STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 73

Docket No. SF-0752-06-0805-I-2

Colister Slater,

Appellant,

v.

Department of Homeland Security,

Agency.

March 28, 2008

Ari Taragin, Esquire, Baltimore, Maryland, for the appellant.

John B. Barkley, Esquire, Phoenix, Arizona, for the agency.

Thomas F. Muther, Jr., Esq., Williston, Vermont, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The agency has filed a petition for review (PFR) of the August 17, 2007 initial decision (ID) reversing its action removing the appellant for inability to perform the essential duties of his position. The appellant has filed a motion to dismiss the agency's PFR for failure to comply with the Board's interim relief order. For the reasons discussed below, we DENY the appellant's motion to dismiss the agency's PFR, GRANT the agency's PFR, and AFFIRM the ID as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The agency removed the appellant from his position of Police Officer, GS-083-11, in the Federal Protective Service (FPS), Immigration and Customs Enforcement (ICE), for "inability to perform the essential duties of [his] position." Initial Appeal File, MSPB Docket No. SF-0752-06-0805-I-1 (IAF), Tab 6, Subtabs 4b at 1, 4f at 1. The appellant filed an EEO complaint alleging that his removal was discriminatory on the basis of age, disability, and in reprisal for prior equal employment opportunity activity. IAF, Tab 6, Subtab 5l. The Equal Employment Opportunity Commission (EEOC) dismissed the appellant's complaint so that he could file a mixed case appeal with the Board, which he did. *Id.*, Subtab 4a. He asserted that he was able to perform his duties and that the agency had discriminated against him on the basis of his perceived disability, IAF, Tabs 1, 3, 4. Following the hearing requested by the appellant, the administrative judge (AJ) found that the agency had failed to prove the required nexus between the charge and the efficiency of the service. ID at 19-20, 23-24. Accordingly, the AJ ordered the agency to cancel the removal, restore the appellant to duty, pay the appellant back pay, and provide him interim relief if a PFR were filed. *Id.* at 26-27. The AJ also found that the appellant did not prove his claim of disability discrimination. *Id.* at 24-26.

¶3 The agency has filed a timely PFR, arguing that the *high probability of hazard* standard applied by the AJ was the incorrect legal standard, that the AJ erred in weighing the medical evidence, and that the agency met its burden of proof. PFR File, Tab 1. The appellant filed a timely opposition to the agency's PFR and also moved to dismiss the PFR, asserting that the agency has failed to comply with the interim relief order. PFR File, Tabs 3, 4. The agency responded to the motion to dismiss, asserting that it has complied with the interim relief order and submitting evidence of its compliance. PFR File, Tab 5.

ANALYSIS

The agency has complied with the interim relief order.

¶4 The ID ordered the agency to provide the appellant with interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A), effective the date of the ID, if it filed a PFR. ID at 27. Under 5 U.S.C. § 7701(b)(2)(A), the agency must show, at a minimum, that it has appointed the appellant to a position carrying the proper title, grade, and rate of pay, and that the appointment was effective as of the date of the ID. *See Powell v. U.S. Postal Service*, 90 M.S.P.R. 358, ¶ 3 (2001). The agency re-appointed the appellant, effective the date of the ID, to his previous position, grade, and pay. *See* PFR File, Tab 1, Attachment 2 at 6. The appellant argues that he has not received pay and was placed on leave without pay. PFR File, Tab 4 at 2. The evidence of record indicates, however, that the appellant requested the leave. PFR File, Tab 1, Attachment 3 at 3. The agency therefore has shown that it has complied with the interim relief order and the appellant's motion to dismiss therefore is denied.

The AJ applied an incorrect legal standard.

¶5 The agency's position of Police Officer, GS-083, requires the ability to meet arduous physical demands, as outlined in the position description. *See* IAF, Tab 24, Exhibit 1 at 31-32. Agencies are authorized to establish such physical requirements for positions, without approval from the Office of Personnel Management (OPM), when such requirements are essential for successful job performance and are clearly related to the position description and job duties. 5 C.F.R. § 339.203. The testimony of Lawrence Saladino, M.D., the agency's Medical Review Officer, John Spottswood, Medical Policy and Program Specialist with OPM, and Joyce Nesbitt-Simon, District Commander and the deciding official with the agency, regarding the appellant's job duties as a police officer and the position's attendant dangers, established that the physical

requirements of the Police Officer position are essential and directly related to those job duties. *See* Hearing Transcript (HT) at 8, 17-18, 69-71, 180-82.

¶6 The agency charged the appellant with "inability to perform the essential duties of [his] position." IAF, Tab 6, Subtabs 4b at 1, 4f at 1. The basis of the charge is the medical determination of Dr. Saladino that the appellant "is not currently able to perform the full range of duties and responsibilities in a safe and efficient manner or without an undue risk of injury to him or others." *Id.*, Subtabs, 4b at 1, 4f at 1, 4g at 1. Dr. Saladino based this conclusion on the following medical diagnoses: Sensory-motor polyneuropathy associated with diabetes mellitus and advancing complications; significantly limited range of motion of the left wrist; 30% decrease in grip strength in the left hand; pain on range of motion of the left ankle; and prognosis that the polyneuropathy will not improve to a degree sufficient to ever allow him to resume full, unrestricted duty. *See id.*, Subtabs 4f at 1-2, 4g at 2. Nesbitt-Simon, the deciding official, testified that the removal action was based on the medical diagnoses and Dr. Saladino's recommendation and not on any observed deficiency in the appellant's performance of his duties. HT at 14-15. After the agency proposed his removal, it notified the appellant that he was "medically disqualified from continuing in any FPS law enforcement position" and that, due to this, it was offering him a reassignment. IAF, Tab 6, Subtab 4e at 1. The appellant rejected the offer and was subsequently removed. *Id.*, Subtabs 4b, 4c.

¶7 A removal as "medically disqualified" is equivalent to a removal for inability to perform for medical reasons. *Cheers v. Office of Personnel Management*, 87 M.S.P.R. 591, ¶ 11 (2001); *see also Justice v. Department of the Navy*, 89 M.S.P.R. 379, ¶¶ 2-3 (2001) (the appellant was medically disqualified from his position and subsequently removed for medical inability to perform his duties); *Cunningham v. Department of the Air Force*, 26 M.S.P.R. 599, 600-01 (1985) (the appellant was "disqualified from his position because of medical reasons," could not be reassigned, and did not apply for disability retirement; the

Board upheld his removal on the charge of being "medically unable to perform the duties of his position"). The record evidence demonstrates that the agency removed the appellant solely on the basis of his alleged medical disqualification. The proper standard for evaluating an employee's fitness to perform the duties of his position, for positions with medical standards or physical requirements, or positions subject to medical evaluation programs, is 5 C.F.R. § 339.206. *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 141-42 (1993).

¶8 Under 5 C.F.R. § 339.206, a history of a particular medical problem may be the basis of a medical disqualification only if "the condition at issue is itself disqualifying, recurrence cannot medically be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm." The ID, citing *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 176 (1996), stated that, in order to carry its burden of proof, the agency must "establish a nexus between [the appellant's] medical condition and observed deficiencies in his performance or conduct, or a *high probability of hazard* when his condition may result in injury to him or others because of the kind of work he does." ID at 3 (emphasis in original). As there was no evidence of observed deficiencies in the appellant's performance or conduct, the AJ applied the *high probability of hazard* standard and concluded that the agency failed to meet its burden of proof. ID at 18-24.

¶9 The first Board case that set forth the *high probability of hazard* standard was *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 584 n.10 (1981). The language in the ID quoted above, citing *Yates*, was the same language used by the Board in *Owens*. *Owens*, 8 M.S.P.R. at 584 n.10. *Owens* took that language almost verbatim from a quotation of the 1972 edition of the Federal Personnel Manual (FPM) in a D.C. Circuit Court of Appeals case reviewing a decision of the Board's predecessor agency, the U.S. Civil Service Commission. *See Doe v. Hampton*, 566 F.2d 265, 273 (D.C. Cir. 1977).

¶10 On March 8, 1989, however, OPM issued new regulations amending 5 C.F.R. Part 339, which regulates the medical qualification and disqualification of federal employees. *See* 54 Fed. Reg. 9761 (Mar. 8, 1989). The purpose of these regulations was "to allow agencies greater flexibility in setting appropriate medical standards and requirements." *Id.* OPM also simultaneously issued a comprehensive revision of chapter 339 of the FPM to reflect the new regulations. *Id.* The new regulations included section 339.206, quoted in paragraph 6. In contrast with the language of the 1972 FPM quoted in *Doe* in 1981, and then in *Owens* and *Yates*, the 1989 FPM, reflecting the revised chapter 339, read as follows:

> A history of a medical condition may be considered disqualifying only if the condition itself is normally disqualifying, a recurrence cannot medically be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm.
>
> . . . Generally speaking, so long as the candidate is *presently* able to do the job, he or she is qualified unless the possibility that the condition might recur would present a substantial health and safety risk.

Federal Personnel Manual, Chapter 339, Subchapter 2-1d. (April 28, 1989) (emphasis in original).[1] The Board first applied 5 C.F.R. § 339.206 in *Lassiter*, 60 M.S.P.R. 138, finding that a removal based upon medical disqualification was appropriate by applying the standard that the medical condition posed "a reasonable probability of substantial harm." *Lassiter*, 60 M.S.P.R. at 141-42 (quoting 5 C.F.R. § 339.206). *Lassiter* did not address the *Owens* line of cases,

[1] While the FPM was abolished on December 31, 1993, it may be relied upon for guidance in appropriate circumstances. *See Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶ 11 n.2 (2007).

however, and subsequent to *Lassiter*, the Board has applied the *Owens* standard in five appeals.[2]

¶11 Considering that the basis for the *Owens* standard, the 1972 FPM, was amended, prior to its abolishment, to reflect 5 C.F.R. § 339.206, and that such regulation remains in force and applies to this field, we conclude that the *Owens* standard of "a high probability of hazard" is no longer appropriate to apply in cases such as this. Rather, the standard promulgated by OPM in its regulations is the proper one: To justify disqualification based upon a medical condition alone, the agency must show that the condition itself is disqualifying, its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. 5 C.F.R. § 339.206. Such a finding is a legitimate reason for an adverse action under title 5 chapter 75. *See Lassiter*, 60 M.S.P.R. at 147-48. To the extent that they applied the "high probability of hazard" standard, the Board's five prior decisions,[3] issued after the OPM regulations came into effect on March 8, 1989, are overruled.

The agency failed to prove its charge by preponderant evidence.

¶12 We find it unnecessary to remand this case for application of the correct legal standard because we can resolve it based upon the existing record. Generally, remand is unnecessary where the existing record is sufficient for meaningful review. *See Smith v. Office of Personnel Management*, 100 M.S.P.R. 500, ¶ 6 (2005). Remand is unnecessary here because both parties addressed the relevant factual dispute, the appellant's medical status, because the record is complete with regard to this medical question and there is no need for additional

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[2] *Simpson v. Department of the Navy*, 95 M.S.P.R. 370 (2004); *Schrodt v. U.S. Postal Service*, 79 M.S.P.R. 609 (1998); *Spencer v. Department of the Navy*, 73 M.S.P.R. 15 (1997); *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172 (1996); *Merzweiler v. U.S. Postal Service*, 69 M.S.P.R. 274, *aff'd*, 98 F.3d 1359 (1996) (Table).

[3] The cases cited in footnote 2, *supra*, are hereby overruled.

development of the record to resolve it, and because we need not base any findings on witnesses' demeanor. *See Smedley v. Office of Personnel Management*, 108 M.S.P.R. 31, ¶ 13 (2008); *Wiley v. U.S. Postal Service*, 102 M.S.P.R. 535 ¶ 11 n.4 (2006), *aff'd*, 218 F. App'x 1001 (Fed. Cir. 2007) (Table); *Hagan v. Department of the Army*, 99 M.S.P.R. 313, ¶ 10 (2005). Furthermore, notwithstanding the AJ's legal error, we find it unnecessary to remand this case for further proceedings because, applying the correct, lower legal standard we find that the agency has not shown that the AJ erred in not upholding the removal. *See Valenzuela v. Department of the Army*, 107 M.S.P.R. 549, ¶ 13 (2007).[4]

¶13 The diagnoses of S.H. Sabnani, M.D. and Bijan Zardouz, M.D. established that the appellant suffered from poyneuropathy in his hands, legs, and feet, caused by his diabetes mellitus. IAF, Tab 24, Exhibit 1 at 11-13, 35-40. Dr. Zardouz stated that diabetes can cause polyneuropathy to progress over time and that the appellant's problems with his hands and feet would likely worsen over time. *Id.* at 37. Dr. Sabnani also diagnosed the appellant with an old fracture in his left wrist, which has caused a significant reduction in range of motion and grip strength in the left wrist and hand. *Id.* at 11-12. Dr. Saladino did not examine the appellant but reviewed all the medical reports and concluded that the appellant could not safely perform his duties. IAF, Tab 6, Subtab 4g. Dr. Saladino testified that the appellant's neuropathy appeared fairly serious and that neuropathy of that severity generally persists and progresses. HT at 88-89. He also testified that the appellant's lost range of motion in his wrist due to an old fracture is not recoverable. *Id.* at 93.

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[4] Because the correct standard we now apply is a lower standard for the agency to satisfy than that applied by the AJ, the agency is not prejudiced by the Board's deciding the case on the current record.

¶14 The appellant produced contrary evidence first in brief letters signed by Physician's Assistant James Garmon, Luzmin Inderias, M.D., and Paul Morales, M.D. IAF, Tab 6, Subtabs 4i, 4j, 4k. These brief letters, with almost identical language, summarily state that the authors examined the appellant and reviewed his position description and believe the appellant is medically qualified to perform his duties. *Id.* These letters are devoid of any medical information or detail concerning the appellant's medical examination and the appellant admitted that he actually drafted each of these letters for Mr. Garmon, Dr. Inderias, and Dr. Morales to sign. HT at 329-30. The appellant also produced medical reports from Jin Kim, M.D. and Johanna Rosenthal, M.D. IAF, Tab 8, Subtabs 7A-3, 7A-4. Dr. Kim concluded that the appellant has a slight deficit in range of motion in his left wrist that is not significant or limiting and that the appellant does not have diabetes. *Id.*, Subtab 7A-3. Dr. Rosenthal provided a more comprehensive report stating that the appellant has diabetes but that it is controlled by diet and that he has a slight history of peripheral neuropathy. *Id.*, Subtab 7A-4. She characterizes the neuropathy as "very minimal," states that the appellant responds to the pinprick and tuning fork tests, and asserts that the prior nerve conduction test results were at the lower limits of normal, but were not abnormal. *Id.* Dr. Rosenthal states that the appellant has a prior wrist fracture but that he retains full range of motion. *Id.* Dr. Rosenthal also calls into question the reliability of the prior results and conclusions concerning the appellant's neuropathy. *Id.* In his testimony, Dr. Saladino called into question the objectivity and reliability of Dr. Rosenthal's report, which he characterized as advocating for the appellant's return to duty rather than as an objective medical assessment. HT at 93-94.

¶15 In assessing the probative weight of medical opinion, the Board considers whether the opinion was based on a medical examination, whether the opinion provided a reasoned explanation for its findings as distinct from mere conclusory assertions, the qualifications of the expert rendering the opinion, and the extent

and duration of the expert's familiarity with the treatment of the appellant. *Lassiter*, 60 M.S.P.R. at 142. None of the doctors who examined the appellant testified at the hearing. Neither party sought the testimony of Drs. Inderias, Morales, Sabnani, or Zardouz, and the AJ denied the appellant's request for Drs. Rosenthal and Kim to testify because it was after the deadline he had set for requesting witnesses. IAF, Tab 32 at 2, 5. Accordingly, the assessment of the probative value of these medical reports, as hearsay evidence, also depends on the circumstances of the case. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981).[5]

¶16 First, the letters of Dr. Morales, Dr. Inderias, and P.A. Gorman have very little probative value. They are entirely conclusory, devoid of any medical documentation or explanation in support of their conclusions. In addition, they were not written by their signatories, but rather by the appellant. The report of Dr. Kim is brief and lacking in explanation to support its conclusions, although it is appended with medical documentation. Dr. Kim's conclusion that the appellant does not have diabetes is questionable because it is in stark contrast to the other evidence and medical opinions in the record. The reports of Drs. Zardouz and Sabnani are corroborating with regard to their conclusions that the appellant suffers from peripheral polyneuropathy. Dr. Rosenthal concurs that the appellant suffers from neuropathy, but concludes that it is minimal and would not affect his

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[5] The following factors affect the weight to be accorded to hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at the hearing; (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the agency's explanation for failing to obtain signed or sworn statements; (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) the credibility of the declarant when he made the statement attributed to him. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981).

ability to perform his duties. Dr. Rosenthal contradicts Dr. Sabnani with regard to the appellant's range of motion in his left wrist but does not address the appellant's grip strength. Despite Dr. Saladino's characterization of Dr. Rosenthal's report as a piece of advocacy, that Dr. Rosenthal highlighted in her report the conclusions that differed significantly from those of the agency's doctors does not undermine the report's credibility or reliability; rather, Dr. Rosenthal's report is a thorough, detailed, and relevant medical opinion addressing the medical issues of the agency's removal action.

¶17 The contradictory reports of Drs. Kim and Rosenthal call into question the conclusions of Drs. Sabnani, Zardouz, and Saladino regarding the extent of the appellant's neuropathy and wrist ailments. Given these inconsistent medical reports and the absence of direct testimony by any examining doctor, we find that the agency did not prove by preponderant evidence that the appellant has a disqualifying medical condition or that it poses a reasonable probability of causing substantial harm. The agency therefore failed to meet its burden of proof and the ID reversing the agency's action is affirmed as modified by this Opinion and Order.

ORDER

¶18 We **ORDER** the agency to cancel the removal and to retroactively restore appellant effective **April 30, 2005**. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

¶19 We **ORDER** the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. We **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and

benefits due and to provide all necessary information requested by the agency to help it comply.

¶20 If there is a dispute about the amount of back pay due, we **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office to resolve the disputed amount.

¶21 We **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

¶22 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. We **ORDER** the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above. The checklists are also available on the Board's webpage at http://www.mspb.gov/mspbdecisionspage.html.

¶23 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The

regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order

before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.