

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

Oleg Chystyakov,

*Appellant,*

v.

Case No. 2012-IDS-12-0255

Department of Development,

*Appellee,*

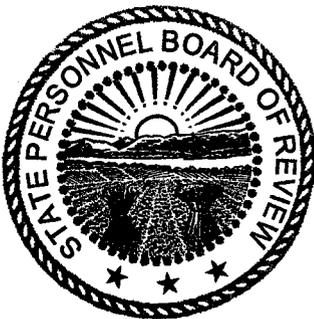
**ORDER**

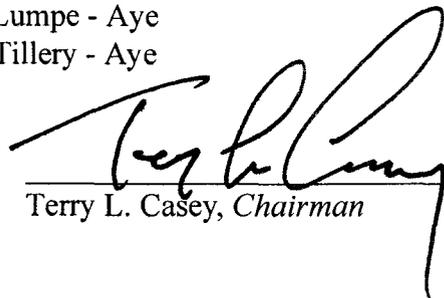
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

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 Chystyakov, effective December 5, 2012, is **DISAFFIRMED**, for failing to provide Appellant Chystyakov his procedural due process rights afforded under the Ohio Administrative Code, and that he be reinstated to his position effective December 5, 2012 through June 25, 2013, the effective date of the Appellant's resignation acceptance date.

Casey - Aye  
Lumpe - Aye  
Tillery - Aye

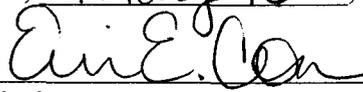


  
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Terry L. Casey, *Chairman*

**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, May 16, 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**

Oleg Chystyakov

Case No. 2012-IDS-12-0255

*Appellant*

v.

March 4, 2014

Department of Development

Christopher R. Young

*Appellee*

*Administrative Law Judge*

**REPORT AND RECOMMENDATION**

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on May 17, 2013 at 10:00 a.m. and concluded upon the submission of simultaneously filed post hearing briefs on June 20, 2013, along with additional pleadings from the Appellee and the Appellant regarding a notice of rescission and a motion to dismiss filed up to and through September 3, 2013. Present at the hearing were the Appellant, Mr. Oleg Chystyakov, who was represented by Merl H. Wayman, Attorney at Law. The Appellee was present through its designee Ms. Lauren Hunter, the Assistant Chief of Human Resources Officer, who was represented by Matthew Karam, Assistant Attorney General.

The subject matter jurisdiction of this board was established pursuant to section 124.03 of the Ohio Revised Code from an involuntary disability separation that had been issued to the Appellant, Oleg Chystyakov, on December 5, 2012, which he timely appealed to this board on December 5, 2012, which was stipulated.

It should be noted that after the completion of the record hearing and prior to the issuance of the Report and Recommendation in this matter, the Appellee, the Ohio Department of Development (DOD), now known as the Ohio Development Services Agency (ODSA), through counsel submitted a notice of resignation of the Appellant dated June 21, 2013, along with Appellee's resignation acceptance letter dated June 25, 2013. Further, the Appellant filed a response to Appellee's notice of resignation, since the Appellee pointed out in its notice of resignation that it intended to file a motion to dismiss. On August 26, 2013, the Appellee filed a motion

to dismiss asserting, among other things, that the State Personnel Board of Review is divested of jurisdiction over the above referenced appeal because the Appellant's resignation replaced the disability separation as a reason for his discontinued service with ODSA. Thereafter, on September 3, 2013, the Appellant filed its Memorandum in Opposition to Appellee's Motion to Dismiss, alleging among other things, that Appellee's Motion to Dismiss is without merit, since at no time did the Appellant withdraw his appeal or expressly waive his rights to have a decision rendered by the undersigned Administrative Law Judge.

After a thorough reading of the above mentioned pleadings, the undersigned Administrative Law Judge, hereby **OVERRULES**, Appellee's motion to dismiss, as not having shown good cause. Further, it should be noted that the time period in question for the instant appeal, as well as the issues presented in the instant appeal, will be from the Appellant's separation date of December 5, 2012 through June 25, 2013, the Appellant's resignation acceptance date.

The issue involved in the instant matter, as in all involuntary disability separations, is whether the Appellee after reviewing all the medical evidence submitted at the pre-separation hearing that there was sufficient evidence, by a preponderance thereof, that the Appellant could not perform the essential duties of his position as of the effective date of the pre-separation hearing, the issue which the Appellant contends at this instant hearing.

#### **FINDINGS OF FACT**

The Appellee called as its first witness Mr. Steven McVey, an Applications Manager who is currently employed by the Ohio Development Services Agency (ODSA), formerly known as the Ohio Department of Development. When questioned, the witness testified that as part of his duties he supervises software developers known as Software Development Specialist 2s (SDS2), one of which was the Appellant, Mr. Oleg Chystyakov, herein who previously held that position prior to his separation from service. The witness identified Appellee's Exhibit A as the position description of a Software Development Specialist 2, whose primary duty included the writing of software applications and fulfilling solutions for business needs of customers. Along this line of questioning, Mr. McVey testified that SDS2s spent eight hours a day at their computer, and agreed when questioned that someone who could not use a computer would not be able to perform the duties of a SDS2.

Next, the witness identified Appellee's Exhibit C, as a series of e-mail exchanges between the Appellant, Mr. McVey and several individuals from the ODSA Communications Department that took place on October 3, 2012. The above referenced e-mail exchanges reflected the Appellant exchanging e-mails with Mr. Michael Leavitt and Ms. Penny Martin regarding an online energy awareness quiz. The testimony revealed that the Appellant was working with Mr. Michael Leavitt, an Electronic Design Specialist and Ms. Martin and building the quiz to make sure that the design standards of ODSA. Specifically, when questioned, the witness testified that he found several of the e-mails sent by the Appellant to Mr. Leavitt were "cheeky", or less than professional.

The testimony then revealed that after several of the e-mails were exchanged between Mr. Leavitt and the Appellant, Mr. Scott Brock, the Chief Information Officer for ODSA, Mr. McVey's supervisor, sent an e-mail on October 3, 2012 at 9:14a.m., located on page 21 of Appellee's Exhibit C, directing all parties to "please hold off any further communication regarding this [energy awareness quiz] until we've had a chance to meet and discuss." Mr. McVey testified that the Appellant disregarded the above direction and proceeded to send an e-mail that same day, located on page 11 of Appellee's Exhibit C October 3, 2012, at 9:33 a.m. to Mr. Leavitt which stated in pertinent part that he was in ASP/ASPX writer (coder) with over 30 years of practical experience and that he would let him know if he needed Mr. Leavitt's assistance. The witness explained that he felt that the above noted e-mail to Mr. Leavitt was Mr. Oleg Chystyakov bullying him. Subsequently, the witness testified that he, following up on Mr. Brock's order, he sent an e-mail to Mr. Oleg Chystyakov at 9:34 a.m., see Appellee's Exhibit C page 11, wherein he notified the Appellant to "please desist from any more communication with Michael [Leavitt] until we have had a chance to meet", along with notifying Mr. Leavitt to disregard the tone of Mr. Oleg Chystyakov's e-mail.

The witness then identified on page 9 of Appellee's Exhibit C, an e-mail that was sent by Mr. Matthew Jackson on October 3, 2012 at 9:36 a.m. regarding a seminar to be held October 24, 2012 regarding "balancing stress and life". The witness testified that after this e-mail was sent out, only a couple hours later, the Appellant sent an e-mail to himself indicating that his blood pressure was high and that Mr. Leavitt probably wanted him to die. See Appellee's Exhibit C page 8. The witness testified that he followed up the above noted e-mail from the Appellant encouraging him to attend the seminar. See Appellee's Exhibit C page 8. Additionally, when questioned, the witness testified that later on October 3, 2012 at

11:39 a.m. the Appellant sent him a follow-up e-mail which stated that he felt that Mr. Michael Leavitt had insulted him earlier.

The witness then identified Appellee's Exhibit D as an email that the Appellant sent to him on Thursday, October 4, 2012 at 7:25 a.m., indicating that he was not feeling well that day and that he would not be coming to work because a graphics designer, presumably Mr. Leavitt damaged his work and health. The witness testified that he acknowledged Mr. Oleg Chystyakov's email and told him to get better. However, the witness noted that the e-mail chain evidenced on Appellee's Exhibit D revealed that at 8:02 p.m. the Appellant sent an e-mail to Mr. McVey's personal e-mail address and copied him at his work e-mail address, wherein the subject of the e-mail was "dangerous situation". In the e-mail itself the witness explained that Mr. Oleg Chystyakov was going to have a meeting with his doctor and a psychologist to estimate his current medical conditions regarding his severe depression and the possible dangerous consequences that are threatening his life. Further, the e-mail states in pertinent part, "I don't allow anybody abuse and insult me without any punishment. I don't allow anybody to destroy my life because of their ambitions." When questioned, the witness testified after he received this e-mail he forwarded it to Mr. Brock and Mr. Shawn Robinson, the Assistant Chief Information Officer.

Next, the witness identified Appellee's exhibit E as an e-mail that he received on October 5, 2012 at 6:20 a.m. from the Appellant indicating that he was going to be meeting with his doctor that morning and that he'd be into work at 12:00 noon. Further, when questioned, the witness testified that after receiving the above-mentioned e-mail, and after having been instructed by Ms. Lauren Hunter, after the Appellant arrived at work, he was to escort the Appellant to Human Resources, most likely because of the Appellant's previous e-mail chain. The witness explained that the Appellant, after Ms. Lauren Hunter handed him some documents, was eventually placed on paid administrative leave, effective that same day, October 5, 2012.

On cross-examination, the witness testified that the Appellant's attendance at work was fine and that he rarely missed work. Further, when questioned, the witness testified that his own personal opinion the e-mail that the Appellant sent to Mr. Michael Leavitt on October 3, 2012 at 9:33 a.m., was in fact bullying, specifically after he had been told not to send any more e-mails before they could talk about the

situation. However, the witness did state that he did not report that the statements were bullying to anyone.

The next witness to testify was Mr. Shawn Robinson, the Assistant Chief Information Officer at ODSA, a position he has held since February 2012. The witness explained that he reports directly to Mr. Scott Brock, the Chief Information Officer. Further, the witness testified that he used to supervise Mr. Oleg Chystyakov from October 2005 through February 2012. The witness testified that after receiving the "dangerous situation" e-mail from Mr. McVey previously identified as Appellee's Exhibit D and specifically the two sentences, "I don't allow anybody abuse and insult me without any punishment. I don't allow anybody to destroy my life because of their ambitions", he deemed it to be a threat toward another ODAS employee. The witness testified that he later contacted Mr. Brock about the situation, who in turn had said he was going to contact his supervisor, the Chief Operating Officer, Mr. Kevin Potter. The witness explained that it wasn't too long afterwards that the Appellant was placed on administrative leave. Furthermore, the witness testified that this was not the first time that he had seen a threatening e-mail from the Appellant. The witness explained that in 2009 when the Appellant was going to see a doctor one day, requesting the use of flex time, he had told the Appellant that he needed prior approval to use flex time, wherein after explaining the time and leave procedures to the Appellant, he responded by writing in an e-mail that he was in "jeopardy".

On cross examination, the witness testified that he did not have any knowledge of whether the Appellant had been scheduled for an Independent Medical Exam (IME). Again, when reviewing Appellee's Exhibit D, the witness stated that he thought that language was threatening and directed toward Mr. Leavitt.

Mr. Matthew Jackson, the Payroll and Benefits Manager for ODSA was the third witness to testify. When questioned, Mr. Jackson explained that he processes payroll, manages the benefits program, collects medical certifications and serves as a hearing officer, as needed. In this case, Mr. Jackson explained that he served as the hearing officer at Mr. Oleg Chystyakov's pre-separation hearing that took place on November 16, 2012. Further, the witness testified that only Ms. Lauren Hunter, who presented management's position, and Mr. Oleg Chystyakov offered testimony at the pre-separation hearing. Mr. Jackson identified Appellee's Exhibit F, specifically page 28, as management's exhibits that were considered at the pre-

separation hearing as follows; Employee History Report, Position Description, Table of Organization, October 3, 2012 Email, October 4, 2012 Email, October 5, 2012 Administrative Leave Letter, IME Report by Dr. Clary, October 23, 2009 Email and Current FMLA Certification.

With regards to Appellee's Exhibit F, pages 49 and 50 regarding the annual certification medical letter dated October 29, 2012, that was introduced at the pre-separation hearing, the witness testified that was management's position that the Appellant couldn't work, as Dr. Valdman stated that the Appellant, "can't work on computer", on the Appellant's FMLA medical certification paperwork. Further, on Appellee's Exhibit F, page 42, Dr. Clary's medical report, the witness testified with respect to his finding on pages 46 and 47, the Appellant was "not fit for duty". Additionally, the witness testified that Appellee's Exhibit H, a letter dated November 14, 2012 from Dr. Boris Valdman, the Appellant's physician, was submitted by the Appellant at the pre-separation hearing. It was noted on said document that the doctor would refer him to a psychiatrist for second opinion, if needed. The witness also identified Appellee's Exhibit I, as another document that was submitted by the Appellant, rating Dr. Clary, in less than favorable terms. Lastly, the witness identified Appellee's Exhibit L, as his Pre-separation Hearing Report dated November 19, 2012, wherein he found that he supported the separation of service of the Appellant. Again, Mr. Jackson came to the above conclusion after reviewing only the documents submitted in the pre-separation hearing; Appellee's Exhibits F, H and I.

On cross-examination, the witness identified Appellant's Exhibit 10, which contained almost the same documents as Appellee's Exhibit F, the documents that were used at the Appellant's pre-separation hearing. When questioned, the witness testified that Ms. Hunter did not provide him with a report from Dr. Nick Marzella which he could've used at the Appellant's pre-separation hearing. The witness when questioned testified that he was aware that the Appellant had been scheduled for an IME with Dr. Marzella, but that he never asked about it or read it at the pre-separation hearing. Further, when questioned, the witness testified that he was not aware that the Appellant had asked Ms. Lauren Hunter for copy of Dr. Marzella's report prior to his pre-separation hearing. See Appellant's Exhibit 24. Furthermore, when questioned, the witness testified that if the Appellant had wanted a copy of Dr. Marzella's report he should have been afforded one prior to the pre-separation hearing. When questioned if he knew that the report from Dr. Marzella had been completed, why did he not inquire as to its existence of report at the pre-separation hearing, testified that he could not make such requests, but only review the

evidence submitted hearing. Furthermore, the witness testified that at the time of the pre-separation hearing he did not know that Dr. Marzella had said in his report that the Appellant was fit for duty.

The witness then identified Appellant's Exhibit 18, which was part of the documentation that was considered at the Appellant's pre-separation, and explained that Ms. Hunter supplied this document from Dr. Valdman regarding the Appellant's already known Epilepsy seizures that he had been experiencing since 2003. When questioned, the witness testified that the Appellant would from time to time have a flare up, and that is when he would need time off. Further, the witness identified Appellant's Exhibit 19 and explained that he on November 13, 2012 approved the Appellant's FMLA leave, along with noting that there was nothing about restricting his duties or any disability repercussions. The witness then identified Appellant's Exhibits 20 and 21, as previous FMLA leave documentation and approval from the previous year. When questioned, the witness testified that he did not require the Appellant in 2011 to submit to an IME, or talk to Ms. Hunter. Furthermore, when questioned, the witness testified that he did not request an Involuntary Disability Separation (IDS) hearing in question, nor did he talk to Ms. Hunter that Dr. Valdman had put on his application that the Appellant, "could not work on computer". The witness then identified Appellee's exhibit H, a document from Dr. Valdman which stated that he had been treating the Appellant for some time, but that it didn't say he was fit for duty. When questioned, the witness testified that at the pre-separation hearing Mr. Oleg Chystyakov stated that he could still work on his computer, along with stating that he is known the Appellant for approximate last two years.

On further cross-examination, the witness after identifying Appellant's Exhibit 8, Dr. Clary's IME report, specifically on page 5 of said report wherein it was noted that Dr. Marzella had already conducted a previous IME on the Appellant, and asked why he did not request that report, again explained that he just didn't inquire. Additionally, when questioned, the witness testified it was his understanding that Ms. Hunter referred the Appellant to Dr. Clary, after reading Dr. Marzella's initial IME report. Moreover, the witness explained that if the Appellant had asked for Dr. Marzella's initial IME report, he should have been provided one.

Appellee's last witness to testify was Ms. Lauren Hunter, the Assistant Chief Human Resources Officer, who explained that she is responsible for conducting Labor Relations, conducting investigations, working with employees who have disability accommodation requests, addressing drug and alcohol incidents, and

addressing possible workplace violence incidents and threats. Further, the witness testified that as a former employee of Nationwide Mutual Insurance Company she was a member of the Incident Management Team, wherein she had been trained on work place violence incidents. The witness explained that she reports directly to Mr. Matt Peters, the Chief of Staff, and that Mr. Matthew Jackson, the Payroll and Benefits Manager, was used as the pre-separation hearing officer in this instant matter.

The witness then identified Appellee's Exhibit D, as an e-mail dated October 4, 2012 at 8:02 p.m. that she received regarding the "dangerous situation", that was sent to Mr. McVey's personal e-mail address by Mr. Chystyakov. The witness noted that within the e-mail it stated the following, "I don't allow anybody abuse and insult me without any punishment. I don't allow anybody to destroy my life because of their ambitions." The witness testified that this e-mail was a "red light" in her opinion, and warranted a high level of scrutiny, with respect to violations of workplace violence rules and regulations. The witness testified that she wanted to get Mr. Shawn Robinson's impressions regarding the e-mail, and that it was concluded to put Mr. Chystyakov on paid administrative leave. The witness then identified Appellee's Exhibit F, page 41, as a letter placing the Appellant on paid administrative leave effective October 5, 2012. Ms. Hunter testified that she then escorted the Appellant to his desk to get his things, then out of the building.

Next, the witness testified that the Appellant was ordered to take an IME, and eventually was sent to Dr. Marzella for an evaluation to see if the Appellant was fit for duty. See Appellee's Exhibit M. The witness noted that on Appellee's Exhibit M, page 85, 12 documents were attached to her letter as background information, along with the "dangerous situation" e-mail, for Dr. Marzella consider in his evaluation. The witness identified Appellee's Exhibit N, see page 91, as Dr. Marzella's October 15, 2012, Psychological Fitness for Duty Evaluation, wherein Dr. Marzella concluded that the Appellant was fit for duty. When questioned, Ms. Hunter testified that she found Dr. Marzella's fitness for duty evaluation report unreliable with respect due to the fact that in his report he points out that the Appellant, could be just, "a brilliant psychopath", along with stating within his report that at face value he found the e-mail in question to be, "threatening". With these conflicting findings within Dr. Marzella's report, Ms. Hunter explained that it was felt that the Appellant should be sent out for the additional evaluation.

The witness then identified Appellee's Exhibit O, as an October 19, 2012, IME request sent to Dr. Clary, with respect to the Appellant. Ms. Hunter testified that she sent the same documentation to Dr. Clary to consider in his evaluation that she sent to Dr. Marzella, with the exception that she also sent Dr. Marzella's report.

The witness testified that after reviewing Dr. Clary's report, see Appellee's Exhibit G, pages 56 – 60, dated October 29, 2012, she found that it was more reliable than Dr. Marzella's report because the Appellant appeared to be more forthcoming during Dr. Clary's examination, as compared to Dr. Marzella's examination. It was noted that Dr. Clary's report stated that the Appellant was not fit for duty. Ms. Hunter then identified Appellee's Exhibit G, as the pre-separation hearing notification package, dated November 9, 2012, that was sent to the Appellant, which was scheduled for November 16, 2012. It was noted that the notification package stated that the Appellant would be required to submit medical information regarding his ability to perform the essential functions of his position, along with a copy of the IME report from Dr. Clary. When questioned, the witness testified that she did not include Dr. Marzella's IME report because ODSA did not rely upon the report to make a determination to go forth with the involuntary disability separation of the Appellant.

The witness then identified Appellee's Exhibit F as the pre-separation hearing packet, which noted that management's exhibits totaled nine, and did not include Dr. Marzella's IME report. Specifically, when questioned, the witness testified that it was management's position that due to its "threat assessment", Dr. Clary's IME report, along with some of the Appellant's own medical records, the current FMLA certification, on pages 49 through 52, wherein it was noted that the employee could not work on computer, as its rationale for separating the Appellant from service. The witness testified that she was there acting as management's representative, while Mr. Matthew Jackson was the hearing officer. The witness also identified Appellee's Exhibit H, a letter from Dr. Valdman and Appellee's Exhibit I, an apparent Internet review of Dr. Clary, was submitted by the Appellant at the pre-separation hearing, and was considered in making a determination. The witness testified after the hearing was completed, Mr. Jackson issued a report and recommendation noted as Appellee's Exhibit L, wherein it was found that the Appellant was not fit for duty. The witness testified that the Director, of the Ohio Development Services Agency, Ms. Christine Schmenk, issued the instant order of involuntary disability separation of the Appellant on or about November 28, 2012, with effective date of December 5, 2012.

The witness then identified Appellant's Exhibit 10, page W, as the Appellant's November 9, 2012, notice of pre-separation hearing that was to be scheduled on November 16, 2012. When questioned, the witness testified that contained within this notice, "This meeting is based upon your inability to perform the essential functions of your position. If you or your physician dispute the facts contained within the medical records, you will be required to provide medical documentation that disputes this information. This evidence MUST be submitted at the pre-separation hearing. Documentation would also need to indicate your ability to return to work and perform the essential functions of her position." The witness then identified Appellant's Exhibit 24, as an e-mail that she received from the Appellant on or about October 24, 2012, requesting, among other things, that he still had not received the results of his first IME, and was questioning that didn't he have a right to get that report. Again, the witness testified that she did have Dr. Marzella's report in her possession, at that time, and that she did not turn it over to the Appellant prior to his pre-separation hearing.

On redirect examination, the witness testified that she did not turn over Dr. Marzella's IME report to the Appellant prior to the pre-separation hearing as she felt it was unreliable.

The Appellant began his case-in-chief by calling himself, Mr. Oleg Chystyakov, to the witness stand. When questioned, the witness testified that he was employed by the Ohio Department of Development, now known as the Ohio Development Services Agency, from October 3, 2005 through his date of separation on December 5, 2012, as a Software Development Specialist 2. The witness explained that in the performance of his job he spent approximately 80% of his time working directly on the computer, along with the other 20% of his time in meetings discussing building web applications. Along this line of questioning, the witness explained that he was supervised by Mr. Stephen McVey, the Applications Manager. When questioned, the witness testified that prior to the incident in question and/or prior to October 2012, he had never been asked to submit to an IME.

The witness then identified Appellee's Exhibit C, page 11, as an e-mail chain wherein it was noted that he had been working on a small project, an "energy awareness quiz", when Mr. Levitt, a graphics designer, not his boss, appeared to be ordering him to do an action, to which he was simply pointing out that he was not a young man in doing this, and had for quite a number of years. The witness testified that he was not trying to be impolite in responding in a way that he did via the e-

mail. With respect to Appellee's Exhibit D, the e-mail sent to Mr. McVey's personal e-mail on October 4, 2012 at 8:02 PM, which stated in pertinent part, "I don't allow anybody abuse and insult me without any punishment. I don't allow anybody to destroy my life because of theirs ambitions", was sent to him because he did not feel well and he was not going to work the next morning. Further, the witness explained that the above e-mail was an attempt to explain that he was going to have his attorney look into the matter.

The witness identified Appellant's Exhibit 1, as an October 12, 2012 notice to the Appellant that he was being placed on paid administrative leave, which he received. Then the witness identified Appellant's Exhibit 2, as an October 10, 2012 e-mail exchange between the Appellant and Ms. Lauren Hunter requesting him to attend an IME. Further, the witness identified Appellant's Exhibit 3, as a letter dated October 10, 2012 from Ms. Beth Brengartner, the Chief Human Resources Officer, to the Appellant giving notice to attend an IME with Dr. Marzella, both which he received. The witness explained that it was not too long after that Ms. Lauren Hunter gave him a short-term disability form, and not too soon after that he put in for FMLA after being placed on paid administrative leave. When questioned, the witness testified that he did attend the IME with Dr. Marzella, and that Ms. Lauren Hunter told him that he would be further informed as what to do.

The witness identified Appellant's Exhibit 7, a letter dated October 19, 2012, which he received requiring him to submit to an IME with Dr. Clary. The witness testified that he then sent an e-mail to Ms. Lauren Hunter (see Appellant's Exhibit 24) asking why a second IME was scheduled and what were the results of the first IME. The witness testified that he only got the results of the first IME on December 12, 2012, after the pre-separation hearing had already been held, and had been separated. When referring back to Appellant's Exhibit 10, page W, the witness explained that he did receive the pre-separation hearing notice, and in accordance with the instructions he did introduce a statement from Dr. Valdman at the pre-separation hearing, but since he did not have Dr. Marzella's IME report, he could not introduce that at the hearing.

## CONCLUSIONS OF LAW

In order for Appellee's involuntary disability separation of the Appellant Chystyakov to be upheld, Appellee had the burden of proving by a preponderance of the evidence that substantial credible medical evidence exists showing that Appellant Chystyakov was unable to perform the essential duties of his position due to a disabling condition as of the effective date of his pre-separation hearing held on November 16, 2012. In the case at bar, Appellee has failed to meet its burden.

In the case at hand, there were several issues to consider in rendering a decision, outside the usual issue, "Was there substantial credible medical evidence existing that shows that the Appellant was unable to perform the essential duties of his position due to a disabling condition?" If the above stated was the only issue to consider, clearly the Appellee provided sufficient evidence at the pre-separation hearing that the Appellant was unable to perform the essential duties of his position due to a disabling condition. However, that is not the issue upon which this case rests. There are, in the undersigned Administrative Law Judge's determination, additional issues which need addressed in the case at hand.

The first issue that needs addressed is whether ODSA had a legal obligation to provide the Appellant with a copy of Dr. Marzella's IME report in response to the Appellant's request for said report prior to the pre-separation hearing, so he could submit said report into the record at the pre-separation hearing, when Dr. Marzella concluded that he was fit for duty and not suffering from a disabling mental illness, injury or condition. After consideration of the above question, one has to answer the question in the affirmative.

Secondly, was the pre-separation hearing "fair" when the Appellee's hearing officer did not consider Dr. Marzella's IME report, even though he knew of its existence, but could not ask for it to be submitted into evidence at the pre-separation hearing. Coupled with the fact the hearing officer submitted to the Appellee's representative, Ms. Hunter, prior to the pre-separation hearing, a copy of Dr. Valdman's FMLA certification, without notice to the Appellant, to present as evidence that he could not perform the essential functions of his position. Again, after consideration of the above questions, one has to answer those questions in the negative.

In the instant case, the Appellee at the pre-separation hearing basically relied upon Dr. Richard Clary's IME report stating that the Appellant was not fit for duty, the Appellant's current FMLA certification, a letter dated November 14, 2012 from Dr. Valdman, which states that the patient did not suffer from psychiatric problems except for mild anxiety and the various e-mail exchanges. Most notably absent from the evidence that the hearing officer considered at the pre-separation hearing, was Dr. Marzella's IME report stating the Appellant was, "fit for duty".

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.

In the case at hand, after it was revealed that the Appellant had sent some e-mails which could by reasonable minds be deemed to be "threatening", the Appellant was placed on paid administrative leave. After which, the Appellant was notified to report to Dr. Marzella for an independent medical examination pursuant to Administrative rule 123:1-30-03 of the Ohio Administrative Code. It should be noted that within the procedures of an Involuntary Disability Separation, both the appointing authority in the employee **shall** receive the results of any examination.

(A) An appointing authority may require that an employee submit to medical or psychological examinations for purposes of disability separation or a reinstatement from disability separation. The appointing authority shall select one or more licensed practitioners to conduct the examinations.

(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. **Both the appointing authority and the employee shall receive the results of any examination and related documents subject to division (C)(1) of section 1347.08 of the Revised Code.**

(C) Except as provided in paragraph (D) of this rule, the appointing authority shall pay the cost of the examinations.

(D) Employee's failure to appear for examination. An employee's refusal to submit to an examination, the unexcused failure to appear for an examination, or the refusal to release the results of the examination amounts to insubordination, punishable by the imposition of discipline up to and including removal. An employee will be responsible for the costs associated with an unexcused failure to appear at a scheduled examination.

The evidence in this case revealed that the Appellant, even after requesting to have a copy of Dr. Marzella's IME report prior to the pre-separation, was denied this, and was only given Dr. Marzella's IME report, after the hearing officer rendered a decision recommending an involuntary disability separation, and after his actual separation service, but prior this administrative proceeding. As can be seen by Ohio Administrative Rule 123:1-30-1 which states in pertinent part:

(C) Pre-separation hearing. An appointing authority shall institute a hearing prior to involuntarily disability separating an employee. The employee shall be provided written notice at least seventy-two hours in advance of the hearing. If the employee does not waive the right to the hearing, then at the hearing **the employee has the right to examine the appointing authority's evidence of disability, to rebut that evidence, and to present testimony and evidence on the employee's own behalf.**

(D) If the appointing authority determines, after weighing the testimony presented and evidence admitted at the pre-separation hearing, that the employee is capable of performing his or her essential job duties, then the involuntary disability process shall cease and the employee shall be considered fit to perform his or her essential job duties. **If the appointing authority determines, after weighing the testimony presented and the evidence admitted at the pre-separation hearing, that the employee is unable to perform his or her essential job duties, then the appointing authority shall issue an involuntary disability separation order.**

As can be seen from reading the above administrative rule, 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, but the employee has the right to examine the appointing authorities evidence of the disability, **to rebut that evidence, and to present testimony and evidence on the employee's own**

**behalf**, as well as the appointing authority has to weigh the testimony and evidence presented.

In analyzing the actions of the appointing authority herein, it denied the Appellant from having Dr. Marzella's IME report to present as rebuttal evidence and/or as direct evidence at the pre-separation hearing that he was capable of performing the essential functions of his job, wherein that report found that he was fit for duty, as well as not allowing the hearing officer to properly weigh the evidence.

Questions also arose with respect to whether the Appellee could, after receiving the first IME, Dr. Marzella's report, which stated that the Appellant was fit for duty, whether the Appellee could send the Appellant out for the additional IME. In this case, that is what the Appellee did, and it is the determination by the undersigned Administrative Law Judge that the Appellee was well within its rights to do so, pursuant to 123:1-30-03 (A) which states in pertinent part:

(A) An appointing authority may require that an employee submit to medical or psychological examinations for purposes of disability separation or a reinstatement from disability separation. **The appointing authority shall select one or more licensed practitioners to conduct the examinations.**

However, where the appointing authority failed to afford the Appellant his procedural due process rights, occurred when he was not given Dr. Marzella's IME report, after having requested the same prior to his pre-separation hearing, which found that he was capable of performing the essential job duties of his position and that he was "fit for duty". Thus, the hearing officer's report and recommendation was flawed from the outset, due to the actions or inactions, as the case may be, of the appointing authority in not allowing the Appellant to present medical evidence, supporting his position, which had a profound effect on the hearing officer's finding. This is not to say that the hearing officer's recommendation would have had a different finding, after consideration of all of the medical evidence, but most likely it would have. In the case at hand, an old phrase comes to mind, bad facts make bad law. If the undersigned were to find that the tainting of the evidence by the appointing authority, by not providing the Appellant with the first IME report, which found him fit for duty, would in effect allow appointing authorities to doctor shop, while denying an

Appellant from having contradictory medical evidence which could establish them fit for duty.

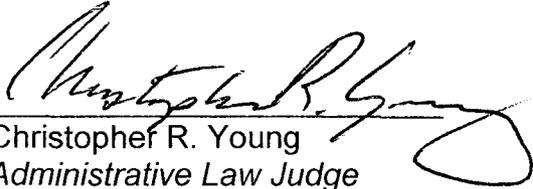
This Board should protect the fairness in the involuntary disability separation process, as it is a non-disciplinary measure.

Further, it should be noted that the FLMA certification which the appointing authority used as evidence at the pre-separation hearing, was also wrongfully interpreted by the hearing officer when read in its entirety. While the document does state that the Appellant, "can't work on computer", the hearing officer didn't take into consideration that the documentation also states that it is only during, "flare-ups" as this was the rational basis for the Appellant having filed the FMLA paperwork in the first place.

Thus, the hearing officer's recommendation and findings were both tainted, in not allowing or considering medical evidence on behalf of the Appellant, and by wrongfully interpreting the Appellant's FMLA paperwork, in its totality, in recommending the Appellant's involuntary disability separation, and should not stand.

### RECOMMENDATION

Therefore, it is my **RECOMMENDATION** that Appellee's involuntary disability separation of Appellant Chystyakov, effective December 5, 2012, be **DISAFFIRMED**, by failing to provide the Appellant Chystyakov his procedural due process rights afforded under the Ohio Administrative Code, and that he be reinstated to his position effective December 5, 2012 through June 25, 2013, the effective date of the Appellant's resignation acceptance date.

  
Christopher R. Young  
Administrative Law Judge