BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

JOEL HAVLINA, Appellant, v. DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. DSEP-05-0009 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, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the Department of Labor and Industries office, 4310 W. 24th Avenue, Kennewick, Washington, on March 2, 2006.

1.2 **Appearances.** George Fearing, Attorney at Law, represented Appellant Joel Havlina. Patricia Thompson, Assistant Attorney General, represented Respondent Department of Transportation.

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

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II. FINDINGS OF FACT

2.1 Appellant Joel Havlina was a permanent employee for Respondent Department of Transportation. 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 13, 2005.

2.2 Appellant became employed with the Department of Transportation (DOT) in 1993. During his tenure with DOT, he held classification as a Maintenance Technician 1, 2 and 3. As a Maintenance Technician 3, Appellant worked at the DOT maintenance offices in Pasco and Connell. Appellant performed very physical work, including road maintenance and cleaning, lifting heavy objects, digging ditches, and traffic control. The essential functions of the Maintenance Technician 3 position also required Appellant to engage in repetitive movements, including bending, kneeling, crawling, and twisting. Maintenance Technicians also operate a variety of heavy equipment, like snow plows, front-end loaders, dump trucks, and trucks with clutches.

2.3 On March 4, 2004, Appellant injured his knee during a work-related training, and he was out from work. Appellant subsequently underwent surgery to his knee and was released to work effective May 17, 2004. Appellant was directed by his physician not to climb ladders, to avoid squatting, bending, crawling, driving a clutch vehicle, and to avoid lifting anything heavier than 15 pounds. Consequently, the department accommodated Appellant's injury with light-duty desk work performing paper and computer work.

2.4 In early November 2004, Appellant met with DOT staff to discuss his condition, ability to return to work, and reasonable accommodation. The winter season is extremely busy for DOT

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Maintenance Technicians and requires them to use a variety of trucks and equipment to plow snow. In addition, employees work alone without the aid of co-workers to assist with physically demanding tasks. As the 2004-2005 winter season approached, Appellant was still unable to drive clutch vehicles, and he was unable to lift over 50 pounds, crawl, squat or twist his knee. Therefore, Appellant was not able to fully perform the duties of his Maintenance Technician 3 position, and the department was unable to provide Appellant with other light duty work during the winter season. Therefore, Appellant was off work during the winter season.

2.5 On March 2, 2005, Wayne Frudd, Regional Safety and Health Manager, met with Appellant and his union representative to discuss Appellant's condition and accommodation needs. Human Resource Consultant Julie Lougheed participated by telephone. Appellant indicated his condition had actually deteriorated from November 2004, and his physical limitations continued to prevent him from performing the full breadth of his maintenance work. Appellant was also on a medication at that time that affected his Commercial Driver's License certification, which prevented him from driving certain types of vehicles. Appellant agreed that based on his medical restrictions, he was unable to perform the Maintenance Technician duties but could perform desk work. During the meeting, they discussed Appellant's skills and other positions he would consider. Appellant indicated that because he lived in Connell, he was unwilling to consider any positions that were more than 40 to 50 miles from his residence. Appellant provided the department with a state application for employment and a résumé to facilitate the search for available positions for which he was qualified.

2.6 On March 10, 2005, the department received a physician's report confirming that Appellant was under the same prior restrictions. Additionally, the report indicated Appellant was unable to sit or walk for a period of more than a half hour at a time but that he could use a clutch at his own

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discretion. Appellant's physician did not provide a prognosis for how long Appellant would remain unable to perform the essential duties of his position.

2.7 As a result, Casey McGill, Assistant Regional Administrator for Maintenance and Operations, determined that separation due to disability was necessary based on Appellant's inability to perform the essential functions of his position, with out without accommodation. As a part of the department's accommodation process, Ms. Lougheed performed a search for vacant, funded positions for which Appellant was qualified in the geographical area indicated by Appellant, including positions that were clerical in nature. However, there were none available. Based on Appellant's geographical limitations, the department was restricted in its ability to conduct a wider job search. In addition, although Appellant met the minimum qualifications of several jobs, they were higher classifications and were considered promotional opportunities which, based on the department's policy, were not options that could be provided to Appellant. However, Appellant was encouraged to apply for any promotional opportunities for which he was qualified.

2.8 On April 18, 2005, Mr. McGill formally notified Appellant of his separation due to disability and the department's inability to accommodate his physical disability. The effective date of the separation was at the end of his work shift on June 17, 2005. After the separation letter was issued, Ms. Lougheed continued to search for vacant positions for a period of two months, however, none became available.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argued that Appellant could not perform the essential functions of his position, and asserts the department was unable to find an alternative position that met Appellant's accommodation needs. Respondent argues that although Appellant indicated he could continue to

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perform office work, there was insufficient work of that nature and further argues the department was not required to create a job where none existed. Respondent argues that it has complied with WAC 356-35-010 by making a good faith effort to accommodate Appellant's disability and that the department's determination to separate Appellant should be affirmed.

3.2 Appellant does not dispute that he had a medical condition which precluded him from performing all the duties of his position. Appellant contends, however, that he could have continued to perform some of his position's tasks, such as vegetation spraying, litter patrol, and computer and paperwork. Appellant argues that the department failed to perform a thorough search to determine what other jobs were available to accommodate his disability. Appellant further argues that the department assumed the accident that led to his knee injury was his fault and, therefore, did little to help him find alternative positions.

IV. CONCLUSIONS OF LAW

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

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 Maintenance Technician 3 due to his disability. WAC 356-05-120 defines a disability as "[a]n employee's physical and/or mental inability to

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perform adequately the essential duties of the job class." The department took the necessary steps to determine whether Appellant could perform the essential duties of his position with or without accommodation. Based on the conditions and limitations outlined by Appellant's physician, the department determined that Appellant was unable to perform the essential functions of his Maintenance Technician 3 position and that there were no accommodations that could be made to enable him to perform those essential functions. 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. . ." Respondent undertook steps to accommodate Appellant; however, Respondent has met its burden of proving that it could not make reasonable alterations, adjustments, or changes to Appellant's position. Furthermore, subsequent searches for alternative positions were unsuccessful, and the department appropriately determined there were no other positions available for which Appellant met the qualifications. Furthermore, the record does not support that Appellant's separation was for any reason other than his inability to perform the essential duties of his position and the lack of available jobs that met his accommodation needs.

4.5 Respondent has met its burden of proving that Appellant's separation due to disability complied with the requirements of WAC 356-35-010, that Appellant could not perform the essential duties of his position and that reasonable accommodation could not be provided. Therefore, the appeal of Joel Havlina should be denied.

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V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Joel Havlina is denied.

DATED this _____ day of _____, 2006.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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