

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

Keith Bennett,

Appellant,

v.

Case No. 2012-IDS-11-0240

Auditor Clark County,

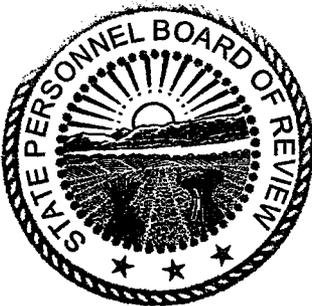
Appellee.

ORDER

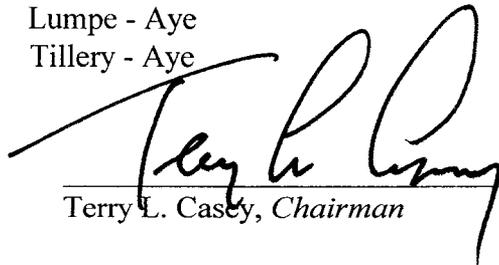
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 concerning the merits of this matter. Further, the Board does not find that it has jurisdiction to address the issue of back pay in this case.

Wherefore, it is hereby **ORDERED** that Appellee's **DENIAL** of Appellant's application for reinstatement is hereby **DISAFFIRMED**.



Casey - Aye
Lumpe - Aye
Tillery - Aye

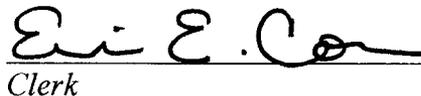


Terry L. Casey, *Chairman*

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, October 10, 2013.



Clerk

10/10/13cc

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**

Keith Bennett,

Case No. 2012-IDS-11-0240

Appellant,

v.

August 22, 2013

Clark County Auditor,

Beth A. Jewell

Appellee.

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on April 10, 2013. Keith Bennett, Appellant, was present at the record hearing and was represented by C. Raphael Davis-Williams, Attorney at Law. Appellee, Clark County Auditor, was present at record hearing through its designee, County Auditor John Federer, and was represented by Andrew P. Pickering, Assistant Clark County Prosecutor.

PROCEDURAL HISTORY

Mr. Bennett filed a timely appeal to this Board from Appellee's October 30, 2011 denial of Mr. Bennett's request for reinstatement from voluntary disability separation. Before convening the record hearing, this Board issued a Procedural Order requiring Appellee to respond to a questionnaire. Evidence submitted in Appellee's response to the questionnaire establishes that Appellant voluntarily disability separated from his position of employment in 2007. Appellant's last day of work was June 15, 2007, and his last day in active pay status was December 28, 2007. Appellant received disability benefits through the Ohio Public Employees Retirement System (OPERS). Dr. Marjorie C. Gallagher conducted a psychiatric evaluation of Appellant in September 2010 and concluded that Appellant was able to resume work with his previous employer. In October 2010, OPERS notified Appellee that Appellant was certified as sufficiently recovered to return to work. OPERS terminated Appellant's disability benefit under R.C. 145.362, effective January 31, 2011.

O.A.C. 123:1-30-04, which governs an employee's right to reinstatement from disability separation, provides in subsection (H) that when an employee who has

been granted disability benefits is found to be physically and mentally capable of resuming service under R.C. 145.362, the appointing authority may request an additional medical or psychological examination before restoring the employee to his previously-held position. In December 2010, following its receipt of the OPERS' notification, Appellee requested that Appellant be examined by Dr. George Kraus. Dr. Kraus concluded that Appellant was not capable of returning to work in his previous capacity. During his January 2011 pre-reinstatement hearing, Appellant did not provide Appellee with the report of Dr. Gallagher or with any other medical or psychological evidence to indicate that Appellant was capable of performing the essential duties of the position. On January 27, 2011, Appellee denied reinstatement of Appellant. On March 14, 2012, this Board issued an Order in Case No. 2011-IDS-02-0051, adopting the Administrative Law Judge's recommendation affirming Appellee's denial of Appellant's reinstatement. In its Order, this Board noted that Appellant retained reinstatement rights for the remainder of the five-year period following the effective date of his receipt of disability benefits, and that its determination did not bar him from reapplying to Appellee for reinstatement within the statutory guidelines.

R.C. 145.362 provides that a disability benefit recipient shall be considered on leave of absence from his position of employment during the first five years following the effective date of his disability benefit. Appellant's effective date was January 1, 2008. On July 10, 2012, Appellant requested that Appellee reinstate him. The parties agree that Appellant's July 10, 2012 request for reinstatement was timely under the applicable statutes.

Appellee convened a pre-reinstatement hearing on October 26, 2012. Before the pre-reinstatement hearing, Appellant was given an opportunity to review the psychological report produced as a result of the examination requested by Appellee in connection with Appellant's request for reinstatement. At the pre-reinstatement hearing, Appellant submitted psychological evidence on his own behalf, and presented his own testimony and the testimony of his wife in support of his request for reinstatement. On October 30, 2012, Appellee denied Appellant's request for reinstatement. On November 2, 2012, Appellant appealed to this Board.

STATEMENT OF THE CASE

At record hearing, Appellant testified in his case in chief and called one additional witness, his wife, Sherrie Bennett. In its case in chief, Appellee called two witnesses, Real Estate Director Tina Cowan and Auditor Federer. References to witness testimony are indicated parenthetically below. Appellant offered his exhibits

1-4 into the record. References to Appellant's exhibits are indicated parenthetically by "Exh.," followed by the exhibit number(s). Appellee offered its exhibits A-H into the record. References to Appellee's exhibits are indicated parenthetically by "Exh.," followed by the exhibit letter(s). The testimony and exhibits form the basis for the Findings of Fact set forth below.

FINDINGS OF FACT

Background Facts

Appellant attended Ohio Northern University and Marion Technical College. Appellant has an Associate's Degree in Civil Engineering. Appellant worked as a technical engineer for the Clark Soil and Water Conservancy District from 1981-1992. Appellant began working for Appellee under the previous County Auditor, George Soddors, in 1992. Appellant worked in the Weights and Measures Section until 1998, and then was transferred to the Current Agricultural Use Valuation (CAUV) program. In Weights and Measures, Appellant particularly enjoyed his interactions with the public, and was initially disappointed when those interactions decreased with his transfer to the CAUV program. In both positions, Appellant's work included complex numerical calculations and recordkeeping. Appellant worked in the CAUV program until March 2007, when he was transferred to the Real Estate Section, where his supervisor was Real Estate Director Tina Cowan. (K. Bennett)

Appellant first saw Clinical Psychologist Dr. Owen Ward for about a year commencing in April 2002, when he was involved in an extramarital affair with a woman who worked in an office located in the same building as the Auditor's Office. The affair became public knowledge within the workplace, and several of Mr. Bennett's co-workers ostracized him. Mr. Bennett was suspended for three days in 2002 for a verbal altercation with Ronald Schinkle, whom Auditor Soddors had hired to replace Mr. Bennett in the Weights and Measures Program. Mr. Bennett was also required to attend counseling. In June 2002, Dr. Philip Gibeau, Ph.D., diagnosed Mr. Bennett with chronic depression and reported that Mr. Bennett had "a number of unresolved personal, marital, emotional and vocational problems that have resulted in a variety of inappropriate behaviors in the workplace." Dr. Gibeau recommended that Mr. Bennett return to his regular job duties with the requirements that he engage in individual counseling and be evaluated for use of antidepressant medication. (Exh. H, p. 16) Mr. Bennett's extramarital affair ended in 2003, and Appellant remained married to Sherri Bennett, Auditor Soddors' sister. (K. Bennett)

In March 2007, after his transfer to the Real Estate Section, Mr. Bennett began experiencing difficulty in the workplace, particularly with Auditor Sodders' Chief Deputy and with a co-worker, Teresa Arnold. Ms. Cowan testified that when Mr. Bennett left in 2007, the atmosphere was strained, antagonistic, and tense, with Mr. Bennett engaging in behaviors such as glaring and talking out loud in an angry voice. Mr. Bennett resumed treatment with Dr. Ward for depression, took a medical leave of absence, and eventually voluntarily disability separated. Dr. Ward treated Mr. Bennett from June 2007 -November 2008 and from November 2010-December 2012, when Mr. Bennett stopped seeing Dr. Ward due to personal financial constraints. (Cowan; K. Bennett; Exhs. A, H)

Record Evidence of Mr. Bennett's Medical and Psychological Status

Current Psychiatric Medications

Mr. Bennett has been taking citalopram to treat his depression since 2007. His daily dose of 60 milligrams has remained the same since 2009. Mr. Bennett initially saw a psychiatrist, who prescribed citalopram and worked with Mr. Bennett to determine the appropriate daily dose. Mr. Bennett's family doctor now prescribes this medication.

K. Bennett v. Clark County Auditor, Case No. 2011-IDS-02-0051 (Bennett I)

On September 21, 2010, Dr. Marjorie Gallagher, M.D., performed a psychiatric evaluation of Mr. Bennett and reported that "Mr. Bennett is no longer disabled based on psychiatric evaluation. Continued psychiatric treatment is recommended." (Exh. A)

On December 17 and 23, 2010, Dr. George Kraus, Ph.D., of Layh and Associates conducted an independent psychological evaluation of Mr. Bennett at Auditor Sodders' request. On January 19, 2011, Dr. Kraus provided a nine-page report. The results of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) indicated as follows:

[Mr. Bennett] is likely chronically depressed and may be immature, self-indulgent, and manipulating of others. He may behave in an obnoxious, hostile, and aggressive way, and he may rebel against authority figures but may refuse to take responsibility for his problems and may have an exaggerated and grandiose

idea of his own capabilities. He appears to be quite impulsive, and he may act out against others without considering the consequences. Preoccupied with feeling guilty and unhappy, he seems plagued by anxiety, hopelessness, and worry about the future... Sullen and resentful of others, he may be quite uncompromising in his interpersonal style and may blame others for his problems. His very high score on the Marital Distress Scale suggests that his marital situation is quite problematic at this time.

Dr. Kraus concluded as follows:

For some three years, Mr. Bennett has been away from work, where he had felt traumatized. It looks as though he was able to recover from much of the acute stress he had experienced. His longstanding pattern of handling stress, though, does not appear to have changed. Therefore, it appears that were he to return to the same work situation, his unmanageable, aggravated, depressive symptoms would likely return. Mr. Bennett may be capable of working again—just not in the same work environment he left.

Should the office climate at the Auditor's Office change significantly at some point in the future and Mr. Bennett has gained significant insight into himself, his actions, and his way of understanding his relationships with others and managing his feelings—his fitness for duty could be reevaluated.

During his January 2011 pre-reinstatement hearing, Dr. Kraus' report was the only evidence before Appellee. Appellant did not present Dr. Gallagher's report at that hearing. On January 27, 2011, Appellee denied reinstatement of Appellant. On March 14, 2012, this Board issued an Order in Case No. 2011-IDS-02-0051, adopting the Administrative Law Judge's recommendation affirming Appellee's denial of Appellant's reinstatement. In its Order, this Board noted that Appellant retained reinstatement rights for the remainder of the five-year period following the effective date of his receipt of disability benefits, and that its determination did not bar him from reapplying to Appellee for reinstatement within the statutory guidelines.

Current Evidence: Bennett II

With the election of Auditor Federer in 2010 and his assumption of the position of Auditor in March 2011, the leadership of the office has changed. The Chief Deputy with whom Mr. Bennett had difficulty is no longer with the office. A vacancy exists in the Real Estate Section for the position Mr. Bennett was transferred to in March 2007 and held at the time of his voluntary disability separation.¹ Three of the four employees currently working in this section are the same employees who worked in the section when Mr. Bennett was voluntarily disability separated in 2007. Teresa Arnold, the employee with whom Mr. Bennett had a strained working relationship in 2007, continues to work in the section and would be a co-worker of Mr. Bennett's upon his return. Mr. Bennett testified that through therapy with Dr. Ward he has learned to relax, he has become more tolerant, he now appreciates the viewpoints of others, he has gained insight into how his actions affect others, and that he is now able to put his personal feelings aside and cooperate with Ms. Arnold and the other members of the Real Estate Division as they work together to achieve the common goals of the Auditor's Office.

Ms. Cowan described the duties of the Real Estate Clerk position² as including contact with the public, assisting taxpayers, and balancing the cash drawer on a daily basis. Ms. Cowan stated that the position involves multitasking and a good deal of interaction with co-workers; the office is very busy and has a backlog of work. Ms. Cowan continues to work as the Director, and Mr. Bennett would report to her upon reinstatement. Ms. Cowan stated that since assuming office in March 2011, Auditor Federer is "giving it his best" to improve the work environment. Regarding Mr. Bennett's ability to do the work, Ms. Cowan testified that she believes "the potential is there" with Mr. Bennett's skills; she testified that she concerned about his ability to multi-task and to deal with the public and co-workers. Ms. Cowan told Dr. Kelliher that she "does not wish to hinder" Mr. Bennett's return to work.

Auditor Federer testified that he believes that Mr. Bennett can perform the essential functions of the Real Estate Clerk position; however, the Auditor noted that Mr. Bennett "needs to deal with the environment" and "the taxpaying public."

¹ The testimony indicated that the Auditor is keeping the position vacant in case of an order to reinstate Mr. Bennett.

² Exhibit F is the Notice of Vacancy for the Real Estate Clerk position.

The Auditor emphasized his desire for a happy, healthy, and safe workplace environment.

Mr. Bennett stated that through his therapy with Dr. Ward and the medication he has taken for several years, he has developed the ability to handle the workplace interactions that lead to his 2007 voluntary disability separation in a positive manner. Mr. Bennett noted that his interactions with the public during his employment with the Auditor's Office and in the ensuing years always have been positive; the psychological reports corroborate this testimony, indicating that Mr. Bennett's interactions with the public have never been problematic: "It is noted that Ms. Cowan and Mr. Federer both mentioned concern that Mr. Bennett might have problems in dealing with members of the public. There is no mention in any of the records received, however, that Mr. Bennett ever had any conflict with the public." (Exh. H, p. 23)

Following Appellant's July 10, 2012 request for reinstatement, Appellee requested an independent psychological evaluation of Appellant. Dr. Casey Kelliher, Psy.D., performed this independent evaluation. Dr. Kelliher conducted a three-session clinical interview with Mr. Bennett in August and September 2012, administered three psychological examinations, reviewed numerous employment records submitted by Auditor Federer, and conducted collateral interviews with Auditor Federer, Real Estate Director Cowan, Mr. Bennett's sister Sue Williams, Mrs. Bennett, and Dr. Ward. (Exh. H, pp. 2, 5) Thereafter, on October 4, 2012, Dr. Kelliher submitted a comprehensive 26-page report. (Exh. H)

Dr. Kelliher's analysis of the findings made in his evaluation begins on page 21 of his report and continues through page 26. Dr. Kelliher reports that Mr. Bennett's current level of functioning "appears to be much improved," compared with the previous psychological evaluations of Dr. Gibeau and Dr. Kraus. Mr. Bennett shows no signs of serious psychological disorder. Mr. Bennett presented as "calm, mild-mannered, and self-controlled." The results of current psychological testing, including the MMPI-2 and other tests, "are essentially benign.... The results are markedly different from the results of testing with the same instruments in 2002 and 2010; present testing indicates a much healthier person." (Exh. H, pp. 21-22)

As Auditor Federer requested, Dr. Kelliher analyzed various possible scenarios that might occur if Mr. Bennett returns to work at the Auditor's Office, exploring the variable of Mr. Bennett's interactions with others. Dr. Kelliher's report provides detailed recommendations, including recommended steps to be taken by Mr. Bennett, Dr. Ward, and the Auditor's Office if the appointing authority reinstates

Mr. Bennett. Dr. Kelliher reported the following regarding the changed environment in the Auditor's Office and Mr. Bennett's interactions with others:

Mr. Bennett is not currently experiencing major current stress, except for the financial problems that a return to work presumably would resolve. A return to work likely would present some increase in stress, in terms of uncomfortable working relationships and possible antagonism on the part of members of the public who come to the Auditor's Office to address problems. The current work environment of the Auditor's Office, however, seems likely to be much healthier than when he left, and therefore less stressful. Mr. Bennett has not engaged in any known behaviors that suggest preparation for violence. He has no known history of actual physical aggression toward anyone, or history of other criminal behavior...Mr. Bennett does not at present show any irrational, bizarre, or suspicious beliefs. He does express some feelings of having been targeted in the past, but he does not indicate that he expects others to sabotage his effort to return to productive work in the Auditor's Office. Rather, he is optimistic that after some initial discomfort he will be seen as interested in performing his work and as not focusing on any conflicts. When asked what could help make a return to work smooth and successful, he focused only on himself, regarding his attitude, his listening, and his willingness to work and to 'go more than half-way.' In this way he placed emphasis on his own responsibility, rather than placing responsibility or blame on others.

It is also noted that the available information does not indicate any problems in Mr. Bennett's work performance or his work relationships prior to 2002, or during the period from the disciplinary action of summer 2002 up to late 2006/early 2007. Mr. Bennett was in treatment with Dr. Ward in 2002, and Dr. Ward played a role in assisting Mr. Bennett to continue working in the office at that time. It may be that Dr. Ward's role made

a serious difference. Mr. Bennett was not in treatment with Dr. Ward in the first half of 2007, however, and did not resume treatment with Dr. Ward until he decided to take medical leave. Thus there was no opportunity for Dr. Ward to help Mr. Bennett to address his workplace problems before he left. This means that there is a real possibility that involvement by Dr. Ward may make a significant difference in Mr. Bennett's ability to return to work.

If Mr. Bennett does return to work at the Auditor's Office, how his reinstatement is handled will make a great deal of difference in whether his return is successful or not. Ongoing, weekly sessions with Dr. Ward will be of great importance in supporting his return. A meeting of Mr. Bennett with Mr. Federer and/or other management personnel, facilitated by a representative of the Personnel office or Dr. Ward, prior to a return-to-work date is advised, so that concerns can be addressed and plans made for how problems will be addressed if they arise. Plans could also be made for brief, informal "check-ins" once Mr. Bennett returns, occurring on a daily or near-daily basis to start with but tapering to weekly contacts for the first month at least. Such contacts could be used to offer Mr. Bennett support and encouragement, and to address any difficulties that might arise.

On page 25 of his report, Dr. Kelliher writes as follows:

It seems likely that the Auditor's Office work environment is much more supportive, or at least much less toxic, than it was when Mr. Bennett last worked there. I predict that in the improved environment, it will be easier to address difficulties that Mr. Bennett does experience, and a low-key, problem-solving approach probably would work best. It would also be important that any problems be addressed early, before they become big problems and are harder to reverse.

Mr. Bennett, or for that matter Mr. Federer, can only have limited influence over the feelings and attitudes of other employees. It is very likely that the reception will Mr. Bennett receives will affect whether he can return successfully....

It is not possible to conclude that Mr. Bennett definitely is or is not fit to return to duty in the Auditor's Office. He appears to be capable at present, but the interaction of Mr. Bennett and his co-workers cannot be known. Conditions that will increase or decrease the chances of successful reinstatement are more knowable, and have been discussed.

Dr. Kelliher reported that Mr. Bennett presents a low risk of physical aggression. "It is not possible to predict violence with a high degree of accuracy, but there are a number of known risk factors, and a review of these yields little suggestion of violence potential." (Exh. H, p. 22)

On October 24, 2012, Dr. Ward wrote a two-page letter, which Appellant submitted to Appellee at the October 26, 2012 pre-reinstatement hearing. (Exh. E) In this letter, Dr. Ward wrote as follows: "I can say that based on Keith's current mental status and my understanding of Mr. Bennett throughout the time I have treated him beginning in 4/30/02 while he was still working in the auditor's office, I find no psychological justification for denying this man a return to work." Dr. Ward continued, "from my evaluation of Keith, I find no contraindications that would prevent him from returning to work. Certainly, he is much more well equipped to deal with the social stress that may exist in his job." Dr. Ward concurred with Dr. Kelliher regarding Mr. Bennett's lack of propensity for violence: "I find it highly unlikely that he would become violent in the work place." (Exh. E)

ANALYSIS, DISCUSSION AND CONCLUSIONS OF LAW

Ohio Adm. Code 123:1-30-04 provides in pertinent part 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.

(E) Determination. The appointing authority will weigh the testimony 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 the 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.

In an appeal concerning the denial of an Appellant's request for reinstatement, the burden of proof remains at all times with the Appellant. This Board has jurisdiction to consider whether or not Appellee properly complied with the procedural requirements associated with the reinstatement process, as well as whether or not Appellee's denial of reinstatement was appropriate, based upon the information it possessed at the time its decision was made. The parties do not dispute Appellee's compliance with the procedural requirements associated with the reinstatement process; nor do they dispute the timeliness of Appellant's application for reinstatement. The question for this Board is, therefore, a substantive one.

Substantively, Appellant must establish, by a preponderance of the evidence, that, at the time of his pre-reinstatement hearing, he demonstrated to the appointing authority that he had recovered sufficiently from his disabling illness, injury, or condition so as to be able to perform the essential job duties of his position based on his education, training, or experience.

The options set forth in the recommendations section of Dr. Kelliher's report evidence his understanding that it is not his responsibility to decide whether to reinstate Appellant. Dr. Kelliher also recognizes that future outcomes cannot be predicted: Dr. Kelliher writes that it is not possible to conclude with "definite certainty" that Mr. Bennett either is, or is not, fit to return to duty. But Appellant is required only to present *substantial* evidence that he is capable of performing the essential functions of his position, not evidence of definite certainty. "Substantial"

evidence is evidence with some weight; it must have importance and value. Our Place, Inc. v. Ohio Liquor Control Comm. (1992), 64 Ohio St.3d 570, 571. It cannot be seriously disputed that the reports of Drs. Kelliher and Ward constitute substantial, credible evidence. Appellee requested the independent evaluation and relies upon Dr. Kelliher's report; in preparing his report, Dr. Kelliher consulted with Dr. Ward, who figures prominently in Dr. Kelliher's recommendations; and, Dr. Ward has treated Mr. Bennett for a significant portion of the past decade, including the nearly two-year period preceding Dr. Ward's October 24, 2012 letter.

The variable underlying Dr. Kelliher's concern is not whether Mr. Bennett is presently capable of performing his job duties but rather how his future interactions with co-workers will unfold, which, as Dr. Kelliher states, "cannot be known." OAC 123:1-30-04 does not contemplate the success or failure of an employee *after* reinstatement; the code sets forth only the requirements necessary to *achieve* reinstatement. The test the code requires an appointing authority to use in evaluating a request for reinstatement is whether the evidence demonstrates that the employee is "able," or "capable," of performing the essential duties of his assigned position. The reports of Drs. Ward and Kelliher both contain substantial, credible psychological evidence that Mr. Bennett has recovered sufficiently to be capable of performing the essential duties of the Real Estate Clerk position.

Auditor Federer acknowledged at hearing that he believes that Mr. Bennett is able to perform the essential functions. Ms. Cowan testified that "the potential is there." Both Federer and Cowan were concerned primarily about Mr. Bennett's interactions with others. Mr. Bennett's response during his evaluation session with Dr. Kelliher demonstrates his willingness to assume personal responsibility for interacting positively with his co-workers. "When asked what could help make a return to work smooth and successful, he focused only on himself, regarding his attitude, his listening, and his willingness to work and to 'go more than half-way.' In this way he placed emphasis on his own responsibility, rather than placing responsibility or blame on others."³

³ While Appellee argues in its post-hearing brief that the Auditor did not have detailed testimony from Mr. and Mrs. Bennett before him at the pre-reinstatement hearing, it is noted that both Mr. and Mrs. Bennett did testify at the pre-reinstatement hearing and advocated for his readiness to return. (K. Bennett; Exh. D) Moreover, evidence provided by Mr. and Mrs. Bennett that supports Mr. Bennett's ability to return to work is contained within Dr. Kelliher's report, which includes material derived from his interviews with Mr. and Mrs. Bennett.

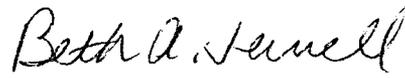
Despite Appellee's efforts to draw an analogy with the facts presented in Johnson v. Ohio Housing Finance Agency, Case Nos. 2012-IDS-03-0050 and 2012-REM-03-0051 (Johnson), Dr. Kelliher's statement that Appellant "appears to be capable" of performing the essential duties of his assigned position is not a casual remark in a brief note, but rather a conclusion reached as a result of a thorough evaluation and analysis that includes recommended strategies for success. In contrast, a review of the Administrative Law Judge's Report and Recommendation in Johnson reveals that it is inapposite: the evidence at Mr. Johnson's pre-reinstatement hearing consisted of a detailed medical evaluation decisively concluding that Mr. Johnson was unable to return to work, and only a brief note from another expert stating that Mr. Johnson "appeared capable" of returning.

Before Appellee in this case was treating psychologist Dr. Ward's evidence that Appellant can return to work and a lengthy report from independent examiner Dr. Kelliher noting that Mr. Bennett's current psychological test results are essentially normal and that Mr. Bennett is a much healthier person today than he was prior to the time of his voluntary disability separation or at the time of his first pre-reinstatement hearing in January 2011. Were Appellant incapable of returning to work, Dr. Kelliher would have had no reason to lay out recommendations for a successful return. Dr. Kelliher also identified the reception Mr. Bennett receives from others within the office as a significant variable underlying a successful return to work and recognized that Mr. Bennett cannot control this variable.

Mr. Bennett has demonstrated by a preponderance of the evidence in the record that he is capable of performing the essential functions of the Real Estate Clerk position. Therefore, as a matter of fundamental fairness, Mr. Bennett should be given the opportunity to return to work. All evidence of record indicates that he appears capable of so doing, and he cannot control the actions of other people. Moreover, Real Estate Director Cowan told Dr. Kelliher that she does not wish to hinder Mr. Bennett's return; as his supervisor, her attitude is likely to be a positive reinforcement for the section staff and for Mr. Bennett. Finally, Auditor Federer testified at record hearing that an important concern for him was any potential for workplace violence; both Dr. Kelliher's and Dr. Ward's reports dispel this concern.

Keith Bennett
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Appellant has demonstrated by a preponderance of the evidence that he has recovered sufficiently to be capable of performing the essential job duties of his previous position. Therefore, I respectfully **RECOMMEND** that Appellee's denial of reinstatement be **DISAFFIRMED**. To allow time for preparations to be made for Mr. Bennett's return to work, as outlined in Dr. Kelliher's recommendations, it is recommended that Appellant be awarded back pay and benefits commencing at that date which marks the five-year anniversary date of his initial receipt of disability retirement benefits.



Beth A. Jewell
Administrative Law Judge

BAJ: