BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

TOM EISENBACH, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	Case No. DSEP-01-0010 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. The hearing was held at the University of Washington, South Campus Center, Seattle, Washington, on December 10, 2002. RENÉ EWING, Board Member, reviewed the file, exhibits and the recorded proceedings and participated in the decision in this matter.

1.2 **Appearances.** Appellant Tom Eisenbach did not appear. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

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

1.4 **Citations Discussed.** Smith v. Employment Security Dept., PAB No. S92-002 (1992); WAC 356-05-102; WAC 356-35-010.

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II. FINDINGS OF FACT

2.1 Appellant Tom Eisenbach was a Trades Helper and permanent employee for Respondent University of Washington. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on November 13, 2001.

2.2 On September 13, 2002, the Board orally granted Appellant's request for a continuance of his September 19, 2002 hearing. By order dated September 23, 2002, the Board rescheduled the hearing for December 10, 2002. On December 9, 2002, Appellant telephoned the Personnel Appeals Board (PAB) office to ask for a second continuance. Appellant stated that he needed to care for his infant daughter the next day due to a medical appointment scheduled for his girlfriend, his child's mother. Appellant subsequently faxed a written continuance request with an attached document purporting to be instructions for a medical appointment for "Lorena J. Eisenbach" at 10:30 a.m. on December 10, 2002. Due to apparent irregularities in the document provided, PAB staff contacted Appellant and directed him to appear at the hearing at 9:00 AM on December 10 with the original document, at which time he could make an oral motion before the Board for a continuance. Appellant did not appear and the hearing proceeded as scheduled.

2.3 Appellant became employed as a Trades Helper in the Facilities Services Department on August 28, 1995.

2.4 As a Trades Helper, Appellant performed maintenance to building ventilation systems. The Trades Helper job was very physically demanding, and Appellant worked on the filter crew changing the heating, ventilation, and air conditioning (HVAC) system filters. The essential functions of the position required that Appellant frequently stand, walk, turn/twist, bend/stoop,

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crawl, and climb ladders and required constant reaching up and out. The job also required that Appellant frequently lift up to 25 pounds and occasionally lift up to 50 pounds.

2.5 On January 5, 2000, Appellant suffered an on-the-job injury while in the process of moving boxes. Appellant developed pain in his back and down his left leg. Appellant was diagnosed with a herniated disk. Appellant has not worked since that date. Appellant's physician stated that Appellant could return to work with a lifting restriction limited to no more than five pounds. Appellant subsequently filed an injured worker's claim with the Department of Labor and Industries (L&I). Appellant was seeing Vocational Counselor Holly Stuermann.

2.6 Appellant was being treated by Dr. Susan C. Schmitt with the Everett Clinic. On June 16, 2000, Dr. Schmitt recommended that Appellant attend a two to three week work hardening program designed to prepare Appellant to return to work.

2.7 On July 25, 2000, Appellant met with Dr. Schmitt, and she noted no change in Appellant's medical condition. In a report to the Department of Labor and Industries she noted that Appellant had not followed through with the prior recommendation that he attend the work hardening program. Appellant had indicated to Dr. Schmitt that he was not able to attend the program due to financial constraints.

2.8 On February 21, 2001, Appellant was examined by Dr. Leighton Chan with the University of Washington Medical Center. Appellant continued to complain of back pain. Appellant also indicated to Dr. Chan that he "was not interested in continuing as a trades helper or laborer at the

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University of Washington" and that he was interested "in going back to school for retraining in another career."

2.9 On May 16, 2001, Dr. Chan completed a review of Appellant's job duties, as outlined in the job analysis. Based on his comparison review of Appellant's medical condition to the job analysis, Dr. Chan signed a physician's statement in which he disagreed that Appellant could perform the duties described in the job analysis. Dr. Chan also concluded that Appellant could perform no lifting or carrying of 10 pounds or more and could not perform overhead work. Dr. Chan estimated the duration of the restrictions as unknown, but possibly one to two years.

2.10 On May 18, 2001, Vocational Counselor Stuermann completed an "Ability to Work Assessment" Report for Appellant. This assessment included a review of Appellant's education/work history, his medical reports, the physician's statement from Dr. Chan, and a job analysis of his position as a Trades Helper. Ms. Stuermann concluded that Appellant's medical status was unstable and that Appellant could not continue to perform the same job or a modified version of the Trades Helper job. She also concluded that Appellant did not have any other identified skills or physical ability for other occupational possibilities.

2.11 On July 26, 2001, Rick Cheney, Director of Maintenance and Alterations, notified Appellant that he was recommending Appellant's separation due to his physical incapacity. Mr. Cheney invited Appellant to respond to the recommendation by August 9, 2001. Appellant received the letter on August 1, 2001, however he never submitted a response.

2.12 Based on the information received from Ms. Stuermann and from Dr. Chan, who determined that Appellant could not perform the essential functions of his Trades Helper position, Jeraldine

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McCray, Associate Vice President of Facilities Services, informed Appellant of his separation due to disability, effective October 12, 2001.

III. CONCLUSIONS OF LAW

3.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

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

3.3 The issue here is whether Respondent complied with the provisions of WAC 251-10-070 when it separated Appellant from his position as a Trades Helper due to his disability. WAC 251-10-070 provides that "[a]n employee unable to adequately perform the work of the employee's position or class due to… physical incapacity may be separated from service after the institution has made good faith efforts to reasonably accommodate the employee's disability… ."

3.4 Appellant's physician stated that Appellant could not perform the essential duties of his position, and Appellant currently remains disabled. Therefore, Appellant's condition meets the definition of a disability. Respondent relied on the appropriate feedback from Appellant's physician that Appellant was disabled and unable to perform the essential duties of his Trades Helper position. Furthermore, Appellant's physician did not indicate that the essential duties of Appellant's Trades Helper position could be modified or accommodated in order for Appellant to perform them. Finally, Appellant had no other educational background or work experience, and

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therefore, Respondent appropriately determined there were no other positions for which Appellant was qualified.

3.5 Respondent has met its burden of proof that Appellant could not perform the essential duties of his position and that reasonable accommodation could not be provided. Therefore, the disability separation of Tom Eisenbach should be affirmed, and his appeal denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Tom Eisenbach is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
René Ewing, Member

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