

BEFORE THE ARBITRATOR

In the matter of the arbitration of a dispute
between

WASHINGTON STATE PATROL

and

INTERNATIONAL FEDERATION OF
PROFESSIONAL & TECHNICAL
ENGINEERS, LOCAL 17

CASE 22315-A-09-1459

ARBITRATION AWARD

Natalie Kaminski, In-House Counsel, appeared on behalf of the union.

Rob McKenna, Attorney General, by *Morgan Damerow*, Assistant Attorney General, on behalf of the employer.

On September 16, 2008, the International Federation of Professional & Technical Engineers (union) filed a grievance on behalf of Patricia Madole. On November 10, 2008, after exhausting the grievance process, the parties filed a joint request for a staff arbitrator with the Public Employment Relations Commission. The agency assigned Starr Knutson as arbitrator. I conducted a hearing on October 27 and 28, 2009, in accordance with Article 29.3 of the 2007-2009 Collective Bargaining Agreement between the union and the State of Washington.¹ A court reporter made a formal record of the hearing. The parties filed closing briefs on December 16, 2009.

ISSUES

1. Was Patricia Madole disability-separated in violation of Articles 2, 27, and 31 of the Collective Bargaining Agreement?
2. If not, what is the appropriate remedy?

1 The agreement covers employees represented by the union in multiple state agencies.

APPLICABLE CONTRACT ARTICLES OR SECTIONS

Article 29.3 D of the collective bargaining agreement (CBA) defines my authority as follows:

1. The arbitrator will:
 - a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement.
 - b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it.
 - c. Not make any decision that would result in the violation of this Agreement.
 - d. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement.
 - e. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.
2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.
3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

The union alleges in its grievance that the employer failed to accommodate the grievant and thus violated the following provisions of the CBA.

ARTICLE 2
NON-DISCRIMINATION

Under this Agreement, neither party will discriminate against employees on the basis of religion, age, sex, marital status, race, color, creed, national origin, political

affiliation, status as a disabled veteran or Vietnam-era veteran, sexual orientation, any real or perceived sensory, mental or physical disability, or because of the participation or lack of participation in union activities. Bona fide occupational qualifications based on the above traits do not violate this Section.

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ARTICLE 27 DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

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ARTICLE 31 REASONABLE ACCOMMODATION AND DISABILITY SEPARATION

31.1 The Employer and the Union will comply with all relevant federal and state laws, regulations and executive orders providing reasonable accommodations to qualified individuals with disabilities.

31.2 An employee who believes that he or she suffers a disability and requires a reasonable accommodation to perform the essential functions of his or her position may request such an accommodation by submitting a request to the Employer.

31.3 Employees requesting accommodation must cooperate with the Employer in discussing the need for and possible form of any accommodation. The Employer may require supporting medical documentation and may require the employee to obtain a second medical opinion at Employer expense. Medical information disclosed to the Employer will be kept confidential.

31.4 The Employer will determine whether an employee is eligible for a reasonable accommodation and the final form of any accommodation to be provided. The Employer will attempt to accommodate the employee in his or her current position prior to looking at accommodation in alternative positions.

31.5 An employee with permanent status may be separated from service when the agency determines that the employee is unable to perform the essential functions of the employee's position due to a mental, sensory, or physical disability, which cannot be reasonably accommodated. Determinations of disability may be made by the agency based on an employee's written request for disability separation or after obtaining a written statement from a physician or licensed mental health professional. The agency can require

an employee to obtain a medical examination at the agency's expense, from a physician or licensed mental health professional of the agency's choice. Evidence may be requested from the physician or licensed mental health professional regarding the employee's limitations.

- 31.6 The agency may immediately separate an employee when the agency has medical documentation of the employee's disability and has determined the employee cannot be reasonably accommodated in any available position, or when the employee requests separation due to disability.
- 31.7 An employee separated due to disability will be placed in the General Government Transition Pool Program if he or she submits a written request for reemployment in accordance with WAC 357-46-090 through 105 and has met the reemployment requirements of WAC 357-19-472.
- 31.8 Disability separation is not a disciplinary action. An employee who has been separated because of a disability may grieve his or her disability separation in accordance with Article 29, Grievance Procedure, unless the separation was at the employee's request.

BACKGROUND

Patricia Madole (grievant) began her employment with the Washington State Patrol (employer) in 1981 as a vehicle identification number inspector, moved to a communications officer position in 1991 and in 2001 moved to a commercial vehicle officer position. The employer disability-separated the grievant in September 2008.

Job Duties

The position description for the grievant's Commercial Vehicle Officer 1 (CVO1) job listed the position objective as:

Unarmed limited enforcement powers officer responsible for commercial vehicle enforcement with an emphasis on School Buses. This includes physical inspection of the commercial vehicle and load for conformity to size, weight, and load restrictions; safety and mechanical requirements as determined by state and federal laws, rules and requirement. (sic)

Required to properly document violations and findings in support of legal action in district, superior, and civil court actions.

Required to operate radio, computer, a scales(s) system (sic) as well as safely operate a motor vehicle. May be required to operate radiological monitoring devices on radioactive loads as required by state and federal law.

The position description goes on to state that seventy percent of the grievant's work activities are "as a commercial vehicle officer with authority limited to commercial vehicles; responsible for conducting comprehensive equipment inspections of public buses and public transportation support vehicles."

Essential Functions

An Officer with limited enforcement powers as stipulated by their letter of authority. This position does not authorize/require use/carrying of a firearm.

Inspects schools buses for assure compliance with laws governing required and proper condition of equipment. (sic)

Weighs and measures commercial vehicles and their loads to assure compliance with state and federal laws, as well as length, height, width, and other configuration requirements. Inspects equipment on commercial vehicles to assure compliance with laws governing required and proper condition of equipment. Inspects driver's documents, operator's license, and permits for compliance with all appropriate state and federal regulations and requirements. Inspects commercial vehicles transporting hazardous materials to assure compliance with hazardous material carrier regulations adopted by the State of Washington.

Takes appropriate enforcement action including warnings, issuance of citations, and places driver/equipment out of service, as it pertains to Washington Administrative Code, Revised Code of Washington, and Code of Federal Regulations concerning commercial motor vehicles and drivers.

Prepares presentations (i.e. size, weight, and load presentations) to industry relating to commercial motor vehicles and drivers. Required to testify in court proceedings related to their enforcement actions as well as in civil actions concerning commercial motor vehicle collisions. Answer phone calls and request for assist form (sic) the public with questions concerning commercial motor

vehicles and drivers. As necessary renders first aid to the public encountered in the performance of their official duties.

Required to obtain and maintain certifications necessary for the performance of their appointed duties. Must attend training, including annual and refresher training, as required by the agency.

Operates two-way radio, computer, ACCESS computer, motor vehicles, stationary scales, Weigh-in-motion and Automatic Vehicle Identification systems, ASPEN inspection computer, battery tester, photocopy machine, fax machine, small hand tools, and preliminary breath tester. Operates radiological monitoring devices on radioactive loads as required by state law.

The union did not dispute the accuracy of the job description or essential functions. One of the required certifications referred to in the second to last paragraph above is a Commercial Vehicle Safety Alliance certification; one of the trainings mentioned in the same paragraph is defensive tactics.

Injury, Light Duty and Accommodation

On July 28, 2004, the grievant filed an employer injury/exposure report indicating that while performing brake tests on school buses on July 15, 2004, she felt as if she had whiplash resulting in a “stiff and sore head, neck, and shoulders.”

On August 19, 2004, the grievant injured herself while attempting to open the overhead hatch on a school bus as part of an inspection. On August 21, she filed another employer report. This time she also filed an accident report with the Department of Labor & Industries (L&I). She took four days of sick leave on August 23-26 following a visit to her doctor at a Kaiser Permanente clinic in Longview, Washington and was authorized to return to regular work duties on August 30, 2004. On September 1, 2004, a different doctor at the Kaiser clinic saw her, determined she could not perform her regular work duties and released the grievant to work with modified duty restrictions.

The employer assigned the grievant to temporary light duty. While on light duty the grievant performed clerical duties, including scheduling bus inspections, she met with school districts as an employer liaison and mentored new CVO1's. Her supervisor testified without rebuttal that the

grievant did not perform any complete school bus inspections or any commercial vehicle inspections while she was on light duty during the remainder of 2004 until her disability separation in 2008. These modified duty restrictions continued with some minor alterations until December 2007 when her doctor at the pain clinic stated her ability to work with her neck flexed was severely limited.

The August 19 incident began a series of medical appointments at various Kaiser clinics with several different doctors, a doctor at a non-Kaiser pain clinic, and a chiropractor who eventually became her primary care doctor. The grievant had four separate independent medical examinations (IME), three ordered by L&I and one ordered by the employer. I will summarize the copious medical information (331 pages) presented at the hearing to that information I believe relevant to this case.

Disability Separation

On December 17, 2007, the employer arranged an IME with an orthopedic surgeon to evaluate the grievant's ability to perform the essential functions of her position as a CVO1. The doctor found she was capable of performing the duties of her position if she could restrict her lifting, pushing, and pulling to less than fifty pounds on a permanent basis. The employer received the IME report on January 2, 2008. The doctor relayed some concerns with the CVO1 job description because the grievant told her that she did not do that work. At the time of the IME, the grievant was performing the work of her light duty position. Due to the doctor's concerns, the employer asked the doctor to complete a supplemental questionnaire and assess the grievant's ability to perform the duties of her CVO1 position.

On January 22, 2008, her doctor at the pain management clinic reported in part: "The patient states she is worried that her employer is trying to terminate her . . . Her work/job description was reviewed. However, I feel that it is plausible that they may make her resume a much more rigorous activity including frequent neck flexion/extension and/or vehicle examinations. If this is the case, the patient certainly is likely to experience a significant recurrence of her neck pain." In another paragraph he goes on to relate that "the patient states that she has had this pain since 2004,

but has not mentioned it to me because we have been working on other factors. She states that this pain began after being manipulated by a massage therapist.” The doctor recommended time loss through February 1, 2008.

The employer received the supplemental report from the orthopedic surgeon on February 12, 2008. The surgeon indicated that in her medical opinion the grievant could perform the duties of a CVO1 restricted by no pushing, pulling, lifting or carrying more than 50 pounds.

The grievant continued to seek medical attention from the pain clinic and the chiropractor. L&I ordered another IME which was conducted on April 8, 2008. A new chiropractor and orthopedic surgeon performed the examination. Their report concluded that the shoulder/cervical sprains related to the 2004 injury were resolved. The grievant did have other preexisting cervical conditions which were unresolved. The report did not recommend additional treatment. On April 23, the employer asked the grievant to provide medical documentation from her primary physician regarding her ability to perform the essential functions of her CVO1 position.

On May 7, the grievant provided a written statement stating that her pain clinic doctor told her he could not “legally fill out the medical questionnaire.” That doctor provided the grievant with a referral to a rehabilitation center. The grievant stated that if the employer would like an evaluation done by the center, to go ahead and schedule it. In addition, the grievant provided copies of two letters from the pain clinic. One dated January 19, 2008, was addressed to “whom it may concern” and the other dated March 22, 2006, addressed to the grievant’s chiropractor. The January 19 letter stated: “*In conclusion, I believe the patient is unable to maintain full time employment unless she is able to receive a job modification, limiting her neck flexion, rotation, and prolonged reading.*” The March 22 letter concluded with the pain clinic doctor stating: “it is my opinion that the grievant should be place on either light duty and *a job description which does not involve any cervical trauma.*” (Emphasis mine.) The grievant testified that at this point the chiropractor was her primary health care provider.

L&I scheduled a third IME for May 8, 2008, with a neurologist. The neurologist found no physical restrictions were necessary and recommended no specific work restrictions as a result of the alleged industrial injury. On May 10, 2008, the grievant's pain clinic doctor reviewed the neurologist's results and discussed them in detail with the grievant. He stated that it was his belief that the grievant had significant restrictions with respect to her job as it included several activities that aggravate her pain.

On June 26, 2008, the employer notified the grievant that it was beginning the reasonable accommodation process based on the January 2, February 12, and April 8, IME reports as well as her pain clinic doctor's written assessment that the grievant was not able to perform the full scope of her CVO1 duties. Up until that time, the employer had believed that the grievant would eventually return to her full CVO1 duties. The employer informed the grievant of the specific essential functions it believed she could not perform and stated it could not accommodate her on a temporary basis indefinitely. It asked her to fill out an updated application form to determine the scope of her knowledge, skills, and abilities in order to locate positions with duties her doctor would release her to perform. It also identified options for the grievant should she choose not to participate in the interactive reasonable accommodation process.

On July 10, the grievant completed the job application; on July 18, the employer offered the grievant her choice of three positions as a reasonable accommodation; on July 31, the grievant declined all three positions stating "it would be premature for me to accept a position that would exasperate (sic) my pain." The grievant attached the January 19, 2008, statement from her doctor who stated she could not perform duties that required neck flexion, rotation, and prolonged reading.

After the grievant declined the positions offered by the employer as a reasonable accommodation, and review of the medical information she presented as the basis for rejecting the positions, the employer determined it did not have any position which did not require neck flexion and proceeded with separating the grievant from her employment due to her disability.

ANALYSIS

Article 27 establishes the standard for taking a disciplinary action. However, the plain language of Article 31.8, states that a disability separation is not discipline. Article 2 states the employer and the union will comply with all federal and state laws; Article 31 outlines the reasonable accommodation process as agreed by the parties to the agreement. By inference, I conclude that the parties consider the Americans with Disabilities Act (ADA) relevant to this case as the employer's policy on reasonable accommodation and the state policy guidelines on reasonable accommodation were introduced without objection into evidence, both of which refer to the ADA.

Article 31 of the CBA provides guidance as to the process the parties believe lawful and pertinent to the disability separation process. Thus, my analysis focuses on Article 31 and definitions found in the ADA for qualified individual and essential functions.

Article 31.1 states that the parties will comply with the laws in providing reasonable accommodations to *qualified* individuals with *disabilities*. (Emphasis mine.)

The law defines a qualified individual as a person who has the ability to perform the essential functions of a position with or without accommodation. The law does not require the employer to eliminate essential functions. If a person cannot perform the essential functions of a position, that person is not qualified for the job under either the ADA or Article 31. The employer is not obligated to create a position or work. If the employer has light duty work available, it may offer it to the employee as an accommodation or part of a return to work program. The employer provided light duty as an accommodation for the grievant, however, the law does not require a light duty assignment continue indefinitely.

The employer determined that the grievant could not perform the following essential functions of the CVO1 position: 1) acquire and maintain a Commercial Vehicle Safety Alliance certification; 2) participate in and be proficient in defensive tactics training; and 3) various physical duties that the grievant asserted she could not perform.

The reasonable accommodation process is an interactive one in which both the employer and the employee must participate. The employee must first request an accommodation, which the grievant did by providing the doctor's notes concerning her work restrictions. The employer receiving a request for a reasonable accommodation must engage in an informal process to clarify what the person needs and identify the appropriate reasonable accommodation. Here the employer did that by providing time off and light duty, both of which are forms of accommodation allowed under the ADA.²

Article 31.5 allows the employer to separate an employee from employment if s/he cannot perform the essential functions of a position due to disability. The number of the medical evaluations and medical reports indicate that the employer made a good faith effort to accommodate the grievant's disability. Based on the medical evaluation of the grievant's doctor the employer concluded the grievant could work with restrictions, but not as a CVO1. It then asked the grievant to provide an updated application in order to search for another job as a reasonable accommodation. The employer found three such jobs and offered them to the grievant on July 18, 2008. The grievant turned down the three vacant positions. She enclosed her doctor's January 2008 statement she could not perform full time work requiring her to flex or rotate her neck or read for prolonged periods of time.

The employer determined in accordance with Article 31.6 that it did not have any work that could be accommodated by her doctor's restrictions on neck movement. The employer disability-separated the grievant on August 29, 2008.

CONCLUSION

Any facts or arguments presented at the hearing or in briefs not cited within this decision I found non-persuasive or immaterial. After full consideration of the parties' briefs, exhibits, testimony

² Article 31.4 gives the employer the authority to determine the final form of any accommodation to be provided.

and applicable law, I conclude the employer acted in compliance with the law and the collective bargaining agreement.

AWARD

The grievance is denied.

Issued at Olympia, Washington, this 15th day of January, 2010.

STARR KNUTSON, Arbitrator