BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ROBERT DOUGLAS LEITCH, Appellant, v. DEPARTMENT OF INFORMATION SYSTEMS, Respondent.	Case No. DSEP-02-0004 ORDER DENYING RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE APPEAL AND 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 BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on May 9, 2003.

1.2 **Appearances.** Appellant Robert Douglas Leitch appeared *pro se*. Kara Larsen, Assistant Attorney General, represented Respondent Department of Information Systems.

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; Hall v. University of Washington, PAB No. 3863-V2 (1995).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

II. MOTION

Background. Respondent served Appellant with its First Set of Interrogatories and Requests for Production Propounded on November 25, 2002. Appellant received the requests on December 11, 2002, but failed to provide his responses. At Appellant's request, Respondent provided him with a second set of discovery requests and asked that he respond by February 28, 2003. Appellant again failed to return the completed discovery to Respondent.

On February 7, 2003, the Executive Secretary for the PAB, attempted to contact Appellant for a telephonic prehearing conference. Appellant was not available.

On April 11, 2003, Respondent filed a Motion to Dismiss for Failure to Prosecute Appeal.

Respondent's Argument. Respondent argued that Appellant had an obligation to prosecute his appeal and to participate in all stages of the adjudicative proceedings. Respondent argued that Appellant's failure to respond to discovery requests after being provided with ample opportunity to answer them evidenced his inability or lack of desire to prosecute his appeal. Respondent argued that Appellant's appeal should be dismissed.

Appellant's Argument. Appellant argued that he was not available for the prehearing conference due to a doctor's appointment and that he was unclear as to what discovery items the Office of the Attorney was requesting. Appellant argued that he was still very interested in pursuing his appeal, and he requested that the motion be denied and that he be allowed to participate in the process.

Decision. The Board may decide an appeal by motion if the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

as a matter of law. WAC 358-30-060(1). All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. For purposes of Respondent's motion to dismiss, we must assume any disputed facts in favor of Appellant. Hall v. University of Washington, PAB No. 3863-V2 (1995).

WAC 358-30-150 provides for "discovery procedures in a manner consistent with the civil rules." Pursuant to the provisions of CR 37, Respondent moved for dismissal of Appellant's appeal. Under the circumstances presented here, Appellant's technical violation of the discovery rules should not result in the harsh sanction of dismissal. Therefore, not withstanding Appellant's lack of timely communication in this matter, Respondent's Motion to Dismiss should be denied.

III. FINDINGS OF FACT

3.1 Appellant Robert Douglas Leitch was a permanent employee for Respondent Department of Information Systems. 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 May 23, 2002.

3.2 Appellant was separated from his position as an Information Technology Applications Specialist 4 with the Telecommunications Services Division of the Department of Information Services due to disability. His separation was effective June 27, 2002. As an Information Technology Applications Specialist 4 (ITAS) 4 Appellant worked on large complex telecommunication systems, and he performed complex problem analysis and computer maintenance.

3.3 Appellant went on sick leave on November 6, 2000. On December 26, 2000, Dr. David Remis, with Group Health Cooperative, indicated that Appellant was disabled from working from

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

December 1, 2000 through January 14, 2001. Appellant was diagnosed with Viral Chronic Fatigue Syndrome.

3.4 Effective December 28, 2000, Appellant was placed on Family Medial Leave.

3.5 On April 2, 2001, the agency received a Shared Leave Medical Certificate from Dr. Remis. Dr. Remis indicated that Appellant's expected return to work was August 2, 2001. Appellant was placed on approved shared leave.

3.6 On August 14, 2001, Dr. Suzanne Adams, a physician at Group Health Cooperative, submitted a second Shared Leave Medical Certificate. She indicated that Appellant's expected return to work date was on or about November 5, 2001. The request for shared leave was approved.

3.7 On November 5, 2001, Dr. Adams submitted an additional Shared Leave Medical Certificate, and she modified Appellant's return to work date to March 20, 2002. The department again approved the request for shared leave.

3.8 On January 16, 2002, the agency submitted a request to Dr. Adams requesting information about Appellant's condition. The agency also asked Dr. Adams to review Appellant's classification questionnaires and the essential functions of his position.

3.9 Dr. Adams responded on April 5, 2002, and she indicated that Appellant's condition substantially limited all or a majority of his life activities and the expected length of these

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

limitations was unknown. Dr. Adams wrote, "He is in a constant state of fatigue/exhaustion. He cannot count on his energy on a day-to-day basis. ..." Dr. Adams also indicated that Appellant was not able to perform all the essential functions of his position (without accommodation) because "he is too fatigued and cannot concentrate so he cannot adequately program and analyze." Dr. Adams did not specify whether Appellant could perform the essential functions of the position with modifications or accommodations.

3.10 Michael McVicker was the Assistant Director of the Telecommunications Services Division, and he was Appellant's appointing authority. Mr. McVicker met with Appellant, and they reviewed the report from Dr. Adams regarding Appellant's condition. Mr. McVicker and Appellant also discussed Appellant's likelihood of returning to work. Appellant agreed that his condition prevented him from performing the duties of his position. Mr. McVicker explored ways to assist in Appellant's return to work, however, based on the physician's report, he concluded that there was no accommodation that would allow Appellant to perform the essential functions of his position. Mr. McVicker concluded that separating Appellant due to his disability was the appropriate action.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that Appellant was disabled, could not perform the essential functions of his position, and that no reasonable accommodation existed that would enable him to perform his job at the time of his separation or in the foreseeable future. Respondent argues that the department was sympathetic to Appellant's condition and they provided him with leave for a period of 20 months, during which time he worked only a half hour. Respondent argues that Appellant's request to be placed on shared leave for an indefinite period of time is not a reasonable accommodation because it does not provide him the ability to return to work and perform the essential functions of his job. Respondent asserts that neither Appellant nor his physician offered

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

suggestions for accommodation. Respondent argues that the department could not continue to indefinitely require other employees to perform Appellant's duties or to fill in his position indefinitely. Respondent argues that the disability separation was appropriate and should be affirmed.

4.2 Appellant agrees that he cannot return to work because his condition remains unchanged. Appellant argues, however, that the department could have placed him on authorized leave without pay or on shared leave. Appellant asserts that he is within three and one half years of becoming eligible for a normal service retirement. Appellant argues, however, that beginning November 2000 he lost a significant amount of retirement service credits because the agency failed to inform him of his ability to self-pay his retirement as permitted under PERS 1. Appellant asks that he be reinstated "under a small amount of shared leave (if it is available) or on authorized leave without pay." Appellant also asks that the agency be required to pay for reinstatement of the full retirement service credit effective November 2000 to the present.

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).

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

5.3 The issue here is whether Respondent complied with the provisions of WAC 356-35-010 when it separated Appellant from his position 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."

5.4 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. . ." 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."

5.5 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. Respondent relied on the appropriate feedback from Appellant's physician that Appellant was disabled and unable to perform the essential duties of his position. Furthermore, Appellant's physician did not indicate that the essential duties of Appellant's position could be modified or accommodated in order for Appellant to perform them.

5.6 We are sympathetic to Appellant's situation. However, the merit system rules do not require the appointing authority to retain Appellant as an employee or to postpone the separation action in order to allow Appellant to become eligible for retirement. Moreover, the appointing authority had no information Appellant would be able to perform any type of work in the foreseeable future.

Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504

5.7 Respondent has met its burden of proof that Appellant could not perform the essential duties of his position and that reasonable accommodation could not be provided. Therefore, the disability separation of Robert Douglas Leitch should be affirmed, and his appeal denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Robert Douglas Leitch is denied.

DATED this _____ day of _____, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Walter T. Hubbard, Chair

_____
Gerald L. Morgen, Vice Chair

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Busse Nutley, Member

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