STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

MATHEW M. JOHNSON,

Appellant,

v.

Case Nos. 12-IDS-03-0050
12-REM-03-0051

OHIO HOUSING FINANCE AGENCY,

Appellee

ORDER

These matters 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 records, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's denial of Appellant's request for reinstatement is **AFFIRMED**, pursuant to Ohio Revised Code Section 124.03 and Ohio Administrative Code 123:1-30 *et seq.*

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, August 22, 2012.

ENTERED
8/22/12

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

Matthew M. Johnson,	Case Nos. 12-IDS-03-0050 12-REM-03-0051
Appellant	
v.	July 19, 2012
Ohio Housing Finance Agency,	
Appellee	James R. Sprague *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

On November 30, 2009, the Appellant's request for a Voluntary Disability Separation (VDS) with the Ohio Housing Finance Agency (OHFA) became effective. On November 15, 2011, the OHFA received the Appellant's request for reinstatement. On January 27, 2012, a pre-reinstatement hearing took place.

On February 1, 2012, the OHFA issued a letter to Appellant that denied the Appellant's request for reinstatement. The denial letter alleged, among other things, the following: "After weighing the testimony and evidence you presented at the hearing, a determination has been made that you remain incapable of performing the essential duties of your former position, a Housing Grant Analyst 2."

Thereafter, the Appellant timely filed two appeals with the State Personnel Board of Review from this denial of his request for reinstatement to his position with the OHFA. (Please see SPBR CASE NOS. 12-IDS-03-0050 and 12-REM-03-0051, which are CONSOLIDATED HEREIN).

The record hearing in this case occurred on July 10, 2012. The Appellant, Mathew M. Johnson, appeared *pro se*. The Appellee, the OHFA, was present through its designee, Claire Long, the Director of Human Resources (HR) for the OHFA. The Appellee was represented by Philip Judy and Linda Ubokudom, Assistant Attorneys General. The record was then closed following the parties' respective presentations of oral closing arguments.

Jurisdiction over the subject matter of this now-consolidated appeal was established and the record hearing was conducted pursuant to R.C. 124.03 and also

O.A.C. 123:1-30-04., which specifically provides that an employee may file an appeal from a denial of a reinstatement request within 30 days after having received the denial from the appointing authority.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

The Appellant, Mathew M. Johnson, was the first witness to testify. On direct examination, Appellant averred that the OHFA administers tax credits and grant money to help provide affordable housing to the poor. The Appellant worked for the OHFA's Office of Planning, Preservation, and Development (PPD) as a Housing Grant Analyst 2.

Mr. Johnson testified that his psychiatrist, Dr. Daniel Lettvin, M.D., released him for work in 2011. Dr. Lettvin wrote a note stating that Mr. Johnson was capable of performing his job duties. Mr. Johnson had been seeing Dr. Lettvin for more than a year. In contrast, Appellant stated that the Appellee's psychiatrist, Dr. J. Nick Marzella, Ph.D., only saw Mr. Johnson for a matter of hours and determined that he was unable to perform his job duties.

Mr. Johnson stated that he offered three letters of recommendation at the pre-reinstatement hearing. Those letters are contained in Appellee's exhibit 12. Mr. Johnson believes the letter from Randy McNeal of McNeal Enterprises is the most important. This letter states that "Mr. Johnson's advice was crucial to receiving the VA [Veterans Administration] award (a highly competitive national grant) and additional funding for this $1.2M project."

On cross-examination, Mr. Johnson was presented with his OAKS Employee History Report. This report shows that he went on disability leave in July 2008. He returned to work on May 17, 2009 but again left on disability on June 28, 2009. On November 12, 2009, he returned to work but left under a VDS on November 30, 2009.

On November 9, 2009, Mr. Johnson's psychologist, J. Edward Black, Ph.D., wrote a note in regard to Mr. Johnson stating: "Please be advised that the above reference has been under my care and can return to work full-time effective immediately. I have expressed my concern regarding this action but agree to endorse his decision."

The Appellant was asked about his job duties. His position description states that, as a Housing Grant Analyst 2:

45 percent of his job duties consist of performing analysis of Community Housing Development Organizations to determine financial feasibility and consistency with the OHFA's goals and objectives;

45 percent consist of conducting regular site visits to ensure projects are progressing as approved by the OHFA Board and in compliance with state and federal regulations;

5 percent consist of conducting education seminars; and

the remaining 5 percent consist of various other duties.

The Appellant testified that his work leaned more toward gap financing and less toward tax credits. He stated that grant writing is not a major portion of his work, but he was generally a lead on special projects that involved writing grants. The Appellant agreed that a Housing Grant Analyst 2 position involves stress, and the ability to handle stress is part of the job.

When Mr. Johnson requested to be reinstated to his former position as a Housing Grant Analyst 2 in the fall of 2011, the only supporting documentation he provided was a brief note from Dr. Lettvin. This note states, "Mr. Johnson continues to be compliant with treatment, and appears to be doing well. He appears capable of performing his duties as a grant analyst for the state of Ohio. He is released to go to work."

Mr. Johnson testified that it appeared that the OHFA gave more weight to Dr. Marzella's analysis of him than to Dr. Lettvin's note and the three letters of recommendation submitted by Mr. Johnson. Mr. Johnson expressed incredulity as to why the OHFA placed more weight on Dr. Marzella's opinion than on Dr. Lettvin's opinion. Mr. Johnson said he only met with Dr. Marzella for a matter of hours, but he met with Dr. Lettvin's for more than a year. In addition, Mr. Johnson believes that the letters of recommendation pertain to his actual work ability.

Sean Thomas was the next witness to testify. He has been employed by the OHFA for 17 years. Since 2005, he has been the Director of the Office of PPD. In his position, he is responsible for incentive programs for the Department of Affordable Housing. He directly supervises four managers, who in turn supervise 15 union staff members. He is familiar with Mr. Johnson, who began working at the OHFA a few months after Mr. Thomas became the Director of PPD.

Mr. Thomas discussed the Appellant's job duties. He stated that since the Appellant would interact with the public, Appellant must have good "verbal" skills. Appellant would deal with technical issues, so he must be able to translate technical

rules into common terms when talking with lay people, Mr. Thomas averred. Appellant would need to be knowledgeable about construction, Mr. Thomas opined. Lastly, Appellant would need to have good presentation and written communication skills, according to Mr. Thomas.

Mr. Thomas testified that the Appellant went out on his first medical leave on July 9, 2008. He came back between May 17, 2009 and June 28, 2009 on a limited work program, but he then left again on leave on June 28, 2009.

On cross-examination, Mr. Thomas stated that he thought the Appellant's writing ability was sufficient for the position. But on re-direct examination, Mr. Thomas stated that, even though the Appellant has a degree in communications, this would not, in and of itself, make one a great communicator. Communication is a skill at which one must work, he offered.

Leslie Blevins next took the stand. She is currently employed at the OHFA and has been the Employee Relations Manager since December 2008. She was familiar with the Appellant and described his job duties.

Ms. Blevins testified that her initial impression of Dr. Black's 2009 note was that it was somewhat coerced by Mr. Johnson, especially in light of the doctor stating, "I have expressed my concern regarding this action but agree to endorse his decision."

Ms. Blevins then discussed Dr. Marzella's Independent Psychological Evaluation (IPE), dated December 29, 2011. After receiving Dr. Marzella's IPE, Ms. Blevins testified that she discussed it with Clare Long, the OHFA Director of HR.

The two of them then decided to meet with the Appellant, where he would have a chance to bring any credible evidence he had to refute Dr. Marzella's IPE. The record of the reinstatement hearing is contained in Appellee's exhibit 11.

At the pre-reinstatement hearing, Mr. Johnson did not present any medical evidence, but he presented three letters of reference from people with whom he worked and one letter from his substance abuse counselor, all of which are contained in Appellee's exhibit 12. Ms. Blevins testified that Appellee did not give much weight to these documents.

Ms. Blevins stated this was the case because when she considered the circumstances—Mr. Johnson had been out for two years and was under a mental health and substance abuse treatment plan—she needed specifics that countered Dr. Marzella's conclusions. However, she offered, none of the letters supplied by Mr. Johnson contained any such specifics.

On cross-examination, Ms. Blevins stated that she had never witnessed Mr. Johnson interact with his team members in a group setting.

Clare Long next took the stand. Ms. Long has been OHFA's Director of HR since June 2011. She has worked for the State of Ohio for more than 19 years, more than ten of which have been in HR. Her previous service includes holding the positions of Deputy Director of Human Resources for the Ohio Department of Administrative Services (DAS) and Deputy Tax Commissioner with the Ohio Department of Taxation.

Ms. Long testified that she was not familiar with the Appellant in the fall of 2011. In September or October of 2011, the Appellant called Ms. Long inquiring about how he could return to work. Ms. Long indicated at hearing that she apprised him of the procedures and requirements set forth in the Ohio Administrative Code that govern the application for reinstatement process.

Ms. Long also specifically indicated to Appellant Johnson that, in order to be reinstated, he would need to submit substantial and credible medical evidence that he is capable of performing his job. She later inquired of Ms. Blevins, Mr. Thomas, and Martin Smith—her predecessor as Director of HR—concerning Mr. Johnson's background andwork at OHFA. She also looked at Mr. Johnson's personnel file.

Ms. Long then received the Appellant's request to return to work, along with a note from Dr. Lettvin. The note, dated September 20, 2011, stated the following: "Mr. Johnson continues to be compliant with treatment, and appears to be doing well. He appears capable of performing his duties as a grant analyst for the state of Ohio. He is released to go to work."

Ms. Long stated that there was always an issue concerning whether Appellant Johnson could in fact work or, conversely, whether he needed to be out on disability. On November 9, 2009, Dr. Black expressed concern in his note releasing Mr. Johnson back to work. Then on November 13, 2009, Dr. Marzella conducted a psychological fitness for duty evaluation and determined that Mr. Johnson was unable to perform the essential tasks and duties of his position.

Ms. Long testified that Dr. Lettvin's note was dated two months prior to November, so it was not recent. Also, it was written on a prescription pad; it was something you would normally see after an employee came back to work after a brief absence, not two years, she opined. Furthermore, the note said that Mr. Johnson "appeared capable" of performing the work, not that he "is capable" of performing the work. Thus, Ms. Long testified, she felt the need to obtain the opinion of an expert psychiatrist or psychologist.

Once Ms. Long received Mr. Johnson's request to return to work, she contacted the DAS Office of Benefits Administration Services to find out the procedure for obtaining an Independent Medical Evaluation. Ms. Long was told that she would need to contact a third-party administrator with which DAS had a contract. Midwest Exams was one such administrator.

She sent Midwest Exams a memorandum, dated December 2, 2011, about Mr. Johnson. Thereafter, Midwest Exams arranged for Dr. Marzella to conduct an IPE of Mr. Johnson.

Ms. Long indicated that she focused on Dr. Marzella's conclusions in his December 29, 2011 IPE. She stated that this IPE was not Dr. Marzella's opinion based solely on an interview; Mr. Johnson was administered tests. Ms. Long offered that this IPE was also based on an objective process of trying to determine whether Mr. Johnson could perform the job duties of a Housing Grant Analyst 2. Also, she averred, Dr. Marzella's conclusions state many things regarding Mr. Johnson's current state of mind.

Ms. Long said that, after reviewing Dr. Marzella's report, an initial determination was made that Mr. Johnson was incapable of performing his job duties, and a pre-reinstatement hearing was scheduled. Mr. Johnson subsequently requested that the hearing be rescheduled so that he could meet with his doctor in order to provide Ms. Long with additional medical information. Ms. Long testified that this fact was significant because OHFA did reschedule the hearing, but Mr. Johnson never provided her with additional information.

Ms. Long testified that when determining whether Mr. Johnson should be reinstated, she considered: 1) Dr. Marzella's Psychological Fitness for Duty Evaluation, dated November 17, 2009; 2) Dr. Black's note, dated November 9, 2009; 3) The position description and duties of a Housing Grant Analyst 2; 4) Public information concerning Mr. Johnson; 5) The requested extension by Mr. Johnson of the pre-reinstatement hearing; 6) Dr. Marzella's Psychological Evaluation, dated December 29, 2011; 7) Dr. Lettvin's release to work note, dated September 20, 2011; 8) Mr. Johnson's written request for reinstatement; 9) Randy McNeal's letter of recommendation, dated January 27, 2012; 10) William Showman's letter of recommendation, dated January 26, 2012; 11) Cindy Doyle's letter of recommendation, dated January 26, 2012; and 12) a note from Mr. Johnson's substance abuse counselor at the Scioto Paint Valley Mental Health Center, dated September 20, 2011.

Ms. Long summarized why the Appellant was denied reinstatement. She stated that Dr. Marzella analyzed Mr. Johnson and concluded that he was incapable of performing the job. In contrast, she stated, Dr. Lettvin only provided a note that said

Appellant Johnson appeared capable. The note did not mention the job duties and it did not provide any analysis. Ms. Long averred that she thought it was clear that Dr. Lettvin did not perform any analysis.

In his **closing argument**, Mr. Johnson offered the following:

Appellant Johnson stated that the OFHA based its opinion on the two exams administered by Dr. Marzella. After the first exam, Mr. Johnson received subsequent treatment. The total time he spent with Dr. Marzella was between two and four hours. In contrast, Mr. Johnson had interpersonal communication for more than one year with Dr. Lettvin, a psychiatrist who administered pertinent and helpful medication.

Mr. Johnson also stated that in the spring of 2010, while Mr. Johnson was on disability separation, he successfully wrote a nationally competitive grant, which is directly related to the work that he does for the OFHA. This includes establishing a partnership with a non-profit, securing a site for development, and submitting a funding proposal in a timely fashion. Mr. Johnson argued that he is fit for duty and can carry out anything that is requested of him by OFHA.

In the Appellee's **closing argument**, counsel offered the following:

Counsel pointed out that Mr. Johnson had only been at work for approximately six weeks since mid-2008. The issue here is whether there is substantial, credible, medical evidence that Mr. Johnson can perform the essential functions of his job. At the time the final decision was made, via letter on February 1, 2011, Mr. Johnson could not.

Based on the testimony presented and evidence admitted at hearing, I make the following Findings, which incorporate by reference any Finding set forth, above, whether express or implied.

In addition, I find the following:

1. The Appellant was a Housing Grant Analyst 2 in the Office of Planning, Preservation, and Development. 45 percent of his job duties consisted of performing analysis of Community Housing Development Organizations to determine financial feasibility and consistency with the OHFA's goals and objectives. 45 percent consisted of conducting regular site visits to ensure projects are progressing as approved by the OHFA Board and in compliance with state and federal regulations. 5 percent consisted of conducting education seminars. The remaining 5 percent consisted of various other duties.

2. The Appellant first went on disability leave in July 2008. He returned to work on May 17, 2009 as part of a limited work program but again left on disability on June 28, 2009.

3. On November 9, 2009, Mr. Johnson's psychologist, J. Edward Black, Ph.D., wrote a note in regard to Mr. Johnson stating: "Please be advised that the above reference has been under my care and can return to work full-time effective immediately. I have expressed my concern regarding this action but agree to endorse his decision."

4. On November 12, 2009, the Appellant returned to work. His last day of work was November 27, 2009.

5. On November 30, 2009, the Appellant's request for a VDS with the OHFA became effective.

6. The Appellant's psychiatrist was Daniel Lettvin, M.D. He released the Appellant for work on September 20, 2011.

7. On November 15, 2011, the OHFA received Mr. Johnson's request for reinstatement.

8. Psychologist J. Nick Marzella, Ph.D., evaluated the Appellant on November 13, 2009 and on December 28, 2011. Both times, Dr. Marzella found the Appellant to be psychologically unable to perform the essential tasks and duties of a Housing Grant Analyst 2.

9. On January 9, 2012, the Appellant requested that his pre-reinstatement hearing be rescheduled so that he could meet with his psychiatrist and have the psychiatrist prepare additional information for his hearing. The Appellant never provided any additional information from his psychiatrist at the rescheduled pre-reinstatement hearing.

10. On January 27, 2012, a pre-reinstatement hearing took place.

11. On February 1, 2012, the OHFA denied Mr. Johnson's request for reinstatement.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellant presented to OHFA substantial, credible medical evidence that Appellant was, again, capable of performing the essential duties of his position? Based on the Findings set forth, above, and for the reasons stated, below, we must answer this question in the negative. Accordingly, because Appellant failed to provide OHFA with this requisite substantial, credible medical evidence, this Board should affirm OHFA's determination denying Appellant's request for reinstatement

O.A.C. 123:1-30-02 governs the VDS process. Section (D) discusses an employee's right to reinstatement after a VDS: "An employee that is granted a voluntary disability separation shall retain the right to be reinstated to his or her position for two years from the date that the employee is no longer in active work status due to a disabling illness, injury or condition." In addition, section (A) states that "[a]n employee is not eligible for reinstatement if the request occurs later than two years from the date that the employee was no longer in active work status due to the disabling illness, injury, or condition." Furthermore, section (J) states that "[a]n employee who fails to apply for reinstatement within two years from the date that the employee was no longer in active work status due to the disabling illness, injury, or condition shall be deemed permanently separated from service. In addition, O.A.C. 123:1-30-04(B) states that an "employee's request for reinstatement shall be accompanied by substantial, credible medical evidence."

Mr. Johnson's request for a VDS was effective on November 30, 2009. For purposes of determining his reinstatement rights, his last day of work was November 27, 2009. Consequently, Mr. Johnson's right to reinstatement expired on November 25, 2011.

Mr. Johnson dated his letter of request for reinstatement to his position as a Grants Analyst 2 in the OHFA's Office of PPD for September 20, 2011. The OHFA's HR office received his letter on November 15, 2011. His request was accompanied by a note, dated September 20, 2011, from Dr. Lettvin stating, "Mr. Johnson continues to be compliant with treatment, and appears to be doing well. He appears capable of performing his duties as a grant analyst for the state of Ohio. He is released to go to work."

Pursuant to O.A.C. 123:1-30-03, the OHFA requested Mr. Johnson to submit to an examination with Dr. Marzella. The examination occurred on December 28, 2011, and the OHFA's HR office received a letter from Dr. Marzella on January 4, 2012. Dr. Marzella concluded, among other things, that Mr. Johnson "should remain disability

separated from the Ohio Housing Finance Agency." Subsequently, the OHFA initially determined that, based on Dr. Marzella's conclusions, Mr. Johnson remained incapable of performing the essential job duties of the Housing Grant Analyst 2 position. A pre-reinstatement hearing occurred on January 27, 2012, at which time Mr. Johnson provided no additional substantial, credible medical evidence in support of his request for reinstatement.

Appellant Johnson has met the two-year statute of limitations for requesting reinstatement after a VDS, pursuant to O.A.C. 123:1-30-02. However, the Appellant failed to present the substantial, credible medical evidence required by O.A.C. 123:1-30-04(B). Consequently, the Appellee's denial of the Appellant's request for reinstatement should be affirmed.

The Appellant's only supporting documentation consists of a note from Dr. Lettvin permitting him to return to work, three letters of recommendation by former employers, and a treatment summary from his substance abuse counselor at the Scioto Paint Valley Mental Health Center.

Of these supporting documents, only the note from Dr. Lettvin is arguably substantial, credible medical evidence. The note states: "Mr. Johnson continues to be compliant with treatment, and appears to be doing well. He appears capable of performing his duties as a grant analyst for the state of Ohio. He is released to go to work."

Considering that Mr. Johnson was absent from work for more than two years for a serious condition, Dr. Lettvin's brief note describing Mr. Johnson's psychological state is insufficient. This note only states that Mr. Johnson "appears capable." It provides no analysis and does not mention the job duties that Mr. Johnson would be required to perform.

Unfortunately, Dr. Lettvin's note does not constitute substantial, credible medical evidence. Furthermore, because Appellant provided no other documentation that could be considered to constitute substantial, credible medical evidence, Appellant's evidence cannot meet the threshold requirement for reinstatement set forth in O.A.C. 123:1-30-04(B).

As a corollary item, I note that, on January 9, 2012, the Appellant requested that his pre-reinstatement hearing be rescheduled so that he could meet with his psychiatrist and have the psychiatrist prepare additional information for his hearing. Yet, Appellant Johnson never provided any additional information from his psychiatrist at the rescheduled hearing.

Because this may merely show the occurrence of a continuing course of treatment, I may put no weight on this fact. However, I note that Appellee posits that that Appellant's presentation of no new information from Dr. Lettvin at the pre-reinstatement hearing implies that Appellant purposely failed to provide any such additional information because the information was not favorable to the Appellant.

Even if I consider Dr. Lettvin's September 20, 2011 return to work statement to constitute substantial, credible evidence, the Appellant would still be unable to demonstrate by a preponderance of the evidence that he should have been reinstated.

In contrast to Dr. Lettvin's brief note, Dr. Marzella conducted two extensive evaluations of Mr. Johnson. Dr. Marzella, saw the Appellant at two different points in time: on November 13, 2009 and then again on December 28, 2011. At both exams, the Appellant was administered the Minnesota Multiphasic Personality Inventory-2 and the Millon Clinical Multiaxial Inventory-III tests. He was also subjected to mental status evaluations and in-depth interviews.

After each of the exams, Dr. Marzella wrote a thorough evaluation of the Appellant's psychological state. Moreover, in both of his evaluations, Dr. Marzella determined that the Appellant was not capable of performing the tasks and duties of a Grant Analyst.

It is true that we may only consider Dr. Marzella's more recent December 2011 exam and evaluation as persuasive in this case. Nonetheless, it is clear that Dr. Marzella's 2009 exam and evaluation provided Dr. Marzella with an historical understanding of Appellant's duties and condition, adding credibility to Dr. Marzella's more contemporaneous exam of Appellant and to Dr. Marzella's conclusions therefrom.

To summarize, the documentation provided by Dr. Marzella is weightier than the note provided by Dr. Lettvin. Dr. Marzella provided thorough analyses of the Appellant's psychological status at two different points in time. In comparison, Dr. Lettvin provided a simple note with no analysis at only one point in time. Dr. Marzella described the objective and subjective tests performed on the Appellant, whereas Dr. Lettvin provided no information on the type of evaluation conducted. Dr. Marzella also definitively concluded that the Appellant was psychologically unable to return to his position, but Dr. Lettvin's note hints at inconclusive determinations when he states that Mr. Johnson "appears to be doing well" and he "appears capable . . . ."

In conclusion, the Appellant failed to meet his burden of proof by presenting substantial, credible medical evidence, as required by O.A.C. 123:1-30-04(B). But even if the note provided by Dr. Lettvin *had* constituted substantial, credible medical

evidence, Dr. Marzella's much more thorough analysis of the Appellant's psychological state would outweigh Dr. Lettvin's brief note. Accordingly, Appellee's denial of Appellant's application for reinstatement should be affirmed.

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's denial of Appellant's request for reinstatement, pursuant to R.C. 124.03 and O.A.C. 123:1-30 *et seq.*

James R. Sprague
Administrative Law Judge