STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Crystal Collins,

Appellant,

v. Case No. 2014-IDS-06-0147

Department of Public Safety,

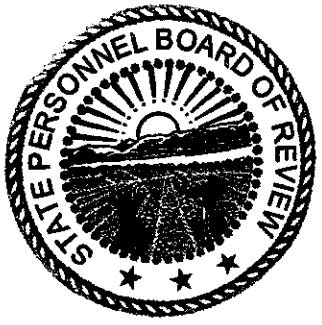
Appellee,

ORDER

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

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

Wherefore, it is hereby **ORDERED** that Appellee's instant Involuntary Disability Separation of Appellant is **AFFIRMED**, pursuant to R.C. 124.03, O.A.C. 124-1-03 (A) and O.A.C. 123: 1-30-01.



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, January 28, 2015.

Clerk

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

NOTICE

Where applicable, this Order may be appealed under the provisions of Chapters 124 and 119 of Ohio Revised Code. An original written Notice of Appeal or a copy of your Notice of Appeal setting forth the Order appealed from and the grounds of appeal must be filed with this Board fifteen (15) days after the mailing of this Notice. Additionally, an original written Notice of Appeal or a copy of your Notice of Appeal must be filed with the appropriate court within fifteen (15) days after the mailing of this Notice. At the time of filing the Notice of Appeal or copy of your Notice of Appeal with this Board, the party appealing must provide a security deposit to the Board. In accordance with administrative rule 124-15-08 of the Ohio Administrative Code, the amount of deposit is based on the length of the digital recording of your hearing and the costs incurred by the Board in certifying your case to court. The length of the digital recording, the costs incurred, the corresponding amount of deposit required, and the final date that the Notice of Appeal or copy of your Notice of Appeal and the Deposit will be accepted by this Board are listed at the bottom of this Notice. If a full or partial transcript of the digital recording has been prepared prior to the filing of an appeal, the costs of a copy of that certified transcript will be accepted by this Board; transcript costs will be listed at the bottom of this Notice.

IF YOU ELECT TO APPEAL THIS BOARD'S FINAL ORDER, THEN YOU MUST PROVIDE THE DEPOSIT LISTED BELOW AT THE TIME YOU FILE YOUR NOTICE OF APPEAL OR COPY OF YOUR NOTICE OF APPEAL WITH THIS BOARD. Please note that the law provides that you have fifteen (15) calendar days from the mailing of the final Board Order to file your Notice of Appeal or copy of your Notice of Appeal both with this Board and with the Court of Common Pleas. The fifteenth day is the date that appears at the bottom of this Notice.

METHOD OF PAYMENT: for all entities other than State agencies, payment of the deposit must be by money order, certified check, or cashier's check. State agencies are required to use the Intra-State Transfer Voucher (ISTV) system (OBM Form 7205), which must be processed prior to the filing of an appeal. To initiate an ISTV, State agencies may call the State Personnel Board of Review Fiscal Office at 614/466-7046.

IF YOU MAINTAIN YOU CANNOT AFFORD TO PAY THE DEPOSIT LISTED BELOW, THEN YOU MUST COMPLETE THE BOARD'S "AFFIDAVIT OF INDIGENCE" FORM. YOU CAN OBTAIN THAT FORM BY CALLING 614/466-7046. THE COMPLETED AFFIDAVIT MUST BE RECEIVED BY THIS BOARD ON OR BEFORE February 4, 2015. You will be notified in writing of the Board's determination. If the Board determines you are indigent, you will be relieved of the responsibility to pay the deposit to the Board. However, if the Board determines you are NOT indigent, then YOU MUST FILE YOUR NOTICE OF APPEAL OR A COPY OF YOUR NOTICE OF APPEAL AND PAY THE DEPOSIT BY THE DATE LISTED BELOW.

If you have any questions regarding this notice, please contact the Board at 614/466-7046.

Case Number: 2014-IDS-06-0147

Transcript Costs: $243.00 Administrative Costs: $25.00

Total Deposit Required: * $268.00

Notice of Appeal and Deposit Must
Be Received by SPBR on or Before: February 12, 2015

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Crystal Collins	Case No. 2014-IDS-06-0147
Appellant	
v.	December 16, 2014
Department of Public Safety	
Appellee	James R. Sprague *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This case came to be heard on November 13, 2014. Present at the record hearing was Appellant, who appeared *pro se*. Appellee appeared through its designee, Jennifer Tipton, Human Capital Management (HCM) Manager, and was represented by Ryan D. Walters and Erin Butcher-Lyden, Assistant Attorneys General.

This cause comes on due to Appellant's June 23, 2014 timely filing of an appeal from Appellant's Involuntary Disability Separation (IDS) from her position of Data Processor 2 with Appellee, Department of Public Safety (DPS). Appellant received her IDS Order *via* hand delivery on June 13, 2014 and the Order was effective on June 13, 2014.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03.

During Appellant's offering of her direct testimony, Appellant left the hearing room and the offices of this Board. In order to ensure that a full and fair record had been established in this matter, this Board issued a Procedural Order on November 18, 2014. That Procedural Order provided Appellant with an additional opportunity to submit a further narrative concerning her IDS and provided Appellee with an opportunity to file an optional reply, if Appellant chose to file a further narrative.

On December 2, 2014, Appellant timely filed her optional narrative, which consists of a three-ring binder containing a number of documents. Appellee waived its opportunity to file a reply to Appellant's optional narrative.

Accordingly, the instant record closed on or about December 15, 2014.

CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT

At hearing, five witnesses testified.

First to testify was **Crystal Collins, Appellant**, who first testified on as if on cross examination.

Next to testify was **Francheska Welsh**, who is a Customer Service Manager with DPS' Document Management Unit of the License Verification Section. Ms. Welch served as Appellant's supervisor from approximately April 2014 until Appellant's instant IDS.

Next to testify was **Karen Rodgers**, who has served as Chief of Verification Services for DPS since January 2012. Ms. Rodgers indirectly supervised Appellant's position. Ms. Rodgers did so by supervising Eric Potts, Appellant's former supervisor, and also by supervising Francheska Welsh, Appellant's supervisor at the time of Appellant's instant IDS.

Next to testify was **Tyrone Reynolds**, who, at the time of hearing, had served as a DPS Labor Relations Officer 3 for approximately two and one-half years.

Next to testify was **Jennifer Tipton**, an HCM Manager for DPS, who also served as Appellee's designee at hearing.

Last to testify was **Crystal Collins, Appellant**, who offered her consolidated direct testimony and re-direct testimony in a narrative form.

It is useful to offer a brief exposition on the background of Appellant's interaction with Appellee concerning her ability to perform her essential job duties. Much of this background information is contained within the Report and Recommendation issued by Administrative Law Judge Marcie M. Scholl on September 12, 2013 (*i.e. Crystal Collins v. Department of Public Safety*, SPBR Case No. 2012-IDS-10-0232, Recommendation to disaffirm IDS adopted in final Order issued December 18, 2013), for which the undersigned takes administrative notice. Accordingly, it is not necessary, at this time, to re-visit most of that information.

What is particularly relevant regarding that background is that Appellant was previously separated by Appellee. Yet, due to some procedural irregularities, Appellee rescinded that IDS and basically reinstated Appellant. Appellee then utilized the same IME report (from an examination conducted on September 7, 2012 by Psychologist J. Nick Marzella, Ph.D.) and, once again, Involuntarily Disability

Separated Appellant. To put it in simpler terms, DPS Involuntarily Disability Separated Appellant, then put her back on, and then Involuntarily Disability Separated her again, relying on the same evidence.

This Board found that when Appellee rescinded Appellant's IDS and then placed Appellant back on the payroll, Appellee constructively admitted that Appellant could, at that time, perform her essential job duties. Accordingly, when an appointing authority dispositively chooses to disregard or set aside particular evidence of a disabling condition, that appointing authority cannot subsequently use that evidence as the sole basis to Involuntarily Disability Separate an affected employee.

It is noted that *the merits* of Appellant's afore-mentioned 2012 IDS were never adjudicated at this Board. As well, the essential duties that Appellee asserted Appellant could not perform in 2012 are basically the same duties that Appellee asserts Appellant cannot perform in 2014.

We note that both parties offered testimonial evidence at the November 13, 2014 record hearing regarding this issue. This Board may, however, wish to take particular notice of the documentary evidence obtained by the parties and offered at record hearing.

This documentary evidence includes **Appellee' Exhibit 2.**, a May 28, 2014 **Independent Medical Examination (IME) Report submitted by Richard H. Clary, M.D.** (Board certified in Psychiatry). Dr. Clary was retained by Appellee to perform an IME on Appellant. Dr. Clary's examination was conducted on May 16, 2014 and May 20, 2014. Prior to Dr. Clary's examination of Appellant, Appellee provided Dr. Clary with a packet of pertinent background documents to review. (Please see Appellee's Exhibit 1.) Those documents included:

a current Position Description for Appellant's position;

a September 23, 2009 dated Psychological Fitness for Duty Evaluation report from Dr. Nick Marzella;

a May 18, 2010 dated Psychological Specialist Report Fitness for Duty from Michael Murphy, Ph.D., Consulting Psychologist; and

the afore-mentioned September 10, 2012 Psychological Fitness for Duty Evaluation report from Dr. Nick Marzella.

Dr. Clary also had before him e mails and records from Appellant's work and medical records from Michael G. Saribalas, D.O., C.B.S.M., dated April 11, 2012. Among other things, Dr. Saribalas served as Appellant's Psychiatrist.

Dr. Clary's examination of Appellant consisted of two parts. The **first part**, administered on May 16, 2014, consisted of a one and one-quarter hour narrative psychiatric evaluation. The **second part**, administered on May 20, 2014, consisted of Appellant completing the MMPI-2 [administrative notice taken: Minnesota Multiphasic Personality Inventory 2 ®]

On page 6 of his May 28, 2014 dated IME report, at "Summary and Conclusions", Dr. Clary opines:

> In my medical opinion, Ms. Collins is unable to return to work either fulltime or parttime as a data entry 2 operator.
>
> In my medical opinion, Ms. Collins does not pose a threat to herself or others.
>
> In my medical opinion, Ms. Collins has a long history of paranoid thinking. In my medical opinion, it is unlikely that she will be able to perform her duties in the future.
>
> In my medical opinion, Ms. Collins will continue to have problems relating to supervisors and co-workers. She will continue to have problems understanding and following instructions. In my medical opinion, she will continue to have low productivity. In my medical opinion, she will be unable to withstand the stress and pressures associated with day to day work activities.
>
> In my medical opinion, Ms. Collins is unable to perform her job duties. In my medical opinion, she should continue treating with her psychiatrist and her psychologist.
>
> (The numbering at the beginning of these five medical statements has been omitted for clerical convenience)

The documentary evidence presented at record hearing also includes **Appellee's Exhibit 4.**, which consists of two medical/psychological documents that Appellant submitted at her June 10, 2014 IDS pre-separation hearing.

The **first** of these two documents is a one paragraph **Psychological Progress Report from Psychologist Earl F. Greer, Jr.**, Appellant's treating Psychologist. This report reads, in full:

> Treatment:
> Mr. Collins [sic] was initially seen by me on 4/28/14 for Psychotherapy. In psychotherapy she has made appropriate progress, while only having seen for five sessions with the last session on 6/9/14.Her emotional disorder would not currently proven [sic] her from working with psychotherapy recommended to continue.

It is noted that Appellant's last referenced treatment session with Dr. Greer occurred on June 9, 2014, the day before Appellant's most recent pre-separation hearing.

The **second** of these two documents is a **prescription pad return to work form also dated June 9, 2014, from Michael G. Saribalas, D.O., C.B.S.M.**, who, as previously indicated, served as Appellant's Psychiatrist. The form indicates:

> P[atien]t seen in office today. P[atien]t is stable psychiatrically today.
> Ok to return to work.

By way of background only, it is also noted that Dr. Greer certified a "Department of Administrative Services [DAS] Statement of Psychiatric Disability" application. The application was signed by Dr. Greer on June 7, 2014 and by Appellant on June 10, 2014.

Testimony offered at hearing indicated that DAS had denied this application for disability benefits and that Appellant had considered appealing DAS' initial denial. (Please see **Appellee's Exhibit 7.**) In this application, Dr. Greer certifies that Appellant's estimated return to work date, on a part-time basis, is October 10, 2014.

Appellant's application for disability benefits was produced contemporaneously with Appellant's June 10, 2014 pre-separation hearing. However, it does not appear that Appellee relied on this application when it made its decision to Involuntarily Disability Separate Appellant.

The record reflects that Appellee complied with the pertinent procedural due process prerequisites necessary to Involuntarily Disability Separate a State employee. Appellee provided Appellant with sufficient advanced written notice of her pre-separation hearing. Further, at Appellant's pre-separation hearing, Appellant was provided with an opportunity to examine Appellee's testimonial and

documentary evidence, including a copy of Dr. Clary's May 28, 2014 afore-mentioned IME report, which was provided to Appellant. Appellant was also provided with an opportunity to offer her own testimonial and documentary evidence, including Dr. Greer's and Dr. Saribalas' afore-mentioned documents (Appellee's Exhibit 4.).

Appellee thereafter timely served Appellant with the instant IDS Order and Appellant timely filed her appeal therefrom.

We turn, next, to the parties' exposition on the question of whether Appellant could perform her essential duties on or about June 13, 2014, the effective date of Appellant's instant IDS? The record indicates that Appellant's position required detailed and consistent entry of various types of data, including data that concerned next of kin notification in the event of the death of a motor vehicle operator, passenger, or other identified individual. Appellee demonstrated that attention to detail, a low data entry error rate, and a reasonable production rate were all keys to the successful completion of this oft-required task.

While not as critical, other data entry that Appellant performed also needed to have a relatively low error rate with a reasonable rate of production, Appellee demonstrated.

The record reflects that Appellant was unable to successfully complete either of these tasks. This was despite Appellant being offered substantial job coaching and despite Appellant being allowed to resume her duties under a new supervisor in a different unit upon Appellant's return from her previous IDS.

Appellee also showed that Appellant had numerous issues and problems with her computer at work. Many of these problems evaded the ability of Appellee's IT personnel to resolve. This is because many of these issues and problems seemed to have been caused by Appellant's continuing inability to focus or stick to the task at hand, as reflected in the record. Unfortunately, this appears to have been the case due to the mental and/or emotional impairments from which Appellant suffered.

Moreover, Appellee's documentary evidence of impairment (in the form of Dr. Clary's IME report) clearly outweighs Appellant's documentary evidence of lack of impairment (in the form of Dr. Greer's one-paragraph note and in the form of Dr. Saribalas' return to work note). Thus, the extant record supports a finding that Appellant could not perform the essential duties of her position at the time of Appellant's instant IDS.

Based on the testimony presented and evidence admitted at hearing and upon Appellant's supplemental narrative, I make the following Findings:

First, I note that I incorporate, herein, any finding set forth above, whether express or implied, including any administrative notice taken, above.

Next, I find that Appellee has met its general procedural due process requirements regarding Appellant's instant IDS. These include the requirements set forth in O.A.C. 123: 1-30-01 (B) through (D).

Further, I reiterate that Appellee has supplied into the record substantial, credible, legally-admissible medical evidence demonstrating, by a preponderance of the evidence, that Appellant could not perform the essential duties of her position for the requisite time period under review in the instant appeal.

CONCLUSIONS OF LAW

This case presents this Board with the question of whether Appellee has demonstrated, by a preponderance of the evidence, that it met all pertinent procedural and substantive requirements necessary in order to Involuntarily Disability Separate Appellant from her Data Processor 2 position? Based on the findings set forth, above, and for the reasons set forth, below, this Board should find that Appellee has properly demonstrated that it complied with those procedural and substantive requirements. Accordingly, this Board should affirm Appellant's instant IDS.

R.C. 124.03 (A) (1) sets forth the jurisdiction of this Board to hear appeals from discharges, including Involuntary Disability Separations.

O.A.C. 123: 1-30-01 (A) indicates that an appointing authority shall Involuntarily Disability Separate an employee if: 1) the appointing authority has received substantial, credible medical evidence of the employee's disability and 2) the appointing authority then determines that the employee cannot perform the essential duties of the assigned position, due to the pertinent disabling illness, injury, or condition.

O.A.C. 124-1-03 (A) and O.A.C. 123: 1-30-01 (F) provide for an appeal of the IDS through the filing of an appeal with this Board within 10 days following the date the IDS Order is served on the employee.

It is noted, above, that Appellee met the pertinent procedural due process prerequisites necessary to Involuntarily Disability Separate a State employee, satisfying the requirements set forth in O.A.C. 123: 1-30-01 (B) through (D).

It is also noted, above, that Appellee presented substantial, credible medical evidence demonstrating that Appellee could not perform her essential job duties at the time of her IDS, satisfying the requirements set forth in O.A.C. 123: 1-30-01 (A).

Accordingly, Appellee has met its burden of proof and has demonstrated, by preponderance of the evidence, that it complied with all pertinent procedural and substantive due process requirements when it Involuntarily Disability Separated Appellant from her Data Processor 2 position with Appellee, effective June 13, 2014.

Appellant certainly appears to be a very warm, respectful, and well-intentioned person, who, unfortunately, may have been overwhelmed by her current condition and situation. *It is certainly hoped that Appellant is able to recuperate from her current condition and that she can return to her productive career in State service; particularly since Appellant's reinstatement rights do not expire until June 13, 2016.*

RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellee's instant Involuntary Disability Separation of Appellant, pursuant to R.C. 124.03, O.A.C. 124-1-03 (A) and O.A.C. 123: 1-30-01.

James R. Sprague
Administrative Law Judge