STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Crystal Collins,

Appellant,

v. Case No. 2012-IDS-10-0232

Department of Public Safety,

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 involuntary disability separation of Appellant Collins, effective October 16, 2012, be **DISAFFIRMED** and that she be reinstated to her position effective October 16, 2012.

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, December 18, 2013.

Clerk

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

12/18/13pa

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Crystal Collins	Case No. 2012-IDS-10-0232
Appellant	
v.	September 12, 2013
Department of Public Safety	
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 June 19, 2013. Present at the hearing were Appellant Collins, represented by William J. O'Malley, Attorney at Law, and Appellee Department of Public Safety designee Jenny Tipton, Human Capital Management Manager, represented by Linda Ubokudom, Assistant Attorney General.

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

Appellant Collins was placed on involuntary disability separation, effective October 16, 2013.

STATEMENT OF THE CASE

Appellee's first witness was Appellant Collins, as if on cross examination. Appellant Collins testified she has been classified as a Data Processor 2 for approximately six years and identified Appellee's Exhibit 1 as a position description for her position, describing it as an updated version of the position. In looking at Appellee's Exhibit 2, her employment history, Appellant Collins testified she was on a medical leave of absence beginning in May, 2010 and returned to work on May 23, 2011. In April, 2012, Appellant Collins went out again on a medical leave of absence until her return to work on August 14, 2012. She identified Appellee's Exhibit 3 as her doctor's statement, dated August 7, 2012, returning her to work on August 14, 2012. She was then placed on administrative leave with pay on October 1, 2012.

On September 7, 2012, Appellant Collins met with Dr. Marzella, at the expense of the Appellee. Appellee's Exhibit 5 was identified by Appellant Collins as Dr. Marzella's report of that examination. She testified she first saw Dr. Marzella in 2009 and the report he completed then had several inaccuracies in it, such as he stated her husband had had a heart attack when he did not. Appellant Collins testified that due to her past history with Dr. Marzella, she was not comfortable with him. She stated she corrected him on her husband's heart attack and he wanted to continue to talk about her husband, but she did not think her husband's problems were relevant, so she was reserved when she spoke with Dr. Marzella.

Appellant Collins identified Appellee's Exhibit 6 as a letter dated October 1, 2012 to her from Appellee informing her that the letter she received dated June 5, 2012, placing her on disability separation was rescinded and she received back pay from August 14 through September 30, 2012. She was then placed on administrative leave with pay and was involuntary disability separated effective October 16, 2012. Appellant Collins attended a pre-separation hearing on October 5, 2012. Her attorney was present with her and she received Dr. Marzella's report prior to the hearing. At the hearing, Appellant Collins did not present any new evidence. Appellee's Exhibits 7 and 8 were identified by Appellant Collins as the notice letter and the Order of separation, respectively, both of which she received timely. After receiving both of those documents, Appellant Collins tried to submit new medical evidence to Appellee and Appellee's Exhibit 9 was identified as a letter dated November 13, 2012, informing Appellant Collins that the medical evidence submitted after the pre-separation hearing was not going to be considered and that she could apply for reinstatement anytime after January 16, 2013.

Appellee's next witness was Eric Potts, Customer Service Manager for approximately twenty-three years. He has been employed by Appellee for approximately twenty-six years. He was the immediate supervisor of Appellant Collins for approximately three years. Mr. Potts explained a Data Processor enters information into people's driving records from Ohio as well as from other states. The information entered includes address changes, emergency contact information, ticket information, etc. He testified that Appellant Collins, as a Data Processor 2, entered convictions on records and emergency contact information, both of which are considered to be sensitive information. Mr. Potts stated the traits needed for the job include attentiveness, accuracy, consistency, timeliness, good judgment and an ability to concentrate. He explained there are eighty-eight counties sending in

conviction information and Appellant Collins had to ensure that the correct information was being entered on the correct person's record. The records have to be updated within seven days of the conviction. Mr. Potts stated there is a tracking mechanism built into the system, so he reviews reports and is able to determine who entered what into two different systems.

On cross examination Mr. Potts identified Appellant's Exhibit A as Appellant Collins' performance evaluation from June, 2011. He stated it was only based on three months due to Appellant Collins being off work for depression. He testified her performance was rated as satisfactory, meeting expectations in all categories. Mr. Potts stated the employees are expected to process approximately 150 documents a day and Appellant Collins was doing approximately 198 a day.

Appellant's Exhibit B was identified as Appellant Collins' special performance evaluation from December, 2011. Mr. Potts explained this was done to cover the six months from the last evaluation since the previous one was only for three months. He stated it was a good evaluation, showing Appellant Collins was producing at a high level.

On redirect examination, Mr. Potts testified there was no concern with Appellant Collins' productivity but more about her behavior and tentativeness. He explained Appellant Collins complained about her computer, alleging things were not right with her desk. The IT department was brought in to look at Appellant Collins' computer and although nothing was ever found, her computer was replaced three or four times to accommodate her. Mr. Potts also stated Appellant Collins told him her husband had become ill and at about that time, she changed. She repeatedly complained about her computer and people messing with her desk. If he approached Appellant Collins, she would act as if he startled her. Prior to this time period, Mr. Potts stated he had a great relationship with Appellant Collins, but when these issues came up, her productivity did suffer due to the time she spent complaining about her computer and desk. He testified he did not feel these were issues which should be raised on Appellant Collins' performance evaluations, so that is why these issues are not mentioned.

On re-cross examination, Mr. Potts testified that when he first heard Appellant Collins' complaints about her computer, he checked her computer and found nothing. As she kept complaining, he called in the IT department. The complaints started upon Appellant Collins' return from her first leave of absence. Nothing was

ever found to be wrong with her computer, but to accommodate her, the Appellee made three replacements. Mr. Potts stated Appellant Collins' productivity fell during this time but she did not make any errors in her work. He testified that other employees went to him and voiced their concerns about Appellant Collins' behavior.

Appellee's next witness was Jennifer Tipton, Human Capital Management Manager Benefits Supervisor for approximately seven years and an employee of Appellee for approximately twenty-three years. Ms. Tipton stated she supervises four employees and her unit processes disability and FMLA claims, schedules fitness for duty exams and is a hearing officer for pre-separation hearings.

Ms. Tipton testified she knows Appellant Collins as she talked with her regarding her disability papers and she was also the hearing officer in Appellant Collins' pre-separation hearing. Ms. Tipton explained there is a committee comprised of representatives of the legal, labor and human resources departments who meet to review all employees who have been out on a leave for more than six months or who are close to exhausting their disability leave. The committee looks at all the information and decides whether or not to move forward with a pre-separation hearing. With regard to Appellant Collins, the committee noted there is a maximum of one year for disability leave and since Appellant Collins had multiple disabilities, she was going to exceed her one year of eligibility. Appellant Collins' doctor predicted she could return to work in June, but her disability ended in May, so that is what prompted the initial disability separation.

Ms. Tipton identified Appellee's Exhibit 6 as the letter of rescission of the first disability separation. Appellee's Exhibit 3 was identified as the questionnaire from the Department of Administrative Services which was presented to Appellant Collins' doctor. It is signed August 7, 2012 and this is the document that was presented at the pre-separation hearing. Appellee's Exhibit 5 was identified by Ms. Tipton as the report from Dr. Marzella. She explained Appellant Collins was sent to Dr. Marzella in response to her request for reinstatement and Appellee's Exhibit 4 was identified as the letter and documents given to Dr. Marzella by the department. Ms. Tipton testified Appellant Collins received a copy of Dr. Marzella's report prior to her pre-separation hearing. She also stated that the department relied on Dr. Marzella's last sentence in his report. After the pre-separation hearing, Ms. Tipton stated she met with her supervisor and reviewed the comments of Appellant Collins' attorney. Then a letter was drafted to separate Appellant Collins and the letter was forwarded to the Director for his approval. The Director signed the letter and

returned it to Ms. Tipton. He did not ask for any additional information. She stated Dr. Marzella's report carried more weight than Appellant Collins' doctor, as Dr. Marzella's report was more recent in time. Ms. Tipton testified Appellant Collins was asked to come into the office and she was given the letter and order of separation at that time, which was October 16, 2012 and identified as Appellee's Exhibits 7 and 8, respectively.

Ms. Tipton testified that when Appellant Collins was getting ready to leave after receiving the letter and order of separation, she handed Ms. Tipton a letter from her doctor which was dated prior to the date of the pre-separation hearing, but was not presented at the pre-separation hearing. Ms. Tipton testified this letter was not considered since it was presented after the hearing and after the paper work had been given to Appellant Collins. Ms. Tipton drafted a letter stating such and informing Appellant Collins that she would have to wait until January 16, 2013, (90 days from the effective date of the separation) to apply for reinstatement. She stated to date, there has been no further request for reinstatement.

On cross examination Ms. Tipton stated Appellant Collins' doctor, Dr. Washington, stated she could return to work in June 2012, but that did not happen. She stated the Department of Administrative Services (DAS) relied on the psychology report from Dr. Burke in which he determined there was no longer a disability which could be compensated under the standards of DAS. Therefore, Appellant Collins disability leave benefits ended on July 3, 2012 and the Appellee then exercised their option to have her sent out for an examination due to her request for an extension to return to work. In looking at Dr. Marzella's report, Ms. Tipton stated it was her belief that Dr. Marzella knew where Appellant Collins' worked and the mistake on the first page was just a typo. She also stated she does not know what Appellant Collins' social supports are. She also acknowledged that nothing in Dr. Marzella's reports indicates that Appellant Collins' condition worsened from August 7, 2012 when she was examined by her doctor and that Dr. Marzella placed no duty restrictions on her other than to say "no work". When asked if the term "unsuitable" means "incapable", Ms. Tipton stated she did not know. She also testified that Appellee does not look at the totality of the circumstances but only considers the most up-to-date medical report.

Appellant Collins testified her complaints about her computer began in 2009, before her first disability in 2010. She stated only one computer was replaced. In 2012, she took a leave of absence and wanted to return to work in June of 2012, but she was rejected two times by the Appellee, so she took her time in requesting to return to work a third time since she did not feel she was prepared for another rejection. Her doctor, Dr. Saribalas released her to return to work on June 6, 2012 but she wanted to extend her leave until July 4, 2012. She asked to return in July and was told no by her supervisor and told to talk to Ms. Tipton. On August 7, 2012, Appellant Collins stated she provided her doctor statement to the "other" Jenny. She testified she received another doctor's statement the next month and tried to give the statements to Ms. Tipton. Appellant Collins testified she has received another return to work statement after October of 2012 but is not sure if she submitted it to Appellee. She stated she did submit a statement from Dr. Saribalas dated November 16, 2012, saying she could return to work.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents admitted into evidence, I find the following facts:

1. Appellant Collins has been employed with Appellee for approximately six years. Her most recent position has been as a Data Processor 2. Her two most recent performance evaluations show her performance to be "Satisfactory" and the comments she received about her work were positive and complimentary.

2. Appellant Collins was off on disability leave for depression from May 24, 2010 to May 23, 2011. She went on another leave of absence beginning April 10, 2012 and was released to return to work on August 14, 2012. During this time, she applied for disability leave benefits from the Department of Administrative Services, but after a review by Dr. Burke for the Department of Administrative Services, she was denied disability leave benefits for the time period of April 19 through July 3, 2012.

3. Appellee had placed Appellant Collins on involuntary disability separation effective June 5, 2012. In a letter dated October 1, 2012 to Appellant Collins, Appellee notified her they were rescinding that involuntary disability separation and paying her back pay from August 14, 2012 through

September 30, 2012 and then immediately placing her on administrative leave with pay effective October 1, 2012.

4. When Appellant Collins submitted her doctor's statement from Dr. Saribalas, dated August 7, 2012, she believed she was requesting a reinstatement from the June 5, 2012 disability separation, since at that time, that separation had not yet been rescinded.

5. Appellee sent Appellant Collins for a psychiatric examination with Dr. Marzella on September 7, 2012. In his report, Dr. Marzella states he is examining her to determine if she should return to work.

6. On October 1, 2012, Appellee notified Appellant Collins of the rescission of the June 5, 2012 disability separation and of a pre-separation hearing to be held on October 5, 2012.

7. Appellant Collins and her attorney attended the October 5, 2012 pre-separation hearing and she received the report of Dr. Marzella prior to the hearing. Appellant Collins did not present any new medical evidence at the hearing.

8. Appellee relied on the report of Dr. Marzella and involuntary disability separated Appellant Collins effective October 16, 2012. When Appellant Collins received the separation order, she tried to submit another statement from her doctor, but was told she would have to wait three months, or until January 16, 2013, to submit a request for reinstatement.

CONCLUSIONS OF LAW

Appellee had the burden of proving by a preponderance of the evidence that Appellant Collins could not perform the essential duties of her position as of the effective date of her involuntary disability separation, October 16, 2012. Appellee has failed to meet its burden.

The actions of the Appellee in this case are, at best, confusing and at worst, misleading. Appellant Collins testified she was confused at times whether or not she was applying for reinstatement and after reviewing the testimony and

documents admitted into evidence, it is easy to see why Appellant Collins became confused.

Apparently Appellant Collins was originally placed on involuntary disability separation effective June 5, 2012. She must have applied for disability leave benefits sometime in April, 2012, as Appellee's Exhibit 4 contains a Report and Recommendation from a hearing officer for the Department of Administrative Services attached to a cover letter from DAS informing Appellant Collins that the hearing officer recommended that the determination of the Disability Services Unit to deny her application for disability leave benefits be affirmed. That denial was based on a report of Dr. Burke that Appellant Collins "failed to establish that she was mentally unable to perform her job duties during the period from April 19 through July 3, 2012."

Appellant Collins had statements from her doctor, Dr. Saribalas, which released her to return to work on June 6, 2012; July 4, 2012; and August 14, 2012. Although no letter requesting reinstatement was presented at the hearing, Ms. Tipton testified Appellant Collins did request reinstatement and presented the report from Dr. Saribalas which stated she could return to work on August 14, 2012. At this point in time, the involuntary disability separation which was in effect beginning June 5, 2012, had not been rescinded and was still in effect. Therefore, when Appellant Collins submitted the medical evidence from Dr. Saribalas stating she could return to work on August 14, 2012, it was a request for reinstatement. In response to that request, Appellee sent Appellant Collins to Dr. Marzella for a psychiatric examination on September 7, 2012. Dr. Marzell's report, dated September 10, 2012 states:

> Crystal Collins was referred for this psychological fitness for duty evaluation in order to determine her psychological suitability to *return to work* as a Data Processor 2 at *ODAS*. (Emphasis added).

By reading that sentence, it is obvious that Dr. Marzella also was under the impression that Appellant Collins had submitted a request for reinstatement and he was examining her to determine if she should be returned to work or not. It is also interesting to note, however, that he erroneously stated in his report that Appellant Collins was trying to return to work to the Department of Administrative Services (ODAS). In looking at the above circumstances, it is easy to see why Appellant

Collins thought she had applied for reinstatement and had done so by submitting the August 14, 2012 return to work release from Dr. Saribalas.

What happens next is confusing, to say the least. On October 1, 2012, Appellee notifies Appellant Collins by letter of the same date, that the June 5, 2012 involuntary disability separation is being rescinded and she will be receiving back pay. The first paragraph of that letter states as follows:

> The letter you received dated June 5, 2012, placing you on disability separation is hereby rescinded, effective October 1, 2012. As a result you will receive pay from August 14, 2012 (the day your doctor released you to come back to work), through September 30, 2012. However, pursuant to Section 124.388 of the Ohio Revised Code, you are hereby informed that effective October 1, 2012, you will be placed on paid Administrative leave until further notice.

It is important to note that Appellee determined Appellant Collins was capable of being returned to active work status as of August 14, 2012 – the date that Dr. Saribalas released her to return to work. This is confirmed in a letter from John S. Audet, Human Resources Administrator, to Appellant Collins, dated November 13, 2012 wherein the letter states as follows:

> Pursuant to Paragraph A of Ohio Administrative Code (OAC) 123:1-30-04 – Right to Reinstatement: 'An employee may make a written request to the appointing authority for reinstatement from a disability separation." That provision goes on to say: 'An employee may not make a first request for reinstatement until three months from the date the employee was no longer in ***active work status***.' You were last in an active status on October 16, 2012, the date that you met with Jenny Tipton and received a copy of the disability separation order. So, your first request for reinstatement from disability separation may not be until January 16, 2013. (Emphasis added).

Appellee is using the phraseology in the administrative rule, "active *work* status" to prohibit Appellant Collins from submitting a request to return to work before January 16, 2013. Appellee cannot argue that in the letter dated October 1, 2012, that they did anything but return Appellant Collins to an *active work status* effective August 14, 2012. They did not place her on administrative leave until

October 1, 2012 and they told her in the November 13, 2012 letter that her last day of active work status was October 16, 2013, thereby granting her three years of reinstatement rights and confirming that she was not just on active ***pay*** status but was indeed, considered to be in active ***work*** status. The import of that language is that Appellee acquiesced in Dr. Saribalas' decision that as of August 14, 2012, Appellant Collins could perform the essential duties of her position without restriction and was returned to work as of that date and paid her wages from that date until October 1, 2012. This hearing officer understands that while all of the above is true, it is also true that Appellant Collins did not actually physically return to work on August 14, 2012. It would have been impossible for her to do so, since Appellee did not notify her of its decision until October 1, 2012.

When Appellee sent Appellant Collins to Dr. Marzella on September 7, 2012, they had effectively, albeit retroactively, already determined she was fit for duty and paid her, not administrative leave pay, but active work status pay, from August 14, 2012 through September 30, 2012. Therefore, there was no reason to send her to Dr. Marzella on September 7, 2012, as the paper work reflects that Appellee abided by Dr. Saribalas' decision that she was able to perform her duties as of August 14, 2012 and that is the date Appellee used to begin her back pay reimbursement. Thus, the report of Dr. Marzella should not have been relied on at all, as it was disingenuous for Appellee to accept Appellant Collins' doctor's return to work release and at the same time send her out for another examination.

It is unknown to this hearing officer why Appellant Collins' first disability separation was rescinded. It would have made more sense if Appellee either denied Appellant Collins' request for reinstatement on the basis of Dr. Marzella's report (after holding a reinstatement hearing) and allowed Appellant Collins to appeal her denial of reinstatement or Appellee should have told Appellant Collins her August 14, 2012 request for reinstatement was premature for a disability separation that was effective June 5, 2012. Assuming there was a defect in the June 5, 2012 disability separation, then it should have been rescinded way before the August 14, 2012 date and certainly prior to the October 1, 2012 rescission date.

Appellee should not have used Dr. Marzella's report to involuntary disability separate Appellant Collins in October 2012. As is discussed above, Appellee basically relied on Dr. Saribalas' report of August 7, 2012 to bring Appellant Collins back to work and pay her from August 14, 2012 through September 30, 2012. If at that time Appellee felt Appellant Collins could not perform the essential duties of her

position, then they should have sent Appellant Collins out for an independent examination *after* September 30, 2012. A pre-separation would then have been held after the independent medical examination took place and Appellant Collins would have had the opportunity to present another medical statement from her doctor. It is no wonder she did not present any other medical evidence at the pre-separation hearing on October 5, 2012, as she had presented medical evidence in August and Appellee relied on that evidence to rescind her involuntary disability of June 2012. No one can blame Appellant Collins for being confused as to if she should present a reinstatement request or a statement to rebut Dr. Marzella's opinion or nothing at all. This Administrative Law Judge is confused about Appellee's actions, so it is understandable why Appellant Collins was also confused.

Appellee, through Ms. Tipton, testified they only relied on Dr. Marzella's report to effectuate the involuntary disability separation of Appellant Collins, effective October 16, 2012. Notwithstanding the above analysis, there is no reasonable explanation why Appellee did not consider Dr. Saribalas's report of August 7, 2012 since it was in Appellee's possession. There is also no explanation as to why they did not consider Dr. Burke's opinion that she was able to perform her job duties from April 19 through July 3, 2012. Dr. Marzella's report contained errors in it, such as noting she worked for the Department of Administrative Services, stating her husband had a heart attack when he did not, and stating his examination was for the purpose of determining if she should return to work instead of if she should be placed on involuntary disability separation. He notes she was "defensive, non-revealing and suspicious" during his examination. Given the fact that Appellant Collins knew she was there for him to determine her fitness for duty, it is reasonable for her to be defensive and suspicious. He states he administered two psychological inventories to Appellant Collins and "Unlike previous psychological testing wherein she was quite defensive and provided invalid protocols, these inventories suggested her responses did not appear to either greatly exaggerate or deny socially desirable attributes."

Dr. Marzella's conclusion was that "Ms. Collins is psychologically unsuitable to return to her position as a Data Processor 2. . ." There is no further explanation as to what the term "unsuitable" means. The baseline used to determine if an employee should be placed on involuntary disability separation is if the employee can perform the essential duties of the position the employee occupies. Dr. Marzella does not analyze any of Appellant Collins duty to make a finding as to whether or not she can perform the essential duties. He stated "her ability to

analyze, synthesize, and generalize information is fair at best" and is "likey to have below average tolerance for frustration." There was no discussion about her ability to enter information into a computer timely, which the evidence established was her essential duty. The evidence established she was always timely with her work and was exceeding the daily number of documents that Appellee wanted to be processed during a day. Her supervisor, Mr. Potts, testified she did not make errors in her work. Even though Dr. Marzella was furnished with Appellant Collins' position description, there is not one reference to any specific job duty throughout his report.

While it does appear Appellant Collins has at times suffered with depression and anxiety issues, Dr. Marzella's report does not markedly differ with the comments about Appellant Collin's abilities made in Dr. Saribalas' report, but yet Dr. Saribalas returned Appellant Collins to work and Dr. Marzella did not. Dr. Saribalas treated and observed Appellant Collins on a regular basis, while Dr. Marzella saw her once or twice over an approximate three year period. Dr. Marzella's comment about being "unsuitable" does not answer the question of if Appellant Collins could perform the essential duties of her position, while Dr. Saribalas felt confident to return her to her duties. There was nothing in Dr. Marzella's report that was new or compelling enough to overturn the opinion of Dr. Saribalas.

Therefore it is my **RECOMMENDATION** that Appellee's involuntary disability separation of Appellant Collins, effective October 16, 2012, be **DISAFFIRMED** and that she be reinstated to her position effective October 16, 2012.

Marcie M. Scholl

Marcie M. Scholl
Administrative Law Judge

:mms