

In Re the Arbitration of:

WASHINGTON PUBLIC EMPLOYEES )  
ASSOCIATION, )

and )

STATE OF WASHINGTON. )  
\_\_\_\_\_)

AAA No. 75 390 00427 06

Grievance – Edward James  
(disability separation)

## OPINION AND AWARD

Date of Award: July 25, 2007

Arbitrator  
Carol J. Teather  
Attorney at Law  
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## OPINION OF THE ARBITRATOR

### Proceedings

On March 28, 2006, Washington Public Employees Association, UFCW 365 (“WPEA” or “Union”) filed a grievance on behalf of Edward James (“Grievant”) concerning Grievant’s disability separation from his position of Forest Crew Supervisor 1 based upon a non-negotiated physical endurance test, and a violation of Share Leave provisions. Exhibit (Ex.) 3. The parties were unable to resolve their dispute in the initial steps of the grievance procedure, and the grievance was brought to arbitration pursuant to Article 27, Section 27.2(B) Step 4 of the 2005-2007 Collective Bargaining Agreement between the Washington Public Employees Association, United Food & Commercial Workers Local 365, and the State of Washington (“CBA”). The arbitrator was selected through the American Arbitration Association.

A hearing was held on March 21, 2007, and April 20, 2007, in a conference room at the Washington Attorney General’s Office in Tumwater, Washington. The WPEA was represented by attorney Lawrence Schwerin of Schwerin Campbell Barnard & Iglitzin LLP, and the State of Washington (“the State”), Department of Natural Resources (“DNR”) was represented by Kari Hanson, Assistant Attorney General. At the hearing, the parties stipulated that the grievance was arbitrable and there were no procedural impediments to arbitration. The parties’ representatives presented their cases well and provided excellent arguments and authority in support of their positions. The testimony of witnesses was taken under oath and the parties presented documentary evidence. A formal record was made of the hearing by a court reporter.

The parties filed post-hearing briefs which were received by the arbitrator on June 20, 2007, and the hearing was declared closed on that date.

### **List of Exhibits**<sup>1</sup>

- Joint Exhibit 1 -2005-2007 Collective Bargaining Agreement Between the Washington Public Employees Association and the State of Washington
- State Exhibit 2 -Termination Letter dated March 14, 2006
- Joint Exhibit 3 -Grievance Processing Documents
- Joint Exhibit 4 -Position Description-Forest Crew Supervisor 1
- Joint Exhibit 5 -Memo dated 2/21/03; subject: Implementation of Work Capacity Testing for Fire Duty
- State Exhibit 6 -WAC 357-26, Reasonable Accommodation, Index, All Sections
- State Exhibit 7 -WAC 357-46, Layoff and Separation, Index, Sections 160, 165, and 170
- State Exhibit 8 -Grievant's Classification Questionnaire dated 7/12/04
- State Exhibit 9 -DNR Reasonable Accommodation Procedures
- State Exhibit 10 -WWC Crew Supervisor Pacific Cascade Region, Recruitment #2005-09-P092
- State Exhibit 11 -9/27/05 Letter to AAG Dittman from Andrea Brenneke, Re: James v. State/DNR, et al.
- State Exhibit 12 -10/12/05 Letter to Grievant from Thomas Hoffer
- State Exhibit 13 -12/13/05 Letter to Grievant from Thomas Hoffer, without attachments
- State Exhibit 14 -2/16/06 Letter to Grievant from Thomas Hoffer
- State Exhibit 15 -Email Chain 2/24/06 & 2/27/06 Re: Pack Test
- State Exhibit 16 -4/14/06 Letter to Grievant from Thomas Hoffer
- State Exhibit 17 -DNR Policy Manual, PO20-002, Wildland and Fire Suppression Safety
- State Exhibit 18 -3/08/06 Letter to Steve McLain from Leslie Liddle, WPEA Demand to Bargain implementation WCT
- State Exhibit 19 -3/23/06 Letter to Leslie Liddle from Steve McLain, Demand to Bargain Work Capacity Testing at DNR
- Union Exhibit 20 -WPEA/DNR Statewide Standing Committee Meeting Summary for 1/29/03
- Union Exhibit 21 -Resource Protection Division Proposed Work Capacity Testing (Exhibit admitted minus underlinings and handwritten notes)
- Union Exhibit 22 -NIIMS Wildland Fire Qualification System Guide, PMS 310-1
- Union Exhibit 23 -Emails Re: Duties of non-Corrections Forest Crew Supervisors (engines) and WCT
- Union Exhibit 24 -2/27/06 Letter to Leanne Blood from Roger Theine Re: 2/24/06 email message concerning WCT
- Union Exhibit 25 -Grievant's Incident Qualifications Card (red card) 5/28/03
- Union Exhibit 26 -9/23/03 Grievant's Training and Fire Records

<sup>1</sup> All of the exhibits were admitted into evidence except Union Exhibit 39 which was not admitted.

- Union Exhibit 27 –Grievant’s Task Book for Incident Commander Type 3 (ICT3)
- Union Exhibit 28 –6/18/04, Memo to Grievant from Dave Brown Re: WCT
- Union Exhibit 29 -6/24/04 Letter to Grievant from Gary Berndt Re: light duty
- Union Exhibit 30 -9/14/05 Letter to Grievant from Thomas Hoffer Re: Medical Evaluation Report from Dr. Sarah Speck, M.D.; 9/14/05 Letter to Dr. Roland Dougherty, Ph.D. from Thomas Hoffer with Medical Questionnaire
- Union Exhibit 31 -4/22/06 Grievant application for position of CWICC Dispatch Coordinator
- Union Exhibit 32 -3/22/07 Grievant application for position of Radio Operator
- Union Exhibit 33 -8/2/04 Letter to Sally Bollinger from Leanne Blood  
Re: Assignment of Grievant to Light Duty
- Union Exhibit 34 -8/19/04 Letter to Bill Boyum from Leanne Blood  
Re: Reasonable Accommodation for Grievant
- Union Exhibit 35 -10/19/04 Letter to Bill Boyum from Leanne Blood Re: Hostile Work Environment and Implementation of Light Duties
- Union Exhibit 36 -8/11/05 Email from Leanne Blood to Thomas Hoffer Re: Reasonable Accommodations Suggested Options – Grievant
- Union Exhibit 37 –9/28/05 Letter to Thomas Hoffer from Leanne Blood Re: Grievant Reasonable Accommodation
- Union Exhibit 38 –Class Specification for Forest Crew Supervisor – Correctional Facilities
- Union Exhibit 39 –Illustrative Exhibit
- State Exhibit 40 -11/4/05 Letter to Leanne Blood from Thomas Hoffer in response to 10/27/05 email.
- Union Exhibit 41 –Washington State Department of Personnel Pamphlet “Identifying Essential Job Functions”
- Union Exhibit 42 –Essential Functions
- Union Exhibit 43 –Reasonable Accommodation Guide
- Union Exhibit 44 –Position Description Forest Crew Supervisor 1, Pacific Cascade Region
- Union Exhibit 45 –Position Description Forest Crew Supervisor 1, South Puget Sound Region

### **Stipulation**

The parties stipulated that the last day Grievant worked was June 24, 2005, and that he was on leave from June 24, 2005, until his separation on March 21, 2006.

### **List of Witnesses**

Roger Theine, Laurie Cox, William Boyum, Thomas Hoffer, Grievant, Leanne Blood

**Issues**

The parties did not state the issues in the same manner. After carefully examining their statements of issues and positions, however, I find they are basically in agreement as to the issues to be decided. I find the issues are:

Did the State violate the collective bargaining agreement when it required Grievant to pass the work capacity test as a condition of employment?

Did the State violate the collective bargaining agreement when it separated Grievant from employment for failure to pass the Work Capacity Test?

If the State properly required Grievant to pass the Work Capacity Test as a condition of employment, did it reasonably accommodate him in accordance with the collective bargaining agreement?

If the State violated the collective bargaining agreement, what is the appropriate remedy?

**Positions of the Parties**

The State maintains that a relatively new requirement for employees involved in firefighting is taking and passing a Work Capacity Test (WCT), which is also referred to as a Pack Test because the test involves walking a certain distance in a certain amount of time while carrying a backpack of a certain weight. The State further maintains that this is an important safety measure as it is essential for employees involved in firefighting to have the physical capacity both to fight a fire and, if necessary, to flee from it when adverse fire conditions require them to do so for their own survival. The State also maintains that taking the WCT at the arduous level was an essential function of Grievant's position, and, although given a number of opportunities to do so, Grievant failed to pass the WCT. According to the State, it attempted to accommodate Grievant's disabilities, and it was only after it found it could not reasonably do so that it separated Grievant for disability. Additionally, the State contends it did not violate Article 44 of the CBA either when it imposed the requirement of passing the WCT at the arduous level on Grievant or when it declined to bargain the WCT

during the term of the current CBA. The State's position is that it did not violate the CBA.

The Union, on the other hand, contends that the WCT was a past practice or agreement adopted prior to the collective bargaining contract, the CBA contains no reference to work capacity testing, and neither party raised the issue in negotiations. Therefore, according to the Union, Section 44.1 of Article 44 of the CBA, the zipper clause, renders the work capacity testing agreement and practice "null and void," and precludes DNR from relying on it to discharge or "separate" workers from employment. The Union also contends that Grievant was fully certified as a Task Force Leader and Incident Commander Type 4 under the provisions of the National Wildfire Coordinating Group PMS 310-1 publication, and that DNR, in promulgating its Work Capacity Testing program, set the fitness level for these positions at moderate. According to the Union, DNR violated the contract as well as its internal establishment of the WCT by insisting Grievant pass the WCT at the arduous level, and then separating him when he could not do so. The Union further contends that DNR violated the CBA by failing to accommodate Grievant.

## **Discussion**

### **Background Facts**

Grievant was employed by the State of Washington, Department of Natural Resources ("DNR") as a Forest Crew Supervisor 1 in the Southeast Region. His immediate supervisor was Tom Stephens and the Southeast Region Manager was William Boyum. Ex. 8; Tr. 107.<sup>2</sup> Grievant's position was within the fire program of the agency, and was funded, along with other positions, out of the "firefighters' suppression account." Tr. 20, 173.

As a Forest Crew Supervisor 1, Grievant supervised three engine crews, generally nine people, during the fire season. Tr. 20, 47, 190. He was responsible

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<sup>2</sup> "Tr." and a number refers to a page in the transcript of the hearing.

for the deployment, training, and work of these crews utilizing small trucks equipped with water tanks, pumps, and fire suppression tools. Exs. 4, 8; Tr. 188-193. The work consisted of natural resource management activities such as fighting grass, brush and forest fires, maintaining roads, fire breaks, trails and headquarters sites, or rehabilitating streams. Ex. 4. In the off season, Grievant worked alone. Tr. 189.

Employees of the Washington State Department of Natural Resources are part of an inventory of resources to be used to address emergencies where resources are needed. Tr. 25. They may be called upon to respond not only to fires within the State of Washington but also out of state. Tr. 25. For years DNR had allowed self-certification of individuals to say they were fit to engage in fire suppression activities. This practice was not in keeping with the practices of the federal agencies and other state agencies with which DNR worked. Tr. 22. Following a number of fatalities of individuals fighting wildfires that occurred in 1994, the issue of safety became paramount and other agencies began not accepting the practice of self-certification of physical fitness. As a result, the State of Washington was asked to come into compliance with physical fitness standards put out by the National Wildfire Coordinating Group (“NWCG”).<sup>3</sup> Tr. 23. This was part of an effort to standardize the training, qualifications and fitness of persons involved in fire suppression so that people could be deployed, if necessary, throughout the United States. Tr. 24-25; Ex. 22, pp.1,4. The NWCG standards are set forth in its publication entitled “Wildland Fire Qualification Guide”, PMS 310-1. Tr. 25; Ex. 22.

Individuals involved in fire suppression become qualified and certified under PMS 310-1 by a combination of academic courses and fire experience summarized in “Task Books” issued to chart their progress. Exs. 22, 27; Tr. 197-

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<sup>3</sup> The National Wildfire Coordinating Group is at times referred to as the National Wildfire Coordinating Council in the record of these proceedings. The NWCG consists of five federal agencies plus the National Association of State Foresters. Tr. 23; Ex. 22. The State of Washington is part of the National Wildfire Coordinating Group through its membership in the National Association of State Foresters. Tr. 23-24.

198, 201, 203-204. Fire suppression workers are issued an Incident Qualification Card (commonly referred to as a “Red Card”) which lists their qualifications for fighting wildfires. Ex. 25; Tr. 30-31. Grievant’s last “Red Card,” issued for the year 2003, showed he was fully qualified as a Task Force Leader (“TFLD”) and an Incident Commander Type 4 (“ICT4”), and trainee qualified as a Dispatch Recorder (“EDRC”), an Incident Commander Type 3 (“ICT3”), Safety Officer Type 3 (“SOF3”) and a Fire Investigator Level 2 (“INV2”).<sup>4</sup> Ex. 25; Tr. 197-198.

During labor-management meetings of the WPEA/DNR Statewide Standing Committee in the latter part of 2002 and the beginning of 2003, a work capacity test (“WCT”) for workers with fire line ratings was discussed as a safety measure and a proposal was made. Exs. 20, 21; Tr. 21, 72-75, 103-105. DNR and WPEA reached an understanding regarding implementation of work capacity testing which is reflected in a joint memorandum dated February 21, 2003, that was issued to DNR employees with fire duty, Division Managers and Region Managers. Ex. 5; Tr. 20-21. The memorandum pointed out that the safety of those who participate in wildfire suppression is a matter of primary importance and concern, and stated that an element of safety is personal physical fitness. The memorandum further stated that the Pack Test would be used to assess physical fitness for fire duty at four different levels: arduous, medium, light, and none. The arduous level required a 3-mile hike with a 45-pound pack in 45 minutes; the medium level required a 2-mile hike with a 25-pound pack in 30 minutes; and the light level required a 1-mile hike in 16 minutes. Ex. 5. The implementation schedule required fire suppression workers such as Grievant to complete the Pack Test at the appropriate level in 2003 and to pass the test in 2004. Ex. 5, p.4; Tr. 34-35.

Grievant was required to take the Pack Test at the arduous level. Exs. 5 (chart following page 5), 8. DNR’s reasoning behind the test level imposed was

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<sup>4</sup> Trainee qualification means Grievant had completed the theory classes for the particular fire position and could work on a fire in that position with a fully qualified mentor. Tr. 197-198.



that Grievant's position is funded from the fire program and initial attack on a wildfire is an essential function of the position. Tr. 41-45; 47-48, 111-112; Ex. 8.

Grievant took and completed the Pack Test at the arduous level in 2003. Tr. 210. Grievant also took and completed the Pack Test at the arduous level on June 11, 2004, but was unable to pass it. Tr. 211; Ex. 29. By memorandum dated June 18, 2004, Dave Brown, Grievant's second level supervisor,<sup>5</sup> directed him to participate in work capacity testing at the moderate level on June 21, 2004, and notified him that on or before July 20, 2004, he would be required to retest at the arduous level. Ex. 28; Tr. 211. Grievant took the Pack Test at the moderate level on June 21, 2004, but did not pass it. Tr. 212. Subsequently, on June 24, 2004, Grievant was notified by means of a letter from Southeast Assistant Region Manager Gary Berndt that effective immediately he was on light duty work assignments as a Forest Crew Supervisor 1 until July 20, 2004, and could not participate in any fire suppression activities or assignments. Ex. 29. Grievant went out on medical leave on June 25, 2004, on the recommendation of his doctor because of stress. Tr. 216. He did not retake the WCT in 2004.

Grievant was off work on paid leave from June 24, 2004, through September 15, 2005, and subsequently on leave without pay. Tr. 216; Ex. 30; Stipulation. He never returned to duty. Stipulation.

After Grievant took medical leave in June 2004, WPEA attempted to arrange for his return to his regular duties asserting that these duties did not justify DNR's requirement that he pass the WCT at the arduous level. Ex. 33, 34, 35; Tr. 241-243. On March 15, 2005, Grievant, his wife, and his union representatives, Leanne Blood and Leslie Liddle, met with Thomas Hoffer, Human Resource Consultant and Roger Theine, Assistant Human Resources Division Manager, regarding Grievant's work situation and possible accommodations. Tr. 130-132, 243; Ex. 2. At this meeting, Grievant provided letters from two doctors giving

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<sup>5</sup> Grievant's chain of command starting with his immediate supervisor and continuing to Southeast Region Manager was Tom Stephens, Dave Brown, Rex Reed, Gary Berndt, and William Boyum. Tr. 168.

conflicting opinions as to whether it was medically safe for Grievant to perform the firefighting duties of his position and/or take the WCT at the arduous level. Ex. 2. In a letter dated January 21, 2005, Dr. David W. Krueger, M.D., F.A.C.C., diagnosed Grievant's condition as "moderate aortic stenosis," and stated that this condition substantially limits his ability to perform any strenuous activity or any emotionally stressful activity. Ex. 2, attachment A. Dr. Krueger also felt that participating in the fighting of fires met both of these criteria. Dr. Krueger was of the opinion that Grievant was not able to participate in the WCT other than at the light or moderate levels. *Id.* Grievant was referred by his physicians, Dr. Krueger and Dr. Johnson, for a second opinion regarding his decreased exercise tolerance and aortic valve calcification. After reviewing his medical history and examining Grievant, cardiologists Dr. Kara Kurtz Urnes, M.D. and Dr. Catherine M. Otto, M.D., on February 24, 2005, found Grievant suffered from the following conditions: Hypertensive heart disease, bicuspid aortic valve with only mild stenosis, hypertension not ideally controlled, and dyslipidemia. Ex. 2, attachment B. Drs. Urnes and Otto made several recommendations as to treatment for Grievant's conditions and further testing, but stated that "with excellent control of his blood pressure, possibly documented on exercise tolerance test, there would be no contraindication to heavy exercise and work." Ex. 2, attachment B. Upon receiving these medical reports, DNR sought further clarification from Dr. Otto. Ex. 2, attachment 3, Tr. 138. Dr. Otto responded on April 15, 2005, stating that Grievant had "no substantially limiting physical abnormality" from his hypertensive heart disease and "there was no limitation of exercise capacity by his underlying problem of hypertension." Dr. Otto found Grievant could participate in work capacity testing at the arduous level and that the only limitation on his ability to pass the test would be age-related changes which are normal. Ex. 2, attachment C.

Upon receiving the medical reports discussed above, DNR requested a third opinion from Grievant's choice of doctors acceptable to DNR. Tr. 141-142. After

assessing Grievant's cardiovascular system and obtaining pulmonary function and cardiopulmonary exercise testing, in a medical report dated August 21, 2005, Dr. Sarah M. Speck, MD, MPH, FACC, found Grievant "is able to perform the functions of his job and is limited only by his exertional capacity which is most likely the effect of aging and deconditioning and not significant cardiopulmonary or cardiovascular abnormalities at this point in time." Ex. 2, attachment D. Dr. Speck was of the opinion that Grievant could participate in the work capacity test at the arduous level, as well as the moderate and light level, to assess his physical fitness for wildfire suppression positions. *Id.* The report from Dr. Speck resolved DNR's concerns regarding Grievant's ability to take the WCT at the arduous level. Tr. 144.

By letter dated September 14, 2005, Mr. Hoffer directed Grievant to report for duty on October 17, 2005. Ex. 12.

In September 2005, management, through Grievant's attorneys, received a letter from a psychologist, Dr. Roland Dougherty, Ph.D., indicating Grievant had mental health issues. Tr. 145. Mr. Hoffer then sent Dr. Dougherty a medical questionnaire asking for information regarding Grievant's medical condition and ability to perform the essential functions of his position as described in his Classification Questionnaire dated July 12, 2004. Ex. 2, attachment E. Dr. Dougherty responded stating Grievant has the mental condition of "adjustment disorder with mixed anxiety and depressed mood," which prevents him from working under his management team. Dr. Dougherty stated: "The only accommodation that would be likely to significantly ameliorate this condition would be placement under a new management team in which he could have confidence." Ex. 2, attachments E; Tr. 146-147. Subsequently, by letter dated November 1, 2005, Dr. Dougherty stated that Grievant's condition did not preclude him from performing the essential functions of his job under appropriate conditions. Ex. 2, attachment G; Tr. 150-152. Dr. Dougherty reiterated his belief that appropriate conditions included a change in Grievant's chain of command. *Id.*

Based on Dr. Dougherty's opinion that Grievant could not work under his current management team, DNR began to look for alternate placements, and Grievant was offered a Forest Crew Supervisor 1 position in the Pacific Cascade Region, Thurston County. Tr. 147-148; Ex. 10. This position was not a fire position and did not require work capacity testing. Rather, it involved working with Washington Conservation Corps crews doing nature enhancement of the Washington State Department of Natural Resource lands. Tr. 148; Ex. 10. Grievant declined the position. Ex. 11.

In declining the WCC crew supervisor position, Grievant requested that his medical condition be accommodated by placement in one of the following work situations:

- 1) To report Jodery Goble in Goldendale, remaining in fire as a Crew Supervisor 1, with the patrol unit for his work assigned as usual at his home.
- 2) To be assigned to work at CWICC; others have been rotated to CWICC at certain times of the year with per diem and mileage.
- 3) To be assigned to report to Gary Margheim to learn fire investigation; we understand that another employee in another region was provided such an opportunity earlier in the year. Simultaneously, he could be assigned to prevention duties and work under Len Riggan, which would also remove David Brown as his second line supervisor.
- 4) To be assigned to a comparable position in the Department of Ecology or another department of the State.

Ex. 11; Tr. 149. DNR found the accommodations requested were not reasonable because the positions either did not exist or were not vacant, or they were positions at a higher pay level than that of Grievant. Tr. 150; Ex. 12.

On October 12, 2005, Mr. Hoffer sent Grievant a letter summarizing what had occurred in September and October 2005 with respect to Dr. Dougherty and his accommodation requests, and informing Grievant that unless he could provide alternatives to the accommodations found not to be reasonable, he would need to request any annual or sick leave he had remaining or to request leave without pay. Ex. 12.

In October 2005, Grievant submitted a memorandum from Dr. Steve E. Taylor, M.D., dated October 5, 2004, in which Dr. Taylor stated that he suffered from tendonitis in his left knee that limited his physical capacity at that time, and that it would be six weeks before Grievant would be able to do any type of physical capacity evaluation or training exercise. Ex. 2, attachment F.

On December 13, 2005, Mr. Hoffer sent Dr. Taylor a medical questionnaire to complete regarding Grievant's medical condition and ability to perform any of his job functions. Ex. 2, attachment H; Tr. 152. Dr. Taylor stated Grievant stated that Grievant had tendonitis and peroneal nerve irritation (neuritis) in his left knee which had a substantially limiting effect on his ability to perform any of his job functions. Dr. Taylor further stated that this condition caused Grievant to be unable to walk for extended periods and that the condition was likely to last for four to eight weeks. Ex. 2, attachment H. DNR continued Grievant's leave without pay status and postponed his WCT until his knee had healed. Tr. 153. On February 8, 2006, Dr. Taylor medically cleared Grievant to return to full activity. Ex. 2, attachment I; Tr. 154, 156.

Following his release to return to duty, Grievant was scheduled to take the Work Capacity Test on February 21, 2006. Ex. 14; Tr. 156-157. At Grievant's request, the WCT was postponed to February 27, 2006. Ex. 15; Tr. 158-160. Grievant took the WCT on February 27, 2006, and failed. Tr. 160; Ex. 2. He took it again on March 6, 2006, and once again failed the test. Tr. 160; Ex. 2.

On March 21, 2006, Grievant was separated from his position and his employment terminated because he was not able to perform all of the essential functions of a Forest Crew Supervisor 1 with or without reasonable accommodation. Ex. 2. He grieved his separation alleging violations of Articles 12, 16, 30, 44.1 and 44.4 of the CBA. This arbitration followed. Ex. 3.

**The CBA does not preclude use of the Work Capacity Test.**

The CBA contains a broad "zipper clause." Article 44 provides, in pertinent part, as follows:

44.1 This Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement.

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44.3 This Agreement supersedes specific provisions of institution policies with which it conflicts.

44.4 During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each party voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, EXCEPT if the Employer intends to make a change in a mandatory subject of bargaining that is not addressed in this Agreement, the Employer will notify the Union and, if requested, engage in collective bargaining.

CBA, Ex. 1.

The Union argues that Article 44, Section 44.1 renders the February 21, 2003, "Implementation of Work Capacity Testing for Fire Duty" agreement null and void as it is not specifically preserved in the CBA. The State, however, points out that Section 44.1 must be read in conjunction with the other sections of Article 44, specifically Section 44.4 which provides that each party had the opportunity to fully negotiate all subjects during collective bargaining. According to the State, DNR properly rejected the Union's demand to bargain work capacity testing that was made in March 2006. Ex. 19.

It is undisputed that the CBA contains no reference to work capacity testing and that neither party raised the issue in negotiations. Mr. Theine testified that he was a member of the Governor's Management Bargaining Team and did not miss any negotiation sessions for the current agreement. Mr. Theine further testified, without rebuttal, that work capacity testing was not the subject of a proposal submitted by management or the subject of a proposal submitted by WPEA. Tr. 61-62. He also admitted that work capacity testing is not addressed in CBA Article 18, Wildfire Suppression and Other Emergency Duty. Tr. 64.

I have carefully considered the arguments of the parties concerning this issue and reviewed the authority provided by the Union. Neither side presented any evidence on what the parties intended by the language used in Section 44.1 of Article 44 and there is no evidence of bargaining history.

I am not convinced that Section 44.1 of Article 44 renders the parties' agreement to implement work capacity testing null and void. In support of its position that the work capacity test is "null and void," the Union cited to the following language in the decision of the National Labor Relations Board (NLRB) in *Michigan Bell Telephone*, 306 NLRB 281, 282 (1992): "In general a zipper clause is an agreement by the parties to preclude further bargaining during the term of the contract. If the zipper clause contains clear and unmistakable language to that effect, the result will be that neither party can force the other party to bargain, during the term of the contract, about matters encompassed by the clause." After bargaining to impasse with the union, the employer in *Michigan Bell Telephone* implemented a substance abuse policy that included discipline of employees who refused to submit to drug testing or whose test results were positive. The substance abuse policy was implemented during the term of a collective bargaining agreement that contained no provision concerning or referring to drug testing and which contained a zipper clause. Similarly, in the other case cited by the Union, *Jones Dairy Farm*, 295 NLRB 113 (1989), *inf'd* 909 F.2d 1021 (7<sup>th</sup> Cir. 1990), the employer unilaterally implemented a "rehabilitation/work hardening" program during the term of a collective bargaining agreement. Yet, unlike the situations in *Michigan Bell Telephone* and *Jones Dairy Farm*, in the instant case, the State did not attempt to bargain or unilaterally institute a work capacity test during the term of the CBA. The decision to test the physical fitness of employees with fire duty using the Pack Test was made in 2002, before negotiations began for the CBA,<sup>6</sup> and the work

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<sup>6</sup> Negotiating sessions for the current CBA took place at the end of summer, early fall 2004, and were completed toward the end of October 2004. Tr. 63.

capacity testing policy was in place in 2003 and fully implemented by the end of 2004, the beginning of 2005, well before the CBA became effective on July 1, 2005.

DNR had decided to use the Pack Test for work capacity testing, and had discussed work capacity testing for fire duty with the WPEA in 2002. Ex. 21; Tr. 71, 104-105. DNR and WPEA then entered into an agreement to implement a policy of mandatory work capacity testing using the Pack Test to ensure the physical fitness of employees involved in wildfire suppression, and announced this policy to affected employees in a joint memorandum dated February 21, 2003. Ex. 5. Under the terms of the “Implementation of Work Capacity Testing for Fire Duty” agreement, work capacity testing was fully implemented by the end of 2004, the beginning of 2005,<sup>7</sup> See Exs. 5, p.4; Ex. 19; Tr. 65.

WPEA and DNR agreed that work capacity testing is in the interest of employee safety, and that the safety of those who participate in wildfire suppression is a matter of primary importance and concern. See Ex. 5, p. 1 (first paragraph) and p. 2 (first paragraph). Both DNR and WPEA also subscribed to the principles that safety of employees is paramount and there is a need to achieve a standard of safety for firefighters that matches their job requirements (arduous, medium, light). Ex. 5, p. 2. Furthermore, as indicated above, work capacity testing, was fully implemented prior the effective date of the CBA. Under these circumstances, and considering the importance of the policy and the fact the parties never discussed the subject of work capacity testing during CBA negotiations, I find Section 44.1 of Article 44 does not render the work capacity testing policy null and void. Such a result would require an explicit statement to that effect. This finding is further evidenced by Section 44.3 of Article 44. There would be no need for Section 44.3 if there were not institution policies in existence outside of the CBA that were not rendered null and void.

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<sup>7</sup> Work Capacity Tests would be administered during the period that individuals hired for seasonal employment report for work, i.e. April and May. Ex. 5, p. 4.



Section 44.4 of Article 44 is also indicative of the fact that the parties contemplated policies or conditions of employment that are not addressed in the CBA. This section provides that “if the Employer intends to make a change in a mandatory subject of bargaining that is not addressed in this Agreement, the Employer will notify the Union and, if requested, engage in collective bargaining.” (Emphasis supplied) In the case of mandatory work capacity testing for employees with fire duty, which is not addressed in the CBA, the Employer neither intended to nor made a change in the policy or practice. It simply continued the practice that was already in place unchanged.

The work capacity testing policy does not conflict with any provision in the CBA. Rather, it is consistent with Article 18, Section 18.8 which requires employees deployed to wildfire suppression and/or other emergency duty under the Incident Command System to be physically able to perform their duties.

The Union had the opportunity during negotiations for the CBA to attempt to change or eliminate the work capacity testing policy requirements then in existence. Yet, it neither raised the subject nor made a proposal. Under these circumstances, I do not find that the language of Section 44.1 of Article 44 was intended by the parties to nullify the work capacity testing policy that they had previously agreed was an important safety measure for employees with fire duty.

Article 44 of the CBA does not render the work capacity testing policy null and void and does not preclude DNR from relying on it to separate employees who do not meet its requirements. I find the State did not violate Article 44 of the CBA when it required Grievant to pass the WCT as a condition of his employment.

**The State did not violate the contract by applying the arduous WCT standard to Grievant.**

DNR required Grievant to take the Pack Test at the arduous level. The Union contends this was an inappropriate level based on Grievant’s fire positions and the level set by DNR in its Work Capacity Testing program. The Union also contends the State has the burden of proof on this issue. The State contends that

the fitness level imposed on Grievant was based on his Forest Crew Supervisor 1 position which is shown on the fitness standard chart attached to the February 21, 2003, memorandum as Crew Supervisor 1 & 2 (RB) with a physical standard of “arduous.”

I agree with the Union that the State has the burden of establishing that it imposed the correct fitness level on Grievant when requiring him to pass the Pack Test as a condition of his employment. Yet, I find the State met its burden of showing that Grievant was required to take and pass the Pack Test at the arduous level by reason of his fire program position of Forest Crew Supervisor 1.

Grievant was fully certified as a Task Force Leader and an Incident Commander Type 4 under the Incident Command System and PMS 310-1. Exs. 25 and 22, pp, 13-14. The Union correctly pointed out that in promulgating its Work Capacity Testing program, DNR set the level for these positions as moderate. Ex. 5, p.6. The Union argues that DNR violated the contract, as well as its own WCT policy, by requiring Grievant to pass the WCT at the arduous level and then separating him when he failed to do so.

The memorandum sent to DNR employees with fire duty informing them of the Pack Test they would be required to take to ensure their fitness for fire duty contained a list of fire positions and the physical fitness standard for each position. Tr. 29-30; Ex. 5, p.6. This was done so that employees would be able to determine the fitness level at which they would be required to take the test and condition themselves accordingly. Mr. Theine testified that each employee would have a “red card” that showed what fire positions they were certified for, and then they would be a resource that could be used for that role. Tr. 30-31. Mr. Theine also testified that he understood the position of Crew Supervisor 1 & 2 (RB)<sup>8</sup> on the list would be the one that applied to the Forest Crew Supervisor 1 position. Tr. 31. Mr. Theine further testified that the DNR Resource Protection Division developed the list and physical fitness standards some years ago, prior to the

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<sup>8</sup> The letters “RB” means Resource Boss. Tr. 31.

implementation of the work capacity testing program. He additionally stated that prior to the WCT, employees self certified that they were physically fit to do the work of the fire positions for which they were qualified. Tr. 31-32. Mr. Theine's testimony that the Crew Supervisor 1 &2 (RB) position and physical fitness standard was the one that applied to Grievant's Forest Crew Supervisor 1 position is supported by Section 3 of Exhibit 21 which shows that Crew Supervisor 1 & 2 (RB) is not a NWCG fire position but a fire position unique to DNR.

The physical fitness standard set by DNR's Work Capacity Testing program for the fire positions of Incident Commander Type 4 (ICT4) and Task Force Leader (TFL) is "moderate." Ex. 5, p.6. DNR, however, imposed the physical fitness standard of arduous on Grievant based not on his Incident Command fire positions of IC Type 4 and TFL, but on his DNR position of Forest Crew Supervisor 1 which it claimed has initial attack on a wildfire as an essential function.

In determining which job duties are essential functions, the Americans with Disabilities Act (ADA) regulations provide guidance as follows:

- (1) In general, the term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
- (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
  - (i) The function may be essential because the reason the position exists is to perform that function;
  - (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
  - (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
- (3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n).

The Southeast Region Manager, William Boyum, testified that he has the authority to dictate whether initial attack is an essential function of a position. Tr. 118. He further testified that the primary function of the Forest Crew Supervisor 1 position is firefighting, and that individuals holding this position are expected to participate in initial attack on a fire and to have an appropriate Incident Command rating. Tr. 111-112. His testimony in this regard is supported by that of Mr. Theine. Tr. 47-48. The Division Manager for the Resource Protection Division, Mark Kahley, also stated that Forest Crew Supervisors that supervise engines, such as Grievant, are in fact tasked with initial attack firefighter duties and, at times, Incident Command Type 5 (ICT5) duties, therefore, their work level is arduous. Ex. 23. Mr. Kahley further stated that any position that required performance of initial attack firefighter or as an ICT5 would and should be required to maintain conditioning at the arduous level for their own safety and the safety of other firefighters and the public. Ex. 23. When the Union pointed out that although a Forest Crew Supervisor could function as a firefighter or engine leader, they usually do not and, therefore, Grievant should not have to pass the WCT at the arduous level, Mr. Kahley responded by stating that it is not the usual

physical requirements of firefighting that control but the most strenuous. Ex. 23. Mr. Kahley further stated that: “The most strenuous duties, especially if only done occasionally, are the ones that kill firefighters who are inadequately conditioned to perform the occasional arduous duties required.” Ex. 23. He additionally indicated that the arduous WCT requirement is strictly a safety issue. *Id.*

Grievant’s immediate supervisor, Tom Stephens, also indicated that in his position of Forest Crew Supervisor 1, Grievant both oversees and participates in initial attack on a fire and that his position requires him to pass the WCT at the arduous level. Ex. 8.

Grievant himself indicated that his duties at times involve initial attack on a fire. It is clear from his testimony that he performed as an ICT5 or firefighter on small fires in the off season before his crew came on board. Tr. 231-233, 234-235. He drove a truck equipped with a pump and a 50-60 gallon water tank, and used digging tools such as a shovel. Tr. 232. He also had personal protective gear the same as his engine crews, including a helmet, gloves and eye goggles. Tr. 192. He testified that there were times he would be dispatched to a fire by CWICC and times when he would personally spot a fire, notify CWICC of the fire, and then be told to proceed to the fire. Tr. 205-206. Grievant also testified that he worked year round, and when a fire occurred early in the year before he had a crew, he would have to go out and personally fight the fire. Tr. 231. He further testified that in taking action to suppress a fire he would be using a hose and digging tools. Tr. 231. He also described putting in a trail and digging a ditch around a small fire, carrying water in a bucket from a stream to put out a fire and then digging the fire up for the next thirty minutes. Tr. 234-235. These are all arduous tasks.

Grievant’s Forest Crew Supervisor 1 position required a red card with qualification to participate in direct attack on a fire, which would fall into NWCG’s fire positions with an arduous physical fitness requirement. Tr. 89. Grievant’s certified ICT4 and TFL fire positions qualify him also to perform initial attack on a fire as an ICT5 and a Crew Boss, single resource. Ex. 22, pp. 35, 57.

Mr. Boyum testified that anyone with an ICT4 rating would have to have gone through ICT5 procedures, and that an ICT5 would actually perform fire suppression activities. Tr. 120-121.

The Union presented evidence indicating that other workers holding Forest Crew Supervisor 1 positions were tested at the moderate level or not tested at all. Exs. 44, 45. A Position Description Form for Position Number 2144, identified as a Forest Crew Supervisor 1 position with Roy Kanick as the incumbent, showed that Mr. Kanick was only required to pass the WCT for the fireline rating of ICT4, which would be at the moderate level. Ex. 44, 276-277, 289. The signatures on this position description were dated June 1, 2005. Position Description Form for Position Number 6573, identified as a Forest Crew Supervisor 1 position located in the South Puget Sound Region with an incumbent by the name of Karen Harris, showed duties similar to those of Grievant but no requirement to pass the WCT at any level Ex. 45; Tr. 279-281, 290-291. The final signature on this position description was dated September 6, 2005. Ex. 45.

Mr. Theine testified that the document submitted as Exhibit 44 is not the Position Description for position 2144, which is a Natural Specialist 1 position. Tr. 272. He explained that the region had double-filled this position with a nonpermanent appointment, Roy Kanick, and that the duties on the Position Description form were those that were being done for a few months by the nonpermanent appointment. Mr. Theine also explained why this was done and that this was just a temporary situation. Tr. 276. Mr. Theine stated that Mr. Kanick is employed as an Engineering Aid 2. Tr. 277. With respect to the Position Description of the position held by Karen Harris, Mr. Theine testified that this is one of the Forest Crew Supervisor 1 positions with an essential function to participate in the fire program and to pass the WCT at the arduous level. Tr. 279-280. He further testified that Ms. Harris had not passed the WCT at the arduous level that year, 2005, because of a medical condition. Tr. 280. Mr. Theine explained that Ms. Harris had passed the WCT at the arduous level in prior years,

2003 and 2004, but in 2005, she had a medical problem. Mr. Theine testified that Ms. Harris was being given the opportunity to work towards getting back to the level where she could pass the WCT at the arduous level. Tr. 280. Mr. Theine did not know if Ms. Harris would be able to pass the WCT at the arduous level in preparation for the 2007 fire season. Tr. 280.

Mr. Theine mentioned another employee who is unable to pass the WCT because of glaucoma, Mr. Willis. Mr. Willis holds the position of Forest Crew Supervisor, Correctional Facility, but is restricted from work at present on Labor and Industries time loss. Tr. 283. Mr. Theine testified that they were concerned with when Mr. Willis would be released for duty and then whether he could return and meet all of the requirements of his Forest Crew Supervisor, Correctional Facility position. Mr. Theine further testified that they were looking for alternate placements for Mr. Willis. Tr. 283.

I do not find the evidence of the Forest Crew Supervisor positions held by Mr. Kanick, Ms. Harris and Mr. Willis shows that Grievant was subjected to a more severe work capacity testing requirement than other employees holding the same position. Mr. Kanick was only in the position on a temporary basis for approximately seven months to perform certain specified duties and, therefore, was not similarly situated to Grievant. Ms. Harris and Mr. Willis had medical conditions that precluded them from taking the WCT at the appropriate level for their positions. The evidence shows that they were given the opportunity to recover from their medical conditions and to condition themselves to take the WCT at the appropriate level—Ms. Harris at the arduous level and Mr. Willis at the moderate level. As discussed above, Grievant was also given this opportunity.

Based on the evidence discussed above, I find the State has established that the essential duties of Grievant's position include initial attack on a fire as well as supervising engine crews performing initial attack on a fire, and that these duties required him to pass the WCT at the arduous level. The State has established that DNR properly imposed the arduous WCT standard on Grievant as a requirement

of his Forest Crew Supervisor 1 position, and that it evenly administered its Work Capacity Testing policy. I find no violation of the CBA in this regard.

**Grievant was unable to pass the WCT at the arduous level and DNR was unable to reasonably accommodate him.**

Grievant appears to have received the February 21, 2003 “Implementation of Work Capacity Testing for Fire Duty” memorandum and to be aware that he would have to take the Pack Test at the arduous level and what that level required. He then took and completed the Pack Test at the arduous level in 2003 but did not pass it. Tr. 210. After having a considerable period of time to condition himself, Grievant took and completed the Pack Test at the arduous level again on June 11, 2004, but was unable to pass it. Tr. 211; Ex. 29. Grievant took the Pack Test at the moderate level on June 21, 2004, but was unable to pass it even at this level.<sup>9</sup> Tr. 212. As a result, on June 24, 2004, he was placed on light duty work assignments that did not involve fire suppression activities or assignments. Ex. 29. Grievant did not perform the light duty but left work on medical leave on June 25, 2004, because of stress. Tr. 216. On June 29, 2004, Grievant’s doctor, Dr. Johnson, sent a letter to Ms. Bollinger, DNR Southeast Region, requesting reasonable accommodation for Grievant in the form of not taking the arduous WCT nor engaging in arduous exercise. Ex. 34. This was not a reasonable accommodation as participation in initial attack on a wildfire and passage of the WCT at the arduous level were essential functions of Grievant’s position. Tr. 173; Ex. 8. An employer’s duty to reasonably accommodate a disabled employee does not include elimination of an essential job function. *Davis v. Microsoft Corporation*, 109 Wash. App. 884, 890, 37 P.3d 333 (2002); *Pulcino v. Federal*

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<sup>9</sup> Grievant testified that it was a pretty hot day and he was about 40-42 seconds over the time allowed. Tr. 212. The Union argued that the fact Grievant missed passing the moderate test by only 42 seconds on a hot day made it clear that given rest he could have easily passed the test at the moderate level. I am not so certain. Given the fact that Grievant had been or should have been conditioning himself for over one year to pass the test at the arduous level, and the fact that the WCT tests for fitness to work on or around a wildfire which generates a great deal of heat, Grievant should have been able to pass the Pack Test at the moderate level even on a hot day if he were in the proper condition.



*Express Corp.* 141 Wn.2d 269, 644, 9 P.3d 787 (2000) (overruled on other grounds).

By letter dated July 19, 2004, Grievant was notified that his light duty assignment would continue upon his return from leave. Ex. 33. Presumably until such time as he could pass the WCT at the arduous level, which was a requirement of his Forest Crew Supervisor 1 position. Ex. 8. Instead of accepting the light duty, Grievant continued on medical leave while the Union argued on his behalf that he should be allowed to perform his regular duties. Exs. 33, 34, 35.

On March 15, 2005, a meeting was held to discuss Grievant's work situation and possible accommodations. Tr. 130-132, 243; Ex. 2. At this meeting, Grievant presented letters from two doctors giving conflicting opinions as to whether it was medically safe for him to perform the firefighting duties of his position and/or take the WCT at the arduous level. Ex. 2. Upon receiving these medical reports, DNR sought further clarification from one of the doctors, Dr. Catherine M. Otto, M.D. When Dr. Otto found Grievant could participate in work capacity testing at the arduous level and that the only limitation on his ability to pass the test would be normal age-related changes, DNR sought a third opinion from Sarah M. Speck, MD, MPH, FACC. Ex. 2, attachment C; Tr. 141-142. Dr. Speck, like Dr. Otto, found Grievant able to perform the essential functions of his job and to be limited only by his exertional capacity which was most likely the effect of aging and deconditioning and not significant cardiopulmonary or cardiovascular abnormalities. Ex. 2, attachment D. Dr. Speck was of the opinion that Grievant could participate in the WCT at the arduous level, as well as the moderate and light level, to assess his physical fitness for wildfire suppression positions. Tr. 144.

After receiving the doctors' reports finding Grievant fit to perform the essential duties of his position and take the WCT at the arduous level, DNR directed Grievant to report for duty on October 17, 2005. Grievant, however, did not return to duty. Rather, in September 2005, DNR was provided with a letter

from a psychologist, Dr. Roland Dougherty, Ph.D., indicating Grievant had mental health issues. Tr. 145. According to Dr. Dougherty, Grievant suffered from “adjustment disorder with mixed anxiety and depressed mood,” which prevented him from working under his management team. Ex. 2, attachment E; Tr. 146-147. Dr. Dougherty stated that the only accommodation that would significantly ameliorate Grievant’s mental or emotional condition would be placement under a new management team in which he could have confidence. *Id.* Dr. Dougherty did not find that Grievant’s condition precluded him from performing the essential duties of his position as long as he could be under a different chain of command. Ex. 2, attachment G, Tr. 150-152. Yet, such an accommodation is not reasonable. An employer is not obligated to provide an employee with a new supervisor or chain of command. *Snyder v. Medical Services Corp.* 145 Wn.2d 233, 242, 35 P.3d 1158 (2001); *Kennedy v. Dresser Rand co.*, 193 F.3d 120, 123 (2<sup>nd</sup> Cir. 1999).

If an employee cannot be reasonably accommodated in his current position, the employer has a duty to try to locate a vacant, funded position of equal or lower pay that the employee is otherwise qualified to perform with or without reasonable accommodation. *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 562-563, 829 P.2d 196 (1992). In view of Dr. Dougherty’s opinion, DNR began to look for alternate placements for Grievant that were under a different chain of command. Grievant was then offered a Forest Crew Supervisor 1 position in the Pacific Cascade Region that was not a fire position but involved supervising a crew of Washington Conservation Corps (WCC) made up of 4 to 6 young adults. His duties would involve training and directing the crew in various labor-intensive forestry activities involving rehabilitation and enhancement of natural or other resources, and providing coordination and assistance in the training and counseling of corps members for future employment. Ex. 10; Tr. 147-148. There was no WCT associated with this position. Tr. 167. Grievant, through his

attorney, declined the position because of its location which would necessitate a move or the maintenance of two residences. Ex. 11.

Grievant claimed that he was not offered the WWC Crew Supervisor job but given the opportunity to apply for it. Tr. 228-230. Yet, it is clear from the testimony of Thomas Hoffer that Grievant was being offered this position as an accommodation, and that if he had accepted it, either by sending in an application or letting Mr. Hoffer know of his willingness to accept it, he would have been placed in the position. *See also* Ex. 12. It is also clear from the letter from Grievant's attorney declining the position, that she understood that he was being offered the position. Ex. 11.

Grievant testified that a WCC crew does a lot of things with which he was not totally familiar. Tr. 220. He stated that he does not have professional carpentry skills and he had never built a trail except to have a fire line dug. Tr. 220-221. Yet, the recruitment notice of the WCC Crew Supervisor position indicates that "desired qualifications" include "basic carpentry skills" not professional carpentry skills and Grievant had done some trail work in connection with his fire suppression activities. A comparison of the Position Description of Grievant's Forest Crew Supervisor 1 position with the recruitment notice for the WCC Crew Supervisor position indicates that Grievant was qualified for the WCC position. Exs. 4 and 10. Thus, I find the WCC Crew Supervisor position was a valid offer of a position as an accommodation for Grievant's disabilities.

Grievant, through his attorney, requested that his medical conditions be accommodated by placement in one of a number of work situations. Ex. 11; Tr. 149. Yet, DNR found the requested accommodations were not reasonable because the positions were either already filled; were at a higher level; did not exist; or the position was one for which Grievant was not qualified. Tr. 150; Exs. 12, 13. In notifying Grievant that his suggested accommodations were not viable options, Mr. Hoffer advised him that "Even though DNR cannot provide a different chain of command for you, assuming that you do return to your position in the Southeast

Region, DNR will do everything possible to ensure a respectful and professional work environment.” Ex. 13.

WPEA had suggested a number of accommodations during a meeting with DNR officials on March 15, 2005, and again in an email to Mr. Hoffer, which he never received because the email address was incorrect. Ex. 36: Tr. 295-296. The accommodations were as follows:

1. Temporary assignment on behalf of DNR at CWICC, working as a radio operator/dispatcher.
2. Assignment as a NRW2 or fire warden doing prevention work.
3. Assignment to Fire Training Officer duties and “Smokey the Bear” duties.

Ex. 36. Mr. Hoffer testified that the suggested accommodations were discussed but were found not to be viable options. Tr. 296. The radio operator/dispatcher position at CWICC was filled by someone else. There were no NRW2 vacant positions or work in the region, and the fire warden position was a former position and there were none in existence at the time. Tr. 296-297. Finally, the fire training duties and Smokey the Bear duties did not exist as a position. Tr. 296-297. An employer is under no obligation to accommodate a disabled employee by creating a new position, reassigning the employee to an occupied position, or eliminate essential job functions. *Pulcino*, 141 Wn.2d at 644,; *Snyder*, 145 Wn2d at 242.

By letter dated December 13, 2005, from Thomas A. Hoffer, Senior Human Resource Consultant, Grievant was notified as follows:

As I have stated in my previous correspondence with you, your position of Forest Crew Supervisor 1 requires you to take and pass the WCT at the arduous level. You have not been able to pass the WCT at the arduous level or perform the essential functions of your position for two consecutive fire seasons. In order to successfully recruit and train a fire crew for the 2006 fire season, there needs to be a qualified person in your position, able to perform all essential functions, no later than March 1, 2006.

Therefore, you need to take and pass the WCT at the arduous level no later than March 1, 2006 to remain in your current position. If you are not able to do so, and we were not able to find an alternative placement that you would accept, DNR will have no recourse but to separate you for reasons of disability.

Ex. 13.

Grievant was released to return to full duty by his doctor on February 8, 2006. Following his release, Grievant took the WCT at the arduous level on February 27, 2006, and failed to pass the test. He took the WCT again on March 6, 2006, and once again failed to pass the test.

Passing the WCT at the arduous level was a requirement of Grievant's position of Forest Crew Supervisor 1 in the Southeast Region.<sup>10</sup> Grievant was unable to pass the WCT after four attempts at the arduous level and one attempt at the moderate level. Therefore, on March 21, 2006, Grievant was separated from his position for disability because he was not able to perform all essential functions of a Forest Crew Supervisor 1 in the Southeast Region.

Article 30 of the CBA requires the employer to follow state and federal laws and the Washington Administrative Code with regard to reasonable accommodation and disability separation. WAC 357-26-010 states "An employer must reasonably accommodate a known disability of a qualified candidate or employee as required by chapter 49.60 RCW and the federal Americans with Disabilities Act." Ex. 6. Under chapter 49.60 RCW and the federal Americans with Disabilities Act, employers are obliged to reasonably accommodate known disabilities unless doing so would result in undue hardship to the employer. The employer meets its obligation by offering an accommodation that is reasonable, even if what is offered is not what the employee desires. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 445, 45 P.3d 589 (2002). As discussed above, DNR attempted to reasonably accommodate Grievant's disabilities by providing

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<sup>10</sup> The Southeast Region Manager, William Boyum, testified that all of the Forest Crew Supervisor positions in the region have the requirement for passage of the WCT at the arduous level. Tr. 168-169. All of the incumbents of these positions passed the WCT at the arduous level except for Grievant. Tr. 169.

him with leave, light duty, and the offer of a Forest Supervisor 1 position outside his chain of command and without the requirement of passing a WCT.

The placement of Grievant in alternate position was made difficult by Dr. Dougherty's restriction requirement that he be placed under another chain of command. Tr. 158. Nevertheless, DNR continued to look for alternate positions for which Grievant qualified and which met all of the restrictions of his various doctors. Tr. 160. Even after Grievant was separated, DNR continued to look for employment opportunities for Grievant within and outside the agency and to inform him of vacancies when they occurred. Ex. 16; Tr. 162-163.

The Union contends that DNR did not engage in a meaningful interactive process of accommodation. Yet, this argument is not supported by the evidence. As discussed above, DNR officials considered all of the accommodation suggestions made by Grievant's representatives but found them to be unreasonable or unworkable. It searched for other alternate placements but its search was hampered by the opinion of Dr. Dougherty and Grievant's reluctance to consider a position outside of the Yakima area. Furthermore, Mr. Hoffer kept Grievant advised of events and indicated his openness to provide what assistance he could. Exs. 12, 13, 14, 16.

The Union further contends that DNR did not consider accommodating Grievant by placing him in position openings shortly after his termination. It pointed out that Grievant applied for a DNR dispatch position within a month of his separation but was passed over for a co-worker. Tr. 218-219; Ex. 31. He also applied for a radio operator position but was passed over in favor of a summer temporary worker. Tr. 221; Ex. 32.

Yet, the record reflects that Mr. Hoffer advised Grievant of these position openings and told Grievant to contact him if he wish to apply for any of them and he would assist him in any way he could. Ex. 16. There is no evidence showing that Grievant requested any assistance from Mr. Hoffer. Furthermore, even if he had, Mr. Hoffer could provide assistance with the application process but the

selection process for filling the positions was not within his responsibility. Tr. 166. Furthermore, the fact that Grievant was not selected for vacant positions for which he applied does not necessarily mean that he was not considered for these positions. There is nothing to indicate why Grievant was not selected for either of the positions for which he applied and there is no evidence indicating he was not even considered. DNR was only required to take reasonable steps to find an open position for Grievant for which he was qualified. DNR was not obligated to guarantee Grievant an alternate position. I find DNR met its obligations to reasonably accommodate Grievant's disabilities before separating him for inability to perform an essential function of his position. DNR did not violate Article 30 of the CBA.

### **Conclusion**

Initial attack duties and passage of the Pack Test at the arduous level were essential functions of Grievant's position of Forest Crew Supervisor 1. Grievant was unable to pass the Pack Test at the arduous level after a number of attempts. DNR engaged in a continuous process of looking for alternate positions for Grievant for which he was qualified, and that met his requirements and the restrictions of his doctors. When such positions could not be found, DNR properly separated Grievant for disability, and then continued to keep him informed of vacant positions for which he was qualified and could accommodate his disability. I find no contract violation on the part of the State and DNR..

### **AWARD**

The grievance is DENIED.

Date: July 25, 2007

Carol J. Teather  
Arbitrator