessing the general sufficiency of the medical evidence to support a reinstatement of the employee without further examination, but absent conflicting evidence of equal or greater weight they are not enough upon which a refusal of reinstatement may properly be based.

There is no requirement that the medical evidence submitted by an employee be irrefutable. If the evidence required by O.A.C. 123:1-30-04 were to be of such a standard, there would not need to be an option for an appointing authority to solicit a "second opinion" by requiring the employee to submit to a medical or psychological examination. Wittkamp v. Dept. of Rehabilitation and Correction (Jan. 30, 2009), PBR 06-IDS-05-0240; aff'd (Mar. 4, 2009), Full Board.

Appellant provided Appellee with a letter from a licensed psychologist from whom she was currently receiving treatment. The letter indicated that Dr. Hershberger had reviewed the job duties of Appellant's position and that she was able, in his opinion, to perform those job duties. In the event that Appellee had doubts about Appellant's ability to perform her job duties based either on the specificity of the information contained in Dr. Hershberger's letter or other factors, Appellee had the option to obtain additional medical evidence by means of an independent medical examination. Accordingly, I find that Dr. Hershberger's letter was sufficient to provide Appellee with "substantial, credible medical evidence" as required by O.A.C. 123:1-30-04.

Appellee also argued that it could not schedule an independent medical examination because Appellant's failure to execute a medical release made it impossible for Appellee to provide the reviewing practitioner with information required by O.A.C. 123:1-30-03(B). That section of the Ohio Administrative Code provides, in pertinent part:

(B) Prior to any examination, the appointing authority shall supply the examining practitioner with facts relating to the perceived disabling illness, injury or condition. The appointing authority shall also supply physical and mental requirements of the employee's position; duty statements; job classification specifications; and position descriptions.

There is no indication in the statute or in relevant case law that an appointing authority is required to provide an examiner with information not within its control, such

as an employee's medical history, before scheduling an examination. Had Appellee scheduled an independent medical examination and Appellant failed to provide medical records, then perhaps the credibility of the examiner's recommendations could have been challenged. In this instance, however, Appellee did not schedule an examination.

Based upon the above analysis, I find that because Appellant presented substantial, credible medical evidence that she was capable of performing her essential job duties, as required by Ohio Administrative Code Section 123:1-30-04(B), Appellee had an obligation to either reinstate Appellant to her position or require Appellant to submit to a medical or psychological examination in accordance with rule 123:1-30-03 of the Administrative Code. Appellee took neither of these actions.

Therefore, I respectfully **RECOMMEND** that Appellee's denial of Appellant's February 2011, request for reinstatement be **DISAFFIRMED**.

  
Jeannette E. Gunn  
Administrative Law Judge