BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ATLAS WHELESS, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	)	Case No. DSEP-99-0006 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF 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, GERALD L. MORGEN, Vice Chair. The hearing was held on May 31, 2001, in the Conference Room 256 at the Board of Industrial Insurance Appeals in Olympia, Washington. WALTER T. HUBBARD, Chair, reviewed the record and participated in the decision in this matter. LEANA D. LAMB, Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Atlas Wheless was present and represented himself *pro se*. Mitchel R. Sachs, Assistant Attorney General, represented Respondent Department of Transportation.

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 356-35-010.

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II. PRELIMINARY REQUEST FOR CONTINUANCE

2.1 At the outset of the hearing, Appellant requested a continuance of the hearing. Appellant stated that he had been out of town, did not receive a copy of the notice of hearing, and had not been able to obtain legal assistance.

2.2 Respondent objected to the request for continuance. Respondent argued that Appellant filed his appeal in November 1999, that he had been given proper notice of his hearing, and that he had ample opportunity to obtain legal counsel.

2.3 Appellant filed his appeal on December 20, 1999. In his appeal, he provided the Board with his address and telephone number.

2.4 On December 22, 2000, Board staff scheduled his hearing for May 31, 2001. Appellant was served with notice of his hearing by both regular and certified mail at his last known address. The copy sent by certified mail was returned to the Board on January 25, 2001 marked "unclaimed." The copy sent by regular mail was not returned.

2.5 On April 19, 2001, Board staff confirmed the location of Appellant's hearing. Appellant was served with the notice scheduling the location of his hearing by both regular and certified mail at his last known address. The copy sent by certified mail was returned to the Board on May 6, 2001 marked "unclaimed." The copy sent by regular mail was not returned.

2.6 Appellant never provided the Board with a change of address or telephone number.

2.7 After considering the arguments of the parties, the Board denied Appellant's request. The Board found that service of the hearing notices was properly completed and that Appellant failed to show good cause for a last minute request for continuance. [See WAC 358-30-010, WAC 358-30-190 and WAC 358-30-040].

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III. FINDINGS OF FACT

3.1 Appellant Atlas Wheless was a Maintenance Technician 2, Bridge, and 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 December 20, 1999.

3.2 Bridge Maintenance Technicians inspect and maintain bridges. Their duties include washing and cleaning, sand blasting, painting, welding, burning steel, staging, rigging, and span bridge operation. These duties are physically demanding and are performed in a variety of environments including heights, indoors in confined spaces, and outdoors in all types of weather. These positions are required to have a Commercial Driver's License (CDL).

3.3 Appellant is an insulin dependent diabetic. To obtain a CDL, insulin dependent diabetics are required to obtain a waiver from the Department of Licensing. Appellant did not have a waiver and subsequently lost his CDL. In July 1998, Respondent learned that Appellant's CDL was invalid due to his medical condition.

3.4 In July 1998, Appellant suffered a seizure. As a result, he was off work. On July 27, 1998, Appellant returned to work with a physician's statement indicating that he could not drive or operate heavy equipment. On August 12, 1998, Appellant began a "light duty" assignment in Respondent's Corson Avenue shop.

3.5 Because the Corson Avenue shop was running out of light duty work for Appellant, effective October 26, 1998, he was assigned to the first floor mailroom at Regional Headquarters on Dayton Avenue. Appellant worked in the mailroom for a few days. Candy Coe, Supervisor of Offices Services, observed Appellant appearing to be asleep when he should have been working. She was concerned that he was not well enough to be working. She shared her concerns with Kittie Tyler, Human Resource Consultant, and told her that Appellant's assignment to the mailroom was

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not working out. By letter dated October 30, 1998, Appellant was informed that the agency had no more light duty work available and he was placed on leave without pay.

3.6 Respondent intended to have Appellant work in the mailroom until a Computer Aided Drafting (CAD) workstation was made available and then to transfer Appellant from his Maintenance Technician 2 position to a Transportation Technician 2 in-training position. During the interim, Appellant was to work with Heather McNabb, an outside vocational consultant hired by the agency, and his physician to ascertain whether he could be placed in the CAD operator position. However, on October 23, 1998, Appellant informed Ms. McNabb that he would not sign a consent form allowing her to speak directly with his physician.

3.7 The agency determined it could not continue seeking an accommodation for Appellant without a report from his physician and Ms. McNabb on his ability to perform the essential job functions of the CAD operator position. Appellant was informed that a job analysis must be completed prior to his reassignment to the CAD position and that if he failed to comply with the department's request for medical documentation he may lose his Americans with Disability Act (ADA) protection.

3.8 On February 8, 1999, Appellant's physician indicated that Appellant could return to work and perform the duties of the CAD operator position.

3.9 By letter dated July 19, 1999, Respondent informed Appellant that a CAD operator position was available and told him he was to report to work on August 2, 1999 at the Regional Headquarters on Dayton Avenue.

3.10 On July 26, 1999, Appellant had a telephone conversation with Kittie Tyler in which he stated that he had further medical issues that required surgery and that he was unable to return to work on August 2, 1999. Ms. Tyler confirmed their conversation by letter dated July 26, 1999. She

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provided Appellant with a medical authorization form for signature so that the agency could contact his physicians to request an update on his condition and determine when he would be able to return to work. Appellant signed a form authorizing his physician to release any and all medical information to the department.

3.11 By letter dated September 1, 1999, Ms. Tyler informed Appellant that his physicians had not provided the information requested by the department. Ms. Tyler told Appellant that before the department could proceed with his accommodation, they needed a date when he could return to work, an assessment as to whether he could perform the essential functions of a CAD operator and any further suggestions on reasonable accommodations from his physician. Ms. Tyler instructed Appellant to provide the requested information by no later than October 22, 1999. Ms. Tyler warned Appellant that if she did not received the information, the department would proceed with a disability separation.

3.12 Appellant informed Ms. Tyler that he had a new physician. By letter dated September 15, 1999, Ms. Tyler contacted Appellant's new physician and requested information about Appellant's ability to return to work in the CAD operator position. By letter dated October 8, 1999, Ms. Tyler informed Appellant that his physician had not provided the information requested by the department. Ms. Tyler again told Appellant that the department could not proceed with his accommodation until they received information from his physician regarding a date when he could return to work, an assessment as to whether he could perform the essential functions of a CAD operator and any further suggestions on reasonable accommodations. Ms. Tyler instructed Appellant to provide the requested information by no later than October 22, 1999. Ms. Tyler warned Appellant that the department would proceed with a disability separation, effective December 22, 1999, if she did not receive the information.

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3.13 The department did not receive a response from either Appellant or his physician. By letter dated November 19, 1999, Thomas Lentze, Assistant Regional Administrator, notified Appellant of his disability separation from employment effective January 19, 2000.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that Appellant was a model employee who became disabled and was no longer able to perform the duties of his position. Respondent contends that the department complied with the requirements of the ADA, Washington State laws and the Merit System Rules in attempting to accommodate Appellant. However, despite the department's diligent efforts, Appellant did not provide the responses and information the department requested. Respondent contends that the department held the CAD operator position vacant for months but because of the lack of response from Appellant and his physician, the department had no choice but to go forward with the disability separation.

4.2 Appellant argues that he was a good employee and that the only thing that changed was his medical condition. He asserts that he did everything the department asked him to do, but that he does not know what happened to the information after it left him. Appellant contends that if he were on the reduction in force (RIF) register, he would accept any job that was offered to him.

V. CONCLUSIONS OF LAW

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

5.2 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).

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5.3 Respondent has met its burden of proof. It is undisputed that due to his medical condition, Appellant could no longer perform the duties of his Bridge Maintenance Technician position. Respondent has established that the department complied with the requirements of the WAC 356-35-010 and that reasonable accommodation could not be provided. Therefore, the disability separation of Atlas Wheless should be affirmed and his appeal should be denied.

5.4 In his closing comments, Appellant stated that he would accept a job from the reduction in force register. WAC 356-35-010 provides that "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." We encourage Appellant to contact the Department of Personnel and explore the possibility of having his name placed on the appropriate RIF registers.

VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Atlas Wheless is denied.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair

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