

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

CHARLES EWELL,

Appellant,

v.

Case No. 12-MIS-02-0038

MONTGOMERY COUNTY COURT OF COMMON PLEAS,

Appellee.

ORDER

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

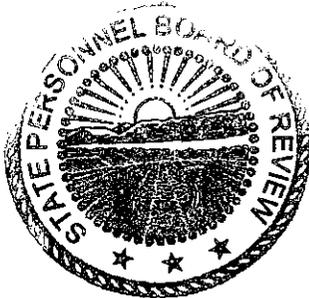
After a thorough examination of the record and a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

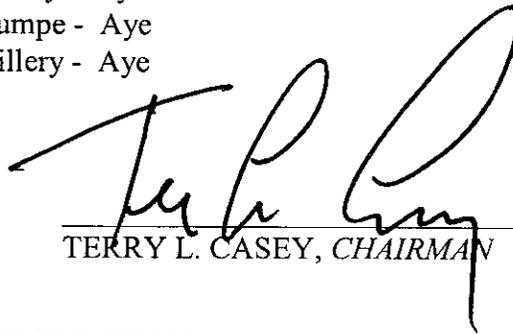
Wherefore, it is hereby **ORDERED** that the instant appeal be **DISMISSED** due to Appellant's actual receipt of Temporary Total Disability benefits at the time Appellant applied for reinstatement, pursuant to Ohio Revised Code §§ 124.03(A) and 124.32.

Casey - Aye

Lumpe - Aye

Tillery - Aye

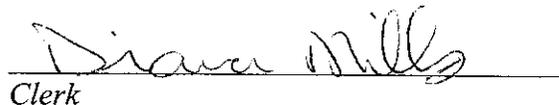



TERRY L. CASEY, CHAIRMAN

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, October 11, 2012.


Clerk

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

10-11-12

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

Charles Ewell,

Appellant,

v.

Montgomery County Court of Common
Pleas,

Appellee.

Case Nos. 12-MIS-02-0038

September 17, 2012

James R. Sprague
Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause comes on due to Appellant's February 23, 2012 filing of an appeal from Appellee, Montgomery County Court of Common Pleas', denial of Appellant's application for reinstatement from an Involuntary Disability Separation (IDS). Because this case has presented several complex jurisdictional questions at various points in time, the record in this case has been rather extensively developed.

To that end, on March 8, 2012, this Board issued a Procedural Order/Questionnaire and on March 29, 2012, Appellee filed Appellee's response to the Procedural Order/Questionnaire. On April 23, 2012, Appellant filed Appellant's reply to Appellee's response.

On March 30, 2012, this Board issued a second Procedural Order regarding scheduling a Pre-Hearing and regarding what materials Appellee was to bring to same. On May 10, 2012, this Board conducted its first Pre-Hearing in this matter.

At the first Pre-Hearing, it was determined that Montgomery County has a County Personnel Department (CPD) that has subsumed the personnel functions formerly fulfilled by the Ohio Department of Administrative Services (DAS). In that role, the CPD may promulgate rules concerning various personnel transactions as long as those rules are properly promulgated and do not attempt to abridge, amend, or rescind pertinent provisions of the Ohio Revised Code.

To that end, the CPD kept a rule – Policy 5.6 – that (at Subsection IV. B.) provides a three-year reinstatement period following a disability separation. (Appellee's

Exhibit 14.) It is noted that Subsection IV. B. continues to reference [what would be former] R.C. 124.32.

Yet, the State's rule on same (now O.A.C. 123:1-30-04) only provides for a two-year reinstatement period following a disability separation.

It is also noted that the CPD did not amend its Policy 5.6 to take out the former – and now inapplicable – language that provides that DAS will provide the appointing authority with the name of a physician to whom to send an employee for an Independent Medical Examination (IME).

A more extensive discussion concerning the interaction of R.C. 124.32, Policy 5.6, and O.A.C. 123: 1-30-04 is set forth in the Conclusions of Law, below.

At the first Pre-Hearing, the parties were also given the option to file jurisdictional briefs and Appellee chose to do so, filing a one-page analysis on May 29, 2012. Appellant chose not to file a brief at that point.

On May 17, 2012, this Board issued a Scheduling Notice, setting this matter for Record Hearing on July 18, 2012.

On July 18, 2012, the parties and counsel appeared for Record Hearing. Yet, at the time set for Record Hearing, Appellee raised a compound jurisdictional question that had first been raised by this Board. That question was whether Appellant had been in an "inactive work status" for greater than a two-year period and, if so, whether this Board possessed jurisdiction to offer Appellant an avenue of remedy from Appellee's denial of Appellant's reinstatement request. Thus, the scheduled Record Hearing was converted to a second Pre-Hearing.

Moreover, this time, the parties were required to fully brief all apparent outstanding jurisdictional questions presented in this matter. Questions to be briefed included whether R.C. 124.32 (B)'s two-year limitation on reinstatements from disability separations bars this Board from providing Appellant with an avenue of remedy if he had been in an inactive work status for a period of greater than two years. Questions to be briefed also included whether Appellant's receipt of Temporary Total Disability (TTD) benefits for the pertinent periods in which it was received effectively bars this Board from making a potential finding that Appellant could again perform the essential duties of his position.

Accordingly, on or before September 10, 2012, the parties filed their respective jurisdictional briefs and optional reply briefs.

Because of the various jurisdictional questions raised by Appellee, Appellee did not stipulate regarding this Board's jurisdiction over the subject matter of this appeal. Further, for the reasons that follow, the undersigned cannot find that this Board possesses such jurisdiction. Thus, the instant matter should be dismissed, pursuant to R.C. 124.03 (A) and R.C. 124.32.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

Appellant held the position of Intensive Probation Officer with the Court of Common Pleas of Montgomery County. This was a classified non-exempt position.

Appellant was injured in June 2007 while working for Montgomery County. This injury occurred during an accident. Specifically, Appellant's left hand was dragged along the pavement when the work van he was driving flipped over. Appellant was off work after the accident in June of 2007 until February of 2008 and then returned to work until September 7, 2008, when he had an additional surgery on his hand. He did not return to work after the surgery.

Appellee asserts that Appellant's last date in an active work status (the standard referenced in O.A.C. 123: 1-30-04) was September 8, 2008.

Appellant's IDS Personnel/Payroll Action Form was signed on September 3, 2009. (Appellee's Exhibit 6.)

Appellant's IDS was effective September 8, 2009. (Appellee's Exhibit 6)

On September 7, 2011, Appellant presented the Deputy Court Administrator with a prescription pad note from Kevin J. Paley, M.D., that stated, "Charles May Return to work 9/7/11." (Appellee's Exhibit 5.)

Appellee then required Appellant to obtain an IME, ostensibly " ...pursuant to O.A.C. 123:1-23-03 and 123:1-03-04." A psychological examination was performed on October 11, 2011 and an orthopedic examination was performed on November 3, 2011. (Appellee's Exhibit 9., p.2)

A pre-reinstatement Hearing was scheduled for December 20, 2011. At this Hearing, Appellant's counsel requested a continuance for additional time to secure and present evidence on behalf of his client. The request was granted.

The pre-reinstatement Hearing was rescheduled for, and commensurately held on, January 18, 2012.

Subsequent to the pre-reinstatement Hearing, Appellant's request for reinstatement was denied.

That denial came in the form of a February 13, 2012 dated letter and accompanying Order signed by James W. Drubert, Court Administrator/Hearing Officer, and reviewed and approved by the Honorable Barbara P. Gorman, Administrative Judge. (Appellee's Exhibit 9., p. 3) The Findings in this Order included a determination that "... there was not sufficient substantial, credible, medical evidence to support the conclusion that Charles Ewell is capable of performing the essential job functions of a Probation Officer." (*id.*) Appellee based its decision on the totality of recent Bureau of Workers' Compensation evaluations and IMEs. (*id.*)

The record reflects that Appellant was receiving TTD and that **the last date that Appellant was actually on TTD was January 10, 2012.** (Appellee's Exhibit 1.)

January 10, 2012 falls more than four months after September 7, 2011, the date on which Appellant applied for reinstatement.

Indeed, January 10, 2012 falls more than one month after December 20, 2011, the date for which Appellant's pre-reinstatement Hearing was initially scheduled.

However, January 10, 2012 precedes January 18, 2012, the date on which Appellant's pre-reinstatement Hearing was actually held.

January 10, 2012 also precedes February 13, 2012, the date Appellee issued its denial of Appellant's request for reinstatement.

CONCLUSIONS OF LAW

This case presents this Board with two questions. First, does this Board possess jurisdiction to provide Appellant with an avenue of remedy from the denial of his reinstatement application? Secondly, if this Board does possess that jurisdiction, then does Appellant's actual receipt of TTD benefits at the time he applied for reinstatement preclude Appellant from being able to claim that he could again perform his essential duties?

Based on the Findings, set forth, above, and for the reasons set forth, below, we must first answer that this Board does possess jurisdiction to provide Appellant with an avenue of remedy from the denial of his reinstatement application. However, we must answer further that Appellant's actual receipt of TTD benefits, as of the September 7, 2011 date of his application for reinstatement, legally precludes Appellant from being able to assert that he could again perform his essential duties as of September 7, 2011.

We must first address which of several potential reinstatement periods applies to Appellant.

We note that, while the Hamilton County CPD must follow state law and time lines such as those mandated in R.C. 124.32 (B), the CPD possesses its own independent authority to promulgate rules that amplify and explain pertinent provisions of the Revised Code.

Because R.C. 124.32 (B) now establishes a two-year period of reinstatement, it must be this period that we utilize, herein.

Because Policy 5.6 also expressly references R.C. 124.32 concerning an employee's potential window for filing a reinstatement application, **we must also utilize the language from R.C. 124.32 (B) that the application must be filed " ... within two years from the date of separation ... "**

As such, we are precluded from utilizing the language of O.A.C. 123:1-30-04 (A) that the employee must apply for reinstatement " ... within two years from the date the employee was no longer in active work status ... ".

In this case, Appellant's IDS was effective September 8, 2009 and he filed his application for reinstatement on September 7, 2011. Thus, Appellant applied, although barely, within the specified two-year window set forth in R.C. 124.32 (B). Accordingly, this Board possesses jurisdiction to offer an avenue of remedy to Appellant from Appellee's denial of Appellant's reinstatement application.

Unfortunately, however, Appellant was actually receiving TTD benefits at the time he applied for reinstatement. Furthermore, he received them for more than four months thereafter, since his TTD was in effect through January 10, 2012.

This Board has consistently held that receipt of TTD benefits is an admission that the employee cannot perform the essential duties of the pertinent position, for the employee is, by definition, temporarily and totally disabled.

Finally, we must review whether Ohio Courts have mandated that even the receipt of TTD benefits is insufficient to preclude an administrative appellate review

concerning whether an employee should have been permanently separated while still receiving TTD. We must also review whether separating that employee is a violation of Ohio's Workers' Compensation law, specifically R.C. 4123.90.

Ohio courts have issued several opinions on this subject. Therefore, it is useful to discuss them together to get a more comprehensive picture of the position of Ohio's Courts on this issue.

In *Coolidge v. Riverdale Local School Dist.*, 797 N.E.2d 61 (Ohio 2003), the Supreme Court of Ohio made what, at the time, appeared to be a seminal change in the way employees, who were receiving TTD, could be regarded. In *Coolidge, id.*, a teacher who had been on TTD for several years following an injury sustained in the classroom had exhausted all of her leave time. Not only was Ms. Coolidge's teaching contract then terminated by the Riverdale Board of Education, her arbitration of that termination was also denied for "good and just cause". The Supreme Court determined that R.C. 4123.90's Workers' Compensation protections extended to Ms. Coolidge and that she could not be permanently severed from employment under these circumstances because doing so would constitute an impermissible discharge under the statute.

Thereafter, the Court of Appeals issued a decision in *Cordial v. Ohio Dept. of Rehab. & Corr.*, 2006 WL 1390843 (Ohio App. 2006) that helped explain and seemingly narrowed the broad mandate that some thought the decision in *Coolidge, id.*, represented. After the Court of Appeals issued its holding in *Cordial, id.*, the Ohio Supreme Court, itself, appeared to narrow its self-declared "overbroad dicta" in *Coolidge, id.*

Indeed, in *Bickers v. W. & S. Life Ins. Co.*, 879 N.E.2d 201 (Ohio 2007), the Supreme Court held that *Coolidge, id.*, is limited to considerations of "good and just cause" for termination under O.R.C. 3319.16 ("Termination of contract by board of education"). The Court in *Bickers, id.*, found that the decision in *Coolidge, id.*, does not create a claim of wrongful discharge in violation of public policy for an employee who is discharged while receiving Workers' Compensation.

The Court distinguished Ms. Coolidge's situation from that of Ms. Bickers because, unlike Ms. Bickers, Ms. Coolidge was a teacher under a contract governed by R.C. 3319.16, which afforded her protection from termination without "good and just cause." *Id.* Because Ms. Bickers was not a teacher protected by a contract covered by R.C. 3319.16, she was not entitled to the benefit of the holding in *Coolidge, id.*, and could not assert a wrongful-discharge claim in reliance on *Coolidge, id.*

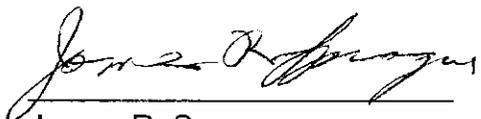
Unfortunately, for Appellant, his employment, like that of Ms. Bickers, does not fall under the statutory educational protections found in R.C. 3319.16. Thus, when taken together, it appears Ohio case law would not preclude Appellee from permanently severing Appellant from employment.

Further, it would appear that Ohio case law does not bar this Board from continuing to apply its precedent on this issue. To reiterate, that precedent indicates that, when an employee is actually receiving TTD benefits at the time of the application for reinstatement, that employee cannot then claim before the Board that the employee could have performed the essential duties of the position at the time of the application for reinstatement.

In summary, we have found that this Board possesses jurisdiction to offer Appellant an avenue of remedy from Appellee's denial of his application for reinstatement. Yet, we have also found that Appellant's contemporaneous receipt of TTD benefits at the time of his application for reinstatement is a *per se* admission that he was unable to perform the essential duties of his position at the time of his application. Such an admission effectively bars this Board from being able to determine whether Appellant could have performed those essential duties at the time Appellant applied for reinstatement.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **DISMISS** the instant appeal due to Appellant's actual receipt of Temporary Total Disability benefits at the time Appellant applied for reinstatement, pursuant to R.C. 124.03 (A) and R.C. 124.32.



James R. Sprague
Administrative Law Judge