**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

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| In the Matter of the Appeal by<br><br>**SYLVIA C. SOLIS**<br><br>From denial of reasonable accommodation and medical termination from the position of Motor Vehicle Field Representative with the Department of Motor Vehicles at Campbell | ) | SPB Case Nos. 98-4806 and 99-0574<br><br>**BOARD DECISION**<br>(Precedential)<br><br>**No. 00-07**<br><br>July 6, 2000 |

**APPEARANCES**: Brian K. Taylor, Staff Attorney, California State Employees Association, on behalf of appellant, Sylvia C. Solis; Kaye Krumenacker, Senior Staff Counsel, Department of Motor Vehicles, on behalf of respondent, Department of Motor Vehicles.

**BEFORE**: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter, William Elkins and Sean Harrigan, Members.

## DECISION

This case is before the State Personnel Board (SPB or Board) after the Board granted the petition for rehearing filed by Sylvia C. Solis (appellant) to review whether the respondent, the Department of Motor Vehicles (DMV or Department), proved by a preponderance of the evidence that appellant was unable to perform any position within the Department when it medically terminated her pursuant to Government Code § 19253.5.

In this Decision, the Board finds that DMV failed to show that it adequately reviewed whether there were any other positions available in the Department into which appellant could have been medically demoted or transferred before it medically terminated her. The Board also finds that DMV was not required to convert appellant's temporary light duty assignment at the "Start Here" window at DMV's Santa Teresa Field Office into a

permanent position as a reasonable accommodation under the Americans with Disabilities Act (ADA), the Fair Employment and Housing Act (FEHA), or Government Code § 19230 of the State Civil Service Act.

## BACKGROUND

Factual Summary[1]

(Employment History)

DMV appointed appellant as permanent intermittent Motor Vehicle Field Representative (MVFR) on July 17, 1995. Appellant was assigned to the Campbell Telephone Service Center as a Telephone Service Center Technician (TSC Technician). As a TSC Technician, appellant spent most of her workday wearing a telephone headset while operating a computer terminal, responding to telephone calls by accessing information and performing transactions on the DMV database. In response to customer calls, appellant would, among other things, schedule appointments at DMV field offices, look up information, and collect registration and licensing fees via credit card.

(Appellant's Medical Issues)

On or about February 14, 1997, appellant complained that she was experiencing significant pain in her right wrist as a result of the cumulative trauma of performing repetitive key strokes and pulling paper from her printer. On February 21, 1997, DMV filed an employer's report of injury with the State Compensation Insurance Fund (SCIF).

[1] Some of this factual summary was taken from the Proposed Decision.

Appellant's claim was accepted by SCIF, and appellant was, eventually, referred to Michael C. Post, M.D. (Dr. Post).

(Temporary Light Duty Assignment at "Start Here" Window)

In response to appellant's medical complaints, in or about March or April, 1997, DMV temporarily assigned appellant for approximately two weeks to the Santa Teresa Field Office. The manager of that office, Marilyn Patterson (Patterson), placed appellant at the "Start Here" window. The DMV employee at the "Start Here" window assists customers as they enter the field office by directing them to the proper line for their needs, providing them with the correct forms, and restocking the field office's forms and booklets. When the "Start Here" employee is not assisting customers at the "Start Here" window, he or she processes the mail, which requires using a computer terminal to input any registrations or title transfers that may be received.[2] Additionally, when there are many DMV customers in line, the office manager might assume the "Start Here" station, and the "Start Here" window employee might assume one of the computer terminal stations. According to Patterson, the employee at the "Start Here" station spends approximately half the workday assisting customers, and the rest of the workday processing mail transactions. Appellant testified that she was able to perform adequately the tasks of the "Start Here" station.

[2] The "Start Here" station at the Santa Teresa Field Office does not have its own computer terminal; the "Start Here" window employee can use a computer terminal is located just to the side of the station.

Working at the "Start Here" window is not a permanent position at DMV's Santa Teresa's Field Office. [3] Instead, it is just one of the stations all MVFRs at that office are required to rotate through during the course of their work.[4] An MVFR at that office is also required to work the registration counter, the drivers' license counter, and the inventory station, all of which require the MVFR to use a computer terminal to access DMV's data base to complete customer transactions or obtain information. A study conducted by DMV estimated that an MVFR in a field office spends approximately two hours, or 25%, of the workday using the keyboard.

After appellant completed her two weeks at the Santa Teresa Field Office at the "Start Here" window, she returned to the Campbell Telephone Service Center. Appellant's injury flared up again. The last day appellant worked at the Campbell Telephone Service Center was August 14, 1997

(Appellant's Request for Reasonable Accommodation)

On November 11, 1997, Dr. Post issued a "Permanent and Stationary Report" (Report) that described appellant as having:

> Cumulative trauma disorder with history of bilateral wrist tendinitis, deQuervain's tenosynovitis, and probable thoracic outlet syndrome.

[3] CSEA representative Brenda Farley testified that she had assisted two MVFRs with disabilities at the Whittier Field Office to be assigned to the "Start Here" window on a long-term basis. The Whittier Field Office is a Class Grade 4 office and is larger than the Santa Teresa Field Office, a Class Grade 3 office.

[4] Denise Caesar, DMV Classification and Pay Analyst, testified that if a DMV employee were permanently assigned to a "Start Here" window, she could not classify that employee as a MVFR, but would have to perform an audit of the duties and reclassify such a position.

In his Report, Dr. Post described her condition as a "rather severe tendinitis problem." He stated that he did "not feel that [appellant] can return to her usual and customary work" and recommended the following work restrictions:

> no forceful or repetitive gripping, grasping, pinching, or fine manipulation with either hand, no keyboarding greater that two hours a day, at 15 minute non-consecutive intervals.

Dr. Post's Report also stated that appellant should have "an ergonomic work station," and, because appellant was "at high risk for developing recurrent tendinitis," Dr. Post stated that "it would be preferable to have work that did not require her to use the keyboard more than on a seldom basis."

On November 24, 1997, appellant filed a Request for Reasonable Accommodation (Request) with DMV. In that Request, as her limitations, appellant set forth the restrictions Dr. Post had included in his Report. At the end of Dr. Post's restrictions, appellant added "(preferably no keyboarding)." In her Request, appellant also asked for a voice-activated computer and a 17" computer monitor.

On December 1, 1997, Cheryl Seavers, manager of the Campbell Telephone Service Center, notified the Telephone Service Center administrator that the Campbell Telephone Service Center could not accommodate appellant's medical needs.

On December 18, 1997, Sandy Knight (Knight), appellant's supervisor at the Campbell Telephone Service Center, sent appellant a notice that stated that appellant would be temporarily placed at the "Start Here" station at Santa Teresa Field Office effective December 30, 1997, until DMV could find an appropriate placement to meet her medical restrictions. On December 19, 1997 appellant received a notice from SCIF that

informed her that DMV had no modified or alternative work available for her. SCIF also asked appellant if she wanted to participate in vocational rehabilitation benefits. Because appellant thought that DMV had no modified work for her, she replied to SCIF on December 24, 1997 that she wanted to participate in vocational rehabilitation, and did not show up at the Santa Teresa Field Office on December 30, 1997 as directed by Knight's memorandum.[5]

Appellant was paid a vocational rehabilitation maintenance allowance (VRMA) from January 8 through May 25, 1998. Her VRMA stopped when she accepted employment with the United States Postal Service. Appellant, however, resigned from the Postal Service when her work there aggravated her tendinitis.

In early June 1998, appellant went to the Santa Teresa Field Office to pay her vehicle registration fees. Patterson asked appellant how she was doing and if she was interested in working at the Santa Teresa Field Office. Appellant replied that she still had work restrictions. Patterson responded that appellant should send her a letter stating the restrictions, and she would process it. On June 2, 1998, appellant sent a handwritten note to Patterson requesting to return to the "Start Here" window and listing the same restrictions set forth in her Request. Appellant requested a start date of June 9, 1998. Patterson received the note on June 3, 1998. On June 12, 1998, Patterson responded

[5] On January 22, 1998, DMV notified appellant that it was invoking Government Code § 19996.2, which allows an appointing power to terminate an employee for being absent without leave for five consecutive working days, for her failure to report to the Santa Teresa Office on December 30, 1997. DMV withdrew its action against appellant under Government Code § 19996.2 when it learned of appellant's confusion as to the inconsistent information she had received from DMV and SCIF about returning to work.

that she could not return appellant to work due to her restrictions, but that DMV Return-To-Work Coordinator Patrick Gage (Gage) would be looking into other options for her.

On November 3, 1998, Elaine Anderson (Anderson), Manager of the DMV Health and Management Section, sent appellant a "Reasonable Accommodation Denial" (Denial). The Denial acknowledged that appellant "may be considered a Qualified Individual With a Disability as defined by the ADA," but stated that she was not qualified to perform the job of an MVFR at the Campbell Telephone Service Center because she was not able to perform the essential functions of her job, which included repetitive gripping, grasping, pushing, pulling, fine manipulation with either arm, and keyboarding. Additionally, the Denial stated that:

> Given the multiple medical restrictions, even if a voice computer could enable you to perform the one essential function of keying or inputting information into the Series 1 Computer, the fact remains that you are medically precluded from performing all the other essential functions required in your position of Motor Vehicle Field Representative.[6] Namely, you are precluded from handling and partly completing forms, writing, pulling manuals and preparing items to be mailed.

The Denial concluded that, because appellant's medical restrictions prevented her from performing the essential functions of her job, and because the law does not require an employer to reallocate the essential functions of a job as a reasonable accommodation, DMV had no legal obligation to accommodate appellant under the ADA.

[6] Gage testified that DMV utilizes the Series 1 computer to access the DMV database instead of personal computers. Series 1 computers do not have voice-activation.

(Options Letter and Medical Termination)

On November 13, 1998, DMV sent appellant a letter (Options Letter) that informed her that she could choose one of the following four options: (1) return to work (if she could perform the full range of duties); (2) voluntarily resign; (3) disability retire; or (4) be medically terminated. The Options Letter stated that appellant had until November 27, 1998 to choose one of these options, or DMV would pursue a medical termination. [7]

On November 24, 1998, appellant's workers' compensation attorney responded that appellant:

> continues to desire to return to work at the DMV at a suitable modified position, or at "an appropriate vacant position in a comparable classification"; further, under no circumstances does [appellant] wish to waive any right she may have to disability retirement benefits, or other PERS benefits to which she may be entitled. Neither does [appellant] wish in any manner to forfeit, waive or otherwise negatively affect her employment status with DMV.

By letter dated January 19, 1999 (Medical Termination Letter), DMV notified appellant that she would be medically terminated from her position as an MVFR effective February 15, 1999. In the Medical Termination Letter, DMV stated that appellant was

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[7] The Options Letter improperly stated that if appellant did not choose one of the offered options by November 27, 1998, DMV would consider appellant to have waived her disability retirement rights. In order to have a valid waiver of disability retirement rights under Government Code §§ 19253.5 and 21153, an employee must explicitly waive the right to retire for disability, and either elect to withdraw his or her PERS contributions or permit those contributions to remain in the fund with rights to service retirement; a mere failure to choose from limited options will not constitute a waiver of disability retirement rights. (In any event, appellant was not entitled to retire for disability at the time of her medical termination because she had not worked long enough in state service to become vested.)

The Options Letter also erroneously implied that the four options offered to appellant were the only options available to her. It would have been preferable if the Options Letter had stated that the four offered options were some of the available options, and invited appellant to engage in an interactive process with DMV to explore any other options that might meet the needs of both appellant and the Department.

"unable to perform the duties of [her] present position or another position in a comparable or in a lower related class," and that it could not accommodate her medical restrictions.

Gage testified that Office Assistant was the "only position that DMV had in a comparable class or lower related class to MVFR that [did] not have an essential function of keying." Gage stated that DMV could not place appellant in an Office Assistant position because the only Office Assistant positions that did not include typing involved considerable and difficult filing in vertical drawers, which was prohibited by Dr. Post's restriction against "repetitive gripping and grasping."

Patterson testified that the Santa Teresa Field Office employed MVFRs and Licensing Registration Examiners (LREs). DMV offered no evidence as to whether it reviewed if appellant could perform in the position of LRE, or any positions other than TSC Technician and Office Assistant within the Department.

Procedural History

On November 24, 1998, appellant filed with the Board an "Appeal of Denial of Obligation to Accommodate under Americans with Disabilities Act."

On February 8, 1999, appellant filed an appeal with the Board from her medical termination.

On April 30, 1999, appellant submitted a letter to the Board that stated that "reasonable accommodation will be raised as an affirmative defense to [appellant's] medical termination," and that appellant had no objection to the Board's combining her two appeals. At the beginning of the hearing on appellant's appeal from her medical termination, appellant's attorney stated that he had no objection to the Board's combining

appellant's medical termination appeal with her reasonable accommodation appeal, but left it to the Board to make the determination. He stated that, even if the two appeals were not combined, appellant would be raising reasonable accommodation as an affirmative defense to her medical termination. The Department did not object to appellant's attorney's request.

Because both parties during the hearing before the ALJ addressed all the issues raised by appellant in her appeal from denial of reasonable accommodation and in her appeal from medical termination, the Board will treat this matter as a consolidation of those two appeals.

## ISSUES

1. Was DMV required to convert a temporary light duty assignment into a permanent position as a reasonable accommodation for appellant?

2. Has DMV met its burden of showing that appellant is not able to perform any position within the Department?

## DISCUSSION

### Reasonable Accommodation

If an employee has requested a reasonable accommodation, before an appointing power may invoke the medical termination provisions of Government Code § 19253.5, it must first determine whether the employee is entitled to a reasonable accommodation under the ADA, FEHA or Government Code § 19230.

Appellant asserts that she is a qualified individual with a disability who is entitled to a reasonable accommodation under the ADA, FEHA and/or Government Code § 19230.

Appellant argues that, as a reasonable accommodation, DMV is required to convert her temporary light duty assignment at the Santa Teresa Field Office "Start Here" window into a permanent position for her.

In order to show that she is entitled to a reasonable accommodation, appellant must show that: (1) she has a disability as defined by the ADA, FEHA or Government Code § 19231; and (2) she is able to perform the essential functions of her position with a reasonable accommodation.[8]

Disability Analysis

The definitions of "disability" set forth in the ADA, FEHA and Government Code § 19231 are all slightly different. To establish a disability under the ADA, an employee must show that he or she has a physical or mental impairment that *substantially limits*[9] the performance of a major life activity.[10] To establish a physical disability under the FEHA, an employee only needs to show that he or she has a physiological condition that *limits* his or

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[8] See, Doris Jones (1999) SPB Dec. No. 99-06.

[9] The ADA regulations define "substantially limited" to mean that the individual is either:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
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> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

[10] Equal Employment Opportunity Commission (EEOC) regulations promulgated under the ADA define "major life activities" to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). In addition, EEOC, in "Interpretive Guidance" promulgated as an appendix to its regulations, has stated that sitting, standing, lifting and reaching also are major life activities. 29 C.F.R. § 1630.2(i), Appendix III.

An employee may also establish a disability under the ADA by showing that he or she has "a record of" a disability, or that the appointing power "regarded" him or her as having a disability.

her ability to participate in major life activities.[11] Courts that have reviewed the definitional differences in these two statutes have reached inconsistent results as to whether and to what extent the ADA's and FEHA's tests for disability differ.[12]

Under Government Code § 19231(a)(1),[13] an individual is deemed to have a disability when he or she has a physical or mental impairment that *substantially limits* one or more major life activities. That subdivision defines an individual with a disability to be *substantially limited* if he or she is "likely to experience difficulty in securing, retaining, or advancing in employment because of a disability." While the definition of "disability" set forth in Government Code § 19231 is closer to the ADA's definition, the Board, in Andrew Ingersoll,[14] made clear that it would apply the definitions of disability set forth in either the ADA, FEHA or Government Code § 19231, whichever were more protective of a state employee's civil service rights.

The medical information submitted by DMV shows that, because of her severe tendinitis problem, appellant was unable: (1) to perform her usual household duties; (2) to push or pull any objects; (3) to complete tasks at a computer or desk; or (4) to drive a car

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[11] Government Code § 12926(k). An employee may also show that the appointing power regarded him or her as having a disability.

[12] Compare Pensinger v. Bowsmith, Inc. (1998) 60 Cal.App.4th 709 to Muller v. Automobile Club of So. California (1998) 61 Cal.App.4th 431. See also, Cassista v. Community Foods (1993) 5 Cal.4th 1050. Currently pending before the California Supreme Court is the case of Swenson v. County of Los Angeles, No. S083916, which raises this issue.

[13] Government Code § 19231(a)(1) defines an "individual with a disability" to mean:

> any individual who (A) has a physical or mental impairment which substantially limits one or more of that individual's major life activities, (B) has a record of the impairment, or (C) is regarded as having such an impairment.
>
> An individual with a disability is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.

for a minimally acceptable duration of 30 minutes. With respect to the major life activity of working, because of her severe tendinitis, appellant was not only unable to perform her duties as a TSC Technician, she was also unable to perform the duties of a mail carrier for the Post Office. Given this evidence, appellant has demonstrated that she is significantly restricted in the ability to perform a broad range of jobs.

DMV concluded in its Denial that, from its review of the doctors' reports it had received, appellant could be considered to have a disability covered under the ADA. Although courts have differed as to whether tendinitis or similar conditions (such as carpal tunnel syndrome) are disabilities under the ADA,[15] the Board finds that appellant has shown that her tendinitis has caused her significant difficulty in retaining a job, and is sufficiently severe and permanent to constitute a "disability" under the ADA, FEHA and Government Code § 19230.

Reasonable Accommodation Analysis

To prevail on her appeal from denial of reasonable accommodation, appellant must also show that she can perform the essential functions of her position with a reasonable accommodation. Appellant asserts that she cannot perform the keyboarding functions required of a TSC Technician, and the medical reports that were admitted into evidence support her assertion. Keyboarding is clearly an essential function of the TSC Technician

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[14] (2000) SPB Dec. No 00-01.

[15] See, e.g., Quint v. A. E. Staley Manufacturing Company (1st Cir. 1999) 172 F.3d 1; DePaoli v. Abbott Laboratories (7th Cir. 1998) 140 F.3d 668; Wilmarth v. City of Santa Rosa (N.D. Cal. 1996) 945 F.Supp. 1271.

position. Appellant has not established that she can perform the essential functions of the TSC Technician position with a reasonable accommodation.

Appellant asserts, however, that she can perform the duties of the "Start Here" window station in DMV's Santa Teresa Field Office. She contends that, because she cannot perform the essential functions of the TSC Technician position, DMV is required to reassign her to another position that she can perform.

While the ADA, FEHA and Government Code § 19230 all include reassignment as a possible reasonable accommodation,[16] the law is clear that an employer is not required to create a new or light duty position as a reasonable accommodation for a disabled employee who cannot perform the essential functions of his or her job.[17]

Appellant asserts that the "Start Here" window station should be considered to be a stand alone position in the Santa Teresa Field Office into which she should have been reassigned because at least one other larger DMV office (the Whittier Field Office) assigned employees to that station. Even if a larger DMV field office may have assigned disabled employees to the "Start Here" window station for significant periods of time as reasonable accommodations, the evidence showed that, in the smaller Santa Teresa Field Office, the "Start Here" window station was just one of many stations that an MVFR had to

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[16] See, 42 U.S.C. §§ 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); Government Code § 12926(n)(2); Government Code § 19231(a)(2)(B).

[17] See, Kees v. Wallenstein (W.D. Wash. 1997) 973 F.Supp 1191, 1196. ("Although the ADA provides that reassignment to a vacant position may be a reasonable accommodation, see 42 U.S.C. § 12111(9)(B), employers are not required to convert temporary light duty positions into permanent positions in order to accommodate disabled employees.") See also, Willis v. Pacific Maritime Assn. (9th Cir. 1998) 162 F. 2d 561, 567 ("In order for reassignment to a vacant position to be reasonable, an existing position must be vacant: there is no duty to create a new position for the disabled employee…")

rotate through as part of his or her duties in that office. Patterson's testimony showed that requiring all MVFRs in the Santa Teresa Field Office to work at all the office's stations on a rotational basis was a legitimate business requirement.[18] The law does not require that DMV turn one of the functions of the MVFR position at the Santa Teresa Field Office into a stand alone position to accommodate appellant's disability.

Appellant's two-week stint at the "Start Here" window at the Santa Teresa Field Office was in the nature of a temporary assignment of an injured employee under Government Code § 19050.8 and Board Rule 443. Under Government Code § 19050.8 and Board Rule 443, a temporary assignment of an injured employee is voluntary on the part of both the employee and the appointing power. Because the Board strongly encourages departments to provide injured employees with temporary assignments while they are recovering, the Board will not penalize departments that do so by forcing them to convert voluntary, temporary light duty assignments into mandatory permanent positions.

While the Board strongly supports the state's commitment to the employment of employees with disabilities who want to remain productive members of the state workforce, the Board finds that appellant has failed to prove that DMV was required to convert her temporary light duty assignment at the Santa Teresa Field Office into a permanent position as a reasonable accommodation under the ADA, FEHA or Government Code § 19230.

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[18] See, Miller v. Illinois Department of Corrections (7th Cir. 1997) 107 F.3d 483, 485. ("if an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties.") See also, Anderson v. Coors Brewing Company (10th Cir. 1999) 181 F.3d 1171, 1176-1178.

## Medical Termination

In order to medically terminate appellant in accordance with Government Code § 19253.5(d), DMV must show that: (1) appellant is unable to perform the work of her present position as a TSC Technician, or any other position in DMV; and (2) appellant is not eligible for or has waived the right to retire for disability.[19]

While DMV has met the second condition precedent to a medical termination because, at the time of her medical termination, appellant had not worked in state service long enough to be eligible for disability retirement, DMV has not satisfied the first condition. Before an agency can invoke Government Code § 19253.5(d), it must show that an employee cannot perform the work of his or her own position or *any other position in the agency*. While it appears that DMV properly concluded that appellant, because of her medical condition, could not continue to perform the significant keyboarding duties of her TSC Technician position, DMV did not offer sufficient evidence to show that appellant could not perform the work of any other position in the Department. As the Board stated in G[redacted] M[redacted],[20]

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[19] 19253.5(d) provides:

> When the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician, and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, or any other position in the agency, and the employee is not eligible or waives the right to retire for disability and elects to withdraw his or her retirement contributions or to permit his or her contributions to remain in the retirement fund with rights to service retirement, the appointing power may terminate the appointment of the employee.

[20] (1997) SPB Dec. No. 97-05, p. 8. (Footnote omitted.)

> The Department bears the burden of proving appellant's inability to perform the work of his position or any other available position before medically terminating an employee. Thus, unless the employee is to be disability retired, the appointing power has an affirmative obligation to attempt to keep an employee working in some position of the agency, assuming the employee wants to continue working. (Emphasis in original.)

In M[redacted] the Board held that Government Code § 19253.5(c)[21] imposes an affirmative duty upon an agency that invokes its medical demotion provisions to demote an employee to the position that is closest to the employee's current salary level in which the employee is medically able to perform and for which the employee meets the minimum qualifications. Government Code § 19253.5(d) must be read consistently with Government Code § 19253.5(c). In order for an agency to invoke the provisions of Government Code § 19253.5(d) to medically terminate an employee, the agency must prove that the employee is medically unable to perform in any position in the agency for which the employee meets the minimum qualifications. In order to meet this burden, an agency must show that it reviewed all the vacant positions in the agency into which the employee could conceivably have been demoted or transferred, and it determined that the

[21] Government Code § 19253.5(c) provides:

> When the appointing power, after considering the conclusions of the medical examination and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position.
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> Except as authorized by the Department of Personnel Administration under Section 19837, the employee demoted or transferred pursuant to this section shall receive the maximum of the salary range of the class to which he or she is demoted or transferred, provided that the salary is not greater than the salary he or she received at the time of his or her demotion or transfer.

employee either did not meet the minimum qualifications of, or was medically unable to perform in, those positions. DMV did not meet this burden.

In its Medical Termination Letter and during the hearing before the ALJ, DMV asserted that appellant could not perform the duties of her position or "another position in a comparable class or in a lower related class" in the Department. The only classification other than MVFR that DMV stated it reviewed was that of Office Assistant. DMV rejected that classification because the positions within it required either keyboarding or filing that DMV asserted appellant could not do. By looking only for other positions in a comparable or lower related class to MVFR, DMV interpreted the requirements of Government Code § 19253.5(d) too narrowly. DMV should have broadened its search to review any positions anywhere within its Department into which appellant could possibly have been transferred or demoted.[22]

Moreover, DMV submitted no evidence that showed that any doctor or other medical expert had reviewed the duties of any DMV positions other than TSC Technician to evaluate whether appellant was medically able to perform the duties of those other positions.[23] While an appointing power, when making a medical termination decision, is not required to send an employee for a fitness for duty

[22] Pursuant to Government Code §§ 18525.3 and 19050.4 and Board Rules 430 and 431, an employee may be transferred to a position in a different class that has substantially the same level of duties, responsibility, and salary as the employee's present class, as determined by Board rule. The Board may prohibit a transfer to a class that was established for limited duration positions or would be in a promotional relationship to the employee's present class.

[23] Nether party called any doctors or medical experts to testify in this matter. Instead, with the consent of appellant's representative, the ALJ admitted into evidence, for the truth of the matters they asserted, numerous medical reports from appellant's workers' compensation case offered by DMV.

examination, but, instead, may rely upon either a written statement from the employee or medical reports submitted by the employee,[24] the medical information relied upon by the appointing power must evaluate the employee's ability to perform the duties of other positions within the department before the department can conclude that the employee cannot perform in those other positions.[25] There was no evidence submitted in this case that showed that DMV had obtained a medical evaluation of appellant's ability to perform the functions of any positions within the Department other than TSC Technician before it determined that her medical condition precluded her from performing in any of those other positions.

There was also no evidence submitted in this case to show that DMV at any point engaged in an interactive process with appellant and her representative to determine whether there were any other positions within the Department that appellant was qualified for and medically able to perform. DMV should have engaged in a flexible, informal interactive process with appellant during which the parties could have discussed appellant's work restrictions and possible solutions that could be implemented to address those restrictions.

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[24] See, Government Code § 19253.5(e), which provides:

> The appointing power may demote, transfer, or terminate an employee under this section without requiring the employee to submit to a medical examination when the appointing power relies upon a written statement submitted to the appointing power by the employee as to the employee's condition or upon medical reports submitted to the appointing power by the employee.

[25] See, G[redacted] M[redacted] (1997) SPB Dec. No. 97-05 at pp. 17-18.

Because DMV did not meet its burden of proving that appellant could not perform any position in the Department other than TSC Technician, appellant's medical termination must be revoked.

## CONCLUSION

The Board finds that, because appellant failed to prove that she was entitled to the reasonable accommodation she requested, her appeal from denial of reasonable accommodation must be denied. The Board also finds that, because DMV failed to conduct a thorough review of whether appellant was medically able to perform in any other available positions within the Department into which she could have been demoted or transferred, appellant's medical termination must be revoked. The revocation of appellant's medical termination is without prejudice to the Department's serving another medical termination upon appellant if, after conducting a thorough review of all such positions, it concludes that appellant either medically cannot or is not qualified to perform the work of any other available positions. DMV is also strongly encouraged to engage in an interactive process with appellant to determine whether it could demote or transfer her to another position, or provide her with a reasonable accommodation, that would enable her to return to work as a productive member of the Department's workforce.

## ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The appeal of Sylvia C. Solis from denial of reasonable accommodation is denied.

2. The medical termination taken by the Department of Motor Vehicles against Sylvia C. Solis is revoked.

3. The Department of Motor Vehicles shall pay to Sylvia C. Solis all back pay and benefits, together with interest thereon, determined in accordance with Government Code §§ 19253.5(g) and 19584, that she would have earned had she not been medically terminated on February 15, 1999.

4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon written request of either party in the event the parties are unable to agree as to the back pay, benefits and interest due Sylvia C. Solis.

5. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

**STATE PERSONNEL BOARD**[26]

Florence Bos, President
Richard Carpenter, Member
William Elkins, Member
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 6, 2000.

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Walter Vaughn
Executive Officer
State Personnel Board

[26] Board Member Ron Alvarado did not participate in this decision.

[Solis-dec]