BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ROGER CLAY, Appellant, v. DEPARTMENT OF GENERAL ADMINISTRATION, Respondent.	)	Case No. DSEP-00-0007 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and LEANA D. LAMB, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on August 1, 2001.

1.2 **Appearances.** Appellant Roger Clay was present and was represented by Edward Earl Younglove III, Attorney at Law, of Parr & Younglove, P.L.L.C. Stewart Johnston, Assistant Attorney General, represented Respondent Department of General Administration.

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 Roger Clay was a Custodian and permanent employee for Respondent Department of General Administration in the Division of Capitol Facilities. 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 July 17, 2000.

2.2 Appellant became employed as a Custodian with the Department of General Administration (GA) in 1994. On January 4, 1999, Appellant suffered an on-the-job injury to his lower back. Appellant has not worked since that date.

2.3 By letter dated February 12, 1999, Personnel Officer Cyndy Putscher informed Appellant of his eligibility to use family medical leave during his absence due to the on-the-job injury. She also informed Appellant that in the alternative, he could use other accrued leave, including sick and annual leave, which would allow him to retain his medical coverage as long as he continued to take one day's paid leave per month. Because Appellant was receiving time loss compensation from the Department of Labor and Industries, he declined to be placed on family medical leave and opted to continue to be on leave without pay status while using one day of paid leave per month.

2.4 The practice at GA is to consult with an employee and his/her physician if a year has passed since he/she has been absent from work due to a disability. In March 2000, Respondent's representatives met with Appellant and his union representative to discuss Appellant's condition, the likelihood and timeframe of his return to work, and the need for any accommodation. During the meeting, Appellant indicated that he was still unable to return to work.

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2.5 By letter dated April 5, 2000, Kenneth C. Skillen, Safety Program Manager, inquired from Appellant's physician, Dr. K. Connolly, whether Appellant was able to perform the duties of his position as a Custodian. The department specifically asked Dr. Connolly to determine what duties, if any, Appellant was able to perform and whether Appellant would be able to perform other duties with reasonable accommodation. The department provided Dr. Connolly with an Essential Functions Job Analysis for Appellant's position that outlined the essential job functions of his position. Dr. Connolly completed the essential functions form and indicated that Appellant could not perform the essential functions of his position as a Custodian. Although listed as an option on the form, Dr. Connolly did not suggest that modifications could be made to Appellant's position that would allow him to return to his custodial position.

2.6 Dr. Connolly's assessment resulted in a June 16, 2000 notification from General Administration to Appellant discussing the department's intent to explore other accommodations. Respondent again met with Appellant on June 26, 2000 to discuss the agency's accommodation process.

2.7 Mr. Skillen conducted a subsequent search of vacant, funded positions for which Appellant was qualified. Mr. Skillen identified two Office Trainee positions: one position was located in the Central Stores Division (warehouse) and the other with Consolidated Mail Services. After reviewing the position descriptions, Appellant indicated his interest in the position located at the Central Store's warehouse.

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2.8 On July 18, 2000, Mr. Skillen provided Dr. Connolly with an Essential Functions Job Analysis for the Office Trainee position at Central Stores to determine whether Appellant could perform the essential functions of the position on a regular fulltime basis.

2.9 Prior to implementing Appellant's separation due to disability, appointing authority Grant Fredericks, Deputy Director, consulted with Mr. Skillen and other human resources staff. Based on the information he received from them, which included Dr. Connolly's determination that Appellant could not perform the essential functions on his custodial position, Mr. Fredericks concluded that separating Appellant due to his disability was the appropriate action.

2.10 By letter dated June 28, 2000, Mr. Fredericks formally notified Appellant of his separation due to disability and the department's inability to accommodate his physical disability. The disability separation became effective August 31, 2000.

2.11 On August 18, 2000, Respondent received a response from Dr. Connolly indicating that Appellant could not perform the activities described in the job analysis of the Office Trainee position. Dr. Connolly indicated that Appellant's condition was "not stable." Dr. Connolly did not indicate that Appellant could perform the essential functions of the position with modifications or accommodations.

2.12 By letter dated August 21, 2000, Ms. Putscher informed Appellant that the department was no longer making available the Office Trainee position as an accommodation option based on Dr. Connolly's determination he could not perform the duties of the position.

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III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that it relied on the appropriate feedback from Appellant's physician that Appellant was disabled and unable to perform the essential duties of his custodial position. Respondent asserts that Appellant's physician did not indicate that essential duties of Appellant's custodial position could be modified or accommodated in order for Appellant to perform them. Respondent contends that it subsequently met with Appellant to discuss his medical separation and to inform him that they would begin the reasonable accommodation process. Respondent asserts that good faith efforts were made to find other positions for Appellant and that Appellant's physician again concluded that Appellant could not perform the duties of the Office Trainee position. Respondent argues that it has complied with WAC 356-35-010 by making a good faith effort to accommodate Appellant's disability. Respondent further argues that the merit system rules did not require them to allow Appellant to use all of his leave prior to initiating a disability separation.

3.2 Appellant argues that an employer can separate an employee only when reasonable accommodation cannot be provided. Appellant argues that Respondent, however, initiated his separation prior to receiving notice from Dr. Connolly that he could not perform the duties of the Office Trainee position. Appellant asserts that Respondent failed to complete the accommodation process prior to issuing his disability separation letter and in effect, provided him with only 10 days notice of his separation after receiving information from Dr. Connolly on August 18, 2000, that he could not perform the Office Trainee duties. Appellant also asserts that the department informed him that he could continue to use his accrued leave at one day a month to maintain his medical eligibility. Appellant contends, however, that at the time of his separation, he had over 100 hours of accrued leave and that Respondent's breach of the agreement affected his insurance coverage.

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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 The issue here is whether Respondent complied with the provisions of WAC 356-35-010 when it separated Appellant from his position as a Custodian due to his disability. WAC 356-05-120 defines a disability as "[a]n employee's physical and/or mental inability to perform adequately the essential duties of the job class." 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.

4.4 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. . ." After receiving information about Appellant's disability, the department had a responsibility to take the necessary steps that would reasonably enable Appellant to perform his job. However, based on Dr. Connolly's prognosis, the appointing authority reasonably concluded that accommodation could not be provided to enable Appellant to perform the essential functions of the Custodian position.

4.5 As a part of its accommodation process, Respondent then conducted a search for vacant, funded positions for which Appellant was qualified. The Office Trainee position was identified at

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the Central Stores warehouse. However, when Respondent notified Appellant of his separation on June 28, 2000, Respondent did not yet have a conclusive determination as to whether Appellant was capable of performing the essential duties of the Office Trainee position. In fact, Respondent did not receive Dr. Connolly's response to its July 18, 2000 inquiry regarding the Office Trainee position until August 18, 2000.

4.6 Subsection (1) of WAC 356-35-010 is clear that an appointing authority may initiate a disability separation of a permanent employee only when reasonable accommodations cannot be provided. Subsection (3) indicates that "[w]hen reasonable accommodations cannot be provided, the employee may be separated by the appointing authority after written notice of, whichever is greater, (a) Sixty calendar days; or, (b) The number of consecutive work days for which only accrued sick and vacation leave . . . could be used." The department failed to comply with the notice requirements of WAC 356-35-010 when it initiated Appellant's separation prior to having the information necessary to determine whether reasonable alterations, adjustments, or changes could be made to enable Appellant to perform the essential duties of the Office Trainee position.

4.7 Appellant raises the issue that Respondent should have allowed him to exhaust all leave balances prior to initiating his separation. WAC 356-35-010 (2) provides as follows:

> If the disability prevents performance of an essential function of the current job, and there is no appropriate work available while trying to reasonably accommodate the employee, the employee shall be allowed to use accrued vacation, shared leave, exchange, and/or compensatory time. If there is no paid leave available or if the employee chooses not to use paid leave, the employee shall be placed on authorized leave without pay.

4.8 The Family and Medical Leave Act (FMLA) permits an eligible employee to take up to 12 work weeks of leave during a calendar year for a number of reasons, including any serious health

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condition that makes the employee unable to perform one or more of the essential functions of the employee's job. Employees may request to use sick leave, annual leave, leave without pay, or shared leave during the 12 week period designated as part or all of the FMLA entitlement. Workers' compensation leave may also be counted toward satisfying the FMLA entitlement.

4.9 It is unfortunate that Appellant believed that he could use the remainder of his leave. However, once a determination has been made that no reasonable accommodation can be provided, neither the merit system rules nor the Family Medical Leave Act require an employer to postpone or delay the separation of an employee until his or her leave balances are exhausted.

4.10 The appeal of Roger Clay is granted in part, and his separation shall become effective 60 days after the August 21, 2000 letter which informed him that the Office Trainee position was no longer an accommodation possibility and that no other accommodations existed. Appellant shall be reinstated to the employment status he held prior to his separation and shall receive all rights and benefits he would have been entitled to during the 60-day notice period.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Roger Clay is granted in part and his disability separation shall become effective 60 days from August 21, 2000.

IT IS FURTHER ORDERED that Appellant shall be reinstated to the employment status he held prior to his separation and shall receive all rights and benefits he would have been entitled to during the 60-day notice period.

DATED this _____ day of _____, 2001.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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Leana D. Lamb, Member

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