

NO. 35901-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOEL HAVLINA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves judicial review of an administrative order by the Personnel Appeals Board (PAB), attached as Appendix A. Appellant, however, assigns error only to a superior court judgment and then only in a superficial fashion. Appellant fails to identify what errors were made by the PAB and completely fails to comply with RAP 10.3(h):

Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rule 10.3(a)(3) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 or a final order under RCW 41.64 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

As discussed in Argument, part V - B, below, the Appellant's brief is so defective that the appeal should be denied on that basis, and the decision of the PAB affirmed. However, assuming the Court attempts to determine what errors Appellant believes were committed, the Respondent Department of Transportation (DOT) also shows below how the PAB decision has no errors of fact, no errors of law, and no abuse of discretion.

II. ISSUES FOR REVIEW

- A. **Should the appeal be denied for failure to assign errors as required by RAP 10.3(h) to the PAB findings and conclusions, and failure to state issues that allege or identify errors by the Board?**
- B. **Did the Thurston County Superior Court err when it upheld the PAB decision upholding Respondent DOT's disability separation of Appellant?**
- C. **Was the PAB's decision upholding Respondent DOT's disability separation of the Appellant founded on an error of law, contrary to a preponderance of the evidence as disclosed by the entire record or arbitrary and capricious?**

III. STATEMENT OF THE CASE

Joel Havlina, the Appellant, was employed by the Department of Transportation (DOT) as a Maintenance Technician 2 in Connell. (Superior Court Report of Proceedings (RP) 4; Findings of Fact, Conclusions of Law and Order of the Board (PAB Findings) § 2.1; PAB Hearing Transcript (PAB Tr.) 324) As a Maintenance Technician 2, Appellant's duties included road maintenance, lifting heavy objects, repairing guard rails, snow and ice removal, and digging ditches. (PAB Findings § 2.2; PAB Tr. 323-324) As part of his job, Appellant was required to operate heavy equipment such as snow plows, dump trucks, front-end loaders, and trucks with clutches. (PAB Exhibit (Ex.) R-21 at 3; PAB Findings § 2.2) The

essential job functions of a Maintenance Technician 2 include the ability to bend, kneel, crawl, twist and operate heavy equipment. (PAB Findings § 2.2)

On March 4, 2004, Appellant injured his left knee while walking up a flight of stairs during work-related training in Wenatchee. (Ex. R-1 at 1; RP 5; PAB Findings § 2.3; PAB Tr. 333) Appellant first sought treatment for the injury on March 15, 2004. (Ex. R-2) The medical provider that treated Appellant recommended he be placed on light duty for the time being, with no squatting, bending or lifting more than 15 pounds. (Ex. R-2) Appellant was then referred to an orthopedic surgeon who operated on Appellant's knee on March 31, 2004. (PAB Tr. 338) After time off to recuperate, Appellant returned to the job on May 17, 2004. (RP 5; PAB Findings § 2.7; PAB Tr. 339) However, he did have certain limitations placed on him by his physician. (RP 5) Appellant was directed not to crawl, climb, squat, bend, drive a vehicle with a clutch, or lift more than 25 pounds. (Ex. R-3; PAB Findings § 2.3)

Due to these restrictions, DOT accommodated Appellant by assigning him light duty, such as desk work. (RP 5; PAB Findings §

2.3) In a meeting on June 15, 2004, Appellant met with Tom Root, the Maintenance and Operations Superintendent; Wayne Frudd, the Regional Safety and Health Manager; Tom Lenberg, the Maintenance Supervisor; and Mike Kukes, the Maintenance and Operations Assistant Superintendent, to review his essential job functions. (Ex. R-5; PAB Tr. 220, 272) At that time, Appellant was still not able to crawl, squat, kneel, or twist his injured leg. (Ex. R-5)

Appellant was told to bring Tom Lenberg an updated evaluation from his physician in July, 2004. (Ex. R-5) On July 21, 2004, Appellant notified Lenberg that he was still not able to do any crawling, twisting or squatting, but he could attempt to drive a clutch at his own pace. (Ex. R-5; PAB Tr. 222) On August 24, 2004, Appellant notified Lenberg that his situation had not improved at all over the last month. (Ex. R-5; PAB Tr. 225) Appellant still could not crawl, kneel, or lift more than 50 pounds, and had to self-limit his clutch use. (Ex. R-6)

After receiving another medical evaluation from Appellant's medical provider in September 2004 which kept all his restrictions in place, DOT became concerned about his slow progress and

questioned his ability to perform duties during the winter season. (Ex. R-9; PAB Tr. 277) The winter season is typically busier and more physically demanding on DOT Maintenance Technicians because they are usually working alone and with larger equipment. (RP 5-6; PAB Findings § 2.4; PAB Tr. 278) On October 6, 2004, DOT received an updated medical evaluation from Appellant which explained the duties he could perform and the duties he could not perform. (Ex. R-11; PAB Tr. 278) Given the results of this evaluation, DOT concluded Appellant was not physically ready to operate heavy machinery during the upcoming winter shift. (Ex. R-12; PAB Tr. 279)

Appellant again met with DOT management on November 15, 2004, to discuss his progress and his ability to work the winter shift. (Ex. R-13; RP 5; PAB Findings § 2.4; PAB Tr. 185, 279) At the time of this November 2004 meeting, Appellant had essentially made no progress with his knee. (PAB Findings § 2.4; PAB Tr. 282) DOT concluded, and Appellant agreed, that he could not possibly perform the essential job functions of a Maintenance Technician 2 during the winter shift. (Ex. R-13; RP 6; PAB Findings

§ 2.4; PAB Tr. 281, 296) DOT attempted to accommodate Appellant for the winter; however, no light duty was available. (Ex. R-13; RP 6; PAB Findings § 2.4; PAB Tr. 296-297) Therefore, Appellant was placed on time loss for the winter season. (Ex. R-13; PAB Findings § 2.4)

In March, 2005, Appellant met with DOT management and indicated his condition was actually somewhat worse than in November 2004. (RP 6; PAB Findings 2.5; PAB Tr. 199, 298) In addition, Appellant was taking medication for his knee which prevented him from driving certain types of vehicles within the DOT that required a Commercial Driver's License, which he had. (Ex. R-15, 22; PAB Findings 2.5; PAB Tr. 284, 313). Appellant agreed that he could no longer perform the essential job functions for a Maintenance Technician 2. (Ex. R-14; RP 7; PAB Findings § 2.5; PAB Tr. 202) At that point, DOT began looking for other job opportunities within DOT for Appellant in order to accommodate him. (RP 7; PAB Tr. 285)

Julie Lougheed, a Human Resource Consultant, conducted a search for other vacant positions for which the Appellant was

qualified and which fit within the geographical limitations he had placed on DOT. (Ex. R-14; PAB Findings § 2.7; PAB Tr. 300) Appellant had notified DOT he would only accept positions within a 50-mile radius of Connell. (RP 7; PAB Findings § 2.5; PAB Tr. 300) This geographical limitation severely limited DOT's ability to accommodate Appellant. (PAB Findings § 2.7; PAB Tr. 303) The majority of DOT positions are located on the west side of the state. (PAB Tr. 297) It is DOT policy that transfers for accommodation purposes cannot be made to positions that would be considered a promotion. (PAB Findings § 2.7; PAB Tr. 301) However, Appellant was encouraged to test and apply for positions that would be considered promotions, even though he could not be transferred there by DOT via accommodation. (PAB Findings § 2.7)

When searching for other positions, DOT looked for vacancies within the department. (Ex. R-18 at 4) On March 2, 2005, Lougheed conducted a search for vacant positions at the Pasco Engineering Office. (Ex. R-18 at 5) There were vacancies; however, the jobs required field work which Appellant could not perform with his medical restrictions. (Ex. R-18 at 5) There were no openings for

clerical positions in the Tri-Cities area. (PAB Tr. 303) Lougheed also made a number of contacts with DOT personnel offices in Wenatchee, Ephrata and Yakima, which were outside of the geographical limitations placed on DOT by the Appellant, but were checked out for Appellant's consideration. (PAB Tr. 300 and 303) The only vacant position for which Appellant may have been qualified was in Yakima for an Equipment Parts Specialist 2; however, he would have to compete for the position because it was a promotion. (PAB Tr. 301) Lougheed sent the job information to Appellant. (Ex. R-18 at 10; PAB Tr. 301) Appellant did not submit an application for this position. (RP 7; PAB Tr. 302)

Lougheed also discussed a return-to-work program with Appellant which is designed to help employees who have been injured on the job to develop resumes and get on other state agency position registers. (PAB Tr. 207) Appellant did not look into this option further. (PAB Tr. 207)

After a thorough search for vacant positions for which Appellant was qualified within DOT's geographical limitations, DOT was unable to locate any positions which would meet

Appellant's medical restrictions. (Ex. R-19 at 3; RP 7; PAB Findings § 2.7; PAB Tr. 306) Even though DOT had no authority to place Appellant in positions outside of the agency, Lougheed made inquiries with the Department of Corrections (DOC) and the Department of Social and Health Services (DSHS) to see if there were any job openings with these other state agencies. There were none. (RP 7; PAB Tr. 304-305) The Appellant admitted that he looked at web sites for other state agencies and even the federal government, but he never followed through and applied for any positions. (PAB Tr. 207 – 208)

By April, 2005, it became clear DOT was not going to be able to accommodate Appellant. (Ex. R-19 at 3; PAB Findings § 2.8) On April 18, 2005, due to Appellant's inability to perform the essential job functions of a Maintenance Technician 2 and DOT's inability to accommodate Appellant, DOT initiated a disability separation of Appellant pursuant to WAC 356-35-010,¹ effective June 17, 2005. (Ex. R-19; RP 8) Lougheed continued to look for vacant positions within DOT for Appellant for 60 days after the separation (from

¹ This WAC was repealed effective July 1, 2005. However, it remains the effective law through this appeal. (Attached as Appendix B.)

April 18, 2005 through June 17, 2005), but none were found. (RP 8-9; PAB Tr. 305-306)

Appellant appealed his disability separation to the PAB on May 13, 2005. (RP 9; PAB Findings § 2.1) The PAB found DOT's disability separation of Appellant was properly done pursuant to WAC 356-35-010 because DOT met its burden of proving Appellant could not perform the essential job functions of his position and reasonable accommodations could not be provided. (RP 9; PAB Findings § 4.5) Based on its findings, the PAB affirmed the disability separation of Appellant. Havlina v. Dep't of Transp., PAB No. DSEP-05-0009 (2006).

Appellant appealed the PAB's decision to the Superior Court of Thurston County, which upheld the PAB's decision. (CP 41-42; Opinion of the Hon. Anne Hirsch, Thurston County Superior Court, Case No. 06-2-00955-7.) Appellant then filed a timely appeal of the Superior Court's decision to the Court of Appeals, Division II.

IV. SUMMARY OF ARGUMENT

Thurston County Superior Court properly applied the standard of review when it found the order of the PAB was not

founded on an error of law, was not contrary to a preponderance of the evidence as disclosed by the entire record and was not arbitrary and capricious. The PAB should be affirmed by this Court for the reasons set forth below.

As a threshold matter, the appeal fails to comply with critical rules of appellate procedure, frustrating meaningful review and prejudicing the Respondent DOT by requiring Respondent DOT to demonstrate a negative—that the PAB did not commit error.

If the merits are reached, there is no error in the findings and conclusions of the PAB that DOT appropriately determined the Appellant was disabled and not able to perform the essential functions of his job. The findings and evidence showed that DOT was unable to provide the accommodation – finding a job outside of DOT with the State of Washington – sought by Appellant as this was not reasonable and there was no requirement to do so.

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V. ARGUMENT

A. Standard Of Review

RCW 41.64.130(1)² provided the basis for an employee to appeal an adverse ruling by the PAB. An appeal may be made on the basis that the PAB order was:

- (a) Founded on or contained an error of law, which shall specifically include error in construction or application of any pertinent rules or regulations;
- (b) Contrary to a preponderance of the evidence as disclosed by the entire record with respect to any specified finding or findings of fact;
- (c) Materially affected by unlawful procedure;
- (d) Based on a violation of any constitutional provision; or
- (e) Arbitrary and capricious.

RCW 41.64.130(1)(a)-(e) (2002).

Review of decisions of the PAB is governed by RCW 41.64.130 and .140.³ Sullivan v. Dep't of Transp., 71 Wn. App. 317, 320, 858 P.2d 283, 285 (1993) (citing Ballinger v. Dep't of Soc. & Health Serv., 104 Wn.2d 323, 328, 705 P.2d 249 (1985); Muije v. Dep't of Soc. & Health Serv., 97 Wn.2d 451, 453, 645 P.2d 1086, 1087 (1982)). In reviewing the PAB's decision the Court of Appeals

² This statute was repealed effective July 1, 2005. However, it remains the applicable law for this appeal. (Attached as Appendix C.)

³ RCW 41.64.140 was also repealed effective July 1, 2005, though it remains the applicable law for this appeal. (Attached as Appendix C.)

applies a de novo standard of review, but uses the same standard of review used by the superior court. Dedman v. Personnel Appeals Bd. and the Dep't of Corrections, 98 Wn. App. 471, 476, 989 P.2d 1214, 1217 (1999).

This Court has said:

On issues of law, we may substitute our judgment for that of the administrative body; however, we accord substantial weight to the agency's view of the law it administers. Valentine, 77 Wash.App. at 844, 894 P.2d 1352 (citing Franklin County Sheriff's Office v. Sellers, 97 Wash.2d 317, 325, 646 P.2d 113 (1982)). On mixed questions of law and fact, we determine the law independently and then apply the law to the facts as found by the agency. Valentine, 77 Wash.App. at 845, 894 P.2d 1352 (citing Black Real Estate Co. v. Department of Labor & Indus., 70 Wash.App. 482, 487, 854 P.2d 46 (1993))

Hamel v. Employment Security Dept., 93 Wn. App. 140, 144-145, 966 P.2d 1282, 1285 (1998).

When challenging a PAB order on the basis that the order was arbitrary and capricious, the Appellant bears a heavy burden. Pierce County Sheriff v. Civil Serv. Comm'n, 982 Wn.2d 690, 695, 658 P.2d 648, 651 (1983). A PAB order is deemed arbitrary and capricious only when the conduct is a willful and unreasoning

action, without consideration and in disregard of facts and circumstances.” Id. at 695, 658 P.2d at 652.

B. The Appeal Should Be Dismissed For Failure To Assign Errors Or Provide Argument As Required By RAP 10.3(h) and 10.3(a)

Havlina did not include a “concise statement of each error” allegedly made by the PAB as required by RAP 10.3(h). Compounding this failure, Havlina’s Issues and Argument do not even cite any PAB Findings, Conclusions, or the record in a manner that attempts to analyze or show error using appellate standards of review, such as the lack of substantial evidence or error of law. *See* RAP 10.3(a)(6) (requiring analysis, and encouraging application of appellate standards of review). The Brief of Appellant is fairly described as a couple pages of general legal propositions concerning accommodation of disabled workers and a bare claim that the State as an employer failed to comply.

The Respondent DOT recognizes that the rules of procedure are to be generously construed and that this Court may wish to address the merits of the Appellant’s argument. Accordingly, the rest of this Brief demonstrates that the PAB did not err. However, as

a threshold matter, this case may be dismissed based on the failure to comply with these core rules of appellate procedure. The Appellant's failure compromises appellate review by failing to present argument, and it prejudices the Respondent DOT by forcing it to review the entire PAB findings and conclusions and show that there is no error under the relevant standards of review. *See*, Washington Appellate Practice Deskbook (Wash. State Bar Assoc. 3d ed. 2005) at p. 8-88.

Alternatively, appellate review may assume that the unchallenged findings by the PAB are verities, such that the only issue is whether the findings support the PAB's Findings of Fact and Conclusions of Law. *See Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn. 2d 22, 30, 891 P.2d 29 (1995); *Shoreline Comm'ty College Dist. 7 v. Employment Sec. Dep't.*, 120 Wn. 2d 394, 842 P.2d 938 (1992).

C. Substantial Evidence Supports The PAB Findings Establishing That DOT Met Its Burden Of Proof

The Court of Appeals reviews "factual challenges to a PAB decision to determine only whether there exists...any competent, relevant and substantive evidence which, if accepted as true, would,

within the bounds of reason, directly or circumstantially support the challenged finding or findings.” Dedman, 98 Wn. App. at 477, 989 P.2d at 1217. Accordingly, before a decision of the PAB is reversed, it would have to:

[D]emonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.

Ballinger, 104 Wn.2d at 328, 705 P.2d at 253 (quoting Gogerty v. Dep’t of Inst., 71 Wn.2d 1, 8, 426 P.2d 476, 480 (1967)). This is generally consistent with the familiar “substantial evidence” review of adjudicative findings.

Appellant asserted in his original notice of appeal to Thurston County that the PAB “decision is contrary to a preponderance of evidence as disclosed by the entire record with respect to any specified finding or findings of fact.” (CP 3 -12) Moreover, as noted above, Appellant did not designate as error any particular findings of fact in his appeal or brief. Appellant’s failure to assign error to the findings of fact, and failure to provide argument showing

any error, results in them being considered verities on appeal. RAP 10.3(g). Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn. 2d 22, 30, 891 P.2d 29 (1995); Shoreline Comm'ty College Dist. 7 v. Employment Sec. Dep't, 120 Wn.2d 394, 842, P.2d 938 (1992).

Even though each finding of fact is to be considered a verity on appeal, DOT will briefly examine the findings to demonstrate that substantial evidence supports the PAB's decision.

Finding of Fact No. **2.1** states Appellant was a permanent employee of DOT. This finding is supported by Appellant's testimony. (PAB Tr. 323)

Finding of Fact No. **2.2** discusses the positions held by Appellant during his employment with DOT. This is supported by Appellant's testimony. (PAB Tr. 322-324) This finding also summarizes Appellant's duties and the essential job functions of his position. This is supported by Appellant's testimony (PAB Tr. 184) and a classification questionnaire signed by Appellant which details his essential job functions. (Ex. R-21)

Finding of Fact No. **2.3** details Appellant's knee injury and subsequent surgery. This finding is supported by Appellant's testimony (PAB Tr. 202-203) and his accident report. (Ex. R-1) Next, this finding summarizes the limitations put in place by his medical provider after the surgery. This is supported by Appellant's testimony (PAB Tr. 204) and a note from Appellant's medical provider to DOT detailing the restrictions. (Ex. R-2) Finally, this finding discusses how DOT accommodated Appellant with light-duty desk work. This is supported by testimony from Tom Lenberg and Michael Kukes. (PAB Tr. 219, 258)

Finding of Fact No. **2.4** refers to a meeting in November 2004 between Appellant and DOT staff to discuss his ability to work the winter shift. This is supported by testimony from Appellant, Tom Lenberg, Wayne Frudd, and Julie Loughed. (PAB Tr. 185, 228, 279, 294) This finding is also supported by notes from that meeting which were admitted into evidence. (Ex. R-13) This finding also discusses the difficulties of the winter season. This is supported by testimony from Tom Lenberg. (PAB Tr. 228-229) Next, this finding discusses Appellant's medical restrictions in November, 2004. This

is supported by Appellant's testimony (PAB Tr. 186-190) and a medical evaluation conducted by Appellant's medical provider. (Ex. R-11) Finally, this finding discusses Appellant's inability to work the winter shift. Appellant admitted he was unable to perform his job during the winter shift. (PAB Tr. 190)

Finding of Fact No. 2.5 details another meeting between Appellant and DOT staff that took place on March 2, 2005. This is supported by testimony from Appellant, Tom Lenberg, Wayne Frudd and Julie Lougheed (PAB Tr. 197, 230, 281, 297), as well as meeting notes taken by Mr. Frudd. (Ex. R-14) Next, this finding discusses how Appellant's condition had deteriorated over the winter and how he would not be able to perform the essential job functions of his position. This is supported by testimony from Appellant and Julie Lougheed. (PAB Tr. 199, 201, 202, 298) This finding also discusses how Appellant was taking medication at the time that affected his Commercial Driver's License certification. This is supported by testimony from Appellant and Casey McGill (PAB Tr. 205, 313) It is also supported by a medical evaluation performed by Appellant's medical provider and DOT's drug policy. (Ex. R-15,

22) This finding also discusses the geographical restrictions Appellant placed on DOT if he were to be accommodated in some other location within DOT. This is supported by testimony from Appellant and Julie Lougheed. (PAB Tr. 206, 300) Appellant also confirmed this limitation in his application provided to DOT. (Ex. R-18 at 18) Finally, this finding states Appellant provided DOT with an application and resume to facilitate a search for available positions. Both were admitted into evidence. (Ex. R-18 at 12-20)

Finding of Fact No. **2.6** details how DOT received a physician's report on March 10, 2005, which confirmed all the prior restrictions and indicated Appellant, could continue to self-pace his use of a clutch and could not sit or stand for more than 30 minutes at a time. This report was signed by Appellant's medical provider and entered into evidence. (Ex. R-15)

Finding of Fact No. **2.7** discusses how Casey McGill, Appellant's appointing authority, determined separation due to disability was necessary. This finding is supported by Casey McGill's testimony (PAB Tr. 312-314) and Appellant's separation letter. (Ex. R-19) Next, this finding states Julie Lougheed performed

a search for vacant positions for which Appellant was qualified within his geographical limitations. This finding is supported by the testimony of Appellant and Julie Lougheed. (PAB Tr. 205-208, 300-305) It is also supported by notes written by Ms. Lougheed and an e-mail she sent to Appellant about a job opening. (Ex. R-18 at 5, 8-11)

This finding also states the only jobs available were promotional opportunities for which Appellant would have to compete. Julie Lougheed testified the only job opening she found that Appellant appeared to be qualified for was an Equipment Parts Specialist position, which Appellant would have to apply for because it was considered a promotion. (PAB Tr. 305) Appellant was encouraged to apply for that position. Finally, this finding states Appellant's geographical limitations restricted DOT's ability to accommodate Appellant. This finding is supported by the testimony of Ms. Lougheed. (PAB Tr. 303)

Finding of Fact No. **2.8** details the separation letter sent from Casey McGill to Appellant. This letter was received by Appellant (PAB Tr. 202) and was admitted into evidence. (Ex. R-19) This

finding also states Julie Lougheed continued to search for positions for two months after the notice of disability separation (from April 18, 2005 through June 17, 2005) of Appellant, and still no positions were available. This is supported by the testimony of Ms. Lougheed. (PAB Tr. 305-306)

The PAB's findings are clearly supported by a preponderance of the evidence which establishes DOT met its burden of proof on the disability separation.

D. The Order Of The PAB Was Founded On Law And Supported By The Facts Of The Case

When reviewing an alleged error of law, the reviewing court may substitute the court's "judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law." Sullivan, 71 Wn. App. at 321, 858 P.2d at 285 (quoting Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113, 117 (1982)). In other words, an "agency's interpretation of its own rule is entitled to great weight...but that interpretation remains subject to independent appellate review." Thomas v. Dep't of Soc. & Health Serv., 58 Wn. App. 427, 432, 793 P.2d 466, 469 (1990) (citing Weyerhaeuser Co. v. Dep't of Ecology, 86 Wn.2d 310, 315, 545

P.2d 5 (1976); Terhar v. Dep't of Licensing, 54 Wn. App. 28, 32, 771 P.2d 1180 (1989)).

A decision is founded on an error of law when it is either erroneously construed or erroneously applied. See RCW 41.64.130(1)(a). WAC 356-35-010 provided, in part: “An appointing authority may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided.” Respondent, in a disability separation case, has the burden of proving Appellant could no longer perform the essential job functions of his position and that reasonable accommodation could not be provided. Smith v. Employment Security Dept., PAB No. S92-002 (1992). Contrary to Appellant’s assertions in his brief at pages 1 and 3, the Appellant was not terminated from employment with DOT; rather he was separated due to disability because the Appellant was unable to perform the essential functions of his job and DOT could not provide a reasonable accommodation.

At the PAB, DOT had the initial burden to prove that Appellant’s condition met the definition of “disability” as provided

in WAC 356-05-120.⁴ “Disability” is defined as “an employee’s physical and/or mental inability to perform adequately the essential duties of the job class.” WAC 356-05-120. In other words, DOT had to prove, and did prove, that Appellant could no longer perform the essential job functions of a Maintenance Technician 2.

The essential job functions of a Maintenance Technician 2 include physically demanding activities such as installing guard rails and posts, cleaning culverts and repairing fences, tree and rock removal, and operation of large equipment, such as dump trucks and front-end loaders, which all have manual transmissions and require the ability to operate a clutch. (Ex. R-19 at 2) In Motzer v. Dep’t of Transp., PAB No. DSEP-02-0007 (2003) (attached as Appendix D), the appellant, Motzer, was a Maintenance Technician 2 who was appealing a disability separation, much like the Appellant in the case at bar. Motzer suffered an on-the-job back injury and was unable to work. Motzer, at 2. For a period of almost one year, DOT worked closely with Motzer’s physician to determine whether she could come back to work. Id. Prior to separation, Motzer’s physician

⁴ This WAC was also repealed effective July 1, 2005. It continues to remain the effective law through this appeal. (Attached as Appendix B.)

concluded she could not perform the essential job functions of a Maintenance Technician 2. Id. at 5. The PAB found because Motzer's physician determined she could not perform her essential job functions, her condition met the definition of "disability" set forth in WAC 356-05-120. Id.

Here, the PAB had evidence that DOT had received several medical evaluations from Appellant's medical provider during the period between the injury and the disability separation. Not one of the evaluations cleared Appellant for full duty. (See Ex. R-2, 3, 4, 6, 7, 8, 11, 15) Each evaluation put a restriction on how much Appellant could sit, stand, walk, lift, squat, twist, and climb ladders. He was never to squat or twist. Even on his last evaluation, which was over a year after the injury, Appellant was still not able to lift more than 30 pounds. (Ex. R-15 at 1) Also, Appellant was taking medication which limited his ability to operate machinery. Having restrictions on these activities, which are vital to working in his position, prevented Appellant from being able to perform the essential job functions of a Maintenance Technician 2.

Moreover, the PAB found that DOT received on March 10, 2005, from Appellant's medical provider, Randall Clower, a medical report confirming Appellant's medical restrictions and his inability to perform the essential functions of his job. (PAB Findings § 2.6; Ex. R-15) In a letter received March 30, 2005, which was one year after the injury, Clower notified DOT that Appellant could not perform the essential job functions of his position, and the best plan of action was to accommodate Appellant with a clerical position. (Ex. R-17)

Not only did DOT and Appellant's medical provider concur that Appellant could not perform his essential job functions, but the Appellant himself concurred as well. During a meeting on March 4, 2005, the Appellant agreed with DOT's assessment that Appellant could not perform his essential job functions then or in the foreseeable future. (PAB Tr. 202) Therefore, Appellant's condition met the definition of "disability" set forth in WAC 356-05-120.

Next, the PAB properly found that DOT met its burden of proving that Appellant could not be accommodated. "Reasonable accommodation" is defined as "reasonable alterations,

adjustments, or changes made by the appointing authority in the job, workplace and/or term or condition of employment which will enable an otherwise qualified person of disability...to perform a particular job successfully, as determined on a case by case basis.” WAC 356-05-333.⁵

“An employer is not required to offer the employee the precise accommodation he or she requests, or to create a job where none exists.” Dedman, 98 Wn. App. at 485, 989 P.2d at 1221 (cites omitted). DOT has to make a good faith effort to accommodate Appellant. Machart v. Liquor Control Board, PAB No. DSEP-00-0005 (2001). Also, DOT has “no obligation to reallocate or alter the essential functions of the Appellant’s position.” Corbett v. Dep’t of Corrections, PAB No. DSEP-01-0005 (2003).

In this case, the PAB record showed that DOT made good faith efforts to accommodate Appellant. Julie Lougheed made several searches for vacant positions within DOT and within Appellant’s geographical limitations. (PAB Tr. 300 – 305) Due to the geographical and medical restrictions, Lougheed was unable to locate any vacant positions suitable for Appellant. Lougheed also

⁵ This WAC was repealed as well effective July 1, 2005. It also continues to remain the effective law through this appeal. (Attached as Appendix B.)

searched for positions that would be a promotion for Appellant, for which Appellant would have to compete; however, Appellant did not pursue those avenues. (PAB Tr. 301; Ex. R-18 at 10) Loughheed also notified Appellant of a return-to-work program. Again, Appellant did not look into that either. (PAB Tr. 207)

The PAB's findings accurately reflect the evidence. (PAB Findings § 2.5 & 2.6) Accordingly, none of the findings are erroneous.

The PAB then applied the correct law to the facts of the case. At the time this case was before the PAB, there was, and still is, no law requiring state agencies to look for open positions in each and every agency within the state. In fact, doing so would constitute an undue burden on the agency. *See Dedman*, 98 Wn. App. at 485, 989 P.2d at 1221. It would be logistically impossible for DOT to conduct a statewide job search of every state agency. Accordingly, the PAB correctly applied the law that was in place at the time of the hearing and continues to remain the law in Washington.

The PAB found that DOT met its burden of proving there were no reasonable accommodations for Appellant. (PAB

Findings § 2.7) The order of the PAB affirming the disability separation of Appellant was founded on law and supported by the facts of the case.

E. The Order Of The PAB Was Not Arbitrary And Capricious

When challenging a PAB order on the basis the order was arbitrary and capricious, the Appellant bears a heavy burden. Pierce County Sheriff v. Civil Serv. Comm'n, 982 Wn.2d 690, 695, 658 P.2d 648, 651 (1983). A PAB order is deemed arbitrary and capricious only when the conduct is a “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” Id. at 695, 658 P.2d at 652. Moreover, whenever “there is room for two opinions, [an] action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” Id.; Dedman v. Personnel Appeals Bd., 98 Wn. App. at 467-77, 989 P.2d at 1217 (reasoning that “a PAB decision is arbitrary and capricious if it is willful and unreasonable and made without consideration and in disregard of facts or circumstances”).

The PAB’s decision to affirm Appellant’s disability separation by DOT was not made without consideration of the

applicable law and facts. Rather, the PAB's decision is supported by the evidence and properly follows the applicable law in place at the time of the decision. Just because Appellant does not like the outcome does not mean it was arbitrary and capricious. Appellant has not met his "heavy burden" of establishing the order was arbitrary and capricious.

F. DOT Did Not Violate The Requirements Of Reasonable Accommodation

Appellant argues DOT did not follow Washington law regarding reasonable accommodation. Appellant admits he was disabled and unable to perform the essential functions of his job as a Maintenance Technician II. (Ex. R-14; RP 7; PAB Findings §2.5; PAB Tr. 202) However, the Appellant argues he was not reasonably accommodated. The accommodation sought by the Appellant was for DOT to find him a position within the State of Washington (with some other state agency) that was within 50 miles of Connell. This is not required by the law. Contrary to Appellant's argument that DOT had to search for other positions outside of DOT, no Washington tribunal has ever imposed a duty on DOT or any other state agency to accommodate outside of the agency. There is no requirement in Washington law that the State

of Washington be considered as one legal entity for purposes of reasonable accommodation. Appellant admitted in the Superior Court hearing there was no law either in Washington or in any foreign jurisdiction to support his argument. (RP 11 and 16) Instead, Appellant makes a policy argument and would have this Court create a law that did not and does not exist. Thurston County Superior Court declined to do so and this Court should as well.

Additionally, Snyder v. Medical Serv. Corp., 98 Wn. App. 315, 326, 988 P. 2d 1023 (1999) found an employer was not obligated to grant an employee's specific request for accommodation. The employer need only "reasonably" accommodate the disability. The accommodation requested by the Appellant was not reasonable. DOT does not have the duty to create jobs where none exist. Dedman, 90 Wn. App. at 458, 989 P. 2d at 1221.

Reasonable accommodation requires a state agency look for a vacant position the Appellant can perform with his disability. DOT attempted to do so, but there were no positions within the 50-mile radius imposed by the Appellant. DOT informed the

Appellant of positions that were promotions within DOT but he did not apply. (Ex. R-18 at 10; RP 7; PAB Tr. 301-302) DOT informed the Appellant of assistance sites for finding jobs but he did not use those either. (PAB Tr. 207) DOT even went so far as to check with other state agencies (DOC and DSHS) to see if they had any openings, but there were none. (RP 7; PAB Tr. 304-305) The Appellant never followed up on any information provided by DOT. (PAB Tr. 209) He even admitted he looked at web sites for other state agencies and the federal government, but never applied. (PAB Tr. 207-208) *See, Dean v. Metropolitan Seattle*, 104 Wn.2d 627, 637-38, 708 P.2d 393 (1985). The Appellant seems to have forgotten reasonable accommodation is an interactive process between the employee and the employer. *See, Davis v. Microsoft Corp.*, 109 Wn. App. 884, 892, 37 P.3d 333 (2002). Here only DOT took action, while the Appellant took none. The Appellant has obligations as well. The Appellant did not engage in the interactive process.

DOT properly conducted a disability separation of the Appellant when it determined he could no longer perform the

essential functions of his job and there was no position within DOT that could have reasonably accommodated the Appellant.

VI. CONCLUSION

The Appellant fails to show any error by the PAB, and therefore the PAB's order should be affirmed.

Respectfully submitted this 11th day of May, 2007.

ROBERT M. MCKENNA
Attorney General



PATRICIA A. THOMPSON, WSBA # 8035
Assistant Attorney General
Attorneys for Respondent

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BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JOEL HAVLINA,) Case No. DSEP-05-0009
)
Appellant,) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD
)
v.)
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the Department of Labor and Industries office, 4310 W. 24th Avenue, Kennewick, Washington, on March 2, 2006.

1.2 **Appearances.** George Fearing, Attorney at Law, represented Appellant Joel Havlina. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Transportation.

1.3 **Nature of Appeal.** This is an appeal from a disability separation.

1
2 **II. FINDINGS OF FACT**

3 2.1 Appellant Joel Havlina was a permanent employee for Respondent Department of
4 Transportation. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the
5 rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the
6 Personnel Appeals Board on May 13, 2005.

7
8 2.2 Appellant became employed with the Department of Transportation (DOT) in 1993. During
9 his tenure with DOT, he held classification as a Maintenance Technician 1, 2 and 3. As a
10 Maintenance Technician 3, Appellant worked at the DOT maintenance offices in Pasco and
11 Connell. Appellant performed very physical work, including road maintenance and cleaning, lifting
12 heavy objects, digging ditches, and traffic control. The essential functions of the Maintenance
13 Technician 3 position also required Appellant to engage in repetitive movements, including
14 bending, kneeling, crawling, and twisting. Maintenance Technicians also operate a variety of
15 heavy equipment, like snow plows, front-end loaders, dump trucks, and trucks with clutches.

16
17 2.3 On March 4, 2004, Appellant injured his knee during a work-related training, and he was out
18 from work. Appellant subsequently underwent surgery to his knee and was released to work
19 effective May 17, 2004. Appellant was directed by his physician not to climb ladders, to avoid
20 squatting, bending, crawling, driving a clutch vehicle, and to avoid lifting anything heavier than 15
21 pounds. Consequently, the department accommodated Appellant's injury with light-duty desk work
22 performing paper and computer work.

23
24 2.4 In early November 2004, Appellant met with DOT staff to discuss his condition, ability to
25 return to work, and reasonable accommodation. The winter season is extremely busy for DOT
26

1 Maintenance Technicians and requires them to use a variety of trucks and equipment to plow snow.
2 In addition, employees work alone without the aid of co-workers to assist with physically
3 demanding tasks. As the 2004-2005 winter season approached, Appellant was still unable to drive
4 clutch vehicles, and he was unable to lift over 50 pounds, crawl, squat or twist his knee. Therefore,
5 Appellant was not able to fully perform the duties of his Maintenance Technician 3 position, and the
6 department was unable to provide Appellant with other light duty work during the winter season.
7 Therefore, Appellant was off work during the winter season.

8
9 2.5 On March 2, 2005, Wayne Frudd, Regional Safety and Health Manager, met with Appellant
10 and his union representative to discuss Appellant's condition and accommodation needs. Human
11 Resource Consultant Julie Lougheed participated by telephone. Appellant indicated his condition
12 had actually deteriorated from November 2004, and his physical limitations continued to prevent
13 him from performing the full breadth of his maintenance work. Appellant was also on a medication
14 at that time that affected his Commercial Driver's License certification, which prevented him from
15 driving certain types of vehicles. Appellant agreed that based on his medical restrictions, he was
16 unable to perform the Maintenance Technician duties but could perform desk work. During the
17 meeting, they discussed Appellant's skills and other positions he would consider. Appellant
18 indicated that because he lived in Connell, he was unwilling to consider any positions that were
19 more than 40 to 50 miles from his residence. Appellant provided the department with a state
20 application for employment and a résumé to facilitate the search for available positions for which he
21 was qualified.

22
23 2.6 On March 10, 2005, the department received a physician's report confirming that Appellant
24 was under the same prior restrictions. Additionally, the report indicated Appellant was unable to sit
25 or walk for a period of more than a half hour at a time but that he could use a clutch at his own
26

1 discretion. Appellant's physician did not provide a prognosis for how long Appellant would remain
2 unable to perform the essential duties of his position.

3
4 2.7 As a result, Casey McGill, Assistant Regional Administrator for Maintenance and
5 Operations, determined that separation due to disability was necessary based on Appellant's
6 inability to perform the essential functions of his position, with out without accommodation. As a
7 part of the department's accommodation process, Ms. Lougheed performed a search for vacant,
8 funded positions for which Appellant was qualified in the geographical area indicated by Appellant,
9 including positions that were clerical in nature. However, there were none available. Based on
10 Appellant's geographical limitations, the department was restricted in its ability to conduct a wider
11 job search. In addition, although Appellant met the minimum qualifications of several jobs, they
12 were higher classifications and were considered promotional opportunities which, based on the
13 department's policy, were not options that could be provided to Appellant. However, Appellant was
14 encouraged to apply for any promotional opportunities for which he was qualified.

15
16 2.8 On April 18, 2005, Mr. McGill formally notified Appellant of his separation due to
17 disability and the department's inability to accommodate his physical disability. The effective date
18 of the separation was at the end of his work shift on June 17, 2005. After the separation letter was
19 issued, Ms. Lougheed continued to search for vacant positions for a period of two months, however,
20 none became available.

21 22 **III. ARGUMENTS OF THE PARTIES**

23 3.1 Respondent argued that Appellant could not perform the essential functions of his position,
24 and asserts the department was unable to find an alternative position that met Appellant's
25 accommodation needs. Respondent argues that although Appellant indicated he could continue to
26

1 perform office work, there was insufficient work of that nature and further argues the department
2 was not required to create a job where none existed. Respondent argues that it has complied with
3 WAC 356-35-010 by making a good faith effort to accommodate Appellant's disability and that the
4 department's determination to separate Appellant should be affirmed.

5
6 3.2 Appellant does not dispute that he had a medical condition which precluded him from
7 performing all the duties of his position. Appellant contends, however, that he could have
8 continued to perform some of his position's tasks, such as vegetation spraying, litter patrol, and
9 computer and paperwork. Appellant argues that the department failed to perform a thorough search
10 to determine what other jobs were available to accommodate his disability. Appellant further argues
11 that the department assumed the accident that led to his knee injury was his fault and, therefore, did
12 little to help him find alternative positions.

13 14 IV. CONCLUSIONS OF LAW

15 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

16
17 4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of
18 supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving
19 that Appellant was unable to perform the duties of the position as specified in the letter of separation
20 and that reasonable accommodation cannot be provided. Smith v. Employment Security Dept.,
21 PAB No. S92-002 (1992).

22
23 4.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010
24 when it separated Appellant from his position as a Maintenance Technician 3 due to his disability.
25 WAC 356-05-120 defines a disability as "[a]n employee's physical and/or mental inability to
26

1 perform adequately the essential duties of the job class.” The department took the necessary steps
2 to determine whether Appellant could perform the essential duties of his position with or without
3 accommodation. Based on the conditions and limitations outlined by Appellant’s physician, the
4 department determined that Appellant was unable to perform the essential functions of his
5 Maintenance Technician 3 position and that there were no accommodations that could be made to
6 enable him to perform those essential functions. Therefore, Appellant’s condition meets the
7 definition of a disability.

8
9 4.4 WAC 356-35-010(1) provides, in part, that an appointing authority “may initiate a disability
10 separation of a permanent employee only when reasonable accommodations cannot be provided. . .”
11 Respondent undertook steps to accommodate Appellant; however, Respondent has met its burden of
12 proving that it could not make reasonable alterations, adjustments, or changes to Appellant’s
13 position. Furthermore, subsequent searches for alternative positions were unsuccessful, and the
14 department appropriately determined there were no other positions available for which Appellant
15 met the qualifications. Furthermore, the record does not support that Appellant’s separation was for
16 any reason other than his inability to perform the essential duties of his position and the lack of
17 available jobs that met his accommodation needs.

18
19 4.5 Respondent has met its burden of proving that Appellant’s separation due to disability
20 complied with the requirements of WAC 356-35-010, that Appellant could not perform the essential
21 duties of his position and that reasonable accommodation could not be provided. Therefore, the
22 appeal of Joel Havlina should be denied.

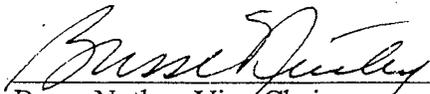
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V. ORDER

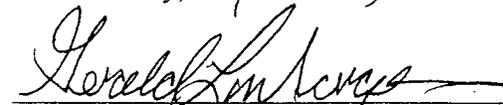
NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Joel Havlina is denied.

DATED this 28th day of April, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD



Busse Nutley, Vice Chair



Gerald L. Morgen, Member

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Chapter 356-35 WAC

DISABILITY--SEPARATION--APPEALS--PROCEDURES

WAC

356-35-010 Disability--Reasonable accommodation--Separation--Appeals.

WAC 356-35-010 Disability--Reasonable accommodation--Separation--Appeals. (1) An appointing authority may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided. When the employee requests a disability separation, the authority is not required to consider reasonable accommodations.

(2) If the disability prevents performance of an essential function of the current job, and there is no appropriate work available while trying to reasonably accommodate the employee, the employee shall be allowed to use accrued vacation, sick, shared leave, exchange, and/or compensatory time. If there is no paid leave available or if the employee chooses not to use paid leave, the employee shall be placed on authorized leave without pay.

(3) When reasonable accommodations cannot be provided, the employee may be separated by the appointing authority after written notice of, whichever is greater,

(a) Sixty calendar days; or,

(b) The number of consecutive work days for which only accrued sick and vacation leave, as defined in WAC 356-18-050 and 356-18-090, could be used.

If the employee is unable to work due to the disability during the notice period and there is no paid leave available, the absence shall be considered approved leave without pay.

The sixty calendar days notice shall not be required when the employee requests and the appointing authority approves a shorter notice period.

(4) For purposes of this rule, determinations of disability shall be made by an appointing authority only at the employee's written request or after obtaining a written statement from a physician or a licensed mental health professional. The appointing authority may require an employee to obtain a medical examination at agency expense from a physician or a licensed mental health professional of the agency's choice. In such cases, the agency shall provide the physician or licensed mental health professional with the specification for the employee's class and a description of the employee's position. Evidence may be requested from the physician or licensed mental health professional regarding the employee's ability to perform the specified duties.

APPENDIX B

(5) Agency initiated separations due to disability shall not be considered disciplinary actions and shall be appealable to the personnel appeals board. At the time of notification that their employment will be terminated because of disability, such employees shall be informed by the appointing authority of their right to appeal. The appeal must be filed in writing to the personnel appeals board as provided in Title 358 WAC within thirty calendar days after notice of separation is given.

(6) During the notice period required by subsection (3) of this section the agency shall inform employees being separated due to disability that they may be eligible for benefits/assistance programs such as employees' insurance plans, Social Security, worker's compensation, veteran's benefits, public assistance, disability retirement, and vocational rehabilitation.

(7) The names of permanent employees who have been separated because of disability shall be placed on reduction in force and promotional registers by the director of personnel as provided in WAC 356-26-030 upon submission of a statement from a physician or licensed mental health professional that they are able to perform the duties of the class(es) for which the registers are established.

[Statutory Authority: RCW 41.06.040 and 41.06.150. 93-14-067 (Order 422), § 356-35-010, filed 6/30/93, effective 8/1/93. Statutory Authority: RCW 41.06.150. 87-02-038 (Order 267), § 356-35-010, filed 1/2/87; 85-14-008 (Order 224), § 356-35-010, filed 6/24/85; 84-23-059 (Order 211), § 356-35-010, filed 11/20/84; 83-24-002 (Order 193), § 356-35-010, filed 11/28/83. Statutory Authority: RCW 41.06.150(17). 82-09-022 (Order 169), § 356-35-010, filed 4/12/82; 81-20-060 (Order 161), § 356-35-010, filed 10/5/81; Order 58, § 356-35-010, filed 9/10/73.]

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desirable or preferable for admission to the examination in lieu of fixed minimum qualifications.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-110, filed 8/10/84.]

WAC 356-05-115 Director. The director of the department of personnel.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-115, filed 8/10/84.]

WAC 356-05-120 Disability. An employee's physical and/or mental inability to perform adequately the essential duties of the job class. (For purposes of WAC 356-35-010, this definition shall not include maternity.)

[Statutory Authority: RCW 41.06.150. 84-23-059 (Order 211), § 356-05-120, filed 11/20/84. Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-120, filed 8/10/84.]

WAC 356-05-125 Dismissal. The termination of employment of a permanent employee (for cause) or of a probationary employee as specified in these rules.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-125, filed 8/10/84.]

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WAC 356-05-128 Drug test. Any blood, urine or other test designed to identify the presence in the body of controlled substances referenced under chapter 69.50 RCW.

[Statutory Authority: RCW 41.06.150. 88-03-042 (Order 291), § 356-05-128, filed 1/19/88, effective 3/1/88.]

WAC 356-05-130 Education leave of absence. An authorized leave of absence for educational purposes.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-130, filed 8/10/84.]

WAC 356-05-135 Elevation. Restoring an employee to the higher classification, with permanent status, which was held prior to being granted a demotion.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-

opposed to general academic instruction, but which may be gained through experience and home study. For other merit system purposes: Employees performing work which requires consistent application of advanced knowledge normally gained through achieving a baccalaureate degree but which may be gained through equivalent experience.

[Statutory Authority: RCW 41.06.150. 86-12-025 (Order 248), § 356-05-315, filed 5/28/86, effective 7/1/86. Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-315, filed 8/10/84.]

WAC 356-05-320 Project employment. A program designated by the director of personnel as "project employment," that is separately funded by a grant, or by specially targeted federal or state funds, has a specific goal, and has an end in sight. Such a program shall normally last up to two years.

[Statutory Authority: RCW 41.06.150. 88-18-096 (Order 308), § 356-05-320, filed 9/7/88, effective 11/1/88. Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-320, filed 8/10/84.]

WAC 356-05-325 Promotion. A change of an employee from a position in one class to a position in a class having a higher maximum salary.

[Statutory Authority: RCW 41.06.150, 41.06.175, 41.06.185, 41.06.195 and 41.06.205. 84-17-042 (Order 209), § 356-05-325, filed 8/10/84.]

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WAC 356-05-332 Recreational establishment. An amusement or recreational establishment, organized camp, or nonprofit educational conference center if (1) it does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of such year were not more than thirty-three percent of its average receipts for the other six months of such year.

[Statutory Authority: RCW 41.06.150. 86-12-025 (Order 248), § 356-05-332, filed 5/28/86, effective 7/1/86.]

WAC 356-05-333 Reasonable accommodation. Reasonable alterations, adjustments, or changes made by the appointing authority in the job, workplace and/or term or condition of employment which will enable an otherwise qualified person of disability or disabled veteran to perform a particular job successfully, as determined on a case-by-case basis.

[Statutory Authority: RCW 41.06.150. 87-02-038 (Order 267), § 356-05-333, filed 1/2/87.]

WAC 356-05-335 Reduction in force. A separation resulting from a lack of funds, lack of work, good faith reorganization for efficiency purposes, or from there being fewer positions than the employees

the appeal and shall be made by the employing agency if the employee prevails. [1985 c 461 § 7; 1981 c 311 § 12.]

NOTES:

Severability--1985 c 461: See note following RCW 41.06.020.

**RCW 41.64.120 Employee appeals--Findings of fact, conclusions of law, order--
Notice to employee and employing agency.**

(1) Within thirty days after the conclusion of the hearing, the board shall make and fully record in its permanent records the following: (a) Findings of fact; (b) conclusions of law when the construction of a rule, regulation, or statute is in question; (c) reasons for the action taken; and (d) the board's order based thereon. The order is final, subject to action by the court on appeal as provided in this chapter.

(2) The board shall simultaneously send a copy of the findings, conclusions, and order by certified mail to the employing agency and to the employee or the employee's designated representative. [1981 c 311 § 13.]

**RCW 41.64.130 Employee appeals--Review by superior court--Grounds--Notice,
Service--Certified transcript.**

(1) Within thirty days after the recording of the order and the mailing thereof, the employee may appeal the decision and order of the board on appeals made pursuant to RCW 41.06.170(2), as now or hereafter amended, to the superior court of Thurston county on one or more of the grounds that the order was:

- (a) Founded on or contained an error of law, which shall specifically include error in construction or application of any pertinent rules or regulations;
- (b) Contrary to a preponderance of the evidence as disclosed by the entire record with respect to any specified finding or findings of fact;
- (c) Materially affected by unlawful procedure;
- (d) Based on violation of any constitutional provision; or
- (e) Arbitrary or capricious.

(2) Such grounds shall be stated in a written notice of appeal filed with the court, with copies thereof served on a member of the board or the executive secretary and on the employing agency, all within the time stated.

(3) Within thirty days after service of such notice, or within such further time as the court may allow, the board shall transmit to the court a certified transcript, with exhibits, of the hearing; but by stipulation between the employing agency and the employee the transcript may be shortened, and either party unreasonably refusing to stipulate to such limitation may be ordered by the court to pay the additional cost involved. The court may require or permit subsequent corrections or additions to the transcript. [1981 c 311 § 14.]

**RCW 41.64.140 Employee appeals--Review by superior court--Procedure--
Appellate review.**

(1) The court shall review the hearing without a jury on the basis of the transcript and exhibits, except that in case of alleged irregularities in procedure before the board not shown by the transcript the court may order testimony to be given thereon. The court shall upon request by either party hear oral argument and receive written briefs.

(2) The court may affirm the order of the board, remand the matter for further proceedings before the board, or reverse or modify the order if it finds that the objection thereto is well taken on any of the grounds stated. Appellate review of the order of the superior court may be sought as in other civil cases. [1988 c 202 § 42; 1981 c 311 § 15.]

NOTES:

Severability--1988 c 202: See note following RCW 2.24.050.

RCW 41.64.910 Severability--1981 c 311. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1981 c 311 § 24.]

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II. FINDINGS OF FACT

2.1 Appellant Mary Motzer was a permanent employee for Respondent Department of Transportation. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on July 5, 2002.

2.2 Appellant became permanently employed with the Department of Transportation in July 1989. Appellant was a Maintenance Technician 2. She performed very physical work, including road maintenance and cleaning, lifting heavy refuse bags, digging ditches, and traffic control. The essential functions of the Maintenance Technician 2 position required Appellant to lift heavy objects and she engaged in repetitive movements, including bending, kneeling and twisting.

2.3 On May 18, 2001, Appellant suffered an on-the-job injury to her neck and lower back. Appellant was unable to perform the essential functions of her position, and she has not worked since that date.

2.4 From May 2001 through April 2002, the department engaged in collaborative efforts with Appellant's physicians to determine whether Appellant could return to work. Appellant's physicians have not released Appellant to return to work to perform the Maintenance Technician 2 duties nor have they indicated that modifications could be made to Appellant's position that would allow her to return to work and perform the essential functions of her position.

2.5 As a part of the department's accommodation process, Kitty Tyler, Human Resource Consultant and ADA Coordinator for DOT NW Region conducted a search for vacant, funded positions for which Appellant was qualified. In August 2001, Ms. Tyler identified a Dump Truck

1 Driver position as a light-duty position. The Dump Truck Driver job analysis was submitted to
2 Appellant's physician. Dr. M. Clowery concluded that Appellant could not perform driving duties
3 because she was taking medications that could impair her driving abilities.

4
5 2.6 Appellant's physician indicated that Appellant could perform a job clerical in nature,
6 however, after reviewing Appellant's experience, training and qualifications, Ms. Tyler determined
7 that Appellant was not qualified because she had no clerical experience. Appellant's work
8 experience was in manual and physical labor.

9
10 2.7 Prior to implementing Appellant's separation due to disability, Thomas E. Lentz, Assistant
11 Regional Administrator for Maintenance & Traffic and Appellant's appointing authority, consulted
12 with Ms. Tyler and reviewed Appellant's medical history and prognosis reports. Mr. Lentz
13 concluded that it was not reasonable for the department to leave Appellant on leave for an indefinite
14 period of time and to continue to have her position open without any definitive return to work date.
15 Mr. Lentz concluded that separating Appellant due to her disability was the appropriate action based
16 on the information and doctor reports he received, which included two medical determinations that
17 Appellant could not perform the essential functions of her Maintenance Technician position and the
18 department's inability to find her another suitable position.

19
20 2.8 By letter dated June 17, 2002, Mr. Lentz formally notified Appellant of her separation due to
21 disability and the department's inability to accommodate her physical disability. Mr. Lentz also
22 informed Appellant that if her medical condition sufficiently improved during the 12-month period
23 following her separation, she could request that her name be placed on the reduction-in-force and
24 promotional registers for which she was eligible.

1 2.9 Appellant continues to be disabled, and she has not received a physician's release to return
2 to work.

3 4 III. ARGUMENTS OF THE PARTIES

5 3.1 Respondent argues that it relied on the appropriate feedback from Appellant's physician that
6 Appellant was disabled and unable to perform the essential duties of her Maintenance Technician 2
7 position. Respondent asserts that Appellant's physician did not indicate that essential duties of
8 Appellant's position could be modified or accommodated in order for Appellant to perform them.
9 Respondent asserts that good faith efforts were made to find other positions for Appellant.
10 Respondent argues that it has complied with WAC 356-35-010 by making a good faith effort to
11 accommodate Appellant's disability and that the department's determination to separate Appellant
12 should be affirmed.

13
14 3.2 Appellant admits that she is unable to return to work. Appellant argues, however, that the
15 department separated her in retaliation because of a complaint several years earlier. Appellant also
16 asserts that she was exposed to a hostile and abusive environment and that other injured employees
17 were accommodated by the department for longer periods of time.

18 19 IV. CONCLUSIONS OF LAW

20 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
21 herein.

22
23 4.2 At a hearing on appeal of a disability separation, the appointing authority has the burden of
24 supporting the action that was initiated. WAC 358-30-170. Respondent has the burden of proving
25 that Appellant was unable to perform the duties of the position as specified in the letter of separation
26

1 and that reasonable accommodation cannot be provided. Smith v. Employment Security Dept.,
2 PAB No. S92-002 (1992).

3
4 4.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010
5 when it separated Appellant from her position as a Maintenance Technical 2 due to her disability.
6 WAC 356-05-120 defines a disability as “[a]n employee’s physical and/or mental inability to
7 perform adequately the essential duties of the job class.” Appellant’s physician stated that
8 Appellant could not perform the essential duties of her position, and Appellant currently remains
9 disabled. Therefore, Appellant’s condition meets the definition of a disability.

10
11 4.4 WAC 356-35-010(1) provides, in part, that an appointing authority “may initiate a disability
12 separation of a permanent employee only when reasonable accommodations cannot be provided. . .”
13 The department took the necessary steps to determine whether Appellant could perform the essential
14 duties of her position with or without accommodation. However, based on Dr. Clowry’s prognosis,
15 the appointing authority reasonably concluded that accommodation could not be provided to enable
16 Appellant to perform the essential functions of her Maintenance Technician position. Furthermore,
17 the department could not locate another position for which Appellant met the qualifications, even
18 though several vacancy searches were completed.

19
20 4.5 Appellant provided no evidence to support her contention that the department’s decision to
21 separate her due to disability was retaliatory in nature, that she was subjected to a hostile and
22 abusive work environment or that the department failed to take reasonable steps to accommodate
23 her disability.

24
25 4.6 Respondent has met its burden of proving that Appellant’s separation due to disability
26 complied with the requirements of WAC 356-35-010, that Appellant could not perform the essential

1 duties of her position and that reasonable accommodation could not be provided. Therefore, the
2 appeal of Mary Motzer should be denied.

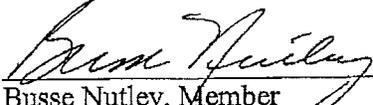
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4 **V. ORDER**

5 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Mary Motzer is denied.

6
7 DATED this 13th day of August, 2003.

8
9 WASHINGTON STATE PERSONNEL APPEALS BOARD

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11 
12 Gerald L. Morgen, Vice Chair

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15 Busse Nutley, Member

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

JOEL HAVLINA,

Petitioner,

v.

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION,

Respondent.

NO. 35901-4-II

CERTIFICATE OF
SERVICE

I certify that I served the original and one copy of the
Brief of Respondent and this Certificate of Service via FedEx
Priority Overnight on May 11, 2007, to:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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/
/

COURT OF APPEALS
DIVISION II
MAY 11 11 59 16
STATE OF WASHINGTON
BY _____
DEPUTY

I also mailed one copy of same via FedEx Priority Overnight to:

George Fearing
Leavy Schultz Davis & Fearing PS
2415 W. Falls Ave.
Kennewick, WA 99336

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of May, 2007, at Spokane, WA.



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