

No. 35901-4-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
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6/21/07

JOEL HAVLINA,

Appellant,

vs.

WASHINGTON STATE;  
and PERSONNEL APPEALS BOARD OF THE STATE OF  
WASHINGTON,

Respondents

APPELLANT'S REPLY BRIEF

GEORGE FEARING, WSBA # 12970  
**LEAVY, SCHULTZ, DAVIS &  
FEARING, P.S.**  
2415 West Falls Avenue  
Kennewick, WA 99336  
(509) 736-1330  
Attorneys for Appellant Joel Havlina

PATRICIA A. THOMPSON #8035  
Assistant Attorney General  
Attorney General of Washington  
Labor & Personnel Division  
1116 West Riverside Avenue  
Spokane, WA 99201-1194  
Attorneys for Respondents

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## **I. ARGUMENT**

### **A. THIS COURT SHOULD ENTERTAIN THE MERITS OF JOEL HAVLINA'S APPEAL ON THE MERITS.**

Joel Havlina admits that, in his opening brief, he failed to fulfill the dictate of RAP 10.3(h), which requires the appellant, from an administrative agency decision, to assign error to the agency's findings of fact and conclusions of law. In his first reply brief, Joel Havlina attempted to supplement his assignments of error by assigning error to those portions of the Personnel Appeals Board's ruling, which Havlina challenges.<sup>1</sup> Joel Havlina respectfully requests that this Court of Appeals review his appeal on the merits.

On appeal, Joel Havlina does not challenge any of the Personnel Appeals Board's findings of fact. Joel Havlina challenges the Personnel Appeals Board's conclusions of law only to the extent that the conclusions state that the State of Washington reasonably accommodated Joel Havlina, despite the State's failure to look for jobs which might be available in

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<sup>1</sup> The Court Clerk rejected Havlina's first reply brief because it contained supplemental assignments of error. Joel Havlina has prepared an appendix, which lists those assignments of error he would forward if he were allowed to supplement the assignments.

departments other than the Department of Transportation. By his assignment of error in the opening brief, Joel Havlina gave the State of Washington fair notice of the only contention he raises on appeal. Therefore, the State of Washington was not prejudiced by the failure of Joel Havlina to assign any errors to the Personnel Appeals Board's conclusions of law.

RAP 1.2(a) provides:

**(a) Interpretation.** These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

A technical violation of the appellate rules will not ordinarily bar appellate review where justice is to be served. **Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.**, 107 Wn.2d 427, 431, 730 P.2d 653 (1986); **Goehle v. Fred Hutchinson Cancer Research Center**, 100 Wn.App. 609, 613, 1 P.3d 579 (2000). Thus, the appellate court will review the merits of the appeal where the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief. **Green River Community College, Dist. No. 10 v. Higher Educ.**

**Personnel Bd.**, 107 Wn.2d 427, 431, 730 P.2d 653 (1986); **Goehle v. Fred Hutchinson Cancer Research Center**, 100 Wn.App. 609, 613, 1 P.3d 579 (2000).

Washington courts have restated, in various words, the rule favoring reaching the merits of an appeal. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced by the failure to assign an error, and the respondent is not thereby prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

**Delagrave v. Employment Security Department of State of Washington**, 127 Wn.App. 596, 607, 8, 111 P.3d 879 (2005). Under RAP 1.2(a), which makes the serving of justice of greater importance than a strict technical application of the rules, the failure to make specific reference in an assignment of error to a challenged finding as required by RAP 10.3(g) will not prevent review when the nature of the challenge is clear and the finding in question is set forth in the text of the argument on the issue. **Daughtry v. Jet Aeration Co.**, 91 Wn.2d 704, 592 P.2d 631

(1979).<sup>2</sup> Finally, RAP 10.3 does not prevent an appellate court from considering a party's argument despite a failure to properly assign error when the brief clearly discloses what action is considered erroneous and the opposing party is presented with no difficulty in responding to the issue. **State v. Clark**, 53 Wn.App. 120, 123, 765 P.2d 916 (1988).

The State of Washington addressed, in its brief, the sole substantive issue raised by Joel Havlina. Therefore, the State of Washington is not prejudiced by this court reaching the merits of the appeal.

**B. THE COURT NEED NOT DEFER TO THE PERSONNEL APPEALS BOARD, WHEN DETERMINING IF THE STATE OF WASHINGTON REASONABLY ACCOMMODATED JOEL HAVLINA.**

The State of Washington faults Joel Havlina for failing to identify the section of RCW 41.64.130(1), under which Havlina seeks reversal. Joel Havlina seeks reversal under subsection (a) of the statute, which subsection demands reversal when the administrative order is “founded on

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<sup>2</sup> This decision involves RAP 10.3(g), rather than RAP 10.3(h), which addresses assignments of error to jury instructions, but the same principle applies.

or contained an error of law.” The Personnel Appeals Board and the Superior Court committed legal error, when each concluded that the State of Washington had no duty of reasonable accommodation to seek employment for Joel Havlina in departments other than the Department of Transportation. Where a party raises an error of law, the reviewing court engages in *de novo* review, since a court holds the inherent authority to determine the correct law, independently of the agency’s decision. **Franklin County Sheriff’s Office v. Sellers**, 97 Wn.2d 317, 330, 646 P.2d 113 (1982).

## II. CONCLUSION

Joel Havlina respectfully requests that the Court of Appeals address the merits of his appeal and correct the error of law committed by the Superior Court and Personnel Appeals Board.

DATED this 19<sup>th</sup> day of June, 2007.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.  
Attorneys for Appellant Joel Havlina

  
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GEORGE FEARING #12970

### **III. APPENDIX**

Appellant Joel Havlina would assign error to the Personnel

Appeals Board's Conclusion of Law 4.4, which reads:

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

CP 11.

Appellant Joel Havlina would assign error to the Personnel

Appeals Board's Conclusion of Law 4.5, which reads:

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

CP 11.

**CERTIFICATE OF SERVICE**

21<sup>st</sup>

I hereby certify that on the ~~19<sup>th</sup>~~ <sup>21<sup>st</sup></sup> of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

- |                                     |                  |                             |
|-------------------------------------|------------------|-----------------------------|
| <input type="checkbox"/>            | Hand-delivered   | PATRICIA A. THOMPSON, #8035 |
| <input checked="" type="checkbox"/> | First-Class Mail | Attorney General's Office   |
| <input type="checkbox"/>            | Overnight Mail   | 1116 West Riverside Avenue  |
| <input type="checkbox"/>            | Facsimile        | Spokane, WA 99201-1194      |

DATED this ~~19<sup>th</sup>~~ <sup>21<sup>st</sup></sup> day of June, 2007.

  
\_\_\_\_\_  
Kristi L. Flyg