BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

REBECCA ROBERTS, Appellant, v. UNIVERSITY OF WASHINGTON, Respondent.	)	Case No. RULE-01-0027 (Disability Separation) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for a hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and RENÉ EWING, Member. The hearing was held at the University of Washington in Seattle, Washington, on October 24, 2002.

1.2 **Appearances.** Appellant Rebecca Roberts was present and was represented by Edward E. Younglove, Attorney at Law of Parr and Younglove, P.L.L.C. 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 358-30-170; WAC 356-35-010.

II. FINDINGS OF FACT

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2.1 Appellant Rebecca Roberts was a Custodian and permanent employee for Respondent University of Washington in Facilities Services. 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 October 22, 2001.

2.2 Appellant began employment as a Custodian with Respondent in September 1979. Appellant sustained an on-the-job injury and was unable to perform her custodial duties. As a result, she began disability leave on April 17, 2000.

2.3 By letter dated October 10, 2000, Appellant's medical provider notified Respondent that Appellant would be unable to perform the essential functions of a custodian with or without accommodation. Appellant was restricted from standing or walking for over a one hour period in an eight hour day and was restricted from lifting or carrying over 20 pounds of weight.

2.4 Appellant was able to perform clerical work and was taking office and clerical courses in school. Appellant's medical provider specifically indicated that Appellant could perform Office Assistant (OA) work.

2.5 Because Appellant was unable to return to her Custodian position, Respondent began the reasonable accommodation process. By letter dated April 5, 2001, Respondent informed Appellant that her leave of absence would continue while the University attempted to identify a vacant position that would accommodate Appellant's limitations.

2.6 Respondent first looked within Facility Services for a vacant position that had a salary range maximum that was up to two percent more or less than the salary range maximum for Custodians and for which Appellant met the position's essential functions with or without accommodation. In

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accordance with University practice, this search lasted from April 16, 2001 to April 27, 2001. Respondent then looked campus-wide for a comparable, vacant position. This search lasted from April 30, 2001 to May 11, 2001.

2.7 Positions at the OA 2 and 3 levels were at pay ranges more than 2 percent above the Custodian pay range. For purposes of reasonable accommodation, a vacant OA 2 or 3 position could not be considered a comparable position. However, Appellant was able to compete for such positions on a promotional basis.

2.8 Respondent identified 17 job positions that met the salary range criteria for consideration as a possible reasonable accommodation. However, two of the positions were suspended and six of those positions had already been offered to other candidates. Of the remaining nine positions, eight required lifting that was beyond Appellant's physical capabilities and the remaining position required espresso bar experience, which Appellant did not have.

2.9 Because no vacant positions were found between April 16 and May 11, 2001, on May 30, 2001, Respondent notified Appellant that the process of attempting to identify a position had been completed and that she would be separated from employment.

2.10 Respondent does not maintain a "candidate bank" (formerly "register") for the OA 1 classification. However, subsequent to October 12, 2000, Respondent filled four OA 1 positions. However, these positions came open outside the search period Respondent used for identifying a reasonable accommodation for Appellant. If an OA 1 position had been open during the search period and Appellant met the specific position requirements, Appellant would have been offered the position.

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2.11 Specific position requirements (SPRs) are assigned to individual positions and require skills and abilities beyond those found in the minimum qualifications for a classification. WAC 251-01-390 defines specific position requirements as "elements which are essential job elements."

2.12 By letter dated October 8, 2001, Jeraldine McCray, Associate Vice President for Facilities Services, notified Appellant of her separation from her Custodian position, effective October 26, 2001.

2.13 WAC 251-18-255 addresses certification of eligibles for positions with specific position requirements**.** The rules states:

> (1) All specific position requirements shall be justified by a job analysis in accordance with WAC 251-17-010(2).
> (2) When specific position requirements have been documented for a position, only the names of eligibles who have demonstrated a satisfactory level of knowledge, skill or ability on such specific position requirements shall be certified for that position.

2.14 Respondent's policy on disability accommodation states, in relevant part:

> . . . .
>
> For employees, if the University determines that it is not possible to accommodate an individual in the current position, and he or she can work at least half time or more, the University will attempt to place the employee in a vacant position in the appointing authority's unit that meets the following requirements:
>
> 1. The position has a salary range maximum that is within plus or minus 2% of the salary range maximum for the employee's position;
> 2. Is at the same or lower per cent time as the employee's position
> 3. The employee meets the position's minimum qualifications and special skill requirements; and,
> 4. The employee is able to perform the position's essential functions with or without accommodation.

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If a position cannot be found in the appointing authority's unit, a University wide search for a vacant position is conducted. The University wide search seeks to identify positions:

1. For which the employee meets the position's skill requirements and minimum qualifications;

2. That pay no more than 2% above the salary range maximum of the employee's position; and,

3. That are at the same or lower per cent time or less as the employee's position.

. . . .

If an individual cannot be accommodated in the current position, and if placement in an alternative vacant position is not possible, the individual may be separated from University employment. Employees who are separated from UW employment are eligible for reemployment assistance for up to 3 years following separation. Former employees who have been released by their health care providers to return to work should contact the Recruiting and Candidate Services Office to begin the reemployment process.

2.15 The University's Policy on Reasonable Accommodation of Employees With Disabilities states, in relevant part:

2. Purpose

This policy sets forth broad guidelines for meeting reasonable accommodation requirements of state and federal law. The University of Washington has developed internal procedures for the implementation of these guidelines, and submitted those procedures to the Governor's Affirmative Action Policy Committee for review and approval prior to adoption. This policy should not be construed as providing rights or obligations not provided under applicable laws.

. . . .

5. Obligations and Rights of the Employer, Employee, and Applicant

The University of Washington will provide reasonable accommodation to the known physical, mental, or sensory limitations of an otherwise qualified individual with a disability.

The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.

The need for reasonable accommodation shall not adversely affect the consideration of an individual with a disability for employment, training, promotion, or opportunity to enjoy equal terms, benefits, privileges, or conditions of employment.

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Generally, it is the obligation of an individual with a disability to request a reasonable accommodation.

. . . .

2.16 The University of Washington Operations Manual states, in part:

The University will endeavor to provide reasonable accommodations for employees and appointees with documented disabilities in order to keep them in their current positions. . . . the University will, after receipt of all needed medical documentation and a skills assessment interview, attempt to place the person in a vacant equivalent or lower position. The search for such a position will take place over a ten-day period and will consider all positions for which closing dates have not been reached and/or referrals not been made; are at an equivalent or lower level; and for which the employee meets the minimum qualifications and specific position requirements. If no such position is available, the employee will be separated from the University.

2.17 WAC 251-10-070, Separation, provides:

(1) An employee unable to adequately perform the work of the employee's position or class due to mental, sensory, or physical incapacity may be separated from service after the institution has made good faith efforts to reasonably accommodate the employee's disability (such as, but not limited to, assessing other positions and/or classes for which the employee may be qualified and assisting in the employment/application process).

(2) A written document which includes the requirements established in WAC 251-10-080 informing the employee of the option to apply for return to employment will be provided prior to separation.

(3) A permanent employee being separated due to disability shall receive a preseparation notice and meet the requirements as outlined in WAC 251-11-020.

(4) As provided in WAC 251-12-080, a separated employee may appeal his/her separation.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent contends that the University attempted to place Appellant back in her position but she was unable to perform the essential functions of the job. Respondent argues that Appellant was placed on extended leave while the University attempted to identify a position for which she was qualified and that met her need for accommodation. Respondent asserts that the University did what it was legally obligated to do in seeking a reasonable accommodation for Appellant and that pursuant to University policy, they proceeded expeditiously to search for positions and notify Appellant. Respondent contends that Appellant was unable to perform the physical work or that she lacked the minimum qualifications or specific position requirements for the vacant positions identified as possible matches during the reasonable accommodation search period. In addition, Respondent contends that outside of the formal search period, Appellant could have applied for vacant positions but she either chose not to do so or was not selected to fill the positions.

3.2 Appellant argues that window of time Respondent used to search for a reasonable accommodation was too restrictive and asserts that Respondent had an ongoing obligation to identify a position for her. In addition, Appellant argues that Respondent relied on unapproved specific position requirements to determine that she did not meet the requirements of positions that were identified as possible reasonable accommodations.

IV. CONCLUSIONS OF LAW

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

4.2 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

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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).

4.3 Between April 16 and May 11, 2002, Respondent made a good faith effort to accommodate Appellant. However, Respondent did not separate Appellant from employment until October 8, 2001. Reasonable accommodation is expected to be an ongoing, interactive process. Respondent should have continued to review vacant OA 1 positions and offer appropriate positions to Appellant until the date of her separation.

4.4 Appellant has an obligation to participate in the reasonable accommodation process. Because she was attending school and obtaining clerical skills, she should have taken steps to ensure that Respondent was timely notified of her successful completion of relevant courses and the skills she mastered.

4.5 Appellant failed to provide any evidence or testimony that during the period of time subject to this appeal, Respondent used unapproved specific positions requirements.

4.6 In fashioning a remedy for this appeal, we considered the notice requirements in the general government reasonable accommodation rule. (WAC 356-35-010). The general government rule requires that an employee be given, at a minimum, sixty-days notice of separation. The rule anticipates that during the notice period, employers will continue to seek a reasonable accommodation for the employee.

4.7 Here, Respondent ceased its attempts to accommodate Appellant nearly five months prior to notifying her of her separation. We find this delay in the process unacceptable. Therefore,

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Respondent should renew its search for an OA 1 position that meets Appellant's restrictions. This renewed search should begin three days following the date of this order and should continue for the next 60 calendar days.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Rebecca Roberts is granted, in part, and Respondent is directed to renew its search for an OA 1 position that meets Appellant's restrictions. This renewed search will begin three days following the date of this order and will continue for the next 60 calendar days.

DATED this _____ day of _____, 2002.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

_____
René Ewing, Member

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