BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

JULIUS ROCK, Appellant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASE NO. R-DISM-11-009 FINDINGS, CONCLUSIONS, AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, DJ MARK, Chair, and JOSEPH PINZONE, Vice Chair. The hearing was held on May 16, 2012, at the Office of the Attorney General in Spokane, Washington.

1.2 **Appearances.** Appellant Julius Rock was present and was represented by Robert Rembert, Attorney at Law. Donna Stambaugh, Assistant Attorney General, represented Respondent Washington State University.

1.3 **Nature of Appeal.** This is an appeal of a presumption of resignation separation due to Appellant's unauthorized absence.

II. FINDINGS

2.1 Appellant Julius Rock was a permanent employee for Respondent Washington State University (WSU). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC. Appellant filed a timely appeal with the Personnel Resources Board on September 2, 2011.

2.2 Appellant began employment with WSU in 2007. At the time of his separation, Appellant worked as a Truck Driver 1 for waste management in the Facilities Operations department. James Parvin, Transportation Supervisor for waste management, was Appellant's direct supervisor. Richard Finch was the Manager of WSU's waste management. Waste management was part of

WSU's Facilities Operations. Lawrence E. Davis, Assistant Vice President for Facilities Operations was the appointing authority for Appellant's position.

2.3 On March 22, 2011, Appellant received an on-the-job injury. He subsequently received workers compensation for his injury.

2.4 By letter dated March 28, 2011, Nikki O'Brien (now Province), Senior Human Resources Consultant, acknowledged Appellant's injury and provided him with information about requesting leave during the time he would be off work and information about returning to work. In the letter, Ms. O'Brien instructed Appellant that "[s]ince you are currently not working due to your injury, it is important that you keep in communication with me regarding your condition, prognosis." The letter was mailed to the home address that Appellant had on file with WSU.

2.5 Jamilee Gecas, Human Resources Consultant, work with workers compensation issues for WSU. She communicated with Appellant by email and worked with him regarding use of his leave during his absence. By email dated April 15, 2011, Appellant informed Ms. Gecas that it was easier for him to access his personal email account rather than his WSU email account and asked her to use his personal email address in the future. Appellant did not update his contact information in his WSU employee record. By email dated June 22, 2011, Appellant confirmed to Ms. Gecas that the best way to contact him was by using his personal email. And, by email date June 27, 2011, Appellant once again told Ms. Gecas to use his personal email address. By email dated July 8, 2011, and sent from his personal email address, Appellant told Ms. Gecas that he was fairly sure he would be back to work shortly after August 1st. Ms. Gecas responded by email on July 8, 2011, and asked Appellant to please provide information to Human Resource Services if he was released to return to work.

2.6 During the course of her normal duties, Ms. O'Brien accessed the Labor and Industries (L&I) website to review WSU employees' accident claims. On approximately July 21, 2011, while reviewing L&I information Appellant's claim, Ms. O'Brien discovered that Appellant had been released for sedentary duties in mid-July 2011. Appellant had not informed WSU's Human

Resources staff of his release. However, Appellant had informed Mr. Parvin that he had been released for light duty. Mr. Parvin told Appellant that there was no light duty work available in waste management.

2.7 After becoming aware of Appellant's release, Ms. O'Brien contacted Mr. Finch and learned that light duty work was available within Facilities Operations. Ms. O'Brien informed Ms. Gecas, her supervisor, that Mr. Finch had work available for Appellant.

2.8 Ms. O'Brien credibly testified that she spoke to Appellant by telephone on August 1 regarding his return to work on August 3, 2011. Appellant told her that the home he rented had been sold and he was in the process of moving and finding a new place to live. Appellant asked if his return date could be extended. Ms. O'Brien was unsure whether moving was a good reason to delay Appellant's return on August 3, 2011, but indicated she would check with Ms. Gecas. While Ms. O'Brien said that she would check about delaying the return date, she did not authorize Appellant's absence on August 3, 2011.

2.9 Appellant testified that he believed Ms. O'Brien would contact him by phone regarding the date for his return. Ms. O'Brien credibly testified that she was unsure whether she was supposed to call Appellant or whether he would call her. Ms. O'Brien testified that Appellant was contacted in writing by letter dated August 1, 2011, from Ms. Gecas.

2.10 In the August 1, 2011 letter, Ms. Gecas notified Appellant that sedentary work was available and that he was to report to work on August 4, 2011. The letter was mailed to the home address that Appellant had on file with WSU and Ms. O'Brien credibly testified that the letter was also sent to Appellant's personal email address. Appellant testified that in preparation for the hearing on his appeal, he found the August 1, 2011, email and letter from Ms. Gecas in his deleted email folder.

2.11 Appellant did not report to work on August 4, 2011. And, even though he was aware as of August 1, 2011, that WSU had sedentary work for him, he did not call or contact Ms. Gecas or any other Human Resources staff about his return to work date.

2.12 Appellant did not contact WSU Human Resources staff or report for work for three consecutive work days from August 4, 2011 through August 8, 2011. Additionally, neither WSU's Human Resources staff nor Appellant's appointing authority made any further attempts to contact Appellant before August 9, 2011. By letter dated August 9, 2011, Mr. Davis notified Appellant that he had failed to report to work since August 4, 2011, and that he was considered to be on unauthorized leave without pay. Mr. Davis further notified Appellant that it was presumed that Appellant had resigned from his position. Mr. Davis told Appellant that he could submit a written request for reinstatement and that the request should include proof that his absence was involuntary or unavoidable. The August 9, 2011 letter was mailed to Appellant by email and by regular and certified mail to his last known address on file with WSU. After Appellant contacted Human Resources staff and informed them that he was unable to open the email attachment, Mr. Davis inserted the letter into the text of an email and provided it to Appellant on August 9, 2011. After receiving the August 9, 2011, letter, Appellant contacted Mr. Parvin for assistance. Mr. Parvin told Appellant that he should contact Human Resources Services. Mr. Parvin knew that Appellant wanted to keep his job.

2.13 Appellant responded to Mr. Davis by email on August 11, 2011. Appellant explained the difficulties he had with receiving his mail because he was in the process of moving and the difficulties he had with opening documents attached to emails because he needed to access them using his cell phone. Appellant said that he thought Ms. O'Brien would call him about returning to work or that his supervisor, Mr. Parvin, would contact him. Appellant indicated that he did not receive Ms. Gecas's August 1, 2011, letter and was not aware of August 4, 2011, return to work date until he received Mr. Davis's August 9, 2011, letter. Appellant asserted that he was not trying to ignore his responsibilities to WSU and believed that the situation was the result of miscommunication. Appellant asked that he be allowed to return to work.

2.14 By email dated August 11, 2011, Mr. Davis acknowledged receipt of Appellant's response and informed Appellant that he would be contacted in writing once a determination was made. Appellant contacted Mr. Davis by email on August 16, 2011, and reiterated that the situation was caused by a lack of communication and that he wished to correct whatever he had done wrong. Appellant contacted Mr. Davis again by email on August 17, 2011, and indicated that the most efficient way to reach him would be contact by a short email or a quick phone call. Appellant also indicated that his doctor had given him permission to return to full duties.

2.15 Mr. Davis considered Appellant's response. Mr. Davis felt that Appellant had been properly notified that sedentary work was available and that he was to return to work. Because Appellant had been in contact with Human Resources staff throughout the process and because HR staff told Appellant he could return to work, Mr. Davis determined that Appellant should have followed up with Human Resources staff if he was unsure of his return date. Mr. Davis concluded that Appellant's explanation for failing to report to work lacked credibility. Mr. Davis also concluded that Appellant failed to show that his failure to return to work was involuntary or unavoidable. As a result, by letter dated August 17, 2011, Mr. Davis notified Appellant that the resignation would remain with an effective date of August 4, 2011.

2.16 WSU employees in work status are expected to report absences to their supervisors. Appellant was aware of this expectation. WSU provided credible testimony and substantial evidence that established that because Appellant was absent from work due to a work place injury and subsequent medical treatment, his contact during his medical leave of absence was to be with Human Resources staff. Appellant was notified on numerous occasions that during his medical absence, he was to contact Human Resources staff regarding his absence, leave status, payroll questions, and benefits resulting from his work place injury. The record shows that at various time throughout the process, Appellant was in contact Human Resources staff, however, he did not follow up with them regarding his return to work date.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant failed to notify Human Resources of his release to sedentary work and then failed to report to work after he was notified that sedentary work was available. Respondent asserts that Appellant should be held accountable for failing to report to work and for failing to advise his employer of his inability to report. Respondent contends that returning to work on August 3, 2011, did not fit Appellant's plans because Appellant was out of state at the same time that he told Respondent that he was moving. Respondent argues that moving would not have prevented Appellant from returning to work. Respondent further argues that WSU provided Appellant with proper notice using his last known address and although not required by the rules, communicated with Appellant by email to his personal email account as he requested. Respondent contends that Appellant provided no proof that his absence was involuntary or unavoidable.

3.2 Appellant argues that he had no intention to relinquish or give up his position. He admits that he may have made a mistake by deleting the August 1, 2011, email from Ms. Gegas from his email but asserts that he had reached out to WSU and asked them to keep him in the loop about his return to work. Appellant contends that his supervisor and Ms. O'Brien said they would keep him informed but they failed to do so. Appellant suggests that WSU's silence resulted from their desire to issue the presumption of resignation letter immediately following his three day absence. Appellant asserts that he was not aware of the August 4, 2011, return to work date until he received Mr. Davis's August 9, 2011, letter. Appellant contends that WSU's failure to communicate the August 4, 2011, return to work date to him by telephone, as he requested, was intentional but that his failure to return to work was not. Appellant asks that he be reinstated to his position.

IV. CONCLUSIONS

4.1 The Personnel Resources Board has jurisdiction over the parties and the subject matter.

4.2 In a hearing on appeal from a separation for unauthorized absence, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that the separation was permitted by the civil service rules

and that the separation was reasonable and appropriate under the facts and circumstances. WAC 357-52-110.

4.3 Separation based upon unauthorized absence is not a "disciplinary" action, in that the action is not a sanction for employee misconduct but provides the appointing authority a process through which an employee who has been on unauthorized absence for three days may be separated. The employer may then proceed to fill the vacant position without undue delay and disruption of operations.

4.4 The rules governing separation for unauthorized absence are found in Chapter 357-46 WAC. WAC 357-46-210, allows employers to separate employees who have "been absent without authorized leave for a period of three consecutive working days." WAC 357-46-215 provides that notice of separation must be provided "to the employee by personal service or by United States mail to the last known address of the employee." WAC 357-46-220 specifies that the employee "may petition the appointing authority in writing to consider reinstatement. The employee must provide proof that the absence was involuntary or unavoidable."

4.5 In this case, Appellant knew sedentary work was available and knew that he was expected to report to work on August 3, 2011. Appellant asked for more time and his request was granted as noted by the return to work date of August 4, 2011, included in the August 1, 2011, letter. If Appellant was unsure of when to report to work, it was his responsibility to seek clarification or ask for further information. Instead, Appellant did not report to work and chose to wait until he was contacted by others. Appellant was aware that when he was scheduled to report to work, it was his responsibility to contact his employer to report his absence. Appellant had an opportunity to keep his job, but he did not avail himself of that opportunity when he failed to contact WSU's Human Resources staff to seek confirmation of the date he was to return to work.

4.6 Additionally, Respondent complied with the requirements found in WAC 357-46-210 through 220. Appellant was absent without authorization for three consecutive work days,

Respondent provided him proper notice of his separation. And, Respondent considered his petition for reinstatement and concluded that his absence was not involuntary or unavoidable.

4.7 The Personnel Appeals Board (PAB), predecessor to the Personnel Resources Board, issued a number of decisions addressing presumption of resignation and abandonment of position. Most instructive to the issues presented in this case is Green v. Department of Labor and Industries, PAB Case No. DISM-98-0066 (1999). Mr. Green was in jail during the three days he should have been at work. His employer knew he was in jail and was unable to report to work, yet they initiated the termination process for abandonment of position. The PAB determined, in part, that because Mr. Green was in jail and unable to report to work, his absence was involuntary and unavoidable.

4.8 Unlike Green, Appellant testified that he did not report to work on August 3, 2011, because he was in the process of moving and finding a new place to live. We conclude that moving and finding a new place to live did not prevent Appellant from reporting to work or from requesting appropriate leave if he needed to be absent from work. We find that Appellant's decision to be absent from work to accommodate his residential move was not involuntary or unavoidable.

4.9 Respondent has met its burden of proof and the appeal should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Julius Rock is denied.

DATED this _____ day of _____, 2012.

WASHINGTON PERSONNEL RESOURCES BOARD

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DJ MARK, Chair

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JOSEPH PINZONE, Vice Chair