IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

DEPARTMENT OF CORRECTIONS, State of Washington, Employer, and TEAMSTERS DRIVER, SALES, and WAREHOUSE LOCAL UNION NO. 117, Union. (Harlan Finch Fitness for Duty Grievance)	ARBITRATOR'S DECISION AND AWARD FMCS No. 120131-01290-6

For the Union:

Spencer Nathan Thal, General Counsel
Teamsters Local 117
14675 Interurban Avenue, Suite 307
Tukwila, WA 98168

For the Employer:

Valerie B. Petrie
Denise R. Pruitt
Assistant Attorneys General
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145

I. INTRODUCTION

In October and November 2010, Correctional Officer Harlan Finch ("Grievant") was experiencing traumatic marital difficulties. His wife, also a DOC employee, had suddenly left him, and the separation also imperiled the relationship between Grievant and his wife's teenage son, who Officer Finch treated as his own. The emotional impact of the separation also carried

over into the workplace to some extent.[1] On October 12, Grievant drank a large amount of vodka, and when he failed to answer telephone calls from his wife and a close friend, they called the police and requested a "welfare check." When the police arrived, Grievant told them he was "tired of talking to people" and had disconnected his phone, and the police took no further action. Exh. E-1(A) at 4. A month later, on the afternoon of November 10, Ms. Finch went to Grievant's home and demanded to be let in. An argument followed when Grievant insisted that she leave. An officer arrived after a call of a "possible disturbance," and upon being admitted to the premises, he found that Grievant was "incoherent" and was chewing on several pills.[2] The officer grabbed Grievant by the cheeks and forced him to spit out the pills, and Grievant was eventually transported to a hospital and admitted for an involuntary evaluation, staying approximately 24 hours while hooked to an IV to flush alcohol from his system. While there, he was visited by his supervisor and a co-worker, and he told them he had no recollection of what had happened to him in the prior 24 hours.

When Officer Finch attempted to return to work a couple of days later, he was informed by a supervisor that he needed a doctor's release, which he promptly obtained from his regular physician of more than twenty years, Dr. Conrad from Group Health. The Employer asked for

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[1] The Department argues that the workplace impact of Grievant's emotional trauma could not be tolerated because of the nature of the institution where he was employed, the Washington Corrections Center in Shelton. That institution, notes the Employer, is the intake center for offenders being brought into the system. As such, it has a more volatile and unpredictable inmate population, and a high turnover rate that precludes a more or less stable set of offenders officers are required to supervise. In addition, Officer Finch worked as the Hearings Officer, a position in which he was required to serve inmates with notices of hearings for alleged infractions of the rules, and then to escort the offenders to the hearing and to be the sole officer providing security for the hearing itself. In performing these functions, says the Department, it is critical that the officer be alert, perceptive, and emotionally stable.

[2] There is some question about the nature of the pills Officer Finch was chewing. He testified that he was attempting to take two Ambien and two or three melatonin (a combination he said helped him to get to sleep more quickly than simply taking Ambien alone). Some of the official reports suggest that Officer Finch had taken a number of Ambien in an attempt to commit suicide, which he denies. Officer Finch's estranged wife was apparently the source of the notion that he was suicidal, but I have no way of judging her credibility on that issue because she did not testify. In any event, I have ultimately found that, in order to dispose of the matter before me, I need not resolve the factual dispute about the pills or about whether Grievant had suicidal tendencies at that time.

more information, and when a second release from Dr. Conrad failed to satisfy the Employer's concerns, Officer Finch was placed on home assignment pending a fitness for duty examination with an independent licensed psychologist, Dr. David Corey.[3] Dr. Corey's examination occurred in December 2010, and in February 2011, following his receipt of additional collateral information from the Department, he judged Officer Finch unfit for duty "in the absence of effective treatment." Exh. E-1(G) at 8. On March 9, the Department began the disability separation process for Officer Finch, initially placing him on FMLA leave pending consideration of the possibilities for reasonable accommodation. Eventually, in June 2011, Grievant was removed from his correctional officer position and placed into a non-custody position at a substantial pay reduction.

In the meantime, however, Officer Finch had arranged for his own fitness for duty exam by a different licensed psychologist, Dr. David Hawkins. Dr. Hawkins' report dated April 26, 2011 declared Officer Finch fit for duty "assuming" he continued to avoid alcohol and completed a series of at least ten individual counseling sessions. Exh. U-18 at 14. The Department refused the Union's demand that Officer Finch be reinstated to his correctional officer position in light of Dr. Hawkins' evaluation, and the Union then filed a grievance challenging the original decision to remove Grievant from his CO position as well as the refusal to reinstate him. The parties were unable to resolve the grievance in the preliminary steps of their grievance and arbitration procedure, and these proceedings followed.

At a hearing held October 29 and November 2, 2012 at the AG's offices in Tacoma, Washington, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed by a certified court

[3] In addition to a release from his regular physician, and prior to being examined by Dr. Corey, Officer Finch had also obtained a "Medical Clearance" to return to work from Dr. Gayle Ely, a Group Health psychiatrist, in early December 2010. Exh. U-12. Nevertheless, the Department proceeded with the independent medical exam.

reporter, and I have carefully examined the transcript in the course of my evaluation of the evidence and argument. Counsel filed simultaneous electronic post-hearing briefs January 18, 2013, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a statement of the issues to be decided, but they have authorized me to formulate the issue statement on the basis of the entire record. I find, first, that there is a preliminary procedural arbitrability issue, i.e. the Department contends that it notified Officer Finch and the Union on March 9, 2011 that it was beginning the "disability separation process" in light of Dr. Corey's finding that he was not fit for duty, yet the Union did not file a grievance challenging that decision until May 27, 2011, well past the contractual twenty-one day grievance filing deadline. The Union counters that the parties were discussing Officer Finch's status during the interim so that the time limits should not be considered to be running until the process played out to its conclusion. Alternatively, the Union contends the failure to reinstate Officer Finch to his CO position constitutes a continuing violation. It is apparent, then, that the first issue before me is whether the Union's grievance is procedurally arbitrable, in whole or in part.

Substantively, it seems to me there are two distinct, albeit related, issues. The first is whether the Department improperly instituted the disability separation process in March 2012. That determination depends to a very great extent on an evaluation of the relative strengths and weaknesses of the competing medical and psychological opinions, especially those of Dr. Corey and of Officer Finch's treating physicians. The second issue is whether the Department

improperly refused to reinstate Officer Finch to his CO position in May 2012 upon receipt of Dr. Hawkins' evaluation (an issue which requires consideration of the relative merits of the Corey and Hawkins examinations). If I find that the Department need not have reinstated Officer Finch despite Dr. Hawkins' finding that he was fit for duty, I must then decide whether the Department could have reasonably accommodated Officer Finch's condition in a manner that would have enabled him to remain a correctional officer, e.g. by allowing him additional time to undergo treatment for what the Union has characterized as a "temporary" psychological disability.

In light of the above discussion, I would formulate the issues before me as follows:

1. Is the grievance of Harlan Finch procedurally arbitrable, in whole or in part?

2. If so, did the Department violate the Agreement by placing Officer Finch in the disability separation process in March 2012?

3. If not, did the Department violate the Agreement by refusing to reinstate Officer Finch to his CO position in May 2012 upon receipt of Dr. Hawkins' report?

4. If not, did the Department violate the Agreement when it did not accommodate Officer Finch's condition by allowing him additional time for treatment before removing him from his CO position?

5. If the answer to Issues 2, 3, or 4 above is in the affirmative to any extent, what is an appropriate remedy?

III. FACTS

The discussion in Part I above outlines the essential facts. While the total record before me (which I have examined with care) is extensive, and while it may well be necessary to add to the factual narration set forth in Part I with additional detail and/or context, in my judgment, that broadening of the description of the factual basis for my decision will be most helpful if it is conveyed in the course of the analysis that follows. Much of the factual record, however, has proved to be unnecessary to my decision, and there is therefore no reason to recite it here even though I did consider it in the course of my evaluation of the record.

IV. DECISION

A. Whether the Grievance Was Timely

The Department argues strenuously that the Union filed this grievance too late.[4] The Union waited until well outside the twenty-one days allowed under the Agreement, notes the Employer (citing the March 9 commencement of the disability separation process as the date the grievance "arose"), and the CBA explicitly provides that the Union's failure to comply with the deadlines of the grievance and arbitration procedure will result in automatic forfeiture. Articles 9.1C and 9.1D. Even if the event precipitating the grievance were viewed as the disability separation letter to Officer Finch dated April 12, 2011, the Employer's argument continues, the grievance would nevertheless be untimely because it was not filed until May 27, once again well beyond the twenty-one day limit. Employer Brief at 15.

I note, however, that the Union's grievance cited two *separate* violation dates—March 9 and May 9.[5] The first was the date the Department notified Grievant and the Union that Officer Finch was being placed into the disability separation process. The second was the date on which the Department refused to change course in light of the evaluation by Dr. Hawkins. The Department's analysis collapses these two events into a single grievable incident (although it

[4] The parties' Agreement calls for a resolution of any arbitrability issues prior to the hearing or as part of the entire hearing and decision-making process. Article 9.5, CBA at 19-20. I chose the latter course because here, as is often the case, the questions of procedural arbitrability are intertwined with the facts necessary to decide the matter on the merits. Nevertheless, as I indicated at the outset of the hearing, it is my practice to decide procedural objections first, and to only proceed to the merits if I determine that the grievance, or at least a portion of the grievance, is properly before me.

[5] The Union did *not* cite April 12, the date of the original separation letter, as the date of one or more of its grievances. In any event, however, that letter was ultimately "suspended" or withdrawn by the Department when Officer Finch indicated a willingness to consider transfer to available non-custody positions as part of the reasonable accommodation process. For both reasons, therefore, it seems to me that the April 12 date is irrelevant in determining whether the Union's grievance was timely filed.

appears the Department has not always taken that approach).[6] That is, the Department contends in its brief that the alleged violation on May 9 was simply the Superintendent's refusal to *change his mind* as to a decision that had already been made. Employer Brief at 16. The Department argues, however, that "there is no authority for the theory that when a union asks the employer to change its mind, and management says no, a new limitations period is created." *Id*.

I agree with the Department's arguments in general, but I think they overlook an important distinction with respect to how these principles must be applied in this case. Specifically, while the placing of Officer Finch in the disability separation process was itself *a fait accomplit* as of March 9, and thus immediately grievable, the ultimate *outcome* of that process could not then be known to Officer Finch and the Union. Conceivably, the Superintendent might reverse his decision on the basis of additional medical evidence, or the process might lead to some form of accommodation—whether permanent or temporary—that would satisfy Officer Finch's concerns as well as the Union's associational interests. If that occurred, there might well be no need to file a grievance. Consequently, while there is no doubt in my mind that the Union failed to file a timely grievance with respect to the Department's *placement* of Officer Finch into the disability separation/reasonable accommodation process, only when that process had fully played out could the Union and Officer Finch have evaluated whether the ultimate *conclusion* of the process gave rise to a "grievance," i.e. "an alleged violation of [the] Collective Bargaining Agreement." *See*, Article 9.1. Moreover, because the grievance filing period only commences when the employee possesses *knowledge of the facts that give rise to the grievance* (*see*, Article 9.3A), it follows that the grievance here was timely

[6] For example, during the processing of the grievance, the Department initially objected to the *March 9* allegations as untimely, but apparently accepted the *May 9* allegations as having been timely filed. *See*, e.g. Exh. U-19 ("with the understanding that the March 9, 2011 alleged violation has been filed outside of the allowed timeframes defined in Article 9 of the CBA, Superintendent Scott Russell has agreed to hear the basis and facts of your grievance regarding both the March 9, 2011 and May 9, 2011 alleged violations").

filed with respect to the Department's rejection of Dr. Hawkins' assessment and the way the reasonable accommodation process concluded.[7]

That result is especially appropriate here where it is uncontested that the reasonable accommodation process was still ongoing on May 27 when the grievance was filed. Precisely where Officer Finch should have been placed as an accommodation—or even whether it might be appropriate to reinstate him to his prior post or an equivalent assignment—very well could have been affected by an evaluation of his psychological condition subsequent to the time Dr. Corey saw him.[8] Nor could I find that the Union failed to preserve its reasonable accommodation argument. The Department tends to parse the language of the grievance sparingly as if the only thing at issue is the *initiation* of the process that led to Grievant's removal from his position as a correctional officer. Reasonable accommodation is part and parcel of the disability separation process, however,[9] and while the Union's precise theories on that score were not laid out in the grievance with the same explicit arguments made by counsel at the hearing and in the brief, the references that do appear in the grievance are sufficient (at least in a grievance drafted by a lay person) to put the Department on notice as to the reasonable accommodation issue.[10]

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[7] The Department's argument that the Union was simply asking the Superintendent to change a decision that had already been made might have been more persuasive had there been no new evidence developed, subsequent to March 9, bearing on Officer Finch's fitness for duty. Here, however, there was a significant piece of new evidence—namely, Dr. Hawkins' evaluation—which arose *after* the Superintendent's initial decision to begin the disability separation/reasonable accommodation process. Thus, the Union was not simply asking the Department to change its evaluation of the facts underlying the original decision, but rather to consider *new* facts that were unavailable when the original decision was made.

[8] Dr. Corey, upon whose judgment the Department relies so heavily, conceded in his testimony that psychological states are dynamic and can change over time, although he testified that he doubted that would be the case for Officer Finch without effective treatment.

[9] In fact, the Department's Policy DOC 840.100 is entitled "Disability *Accommodation* and Separation." Exh. E-32 (emphasis supplied).

[10] The Union's main accommodation theory is that Officer Finch was fit for duty at the time of Dr. Hawkins' evaluation in late April 2011, but that if he was not, he should have been accommodated with more time for treatment before being removed from his position as a correctional officer. At the hearing, Dr. Corey conceded that a leave to obtain treatment for a disabling condition is a recognized form of reasonable accommodation. In fact, as I

In sum, I find that the Union has timely grieved the events of May 9, 2011, either because the Department arguably should have reinstated Officer Finch to his CO position at that time, or because there was an arguably appropriate reasonable accommodation the Department failed to consider, e.g. granting Officer Finch additional time to complete a course of counseling before removing him from his position.[11] Consequently, to that extent, I will consider the merits of the Union's grievance.

B. Whether the Department Violated the CBA By Placing Grievant in the Disability Separation Process

As noted, to the extent the Union contends that it was a violation of the Agreement to place Grievant in the disability separation/reasonable accommodation process, I find that the grievance was untimely filed. Even if the claim were not time-barred, however, it is clear to me that the Department was entitled to rely in good faith on Dr. Corey's expert evaluation of Grievant's psychological and emotional state as of December 2010, as opposed to the judgments of Officer Finch's treating physicians.

It is true, of course, that treating providers, such as Dr. Conrad, may develop valuable insights—and perhaps even superior insights—as a result of working with a patient over a course of months or years, particularly in the counseling context. Consequently, in specific cases, the knowledge available to a treating professional may far exceed the understanding that a one-time forensic examiner is able to develop in the course of a single exam. Many arbitrators have so held. *See*, e.g. Brand & Biren, eds., *Discipline and Discharge in Arbitration* at 440 (2nd Ed., BNA, 2008) ("Where the employee has been observed by a doctor over a long period of time, the

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discuss later, his assessment in essence states that effective treatment was the *only* approach that could reduce the risk he saw in the continued employment of Officer Finch as a correctional officer.

[11] To be clear, I am not holding at this point that either argument has merit, only that the arguments are properly before me under the specific facts of this case as evaluated in light of the parties' CBA grievance and arbitration procedure.

expert medical testimony of the doctor will usually be given greater weight than if the doctor's testimony is based upon a single evaluation"). But here, Dr. Corey did an in-depth evaluation based on psychological testing and a consideration of collateral factual material, such as police reports and medical records, and I could not fault the Department for giving more weight to that evaluation (especially given Dr. Corey's expertise in law enforcement fitness for duty and "direct threat" examinations) than to the somewhat conclusory opinions of generalists like Drs. Conrad and Ely.[12] Their insights were not supported by testing, nor were they gained as a result of an ongoing counseling relationship. It is true, of course, that Dr. Conrad had treated Officer Finch for approximately twenty-five years, a relationship that obviously gave him some insights that were important in evaluating his condition—particularly whether that condition was more likely to be a temporary response to his divorce than a reflection of chronic psychological difficulties. Nevertheless, as to Officer Finch's fitness for duty at that moment in December 2010, I find the Department was entitled to rely more heavily on Dr. Corey's ultimate conclusion.[13]

Similarly, I could not fault the Department for giving more weight to Dr. Corey's judgment as compared to the opinions of the mental health professionals who evaluated Officer Finch in November 2010 for an entirely different purpose, i.e. whether he met the strict standards

[12] That is not to say that the conclusions of Drs. Conrad and Ely should be wholly disregarded, nor that Dr. Corey's criticisms of their conclusions were unfailingly valid. On several occasions, it seems to me, Dr. Corey seized upon a relatively minor, arguable inconsistency in one of the other evaluations, then simply dismissed the entire evaluation as "marked advocacy." *See*, e.g. Exh. E-1(G) at 7. Without analyzing the specific issues in detail, it is sufficient to note that a similar form of analysis could be applied to Dr. Corey's evaluation. For example, in a letter to the Department dated July 18, 2011, commenting on Dr. Hawkins' evaluation, Dr. Corey criticized Dr. Hawkins for reporting that Officer Finch took "two sleeping pills" while heavily intoxicated. Dr. Corey quoted the police report as saying that the "officer removed from Mr. Finch's mouth 'four or five' sleeping pills," not two. Exh. 28 at 1. What the police report actually says, however, is that Officer Finch "spit out what appeared to be 4-5 chewed up pills" without specifying what *kind* of pills they were. Exh. E-1(B) at 3. I do not find this inaccuracy, however, a sufficient basis to disregard Dr. Corey's ultimate judgment about Officer Finch's fitness for duty, any more than I would entirely disregard the evaluations of Drs. Conrad, Ely, or Hawkins based on one or more relatively minor errors.

[13] I also note that the Union's expert, Dr. Hawkins, testified that he did not disagree with Dr. Corey's conclusion that Officer Finch was unfit for duty at the time Dr. Corey saw him. Tr. at 55-56.

for involuntary commitment. Consequently, even if the Union had filed a timely grievance challenging the commencement of the disability separation process, I could not have granted it.

C. Whether the Department Erred in Refusing to Accept Dr. Hawkins' Assessment

Next, I consider the effect of Dr. Hawkins' April 26, 2011 evaluation of Officer Finch. The Union relies heavily on this evaluation in support of its argument that Officer Finch should have been reinstated rather than being separated from his CO position and then accommodated with a transfer to a non-custody position. The Department counters that the Hawkins evaluation, while stating that Officer Finch "does not show any significantly heightened clinical scale scores" on the psychological tests administered to him, nevertheless confirmed many of the same disqualifying psychological traits Dr. Corey had found in December, e.g. "somewhat delusional thinking;" "a tendency for him to be suspicious and distrustful of other people to the point of holding ideas of being 'persecuted' or picked on;" "does not reflect and think in a critical fashion;" "lacks a sense of self-control and confidence;" "quick to anger" in a "reactive" way; etc. Exh. U-18 at 9-14.[14] In spite of these findings, however, Dr. Hawkins judged that while Officer Finch had been "at risk" during his divorce proceedings, he had subsequently exhibited "significant stability" consistent with his life prior to his divorce, and consequently Dr. Hawkins did "not believe that Mr. Finch poses a risk to himself or to others, assuming that he continues to avoid alcohol use and that he seeks at least ten sessions of short-term, solution-focused counseling." Exh. U-18 at 14.

On the other hand, in December Dr. Corey had concluded that Officer Finch *did* pose a direct threat. Dr. Corey's testing revealed a set of personality traits that were generally consistent

[14] At the hearing, Dr. Hawkins explained that some of these "traits" were taken out of context. For example, the "somewhat delusional thinking" phrase came out of the computer program's reading of the MMPI results and, according to Dr. Hawkins, merely identified an area for "exploration," not a finding of "somewhat delusional thinking" *per se*.

with the results of Dr. Hawkins' tests. In addition, Dr. Corey noted that "inattention, impulsivity, distorted (I.e. paranoid) perceptions of the motives of others, and impaired judgment—all of which have been exhibited by Officer Finch in the recent past—can be expected to have profoundly dangerous consequences in a position responsible for ensuring the safety and security of a correctional institution, offenders, staff, and the public." Exh. E-1(G) at 8. Dr. Corey concluded, in essence, that while the risk of Officer Finch's intentionally harming others in the workplace might be "low," the "likelihood" of *unintentional* harm was "significant" or "highly probable" given the nature of the workplace and "the potential consequences to himself and others resulting from inattention, misperception, and impaired functioning on the job." *Id*. at 7.[15] Thus, Dr. Corey's bottom line was "In the absence of effective treatment, I do not believe that the risk of harm can be meaningfully reduced with reasonable accommodation." *Id*. at 8.

On the surface, these two assessments might appear to be competing, but they actually share a significant common insight. As the Union noted at the hearing, they are each "contingent." That is, Dr. Hawkins opined that Officer Finch was fit for duty *so long as* he continued to abstain from alcohol and attended a series of at least ten individual counseling sessions, while Dr. Corey stated essentially the same contingency from the other end of the spectrum: Officer Finch would present an unreasonable risk of harm *in the absence of effective*

[15] The Union argues that Dr. Corey's analysis, under which even a "low" level of risk can result in disability separation because of potentially drastic consequences, would mean that *any* correctional officer could be declared unfit for duty at the Department's whim, especially given that Dr. Corey believes the risk is never "zero." Union Brief at 7. While it is true that Dr. Corey's report at page 7 states that "even a low risk of harm can pose a direct threat since the results can be catastrophic," as I read his evaluation of the probability issue with respect to Officer Finch (which was rendered in response to a specific question posed by the Superintendent), he judged that "inattention, misperception, and impaired functioning on the job" in the corrections context are traits that present a risk of harm at the "highly probable" level, not a "low risk" level as the Union asserts. It is true that Dr. Corey's analysis could have been more clearly stated, but I do not find that logically it would give the Department the ability to remove correctional officers "at a whim."

treatment.[16] The important point, it seems to me, is that both experts agree that treatment *could* be effective in changing Officer Finch's mental state as found in his evaluations in December 2010 (Dr. Corey) and in April 2011 (Dr. Hawkins), i.e. both experts find that his mental state is not necessarily chronic or permanent. It is true, of course, that Dr. Hawkins appears to have been more optimistic on that score, believing that the problematic traits suggested by his psychological testing, at least at a level that would be disqualifying for work as a corrections officer, were a transitory reaction to the trauma of Officer Finch's divorce proceedings—that is, simply a temporary interlude between periods of "significant stability" he had exhibited both before and after the divorce. Exh. U-18 at 14. In that context, then, I can only assume that the "contingencies" Dr. Hawkins stated—abstinence from alcohol and seeking at least ten sessions of individual counseling—were designed to ensure that Officer Finch would *continue to move* from a level of "significant stability" to an even greater level of stability (however that might be described) that would reduce the likelihood that he might become "unstable" again and thus "pose a risk of harm to himself or to others."[17]

Dr. Corey, on the other hand, contends that a forensic examiner in the fitness for duty/direct threat context should not conclude that an individual is fit for duty *assuming* he or she meets one or more future contingencies or conditions, but rather should find that the individual is *not* fit for duty pending successful completion of those contingencies. I am largely persuaded by that argument. Even though I think it might be fair to interpret Dr. Hawkins' evaluation as certifying that Officer Finch was fit for duty as of April 26, 2011—but that he should do certain things to *remain* that way and perhaps become even more stable mentally and emotionally—as

[16] Significantly, Dr. Corey's observation was stated in the reasonable accommodation context, i.e. that the "risk of harm" could not be "meaningfully reduced with reasonable accommodation" in the absence of effective treatment. I will return to that fact in discussing the reasonable accommodation issue in the next section.

[17] As with Dr. Corey's report above, however, the analysis could have been stated with greater clarity.

explicitly formulated, his fit for duty certification was contingent upon future events that the Department had little or no control over and that might have proved difficult to verify. In any event, however, I do not believe the Department was required to credit Dr. Hawkins' optimism about Officer Finch's "significant stability" over Dr. Corey's concerns about the dangers of "misperception" and similar traits, found by both evaluators, in the corrections context. It may well be that individual counseling would effectively treat those traits and that Officer Finch would continue to avoid alcohol, but I think the Department was entitled to see actual results over a reasonable period of time before reinstating Officer Finch to his corrections post.

Consequently, I cannot find that the Department was required to credit Dr. Hawkins' April 26, 2011 assessment over the assessment of Dr. Corey, at least in early May 2011.

D. Reasonable Accommodation

The issue remains, however, whether the Department failed to meet the contractual requirement to make reasonable accommodation. At one level, it is clear that the Department made "a" reasonable accommodation, i.e. the Employer, to its credit, found a non-custody position for Officer Finch in June 2011, and when that position was eliminated, placed him in yet another non-custody job in the facility. Yet it is widely accepted in reasonable accommodation cases that the *preferred* accommodation is one in which an employee is able to continue in the *same job*, and only if there is no reasonable accommodation available that will accomplish that goal should the process move to consideration of a transfer to a different position. *See*, e.g. DOC Policy 840.100(III)(A)(1)("When reasonable accommodation *cannot be made within the employee's current position*, the HRC will review funded vacancies within the facility, etc.") (emphasis supplied). Here, however, the record convinces me that the Department did not exhaust each and every potential accommodation that might have enabled Officer Finch to

remain a correctional officer before changing the focus of the process to a search for alternative positions. To be fair to the Department, they may have been relying on Dr. Corey's expert judgment that the risk of harm posed by Officer Finch could "not be meaningfully reduced with a reasonable accommodation." Yet it appears to me that the Department failed to grasp the significance of the preface to Dr. Corey's pronouncement, i.e. "in the absence of effective treatment." Exh. E-1(G) at 8.[18]

As noted, at the hearing, Dr. Corey conceded that a leave to undergo treatment for a disability may be a reasonable accommodation, and Dr. Hawkins had recommended just such a course of action in an evaluation provided to the Department in May 2011. Even Dr. Corey, of course, had observed that Grievant was unfit "in the absence of effective treatment," thus implicitly recognizing the possibility that treatment could be an effective approach. Putting the two evaluations together, then, they strongly suggest a potential alternative to the disability separation of Officer Finch from his CO position—namely, the opportunity to obtain additional counseling that might be effective in treating the problematic psychological tendencies that appeared to have been aggravated by his divorce.[19] I understand the Department's (and Dr. Corey's) skepticism about Dr. Hawkins' judgment that Officer Finch was fit for duty as of April 26, 2011, but that skepticism could not justify ignoring a potential accommodation that *both*

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[18] Whether Dr. Corey himself failed to appreciate the significance of treatment as a potential reasonable accommodation is unclear to me. On the one hand, his evaluation dated February 5, 2011, quoted above, said there was no available reasonable accommodation for Officer Finch in the absence of effective treatment, but he did not address whether allowing more time for a course of treatment could *itself* be an accommodation. Perhaps Dr. Corey simply believed it was not his place to identify treatment as a possible accommodation. *See*, e.g., Exh. E-1(I), a follow up letter from Dr. Corey to the Department dated February 22 (quoting from an EEOC manual as follows: "a doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability").

[19] While it seems entirely possible to me that Officer Finch possessed these personality traits at some level even prior to the divorce, his work record, as I understand it, had never reflected significant performance issues other than time and attendance. While certainly not conclusive, that fact suggests the possibility of a temporary exacerbation related to the turmoil in his private life, not a personality wholly unsuited to corrections work.

psychologists agreed might have been effective in restoring Officer Finch to fitness. That is, an accommodation that would have temporarily placed Officer Finch in an alternative position (or on continued FMLA leave) while allowing him time to successfully complete a prescribed course of counseling—and to have that successful completion certified by a counselor and/or confirmed by a follow-up forensic evaluation—falls comfortably within the parameters of a reasonable accommodation. That is so, I would note, both under the law and under the Department's *own* guidelines. Had Officer Finch completed that course of counseling successfully, and had his continued control of an alcohol problem been certified by an appropriate substance abuse professional, I cannot think of a legitimate reason for the Department to deny him reinstatement to his former position or its equivalent. That approach, in fact, would have accomplished the primary goal of reasonable accommodation, as recognized in the Department's Policy 840.100, to return the employee to his current position if it is reasonably possible to do so.[20]

In sum, I find that the Department violated the CBA by failing to afford Officer Finch a readily available reasonable accommodation. Therefore, the grievance of Officer Finch must be granted to that extent.

E. Remedy

The Union requests reversal of Officer Finch's disability separation from the correctional officer position and for full back pay with interest. Union Brief at 26. Consideration of those remedies is premature, however, in light of the fact that there is no current fitness for duty

[20] An accommodation is only "reasonable," of course, if it does not pose an "undue hardship" on the Employer, but the Department has not argued that issue here, nor is it clear to me why the course of accommodation I have outlined would imposed any undue burden on the Employer.

certification for Officer Finch.[21] I will remand to the parties for discussions on how best to resume the reasonable accommodation process and/or how to judge whether additional counseling is necessary—or perhaps whether the counseling Officer Finch has already received (in conjunction with the passage of time) has been effective in restoring him to fitness for duty. If the available medical records since May 2011, and/or the current assessments of Grievant's health care providers, are insufficient to establish to both parties' satisfaction that Grievant is fit for duty, I ask that the parties attempt to agree on an independent medical examiner to perform a current fitness for duty/direct threat assessment, and also a substance abuse professional to provide a current evaluation of Officer Finch. These evaluations shall be at the Department's expense. If the parties cannot agree on these professionals after a reasonable period, I will convene a conference call to discuss a procedure by which the parties will provide appropriate information to enable me to knowledgably designate them. If the professionals' evaluations establish that Officer Finch is fit for duty as a corrections officer, or if the parties agree that he is fit for duty without additional counseling and/or evaluation, I will order that he be promptly reinstated to his former position or its equivalent. If the evidence establishes that he was fit for duty at any time between May 27, 2011 and the date of the certifications or agreement of the parties that Officer Finch is fit for duty, I will consider the Union's arguments for back pay as well as any arguments the Department may have as to mitigation and/or offsets.

In light of the process outlined above, which is likely to take some time, I will retain jurisdiction over questions of remedy indefinitely, although I will ask the parties to report jointly to me at 90-day intervals on the status of the matter until it is resolved.

[21] Like Dr. Corey's evaluation, Dr. Hawkins' report is long past its "shelf life," as the Union terms it, and in any event, the Hawkins evaluation was expressly "contingent" or "conditional" even when it was current.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Department failed to provide an available reasonable accommodation designed to allow Officer Finch to remain in the position of Corrections Officer, namely, an opportunity to obtain individual counseling and/or other treatment over a reasonable period that might have enabled him to demonstrate fitness for duty; therefore,

2. The grievance must be granted to that extent; and

3. The matter is remanded to the parties for a good faith attempt to agree on implementation of the reasonable accommodation process as outlined in this Decision and Award;

4. The Arbitrator will retain jurisdiction over all remedy issues until the parties agree that it is no longer necessary to do so or until the Arbitrator relinquishes that reserved jurisdiction with not less than seven (7) days' advance notice to the parties; and

5. Consistent with the terms of the parties' Agreement, Article 9.6, the parties shall share the fees and expenses of the Arbitrator in equal proportion.

Dated this 25th day of February, 2013

Michael E. Cavanaugh, J.D.
Arbitrator