

*Notebook*

IN THE MATTER OF THE ARBITRATION )  
 )  
BETWEEN )  
 )  
STATE OF OREGON, FAIRVIEW )  
TRAINING CENTER )  
"THE EMPLOYER" )  
 )  
AND )  
 )  
AFSCME COUNCIL 75, LOCAL 1246 )  
"THE UNION" )  
\_\_\_\_\_ )

DECISION AND AWARD  
PAULETTE AYO-WILLIAMS  
GRIEVANCE

*Assignment / Topic: Failure to accommodate -  
cross to insurance  
Health Safety - Work Environment*

Hearings Conducted: November 10, 1992  
November 12, 1992  
November 25, 1992  
December 7, 1992  
February 3, 1993

Representing the Employer: Paul Meadowbrook, Esq.  
State of Oregon Executive Dept.  
Labor Relations Division  
155 Cottage NE  
Salem, OR 97301

Representing the Union: Colleen Moen  
Council Representative  
AFSCME Council 75  
4600 Portland Rd. NE  
Salem, OR 97305

Grievant: Paulette Ayo-Williams

Arbitrator: Sandra Smith Gangle  
Alternative Solutions, Inc.  
831 Lancaster Dr. NE, Suite 209  
Salem, OR 97301

Date of Decision: April 23, 1993

## BACKGROUND

This matter came before the arbitrator pursuant to the collective bargaining agreement between the parties effective between September 1, 1989 and June 30, 1992. Jt. Ex. No. 1. The parties were unable to resolve the matter during the regular steps of the grievance procedure. They mutually selected Sandra Smith Gangle, 831 Lancaster Dr. NE, Suite 209, Salem, Oregon as the impartial arbitrator to conduct a hearing and make a decision in this matter.

The parties, having resolved certain pre-hearing discovery issues, with the assistance of the arbitrator, met for hearing on November 10, 1992, November 12, 1992, November 25, 1992, December 7, 1992 and February 3, 1993. The Union and the Grievant were represented by Colleen Moen, Council Representative, Oregon AFSCME Council 75. The State of Oregon, Fairview Training Center (hereafter the "Employer") was represented during pre-hearing matters by Arnie Braafladt, and thereafter by Paul Meadowbrook, Attorney at Law, Oregon Executive Department, Labor Relations Division.

The arbitrator granted the Employer's motion to exclude witnesses. The grievant and one Employer representative were, however, present with their advocates throughout the hearings. The arbitrator tape-recorded the hearings as an adjunct to her personal notes only and not as an official record of the proceedings. All witnesses were sworn and were subject to cross-examination.

By mutual agreement, the parties submitted post-hearing briefs

to the arbitrator on March 5, 1993. The arbitrator received the briefs on March 7 and March 9, 1993 and, at that time, officially closed the hearing and took the matter under advisement. The parties granted the arbitrator a reasonable extension of time in order to prepare her decision.

#### STATEMENT OF THE ISSUE

The parties were not in agreement as to the precise statement of the issue before the arbitrator in this matter. They authorized the arbitrator to frame the issue based on the evidence and argument of the parties. The arbitrator, having reviewed the entire record, frames the issue as follows:

Did the State violate Article 1, Section 11; Article 2; Article 4 or Article 51, Section 1 and/or 2 of the parties' collective bargaining agreement by failing to accommodate the grievant's disability or by failing to provide or maintain a safe and healthy work environment during the thirty (30) day period preceding the filing of the grievance?

If so, what is the appropriate remedy?

#### APPLICABLE CONTRACTUAL PROVISIONS

##### Article 1, Section 11:

The terms of this Agreement shall be applied equally to all members of the bargaining unit.

##### Article 2 - Effect of Laws and Rules:

This Agreement is subject to all applicable existing and future laws of the State of Oregon. In the event of a conflict between a provision of this Agreement and a rule or regulation of the Executive Department or any of its Divisions, the terms of this Agreement shall prevail.

##### Article 4 - Management Rights:

The parties agree that the Employer and the Agency has the right to operate and manage including, but no limited to, the right to maintain order and efficiency; to direct employees and to determine job assignments and working schedules; to

determine the methods and procedures; to determine staffing requirements; to determine the kind and location of facilities; to determine whether the whole or any part of the operation shall continue to operate; to select and hire employees; to promote and transfer employees; to suspend, reduce, demote, discharge for just cause as stated in Article 15, Discipline and Discharge, or take other proper disciplinary action against employees; to lay off employees; and to promulgate rules, regulations, and personnel policies, provided that such right shall not be exercised so as to violate any of the specific provisions of this Agreement.

Article 13, Section 4:

The Union or the grievant shall not expand upon the original elements and substance of the written grievance. Prior to Step 3 of the Grievance Procedure, the Union or the employee may however, modify for the purpose of clarity, the articles cited as being violated and the remedy requested prior to filing at Step 3 of the Grievance Procedure. Improper expansions may, however, be the basis for an arbitrator to find a grievance invalid.

Article 13, Section 5:

b. In the event that arbitration becomes necessary, the Union and the Employer will select an arbitrator by alternately striking names, with the moving party striking first, from an Employment Relations Board list one (1) name at a time until one (1) name remains on the list. The name remaining on the list shall be accepted by the parties as the arbitrator. The arbitration hearing shall commence within fifteen (15) days thereafter, unless otherwise mutually agreed by the parties.

c. The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties and that they will abide thereby. The arbitrator shall have no authority to add to, subtract from or change any of the terms of this Agreement.

d. The arbitrator's fee and expenses shall be paid by the losing party. If, in the opinion of the arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

Article 19, Section 8:

Individual position descriptions shall be reduced to writing and delineate the duties assigned to an employee's position.

A dated copy of the position description shall be given to the employee. Nothing contained herein shall compromise the right or the responsibility of the Agency to assign work consistent with the class specifications.

Article 37, Section 1:

If an employee is released by the attending physician for return to a temporary modified assignment, and the employee is not medically stationary but is expected to be able to resume full duties of his/her previous position within ninety (90) days, the Agency shall offer such work as the employee is capable of performing and which as determined by the Agency is available during the ninety (90) day period. Such short term assignments shall be made without regard to procedures for Lateral Transfers (Article 38). If the employee refuses such assignment, the Agency will notify SAIF of the refusal.

Article 37, Section 2:

a. Demand for Reinstatement. Upon initial request to return from on-the-job injury to a permanent position, certification by the attending physician that the physician approves the employee's return to his/her regular employment shall be prima facie evidence that the employee should be able to perform such duties. This does not, however, preclude the Employer from obtaining further information relative to the Employee's condition.

b. Demand for Reinstatement to former position or classification. Upon demand for reinstatement, an employee who has sustained a compensable injury and is medically stationary shall be reinstated to his/her former position, or a position of the employee's choice within the Agency which the Agency determined is available and suitable, provided that the employee is not disabled from performing the duties of such position. The employee shall have the automatic right to reinstatement to his/her former position for a period of one (1) year from the date of injury. After one (1) year, reinstatement shall be in accordance with State laws and regulations.

c. Demand for Reinstatement to other position(s) that is available and suitable). Employees requiring a change in work assignment on return from on-the-job injury which is deemed by the attending physician to limit an Employee's work capabilities on a permanent basis for more than ninety (90) days shall be assigned if possible by the Agency in the same classification or a classification in the same salary range which he/she is capable of performing or a higher classification at a higher salary range if the Agency deems appropriate and the Employee is capable of performing the job

and is qualified for the job. If not possible, other assignments shall be offered in accordance with State laws and regulations. Employees changing their work assignment under the provisions of this Section are not subject to Article 38 (Lateral Transfers) or Article 40 (Promotions). The Union shall be notified of such transfers.

Article 51, Sections 1-5:

Section 1. The Employer agrees to provide a safe and healthy work environment insofar as practicable.

Section 2. Proper safety devices and clothing shall be provided by the Agency for all employees engaged in work where such devices are necessary. Such equipment, where provided, must be used.

Section 3. If an employee claims that an assigned job or assigned equipment is unsafe or might unduly endanger his/her health and, for that reason refuses to do that job or use the equipment, the employee shall immediately give the reasons for this conclusion to his/her supervisor, in writing, and shall request an immediate determination by a representative of the appropriate governmental agency as to the safety of the job in question. A Union Steward shall accompany the governmental agency representative and employee during this determination.

Section 4. Pending determination provided for in the above Section, the employee shall be given suitable work elsewhere. If no suitable work is available, the employee shall be sent home.

Section 5. Time lost by the employee as a result of any refusal to perform work on the grounds that it is unsafe or might unduly endanger his/her health, shall not be paid by the Agency unless the employee's claim is upheld.

Article 62, Section 1:

When, in the judgment of the Agency, weather conditions require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of his/her work shift. Nothing in this Section shall preclude the authority of the Agency to reassign employees to other work for the balance of the shift.

STATEMENT OF THE FACTS

The Grievant has been employed since June of 1987 at Fairview Training Center, a State residential treatment facility for

developmentally disabled adults. Her classification, originally entitled Recreation Therapist I, is now known as Rehabilitation Therapist I (RTI). The Grievant's assignment has changed several times over the years. Her position description dated March 15, 1990, provided in pertinent part as follows:

1. Serve as the lead worker in the program area.
2. Plan and provide appropriate skill training programs for assigned individuals.
  - A. Assess current abilities, skills, needs, and limitations.
  - B. Write individual behavioral objectives for all individuals in programming.
  - C. Prepare written task analyzed training programs for individuals as needed and/or required.
  - D. Conduct task analyzed programs and provide program instruction that includes maximum reinforcement/generalization in meeting program objectives.
  - E. Evaluate individual's progress and revise programs to reflect current levels of achievement.
  - F. Interpret data and needs in development of new objectives.
  - G. Prepare and submit up-to-date and accurate monthly reviews and IPP assessment summaries.
  - H. Participate as a member of respective interdisciplinary teams.

Ex. U-35

The quoted duties are estimated to fill 60 percent of the employee's time. A variety of other tasks are listed as well, including the following:

4. The instructor is responsible for training and supervising the completion of work contracts. The duties to be performed include:

- A. Individual specialized training.
- 5. Perform other duties as specified.
- G. Maintain a safe working environment. Submit Safety and Sanitation reports one time monthly.
- H. Perform related tasks as required by supervisor.

Ex. U-35

On page 3 of the form, there is a lifting requirement of 50-75 pounds.

The Grievant suffered a work-related low-back injury in December of 1988. The injury was classified as "disabling" by SAIF Corporation in January 1989. See Ex. S-26. Her back injury was aggravated by a second on-the-job incident in September of 1989. Ex. S-26; Ex. U-11.

After the 1989 aggravation occurred, the Grievant's physician requested that she be assigned to "modified work until further notice". See Ex. U-11, p. 3, 6. Her Employer assigned her to "modified work" between September 18, 1989 and October 5, 1989. See Ex. S-29. She was then returned to her regular work assignment after her treating physician, Dr. Sanders, signed a physical assessment form indicating that the grievant could bend and squat "occasionally" and could perform her "current job". See Ex. U-11, p. 9.

As a result of the 1988 and 1989 injuries, it was determined in January 1990 that the grievant had suffered an unscheduled permanent partial disability to her back of five percent. See Ex. U-9.

On or about September 13, 1990, the Grievant was assigned to direct the car wash program at Valley Industries, Fairview's vocational training program for clients. The Grievant at first objected to the assignment for the reason that she did not believe she would be able to perform certain physical requirements, such as bending, squatting and twisting. She presented on or about September 14, 1990 a doctor's statement specifying that she had the following limitations: "no bend, stoop, crawl, lift (sic) over 20#." See Ex. S-2. The doctor also had circled the word "light" in front of "work" on the form. The Grievant's supervisor, Rosemary Cheek, sent the Grievant home when she reviewed the doctor's form. It was Ms. Cheek's conclusion that the Grievant could not perform the duties required of the car wash position with the restrictions that had been imposed by the doctor.

A few days later, the Grievant returned to Fairview with a new doctor's statement, this one dated September 18, 1990. The new statement indicated that the Grievant could return to "regular" work. No restrictions whatsoever were listed on the form. See Ex. S-2, Ex. U-15.

On September 19, 1990, Supervisor Cheek signed a handwritten document at the request of the Grievant, entitled "Duties and Responsibilities". The document provided as follows:

1. Assesses duties required by the work area -- A) Breaks duties into tasks and measures residents. -- B) Prepares written task analyzed training program. -- C) Adapts and maintains tools and equipment to meet job requirements.
2. Instruction - Design forms. Orientate staff.

3. Maintain records and data -- including payroll -- maintains production schedules as necessary.
4. Orientates assigned aides to procedures and program -- orders supplies and equipment for program use -- serves as member of interdisciplinary team.

Your duties are to include the above/but not limited to.  
(sic)

Ex. U-14

The car wash program was located outdoors in a generally open and uncovered area of the parking lot near Farece Building. The area was equipped with hoses hooked up to cold water faucets. The clients generally worked in teams of four or five each day, washing the exteriors of various state vehicles that were sent over to the facility for washing. Clients also were expected to sweep, vacuum and clean the interiors of the vehicles.

The Grievant worked at the car wash program on a generally continuous basis between September 19, 1990 and March 11, 1991. There was a brief period in December when she worked in a Christmas-tree sales program elsewhere on the Fairview campus. There were some days when the grievant's assigned clients worked at an alternative work site inside the Farece building, doing assembly work. After February 1, 1991, the alternative program for the grievant's clients was changed to Room 105, school annex.

The weather in Salem during the period of time between February 10 and March 12, 1991 was generally cold. On 21 of those 30 days, the average temperature was below 50° F. On twelve of the days, the average temperature was 45° or less. See Ex. U-18.

On February 26, 1991 a memorandum entitled "clarification of duties and responsibilities" was typed by Rosemary Cheek and provided to the Grievant. The two-page document provided in pertinent part as follows:

6. When weather is 1) raining hard or 2) too cold (frosty), your alternative program, at this time is in Room #105 at the school annex. Farecee is no longer your alternative program.
7. When the weather does not permit car washing, you are to call all the cottages who have clients in the program and notify them you are going to Room #105 (school annex).

Ex. U-21

On March 11, 1991, the Grievant brought in a physical assessment form, signed by her physician on March 8, indicating that the Grievant should be assigned to "modified work". Various boxes on the form had been checked off by the doctor, indicating that the Grievant was not able to squat, crawl, twist or lift more than 20 pounds. Lesser limitations, that is, "occasionally ok", were indicated for bending, walking on ramps or stairs, pushing/pulling/carrying with arms, and lifting between 11 and 20 pounds. See Ex. U-22.

The following day, March 12, 1991, the Grievant wrote out a brief statement addressed to Personnel, stating as follows:

I am requesting permanent accommodations at my present job due to physical limitations.

Ex. U-25, State Ex. U-3

Also on March 12, 1991, the Grievant filled out a SAIF Worker's Compensation claim form, alleging that she had suffered a "strain", an aggravation of her December 1988 back injury, "due to

physical strain of [her] job." See Ex. U-12. On an accompanying paper, she alleged that the aggravation had occurred "due to [the Employer's] failure to provide promised accommodation". Id.

Upon review of the documents submitted on March 12, 1991. Management made a decision that the Grievant's job could not be accommodated to meet her physical limitations. She was sent home that same day. It is that action that is the subject of the instant grievance, which was filed by the Union on March 13.

On April 22, 1991, the Grievant provided another Physical Assessment form, signed by her doctor. According to the April 22 form, the Grievant could "occasionally" lift up to 40 pounds and could "occasionally" bend, squat, crawl or twist. See Ex. U-31; see also Ex. U-28.

The Employer notified the Grievant on May 3, 1991 that she could return to work on May 8, 1991. She was informed that she would be "accommodated" on two cottages, Patterson and Martin and that she would spend half-time on each cottage. See Ex. U-32.

#### POSITIONS OF THE PARTIES

A. The Union: The Union contends the Employer violated the collective bargaining agreement of the parties when it failed to provide reasonable accommodation to the Grievant on March 12, 1991. The Union contends Management was aware at all times that the Grievant had a five percent permanent partial disability based on her December 1988 back injury and 1989 aggravation. The Employer had a duty to accommodate that disability.

The Employer promised to accommodate the Grievant's disability at the car wash, argues the Union. Her supervisor, Rosemary Cheek, promised to allow her to supervise clients and staff while they did the actual physical work of washing, vacuuming and cleaning the cars. The handwritten document entitled "Duties and Responsibilities", which Ms. Cheek signed on September 19, 1990, evidence that promise, contends the Union.

During the cold winter months, however, especially during the latter part of February and early March of 1991, when the weather was mostly between 35° and 50° F, the Grievant herself had been expected to do more of the physical tasks. Her back injury got gradually worse as a result, yet her supervisor failed to permit her to avoid the physical aspects of the job or to curtail the program during inclement weather.

The Union contends the Employer should have accommodated the Grievant's disability in one or more of the following ways when she made her request for accommodation on March 12, 1991:

(1) Her job at the car wash should have been adjusted to allow her to bring her clients into Farece during cold, wet weather; in the alternative, the Employer should have provided hot water for washing cars and special gear, such as a tarp, rain clothes and boots, to cover the Grievant and her clients when it was raining and cold. The Grievant should also have been relieved of the duties of lifting vacuum cleaners and assisting clients with cleaning duties; her responsibility should have been limited to supervising the clients' work and doing record-keeping, as she had

been promised in September of 1990.

(2) The Grievant should have been offered "modified duty", based on her alleged new aggravation of her 1988 back injury claim. Even though she had been provided a period of modified work after her first aggravation occurred in 1989, she should have been given a second such opportunity in March of 1991. Other injured workers had been offered modified work on more than one occasion. The Grievant should have been treated the same, as provided in the parties' collective bargaining agreement.

(3) Assuming, for the sake of argument, that the car wash position could not have been modified, the Grievant could have and should have been assigned to fill a Rehabilitative Therapist vacancy at Patterson and Martin Cottages, effective March 12, 1991. No employee had been filling that split position since January of 1991. It was that very position that the Grievant actually filled when she was called back to work in May of 1991. Since the position had been available and suitable in March, the Employer should have assigned the Grievant to that position instead of sending her home between March 12 and May 8, 1991.

The Union contends further that the Employer failed to maintain a safe and healthy work environment for the Grievant, as required by Article 51 of the labor agreement, during the 30-day period preceding the filing of the grievance. Specifically, the Union contends the Employer forced the Grievant to work outdoors under unreasonably cold, wet weather conditions, without rain gear or even hot water available for washing cars. She was not allowed

to go indoors to Farece after February 4, because her alternative work assignment had been changed to the school and she was told to use that alternative only when no cars were available to wash. As a result of having to work outdoors under such cold, wet conditions, the grievant aggravated her earlier back injury and further exacerbated her disability.

The Union contends finally that the Grievant was not provided equitable treatment. The employee who succeeded her in the car wash program was provided warm water and a covered barn in which to wash cars. The replacement was also allowed to bring her clients into Farece during wet weather, even in a mild drizzle. The Union also contends some Fairview employees have been provided more than one period of "modified work" following a work-related injury. Others have been allowed to continue a "modified work" assignment beyond 90 days. The Grievant, however, was told she could not get a second period of modification, even though she had not used up a full 90-day period when she first was assigned modified work for her back injury.

B. The Employer: The Employer denies that it violated the collective bargaining agreement in any of the ways asserted by the Union. The Employer contends it could not grant the Grievant's request for permanent accommodation at the car wash assignment, because her job required the very kinds of physical agility and heavy lifting ability that the Grievant's physician indicated she lacked when he filled out a physical assessment form on March 8, 1991. The Employer denies vehemently that the Grievant had been

promised any accommodation when she began the assignment at the car wash in September of 1990. The Employer relies on the full work release for unrestricted "regular" work that the Grievant's doctor had signed on September 18, 1990 to support its contention that the Grievant had not required any accommodation at that time, in spite of her five percent disability determination.

The Employer denies that the Grievant was required to work outdoors under unreasonably cold, inclement weather conditions. She had an alternative work site available at all times and she had full discretion to bring her clients to the alternative site whenever she herself determined it was necessary to stay indoors. She never made a client abuse report, alleging unreasonable treatment of clients, and she never requested a safety inspection by OSHA inspectors. Therefore her allegation of unsafe, unhealthy working conditions is not substantiated.

As for the addition of hot water and a permanent cover over the car wash area later in the spring of 1991, those improvements did not constitute preferential treatment of the grievant's successor. They had been ordered several months prior to March of 1991 but, due to plumbing problems and construction delays, they had not been completed by the time the Grievant made her request for accommodation. The Employer could not speed up the process any faster.

The Employer contends the Grievant was ineligible for a second period of "modified work" based on her 1988 back injury and disability. According to Fairview's return-to-work policy, which

is based on Oregon injured worker statutes and rules, modified work assignments are only available when an employee first returns to work following an on-the-job injury. Such assignments are only available for a maximum period of 90 days. The Grievant had already used up her "modified work" opportunity, between September 18, 1989 and October 5, 1989, after she suffered her first aggravation of her 1988 back injury.

Finally, the Employer denies that it could have reassigned the Grievant to work at Patterson/Martin cottages in March of 1991, as alleged by the Union. According to the Employer, the Patterson/Martin post was not available as a "vacancy" at the time, due to the fact that the Employer was in the midst of effectuating a "realignment" throughout the entire institution, and had not yet determined what staffing changes would be authorized as a result of certain reductions that had occurred in client caseloads. The Employer did not decide until May of 1991, when it hired the Grievant to fill the Patterson/Martin slot, that that position would actually be available for a Rehabilitative Therapist to fill.

The Employer alleges that it had no choice on March 12, 1991 but to send the Grievant home. She could not perform the physical requirements of her job at the car wash. She was ineligible for "modified work" and there were no alternative assignments for RTI's that she could be given prior to May 8, 1991.

#### ANALYSIS AND DECISION

The arbitrator's decision must draw its essence from the parties' collective bargaining agreement. Certain relevant

provisions of the agreement are set forth elsewhere in this report. The agreement has a provision which expressly makes the entire agreement "subject to all applicable existing and future laws of the State of Oregon". (Article 2). Pursuant to that contractual provision, the following relevant statutes and administrative rules are incorporated into the parties' labor agreement:

ORS 659.400 (1) "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2)(a) "Major life activity" includes, but is not limited to self-care, ambulations, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

ORS 659.412 (1) Reemployment rights of injured state workers. (1) For the purpose of administration of ORS 659.415 and 659.420:

(c) An injured worker employed at the time of injury by any agency of the Executive or Administrative Department of the government of this state shall have the right to reinstatement as (sic) reemployment at any available and suitable position in any agency of the Executive or Administrative Department.

(2) ... any agency referred to in subsection (1) of this section may adopt rules to define entry level and light duty assignments. However, the rulemaking power for all agencies referred to in paragraph (c) of subsection (1) of this section shall be exercised by the Administrator of the Personnel Division.

ORS 659.420 (1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

(2) A certificate of the worker's attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.

ORS 659.425 (1) ... an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or

discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

(a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved.

OAR 839-06-245 ORS 659.425 imposes an affirmative duty upon an employer to make reasonable accommodation for an individual's physical or mental impairment where the accommodation will enable that individual to perform the work involved in the position occupied or sought:

(1) Accommodation is a modification or change in one or more of the aspects or characteristics of a position including but not limited to:

- (a) Location and physical surroundings;
- (b) Job duties;
- (c) Equipment used;
- (d) Hours, including but not limited to:
  - (A) Continuity (extended breaks, split shifts, medically essential rest periods, treatment periods, etc.); and
  - (B) Total time required (part-time, job-sharing).
- (e) Method or procedure by which the work is performed.

(2) Accommodation is required where it does not impose an undue hardship on the employer. Whether an accommodation is reasonable will be determined by one or more of the following factors:

- (a) The nature of the employer including:
  - (A) The total number in and the composition of the work force; and
  - (B) The type of business or enterprise and the number and type of facilities.
- (b) The cost to the employer of potential accommodation and whether there is a resource available to the employer which would limit or reduce the cost. Example: funding through a public or private agency assisting handicapped persons;
- (c) The effect or impact of the potential accommodation on:
  - (A) Production;
  - (B) The duties and/or responsibilities of other employees; and
  - (C) Safety:
    - (i) Of the individual in performing the duties of the position without present risk of probably incapacity to him/herself; and
    - (ii) Of co-workers and the general public if the

individual's performance, with accommodation, does not present a materially enhanced risk to co-workers or the general public (See OAR 839-06-230).

(d) Medical approval of the accommodation; and

(e) Requirements of a valid collective bargaining agreement including but not limited to those governing and defining job or craft descriptions, seniority, and job bidding, but this rule shall not be interpreted to permit the loss of an individual's statutory right through collective bargaining.

(3) A handicapped person who is an employee or candidate for employment must cooperate with an employer in the employer's efforts to reasonably accommodate the person's impairment. A handicapped person may propose specific accommodations to the employer, but an employer is not required to accept any proposal which poses an undue hardship. Nor is the employer required to offer the accommodation most desirable to the handicapped person, except that the employer's choice between two or more possible methods of reasonable accommodation cannot be intended to discourage or to attempt to discourage a handicapped person from seeking or continuing employment.

Ex. U-3, see also Ex. S-31

This is not a disciplinary matter. Therefore, the Union has the burden of persuading the arbitrator that the contract has been violated. The basic issue in this case is whether the Employer failed to accommodate the Grievant's disability during the thirty (30) day period prior to the filing of the grievance. The Union must demonstrate that the Employer failed to make reasonable efforts to accommodate the Grievant's disability or to assign her to available and suitable work, choosing instead to send her home on March 12, 1991 and then not reinstate her until May.

The Grievant is clearly an "injured worker", subject to the reemployment rights of ORS 659.412 and 659.420. She suffered on the job injuries to her back in 1988 and 1989. As a result of those injuries, she was given a permanent partial disability of

five percent. (Evidence in the record shows that the Grievant had other injuries as well. She apparently received a seven percent shoulder disability. She also suffered a thumb injury, a knee injury and a foot injury. None of those injuries are relevant to this grievance, however.) It was the back injury that the Grievant alleged to have been aggravated in February and March of 1991, leading to her request for accommodation and her grievance.

Even though the Grievant had a permanent partial disability, her physician had released her for "regular work", with no restrictions whatsoever as of September 18, 1990. See Ex. U-15. The release had apparently been issued for the reason that the Grievant wanted to return to her job as director of the car wash program. She had been sent home on September 17, 1990, based on work restrictions that were almost identical to the restrictions set out on the March 8, 1991 statement. After spending one day off work, the Grievant obtained a full, unrestricted work release from her doctor. Upon presenting that to the Employer, she had been allowed back to work. There is no evidence that the Grievant's doctor made any changes in that unrestricted work release at any time between September 18, 1990 and March 8, 1991. The Grievant testified that she could not recall going to the doctor at any time between those two dates.

According to ORS 659.420(1) a certificate of the worker's attending physician that the worker is able to perform certain work is prima facie evidence of the employee's ability to do the work. See also OAR 839-06-130(1)(a)(A); Ex. S-31; Jt. Ex. No. 1, Art. 37

(2)(a). The Employer has the contractual right to request further information relative to the Employee's condition, but is not required to look beyond the doctor's statement itself. Therefore, the Employer was justified in relying on the doctor's assertion in this case that the Grievant had been fully released from her earlier restrictions.

The Grievant contends the Employer knew at all times, in spite of the doctor's September 18, 1990 release, that she was restricted in her ability to bend, twist, crawl, and lift heavy weights. According to the Grievant's version of the facts, her physician merely gave her a full release for "regular work" on September 18, 1990, because her supervisor, Rosemary Cheek, had expressly authorized the Grievant to limit her job duties to supervisory and record keeping roles only. The Grievant testified that Ms. Cheek had told her she would not need to bend, squat or lift, but that other staff or clients would be available to perform those tasks. It was only when the Grievant reported Ms. Cheek's promise to her doctor that he released her for "regular work", she argued. In other words, "regular work" on the September 18, 1990 release form really meant "modified work" or "accommodated work", according to the doctor's understanding of the situation.

The Grievant contends that Ms. Cheek's handwritten job description for the car wash role, dated September 19, 1990, supports her position regarding the Employer's promise. See Ex. U-14. She stated the doctor had issued the full unrestricted work release after he learned that the car wash assignment had been

promised as a supervisory job only, without physical demands.

Ms. Cheek denied, however, at the hearing, that the hand written job description reflected such a promise. Ms. Cheek (now known as Ms. Rafael) testified that the handwritten job description was merely a general summary of the Grievant's anticipated car wash role. The Grievant's regular position description as a Rehabilitation Therapist I, including the 50-75 pound lifting requirement, always controlled as the fundamental basis of her job. See Ex. U-32. Ms. Rafael stated she had informed the Grievant that her role would involve getting in and helping the clients wash cars and clean the interiors. Bending and stooping would be required. The handwritten job description contained the words "your duties are to include the above/but not limited to -". Those words were intended to incorporate the additional physical expectations of the job, which were not expressly included in the writing.

The Arbitrator finds Ms. Rafael's testimony more credible than the Grievant's. First of all, the sequence of events could not possibly be as the Grievant alleged. Dr. Stevens' full release was signed on September 18, 1990, one day before Ms. Cheek signed her handwritten statement of duties. The doctor could not possibly have relied on any representation regarding the Grievant's job duties, other than that of the Grievant herself, when he signed the release form. Also the Grievant had a tendency to exaggerate and to misstate facts at the hearing. She stated, for example, that she and one client had both had pneumonia during the winter of 1990-91. None of her medical records substantiate that allegation,

however. A medical specialist, Mary Jo Hall, whose job is to investigate and report any and all infectious diseases at Fairview, testified that no car wash clients had suffered from pneumonia during that winter period. Also, Ms. Hall was unaware that any diagnosis of pneumonia had been made with respect to the Grievant.

The Grievant offered a lengthy diary in evidence, which she stated had been written on a day-to-day basis, to document the sequence of events beginning in September of 1990. Ex. U-13, U-20. On cross-examination, however, she admitted that she had not written the diary day-by-day after all. She had written large sections of it at various times, pretending to reconstruct what had happened day-to-day.

For these reasons, the arbitrator finds the Grievant not to be a credible witness. Based on that conclusion, the arbitrator does not agree that the doctor's full work release, dated September 18, 1990, reflected any promise by the Employer to accommodate the Grievant's disability at the car wash position. While the Grievant herself may have told the doctor she would only be supervising clients at the car wash, there is no proof that the Employer had promised such limitations.

A memorandum, sent by Mary Hollins, Fairview's Safety Program Director, to Union President David Bower on September 26, 1990, further substantiates the arbitrator's conclusion. According to Ms. Hollins' letter, the Grievant was sent off work on September 17, 1990, after she submitted the initial doctor's release showing specific restrictions. On September 19, 1990, however, the

Grievant presented a release to return to "regular work, no restrictions". See Ex. S-2 (emphasis added). Neither the Union nor the Grievant apparently objected to Ms. Hollins' characterization of the doctor's authorization or its implication.

Ms. Rafael admitted that the Grievant had informally discussed her "back problem" on a number of occasions during the winter months and that the Grievant indicated that she was considering having surgery on her back. According to Rafael, whenever the Grievant spoke of such things, she asked the Grievant to please supply a doctor's confirmation. The Grievant never presented a doctor's slip until March 12, 1991, however.

Other Union witnesses who testified at the hearing stated that they observed the Grievant limping and having difficulty during the cold wet weather of January and February, 1991. The Union apparently wished the arbitrator to view those observations as indications that the Employer should have been aware of a need to accommodate the Grievant's disability. It does appear that the Grievant's supervisor was insensitive to the adverse effect that the cold outdoor working conditions were having on the Grievant. The arbitrator does not agree, however, that mere insensitivity is the same as official notice to the Employer of a need to accommodate an employee's disability. The Employer must rely on written explanations from an employee's doctors as to the specific limitations that the employee has before its duty to accommodate the employee's disability is triggered. Without a doctor's explanation, the Employer is at a loss to analyze the employee's

job duties in a sufficiently meaningful way to attempt accommodation.

When the Grievant submitted her new doctor's restriction dated March 8, 1991, her Employer made a quick analysis of her job duties at the car wash and concluded that there was no way it could reasonably accommodate the Grievant's disabilities. The Employer therefore sent the Grievant home. See also Ex. U-27. Eventually, in May of 1991, the Employer reassigned the Grievant to a split position between Patterson and Martin Cottages and apparently accommodated her lifting restriction by eliminating the requirement that she be able to lift between 40 and 75 pounds.

The Union contends that the job on Patterson and Martin Cottages existed as of March 11, 1991. It was therefore "available and suitable work" for the Grievant to do at that time. The Employer should have assigned the Grievant to that position, rather than send her home, leaving her unemployed for nearly two months.

While it does appear from the testimony of Rosemary Raphael, Bob Cox, Bill Sexton and Lon Burkhardt, that no meaningful effort was made to find "available and suitable work" for the Grievant on March 12, 1991, the arbitrator cannot conclude that there was, in fact, a suitable vacancy "available" for the Grievant on that date. The Employer offered considerable evidence explaining why no RT had been assigned to Patterson/Martin cottages after January of 1991. Even though applicable standards, as set forth in a consent decree, required a ratio of one RT to 40 clients and the ratios at Patterson and Martin were 1:64 and 1:67 respectively, the Employer

had decided not to add an RT on those cottages for administrative reasons. It was going through a general realignment of staff at that time, based on reductions in overall client loads at the institution.

The Union disputed the Employer's evidence on that fact, arguing that the Employer had a history of double-filling positions or adding positions which were not budgeted, in order to meet federal standards. The arbitrator is not persuaded that the Employer had a contractual duty to do those things, however. Therefore, even though the Employer was not in compliance with the consent decree, in that it did not have adequate staffing of RT's on Patterson/Martin, the arbitrator does not conclude that the Employer should have assigned the Grievant to those cottages as of March 12, 1991.

The arbitrator is also not convinced that the Employer violated the collective bargaining agreement by failing to provide a safe and healthy work environment. If the Grievant had truly believed the car wash assignment was unsafe for herself and/or her clients, due to the cold icy conditions during February and early March, she had three choices for dealing with the problem herself: (1) she could have filed a client abuse investigation report; (2) she could have demanded an OSHA inspection and report; or (3) she could have curtailed the car wash program and sent her clients to the alternative program at the school. Her own job description included a provision requiring her to maintain safety for clients. See Ex. U-35. Ms. Rafael reiterated the curtailment option in a

written clarification statement addressed to the Grievant on February 26, 1991. Ex. U-21. There was some evidence showing that the Grievant's supervisor discouraged her from curtailing the program due to weather conditions. However, it is not clear that the Grievant was ordered to work under unsafe conditions on any particular day.

Finally, the arbitrator is not convinced that the Grievant was a victim of inequitable treatment. Even though some Union witnesses testified that they had been allowed extended periods of "modified work" (more than 90 days) or repeated sessions of modified work, the labor contract expressly limits "modified work" to 90 days, upon return from an on-the-job injury. See Jt. Ex. No 1, Article 37, Section 1. The Grievant had had a period of modified work in 1989. It was "accommodation" that she needed in 1991, not "modified work".

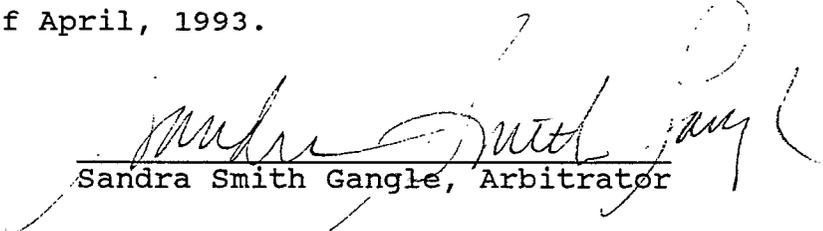
It is unfortunate that the Grievant's back condition became symptomatic in February and March of 1991. The arbitrator is persuaded that the cold weather probably adversely affected the Grievant's pre-existing disability, resulting in the doctor's assessment of March 8, 1991 restricting her physical activity. The arbitrator is also persuaded that the Grievant's supervisor was insensitive to the Grievant and failed to take time to look for "available and suitable" options to place the Grievant between March 12 and May 8, 1991. The arbitrator is not convinced, however, that the Employer violated the labor contract when it sent her home on March 12, 1991, based on its conclusion that there were no ways it could reasonably accommodate her disability.

AWARD

For the reasons stated in the foregoing analysis and decision, the Grievance is denied.

The arbitrator does not conclude that either party is the "losing party" in this case, however, and has apportioned the arbitrator's fees and costs equitably, as provided in Article 13, Section 5(d). The arbitrator's fees and expenses shall be divided equally between the Employer and the Union.

DATED this 23rd day of April, 1993.

  
Sandra Smith Gangle, Arbitrator