BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

GARY A. SCOTT, Appellant, v. MILITARY DEPARTMENT, Respondent.	Case No. DSEP-98-0007 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and NATHAN S. FORD JR., Member. The hearing was held in the Cascade Room of the Department of Social and Health Services' West Seattle Training Center in Seattle, Washington, on December 9, 1999. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Gary A. Scott was present and was represented by Mark S. Lyon, General Counsel for the Washington Public Employees Association. Respondent Military Department was represented by David J. Slown, Assistant Attorney General.

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. FINDINGS OF FACT

2.1 Appellant Gary A. Scott was a General Repairer and a permanent employee for Respondent Military Department at the Washington State National Guard Armory in Seattle, Washington. 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 August 5, 1998.

2.2 Respondent employs general repairers to maintain the facilities at State armories. Typically, one general repairer is assigned to each armory. For the most part, the general repairer is the only department employee specifically assigned to an armory. As a result, general repairers must be able to work independently and without direct supervision. Appellant was the only general repairer assigned to the Seattle armory.

2.3 On December 24, 1995, Appellant was in a motorcycle accident. He was thrown from his motorcycle and received an injury to his brain. As a result, Appellant had difficulty with his coordination and equilibrium, he suffered from headaches, and had difficulty concentrating and remembering things.

2.4 Within days of his accident, Appellant attempted to return to work. However, due to his injury, he was unable to work, and as a result, he was off work until June 18, 1996. While he was off work, Appellant received therapy for his injury and followed a treatment plan that was designed to assist him with his daily living activities, as well as with his functional cognitive skills and training.

2.5 On April 4, 1996, Appellant underwent a neuropsychological evaluation. At that time, Appellant was experiencing a "decline in non verbal [sic], visual-spatial problem solving abilities; a decline in memory ability especially immediate memory for figural information and delayed memory for verbally processed information; decreased hand coordination when both hands are used

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together, decreased math abilities, and decreased ability to discern implicit non verbal rules and benefit from corrective feedback." (Ex. R-1).

2.6 On June 17, 1996, Appellant's physician released him to work "light duty" 20 hours per week for two weeks followed by a gradual increase in his hours if appropriate.

2.7 On June 18, 1996, Appellant returned to work as a general repairer at the Kent armory. In this position, Appellant's work was supervised by Dan Ouimet, Plant Mechanic. For the first month, Mr. Ouimet believed that Appellant was able to satisfactorily perform the duties of his position.

2.8 Effective August 1, 1996, Appellant's hours of work increased to 30 hours per week. After Appellant's hours of work increased, Mr. Ouimet observed a deterioration in Appellant's performance. Mr. Ouiment determined that Appellant was unable to follow simple directions, required continuous supervision, was easily distracted, and failed to work in a safe manner. By letter dated September 12, 1996, Mr. Ouimet concluded that Appellant should not be working.

2.9 Effective November 5, 1996, Appellant was assigned to home until a re-evaluation of his ability to perform the duties of his position was completed. By letter dated November 19, 1996, Appellant's rehabilitation counselors at Harborview Medical Center recommended that because of the difficulties Appellant was experiencing at work, he be placed on authorized medical leave without pay. Respondent complied with the recommendation.

2.10 Appellant continued to participate in rehabilitation activities. On March 4, 1997, Appellant's Harborview Medical Center rehabilitation counselors recommended that Appellant be allowed to return to work 20 hours per week, that he be paired with a co-worker to provide him immediate feedback concerning his work, and that as he demonstrated his competency, his hours and responsibilities be increased.

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2.11 By letter dated March 24, 1997, Respondent informed Appellant that based on the assessment provided by Harborview Medical Center, the department was unable to place Appellant in a half-time position working with a co-worker. As an accommodation, Respondent offered Appellant six months of leave without pay, beginning April 1, 1997. Respondent hoped that with continued rehabilitation, Appellant would be able to return to his general repairer position.

2.12 On May 19, 1997, Appellant underwent a second neuropsychological evaluation. At this time, Appellant was continuing to suffer from difficulties with attention, memory and non-verbal problem solving. The evaluation resulted, in part, in recommendations that Appellant continue to work with rehabilitation counselors, that an on-the-job evaluation of Appellant's work performance be part of his vocational evaluations, that Appellant use memory and attention compensation strategies, and that Appellant undergo further evaluation at the rehabilitation clinic to rule out any other neurological or medical event.

2.13 By letter dated July 24, 1997, Respondent informed Appellant that the department was unable to return Appellant to work because of his inability to perform the essential elements of his job and because of the lack of an open position in the maintenance department. Respondent indicated that returning Appellant to the maintenance team would require the department to create another position and change the manner in which the department performed maintenance which would create a hardship for the department.

2.14 By letter dated September 30, 1997, Respondent asked for a third neuropsychological evaluation. Dr. Dawn Ehde, a Clinical Psychologist with Harborview Medical Center, informed Respondent that another neuropsychological evaluation was not indicated and that it was unlikely that Appellant would show any significant changes since the May 1997 evaluation. In addition, Dr. Ehde recommended an objective on-the-job evaluation of Appellant's functional work performance. Respondent did not follow through with Dr. Ehde's recommendation for an on-the-job evaluation.

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2.15 Appellant continued to participate in rehabilitation activities.

2.16 Prior to determining whether the department could offer Appellant a reasonable accommodation, Respondent asked Appellant to participate in an independent medical evaluation (IME). On June 23, 1998, Appellant reported for the IME. Appellant understood that the evaluation was to be of his physical condition; however, the IME also included a third neuropsychological evaluation. When the physician attempted to administer the neuro-psychological evaluation, Appellant refused to proceed with the examination. As a result, the physician was unable to determine whether Appellant continued to suffer from any cognitive impairment.

2.17 By letter dated July 6, 1998, Major General Gregory P. Barlow, the Adjutant General, informed Appellant that because he refused to complete the IME, Respondent was unable to determine Appellant's fitness for duty and was unable to provide him with reasonable accommodation. Major General Barlow notified Appellant of his separation from employment with the department. Appellant's separation was effective September 4, 1998.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that if Appellant had undergone the third neuropsychological evaluation, most likely he would have been certified to return to work. However, Respondent contends that because Appellant refused to complete the evaluation, the agency had no choice but to separate him from his position.

3.2 Appellant argues that Respondent failed to prove that the department could not reasonably accommodate his condition. Appellant further argues that it was not reasonable for Respondent to require Appellant to undergo a third neuropsychological evaluation when he had already been subjected to two previous evaluations. Appellant contends that any improvement in his condition

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between the second and third evaluation would have been minimal and that Respondent should have used the results of the second evaluation to identify an accommodation for him.

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 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 WAC 356-35-010(4) provides, in part, that "determination 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 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. . . ."

4.4 WAC 356-35-010(4) allows the appointing authority to exercise discretion in determining whether to request an independent medical evaluation. In this case, the appointing authority elected to exercise his discretion and scheduled Appellant for an IME. Although Appellant had undergone two previous neuropsychological evaluations, more than one year had elapsed between the second evaluation and the IME. Because of the length of time between the second evaluation and the IME, the appointing authority's request for a third neuropsychological evaluation was reasonable.

4.5 WAC 356-35-010(1) provides, in part, that an appointing authority "may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided. . .

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." Because Appellant refused to complete the IME, the appointing authority could not ascertain whether Appellant's disability affected his ability to perform the essential functions of his job. Furthermore, because of Appellant's refusal to complete the IME, the appointing authority did not have the information necessary to determine whether a reasonable accommodation was necessary and if so, whether a reasonable accommodation could be offered to Appellant.

4.6 Respondent has met its burden of proving that under the unique circumstances presented here, the department was unable to offer Appellant reasonable accommodation. Therefore, the disability separation of Gary A. Scott should be affirmed and his appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Gary A. Scott is denied.

DATED this _____ day of _____, 2000.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

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Nathan S. Ford Jr., Member

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