BEFORE THE PERSONNEL RESOURCES BOARD

STATE OF WASHINGTON

CHERYL STARKEY, Appellant, vs. WASHINGTON STATE UNIVERSITY, Respondent.	CASE NO. R-DSEP-14-001 FINDINGS, CONCLUSIONS AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This matter came before the Personnel Resources Board, NANCY HOLLAND YOUNG, Chair; DJ MARK, Vice Chair; and SUSAN MILLER, Member. The hearing was held on May 21, 2014, in Spokane, Washington.

1.2 **Appearances.** Appellant Cheryl Starkey was present and was represented by Timothy Esser, Attorney at Law. Respondent Washington State University was represented by Cheryl Wolfe, Assistant Attorney General.

1.3 **Nature of Appeal.** This is an appeal of a disability separation.

II. FINDINGS

2.1 Appellant Cheryl Starkey was an Early Childhood Program Specialist 2 and a permanent employee for Respondent Washington State University (WSU or University). Appellant and Respondent are subject to Chapter 41.06 RCW and the rules promulgated thereunder, Title 357 WAC.

2.2 At the outset of hearing in this matter, the parties stipulated that there were no disputes regarding procedural issues or due process.

2.3. Appellant began her permanent employment with WSU in 1997. In summary and in relevant part, the essential functions of her position included:

> Supervises and participates with children throughout daily classroom program operations including all routine activities, planned education group and individual activities, and outdoor activities.
>
> Assists in physical care which may include, but is not limited to, lifting and carrying children up to 50 pounds in weight, bath rooming, diapering, feeding, providing vigorous physical activity . . . .

2.4 In part, the essential physical requirements for Appellant's position included:

Lift/Carry: Up to 50 lbs.

Pull Push: Up to 50 lbs.

Bend: Frequently

Twist: Frequently

Squat: Frequently

Climb: Occasionally

Kneel/Crawl: Frequently

2.5 On September 18, 2012, Appellant suffered an on-the-job injury. As a result of her injury and as documented by her medical provider on October 2, 2012, Appellant could return to work but she was unable to squat, kneel or crawl. WSU had no available work within Appellant's physical limitation and she was placed on full-time Family Medical Leave (FML). On October 16, 2012, Appellant's medical provider indicated that she could work 6 to 8 hours per day and that she could not squat or kneel but she could, on a seldom basis, bend, stoop, twist and climb stairs. Respondent had no available work that met Appellant's restrictions and she continued to utilize FML. On October 26, 2012, Appellant's medical provider again noted that Appellant could not squat, kneel or crawl but that she could, on a seldom basis, bend, stoop, twist and climb stairs.

2.6 Appellant exhausted her FML on December 25, 2012. When Appellant's FML was exhausted, WSU gave Appellant an additional month of leave in accordance with WSU policy.

2.7 Appellant's medical provider continued Appellant's physical restrictions until January 28, 2013. At that time, the medical provider indicated that Appellant could return to work for 4 hours a day until March 1, 2013, with no physical restrictions. WSU was able to temporarily accommodate a part-time schedule for Appellant and she returned to work for four hours per day at the Children's Center. Appellant continued to work the four hour schedule until March 11, 2013, when she was released by her medical provider to work six hours per day with no physical restrictions. WSU understood that Appellant would return to a full time schedule on March 30, 2013. However, on March 27, 2013, WSU received medical documentation from Appellant's medical provider that indicated Appellant could work six hours per day with no physical limitations until July 30, 2013.

2.8 WSU was able to accommodate Appellant's part time schedule at the Children's Center because during the school year, qualified part-time student help was available to cover the remainder of Appellant's eight hour shift.

2.9 On May 6, 2013, Appellant had a visit with her medical provider. WSU received several pieces of medical documentation following this visit. On a form signed May 13, 2013, Appellant's medical provider continued Appellant's six hours per day work shift but also imposed physical restrictions. The physical restrictions indicated that Appellant could not climb, twist, bend, stoop, squat, kneel or crawl and that she could stand and walk for up to one hour. In addition, her ability to lift, carry, push or pull was limited to 20 to 25 pounds. Appellant's medical provider indicated that the restriction would be in place from May 6 through June 30, 2013.

2.10 Respondent provided credible testimony that work within the Children's Center requires staff to physically engage with the children and to be able to lift, push, squat, kneel and be prepared to move quickly to respond to incidents posing a safety risk for children. Due to the nature of the work in the Children's Center, WSU was unable to accommodate Appellant's physical restrictions in the center, and Appellant was placed on extended medical leave.

2.11 Also as a result of the May 6, 2013 visit, on a form signed May 14, 2013, Appellant's medical provider continued Appellant's six hours per day work shift but removed the physical restriction with the exception of the 20-25 pound restriction for lifting, carrying, pushing and pulling. On a form signed May 22, 2013, Appellant's medical provider once again continued Appellant's six hours per day work shift but removed all physical restrictions.

2.12 Because it appeared that Appellant's physical restrictions were removed, WSU looked for an available position that could accommodate Appellant's part time work schedule. Because the academic school year had concluded, there were fewer qualified students available to help in the Children's Center and the center could no longer accommodate Appellant's part time schedule. However, because Appellant's physical restrictions were removed, WSU was able to find a temporary alternative work assignment as a part time custodian as an accommodation for Appellant.

2.13 Appellant began work as a part time custodian on June 3, 2013, but on June 12 she once again received an on-the-job injury. On June 19, 2013, WSU received medical documentation releasing Appellant to her job of injury for six hours per day with gradual increase to eight hours per day. The documentation included physical restrictions on Appellant bending, stooping, lifting, carrying, climbing, running and foot controls. WSU sought clarification from Appellant's medical provider and on July 29, 2013, he indicated that Appellant was released to her original job of injury with continued physical limitations for six hour per day with a gradual increase in hours as tolerated for an unknown duration.

2.14 The July 29, 2013 clarification released Appellant to her position at the Children's Center but WSU was unable to accommodate a part time schedule in the center. And, Appellant's physical limitations prevented her from performing the essential functions of the Early Childhood Program Specialist 2 position. As a result, Appellant remained on extended medical leave.

2.15 A Washington State Labor and Industries Independent Medical Exam dated August 12, 2013 confirmed that Appellant was unable to perform the physical activities required for her Early Childhood Program Specialist 2 position. On September 9, 2013, Labor and Industries indicated that Appellant could work six hours per day with physical limitations on bending, stooping, lifting, carrying, climbing, running and foot controls. However, WSU was unable to accommodate a part time position with Appellant's physical restrictions and Appellant continued on extended medical leave.

2.16 On November 25, 2013, Labor and Industries again indicated that Appellant could work six hours per day with physical limitations on bending, stooping, lifting, carrying, climbing, running and foot controls. But, WSU was still unable to accommodate a part time position with Appellant's physical restrictions and Appellant continued on extended medical leave.

2.17 Terry Boston, Assistant Vice President for Auxiliary Services which includes the Children's Center, is Appellant's Appointing Authority. Mr. Boston felt that because there was no change in Appellant's physical limitations, they needed to move forward with the separation process. By letter dated October 24, 2013, Mr. Boston notified Appellant that he was considering separating her from employment due to disability. Prior to making the final determination to separate Appellant, Mr. Boston held a predetermination meeting with Appellant. The meeting was held on November 20, 2013.

2.18 At the meeting Appellant had an opportunity to provide any information to Mr. Boston that she felt he should consider before making his decision. Appellant did not present any new medical information at the meeting. But she did indicate that she loved her job and hoped to return to her position in the Children's Center. Appellant asked Mr. Boston to wait for the results of her MRI before making a decision. Appellant thought that her MRI was pending approval by the Department of Labor and Industries and indicated that she would schedule an appointment when she learned of the approval. Appellant's MRI was subsequently scheduled for December 3, 2013.

2.19 Neither Mr. Boston nor WSU's Human Resource Services staff received medical documentation from the MRI. However, Human Resource Services staff confirmed that as of December 9, 2013, the Labor and Industries site for Appellant's claim indicated that Appellant continued to have restrictions.

2.20 Mr. Boston determined that due to her medical condition, Appellant was unable to perform the essential functions of her Early Childhood Program Specialist 2 position on a full time basis, with or without accommodation. Therefore, by letter dated December 13, 2013, Mr. Boston notified Appellant of her separation effective December 20, 2013. The letter also informed Appellant of the process for re-employment with WSU when her medical provider affirmed her fitness to return to work.

2.21 Appellant filed a timely appeal with the Personnel Resources Board on January 13, 2014.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Appellant was injured in September 2012 and that when she returned to work in February, she was released to work a part time schedule with no physical limitations. Respondent explains that because student workers were available during the school year, the Children's Center was able to accommodate Appellant's part time schedule. Respondent asserts that in May 2013, Appellant's medical provider imposed physical limitations in addition to the part time schedule. Respondent contends that because the summer session was beginning, there were fewer student workers available and the University was unable to accommodate Appellant's part time schedule and in addition, her physical limitations prevented her from performing the essential function of her position in the Children's Center. Respondent also contends that there were concerns about safety in the Children's Center due to Appellant's inability to perform the physical requirements of the position. Respondent argues that the University subsequently received medical documentation removing Appellant's physical limitations but due to the lack of qualified student workers in the Children's Center during the

summer session, Respondent was unable to accommodate Appellant's part time schedule in the center. Respondent explains that the University searched for available positions that would accommodate Appellant's part time schedule and found a temporary Custodian position. Respondent acknowledges that Appellant was injured on June 12, 2013, while working in the Custodian position. Respondent argues that as a result of the June 12 injury, Appellant's medical provider imposed physical limitations that removed Appellant from performing custodial work. Respondent also determined that given Appellant's physical limitations, she was unable to work in the Children's Center. Respondent asserts that the University again searched for available positions but found none that would accommodate Appellant's part time schedule and her physical limitations. Respondent argues that given her physical limitations, Appellant was unable to perform the essential functions of her Early Childhood Program Specialist 2 position and that the University was not required to create a new position for her. Respondent further argues that at the time of her separation, there were no available positions at the University for which Appellant was qualified and could perform the essential functions of the job given her reduced work schedule and physical limitations. Respondent argues that the University complied with all applicable civil service rules in attempting to accommodate Appellant's disability and in separating her from employment and asks that the separation be upheld.

3.2 Appellant argues that Respondent should have restructured the duties of her Early Childhood Program Specialist 2 position and assigned the duties she was unable to perform due to her physical limitations to other staff. Appellant asserts that she provided a list of tasks that she could perform and that restructuring her position would not have imposed an undue hardship on Respondent. Appellant asserts that Respondent knew Appellant had a knee injury and that she needed to be careful with her knee. Appellant contends that knowing this, Respondent should have sought clarification from Appellant's medical provider before assigning her to the janitor position. Appellant argues that assigning her to perform janitorial duties exacerbated her condition which prolonged her recovery. Appellant asserts that Respondent had a duty to accommodate her physical limitations and that they failed to do so when they refused to restructure her position in the Children's Center.

IV. RELEVANT CIVIL SERVICE RULES AND WSU POLICY

4.1 WAC 357-46-160 provides:

> A disability separation is an action taken to separate an employee from service when the employer determines that the employee is unable to perform the essential functions of the employee's position or class with or without reasonable accommodation due to mental, sensory, or physical incapacity. Disability separation is not a disciplinary action.

4.2 WAC 357-46-165 states:

> An employer may separate an employee due to disability when any of the following circumstances exist:
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> (1) The employer is unable to reasonably accommodate the employee.
>
> (2) The employer has medical documentation of the employee's inability to work in any capacity.
>
> (3) The employee requests separation due to disability and the employer has medical information which documents that the employee cannot perform the essential functions of the employee's position or class.

4.3 WAC 357-46-170 provides:

> Before separating an employee from employment under the provisions of WAC 357-46-160, the employer must provide at least seven calendar days' written notice to the employee. For permanent employees, the notice must include information on how to apply for reemployment as provided in WAC 357-19-475.

4.4 The WSU Business Policies and Procedures Manual contains the University's Reasonable Accommodation Policy. Policy 60.21 states, in part:

> . . . .
>
> **Reasonable Accommodation**
>
> Reasonable accommodation means modification or adjustment to a job, work environment, policy, practice, or procedure that enables an individual with a disability to enjoy equal employment opportunity and that does not impose an undue hardship on the employer.
>
> In accordance with WAC 357-26-015, reasonable accommodation may include, but is not limited to:
>
> . . .

- Modifications or adjustments to a job, work method or work environment that make it possible for a qualified person with a disability to:

  Perform the functions of the position, or

  Enjoy the benefits and privileges or employment equal to employees without disabilities.

. . .

Undue Hardship

Undue hardship means an excessively costly, extensive, substantial, or disruptive modification, or one that would fundamentally alter the nature or operation of the institution or program.

. . . .

V. CONCLUSIONS

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

5.2 In an appeal of a disability separation, the appointing authority has the burden of supporting both the basis for the action taken and compliance with the civil services law(s) or rule(s) governing the action. WAC 357-52-110. 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. See, Smith v. Employment Security Dept., PAB Case No. S92-001 (1992).

5.3 Respondent has met its burden of proof. Respondent established that due to her physical limitations, Appellant was unable to perform the essential functions of her Early Childhood Program Specialist 2 position with or without reasonable accommodation. Respondent has also established that the Children's Center was unable to continue to accommodate Appellant's part time work schedule in addition to her physical limitations.

5.4 Respondent proved that the agency complied with the applicable civil service rules governing disability separations. Respondent has proven that:

- As required by WAC 357-46-160, Appellant was unable to perform the essential functions of her position. Given the nature of Appellant's physical limitations, Respondent has met its burden of proving that it could not make reasonable alterations, adjustments, or changes to the essential functions of Appellant's position. In addition, WSU policy 60.21 provides that fundamentally altering the nature or operation of the institution or program constitutes an undue hardship. Appellant's suggestion that the essential functions be removed from her position and assigned to other staff is not reasonable and would have the effect of creating a new position thereby altering the nature and operation of the program. The civil service rules do not require an employer to create a new position to reasonably accommodate an employee's disability. See also, Machart v. Liquor Control Board. PAB Case No. DSEP-00-0005 (2001).
- As required by WAC 357-46-165(2), Respondent assured that they had current medical documentation from Appellant's medical provider.
- As required by WAC 357-46-170, Respondent gave Appellant written notice of her separation and the effective date of the separation. Appellant was provided appropriate notice of the action, the reason for the action, and the effective date of the action. Further, the notice provided Appellant with information on how to apply for reemployment.

5.5 Respondent proved both the basis for the action taken and WSU's compliance with the civil service rules governing the action and WSU's Reasonable Accommodation Policy. Respondent has met its burden of proof and the appeal should be denied.

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VI. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Cheryl Starkey is denied.

DATED this _____ day of _____, 2014.

WASHINGTON PERSONNEL RESOURCES BOARD

_____
NANCY HOLLAND YOUNG, Chair

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DJ MARK, Vice Chair

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SUSAN MILLER, Member