

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

Kenneth E. Myers,

*Appellant.*

v.

Case No. 10-IDS-07-0198

Department of Rehabilitation and Correction,  
Allen Correctional Institution,

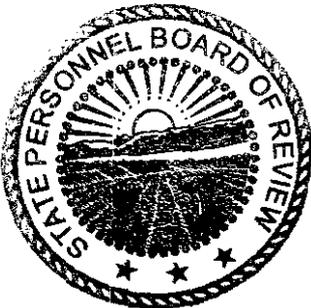
*Appellee.*

**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 Appellant's Involuntary Disability Separation from his position of Correction Officer, effective July 9, 2010, be **AFFIRMED**, pursuant to O.R.C. § 124.03 and O.A.C. § 123:1-30-01 *et seq.*



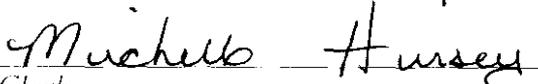
Lumpe - Aye  
Tillery - Aye

  
\_\_\_\_\_  
J. Richard Lumpe, *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 constitute (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 7, 2011.

  
\_\_\_\_\_  
Michelle Hursey  
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**

KENNETH E. MYERS,

Case No. 10-IDS-07-0198

*Appellant*

v.

November 29, 2010

DEPARTMENT OF REHABILITATION AND CORRECTION,  
ALLEN CORRECTIONAL INSTITUTION,

*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 18, 2010. Present at the hearing was Appellant, who appeared *pro se*. Appellee, Department of Rehabilitation and Correction (DR and C), was present through its designee, Labor Relations Officer (LRO) Glenda Turner, and was represented by Nicole S. Moss and Rema A. Ina, Assistant Attorneys General. Also present at hearing was Paul Trame, Vice President of Local 0250, AFSCME, AFL-CIO.

This cause comes on due to Appellant's July 14, 2010 timely filing of an appeal from his Involuntary Disability Separation (IDS) from his position of Correction Officer (CO) at DR and C's Allen Correctional Institution (ACI). Appellant's IDS Order was signed on July 9, 2010, was effective on July 9, 2010, and was received on July 9, 2010. Appellant was reinstated to his CO position effective on or about September 27, 2010.

Jurisdiction over the subject matter of this appeal was established pursuant to R.C. 124.03 and O.A.C. 123: 1-30-01 *et seq.*

**CONSOLIDATED STATEMENT OF THE CASE AND FINDINGS OF FACT**

The pertinent component of Appellant's IDS Order reads:

In accordance with Ohio Administrative [C]ode 123: 1-30-03 and 123: 1-30-01 you are being Disability Separated effective 7-9-10. On 12-8-09 you reported to Deputy Warden of Operations, Jodi Factor, that you were 'having some issues of wanting to hurt some staff'. On 12-9-09 you were placed on Administrative Leave to continue following treatment with a Psychologist [Sean Harlan Austin, Ph.D] you stated you had recently started seeing. On 3-2-10 you attended an Independent Medical Examination (I.M.E.) ordered by the employer [and conducted by Roberto Madrigal, Ph.D]. The results of the I.M.E. concluded in part that: "He still has some aggressive feelings towards his supervisor and he feels that he is justified by feeling them, which is an area of concern.....He can return to his prior occupation but he can't work with his prior supervisor. Although he has had the good judgment of seeking help to control his aggressive and homicidal feelings towards his supervisor I believe that if he were to work closely with him, he still represents a threat to his supervisor's personal security. I do not believe that he represents a threat to anybody else, but working in proximity with his supervisor, as a direct supervisee, these feelings could go out of control and generalize. He is trying to control his feelings and is receiving help to gain control over them but he is not yet in complete control of these feelings.....If he can work away from his supervisor, he is fit for duty. If this is not possible, then he should continue treatment without returning to work." Your personal [P]sychologist [Dr. Austin] stated in his report that: "...Dr. Madrigal states that Mr. Myers might be at risk of acting out if he encounters a certain supervisor. I believe that risk is minimal based on my psychotherapeutic interventions." Neither doctor could conclude that you were not at risk of acting out against your immediate supervisor if brought back to work under his direction.

At hearing, five witnesses testified.

**Kenneth E. Myers, Appellant**, serves as a CO at ACI. **Jodi Factor** has served as the Deputy Warden of Operations (DWO) at ACI since 2005. **Glenda Turner**, LRO, serves as the Personnel Director for both ACI and Oakwood Correctional Institution (OCI) and also served as Appellee's designee at hearing.

**Jesse Williams** currently serves as DR and C's North Regional Director and, prior to that time, served as ACI's Warden and its appointing authority. **Paul Trame** serves as Vice President of Local 0250, AFSCME, AFL-CIO.

Distillation of testimony

A distillation of the testimony offered at hearing reveals the following.

On December 8, 2009, Appellant reported to DWO Jodi Factor that he had thoughts of hurting three DR and C employees who were either in his chain of command or with whom he worked frequently. These employees are: Mario Marroquin, Unit Manager; Alonzo Williams, then-Acting Sergeant; and Thomas Patrick, then-Lieutenant who, at that point in time, frequently served as Appellant's supervisor. Appellant also indicated that he had or would soon begin treatment with Dr. Sean Harlan Austin, Ph.D., a Psychologist licensed in the State of Ohio, to address Appellant's destructive thoughts and provide Appellant with the requisite psychotherapeutic intervention.

After some additional exploration of this revelation, DWO Factor took Appellant to see then-Warden Jesse Williams. After some additional information was gathered, then-Warden Williams determined that Appellant should be placed on some type of administrative leave and DWO Factor then escorted Appellant out of the institution.

On December 9, 2010, Appellant was placed on Administrative Leave with Pay. On March 2, 2010, Appellant attended an Independent Medical Examination (IME), conducted by Roberto Madrigal, Ph.D, a Psychologist licensed in the State of Ohio. On March 17, 2010, Dr. Madrigal issued his IME report. Not to put too fine a point on it but basically Dr. Madrigal concludes that Appellant cannot work with his prior supervisor and that Appellant's working closely with his prior supervisor would represent a threat to the supervisor's personal security. Perhaps most importantly, Dr. Madrigal posits that what he describes as Appellant's aggressive and homicidal feelings toward his supervisor could go out of control and generalize, if Appellant were to return to work and then work in close proximity with his supervisor.

Based on then-Warden Williams' review of Dr. Madrigal's March 17, 2010 report, Warden Williams instructed LRO Glenda Turner to initiate the pre-separation process for Appellant. Soon thereafter, Appellant was served with the requisite

paperwork in accordance with O.A.C. Ch. 123. Near the end of Appellant's first pre-separation conference proceeding, it was discovered that Appellant had not received a copy of Dr. Madrigal's report prior to the date of the first proceeding. As a result, the proceeding was suspended or voided and Appellant was again served with a complete pre-separation conference packet including Dr. Madrigal's report.

A second, full pre-separation conference proceeding was conducted. At that conference, both Dr. Madrigal's report and a letter and conditional return to work authorization from Dr. Austin were considered. It is noted that Dr. Austin's April 26, 2010 letter begins by offering an unrestricted return to work recommendation. However, the letter does go on to note that Appellant might be at risk of acting out if he encounters a certain supervisor but that risk is considered minimal, based on Dr. Austin's therapeutic interventions.

Appellant offered at the conference (and at record hearing) that then-Lt. Patrick had harassed Appellant continually about getting a haircut. Appellant also offered that Lt. Patrick has essentially reconfigured staffing to prevent Appellant from taking an hour off during one work day to make a personal call, which time he had requested in advance.

Following the conference, LRO Turner recommended to Warden Williams that Appellant be placed on an IDS. Warden Williams agreed with that recommendation and Appellant was thereafter placed on the instant IDS.

At hearing, now-Regional Director Williams indicated that he based his decision on Appellant's statements to DWO Factor on December 8, 2009 and on the March 17, 2010 IME report issued by Dr. Madrigal and the April 26, 2010 conditional return to work letter issued by Dr. Austin. Mr. Williams noted that, taken together, neither of these documents provided him with the requisite comfort level necessary for him to return Appellant to work.

Thus, he averred, he talked to Dr. Austin and that conversation did nothing to increase his comfort level. Regional Director Williams stated that he next sought legal counsel from Central Office and, thereafter, asked LRO Turner in for additional discussion and ultimately for effectuation of the instant IDS.

It was also noted at hearing that it would be highly problematic for DR and C to attempt to ensure that Appellant and now-Capt. Patrick would not come into any

significant or prolonged contact. This would present particular challenges, it was noted, because then-Lt. Patrick served essentially as a Special Duty Lieutenant who could be utilized to assist on any shift at ACI. Even now, it was shown that Capt. Patrick is in charge of Tools Control and comes over to ACI from OCI to take inventory and also that he comes to ACI to cross train with supervisors.

Further, it was established that it is of paramount importance for a subordinate to be able to take work direction from his or her immediate supervisor and from the chain of command in general. It was also established that, while an employee need not necessarily get along with supervisory staff, an employee must effectively be able to receive guidance from that staff, in order to create a functional work unit.

#### Findings

Based on the testimony presented and evidence admitted at hearing, I make the following Findings:

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

Next, I find that Appellee complied with all pertinent procedural prerequisites for effectuating the instant IDS, as set forth in O.A.C. 123: 1-30-01 *et seq.*

Further, I find that all relevant credible medical/psychological evidence that was presented to then-Warden Williams on or before July 9, 2010 and that was presented to this Board at record hearing supports a conclusion that Appellant was not capable of sufficiently interacting with ACI's supervisory staff to perform his job duties of providing security and safety for all involved at ACI, and particularly for its pertinent supervisory staff, to whom it was determined he posed a genuine potential threat.

### **CONCLUSIONS OF LAW**

This case presents this Board with the question of whether a DR and C appointing authority is justified in effectuating an IDS of a Correction Officer, when no relevant credible medical evidence exists to suggest that the Correction Officer

can unconditionally return to work without posing a threat to his immediate supervisor? Based on the findings set forth, above, and for the reasons set forth, below, this Board should answer this question in the affirmative and, so, should affirm the instant IDS.

I have found, above, that Appellee met all pertinent procedural prerequisites set forth in O.A.C. Ch. 123. Thus, we may proceed to the issue of whether Appellee was justified in concluding that whatever degree of threat the psychological practitioners who examined Appellant believed was present demonstrated that Appellant was not capable of performing his essential job duties.

The record establishes, and it is not rebutted, that a Correction Officer must be able to take direction and guidance from supervisory personnel at the institution, perhaps most importantly from his or her immediate supervisor. While this requirement is of great importance in any State employment setting, it is imperative in a correctional setting, where decisions that may have great magnitude must at times literally be made in seconds.

To inject an employee's recriminatory and threatening posture into that environment would be, at a minimum, problematic, and, at a maximum, catastrophic. It is troubling, then, that the evidence suggests that then-Lt. Patrick may have potentially had more to fear from his own subordinate than from inmates incarcerated at ACI.

While it is fortunate that we will never know if such concerns would have ever come to fruition, it is clear, as a matter of law, that an appointing authority need not subject its supervisory personnel to an inchoate threat from any of a supervisor's subordinates. Thus, Appellee was legally justified in utilizing the credible evidence available to it in making its decision to effectuate the instant IDS.

Finally, while not a matter directly concerning this appeal, we note the following. Appellant has subsequently been able to obtain psychological documentation that demonstrated to Appellee that Appellant can, again, perform his essential job duties at ACI and Appellant has, thus, been reinstated to his position.

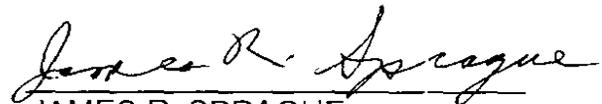
To summarize, because Appellee has demonstrated by a preponderance of the evidence both its procedural compliance and its substantive compliance with all

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pertinent prerequisites set forth in O.A.C. 123: 1-30-01 *et seq.*, this Board should affirm the instant IDS.

### RECOMMENDATION

Therefore, I respectfully **RECOMMEND** that the State Personnel Board of Review **AFFIRM** Appellant's Involuntary Disability Separation from his position of Correction Officer, effective July 9, 2010, pursuant to R.C. 124.03 and O.A.C. 123: 1-30-01 *et seq.*

  
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JAMES R. SPRAGUE  
Administrative Law Judge

JRS: