

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 165-04

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

THOMAS CULLEN III,

Appellant/Respondent,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY, Agency,
and the City and County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board ("Board") on the Agency's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** in part and **REVERSES** in part the Hearing Officer's Decision dated July 7, 2006, on the grounds outlined below.

I. JURISDICTION

The Agency filed a Petition for Review on July 24, 2006 under Career Service Board Personnel Rule ("CSR") 19-61 B (erroneous rule interpretation), 19-61 C (policy-setting precedent) and 19-61 D (insufficient evidence). The Board finds that it has jurisdiction under all three provisions.

II. FACTUAL SUMMARY

Appellant was hired by the Denver Sheriff's Department ("Agency") in 1988 and was employed as a deputy sheriff until his disqualification on November 16, 2004. During his sixteen year career, Appellant had a history of using all of his leave as fast as it accrued. In 2003 he was absent from work 875 hours, 570 of those hours were leave without pay. On February 9, 2004, Appellant received a written reprimand for failure to comply with the Agency's request for FMLA documentation and for a pattern of leave abuse. Following this disciplinary action, Appellant provided medical documentation from his treating physician, Dr. Christopher Hicks, and the Agency granted Appellant FMLA leave to be used on an intermittent basis beginning February 3, 2004. However,

by July 19, 2004, Appellant had exhausted 12 weeks of FMLA leave and did not return to work as ordered.

On August 26, 2004, an interactive process meeting was held with the City's ADA Coordinator, Rita Murphey. Dr. Hicks provided Ms. Murphey with a diagnosis of recovering alcoholism, indicating that Appellant was maintaining sobriety. He advised that Appellant was able to perform his essential job functions without accommodation. Based on this information, Ms. Murphey determined that Appellant was not disabled within the meaning of the ADA and closed the interactive process by letter dated August 31, 2004. Appellant then called in sick September 1, 14, 15, 16, 17, and 21, 2004.

On September 16, 2004 Appellant had telephone conversations with a family member and two friends who worked in the Denver Police Department. He told them he needed money because he was on suspension as a result of shooting someone in a domestic violence incident. Appellant's statements regarding the shooting incident and suspension were not true. On September 22, 2004, the Agency placed Appellant on investigatory leave and referred him to Nicoletti-Flater Associates for a fitness for duty evaluation. Dr. Debra Tasci, Psy.D. Clinical Psychologist, conducted the evaluation on September 27, 2004. Appellant admitted to Dr. Tasci that he had been drinking alcohol as recently as August 2004. He also stated that he had been taking Lorazepam for anxiety and believed this medication was responsible for his memory lapse regarding the telephone calls of September 16, 2004. In her report, Dr. Tasci opined that Appellant met the criteria for a diagnosis of alcohol dependence. Her evaluation, however, focused on Appellant's psychological suitability to maintain full duty. Based on psychological test results, personal and employment history, collateral information and the clinical interview, Dr. Tasci found Appellant to be unfit for duty.

Dr. Tasci's report was reviewed by Rita Murphey, who determined that it was not appropriate to re-enter the interactive process. The Agency then concluded that it had no choice but to disqualify Appellant. Appellant was notified of his disqualification on November 16, 2004.

III. FINDINGS

The City's disqualification rule, CSR 14-21, provides as follows:

An employee shall be separated without fault, hereinafter called a disqualification, if a legal, physical, mental or emotional impairment or incapacity, occurring or discovered after appointment, prevents satisfactory performance of the essential functions of the position.

Prior to disqualification because of physical or mental impairment or incapacity, if it is determined pursuant to the rule on reasonable accommodations for individuals with disabilities that an employee is disabled within the meaning of the Americans with Disabilities Act of 1990 (ADA), the agency or department must have attempted

to make a reasonable accommodation pursuant to that rule. If a reasonable accommodation cannot be provided or the employee rejects a reasonable accommodation, disqualification may be initiated.

If it is determined that an employee is not disabled within the meaning of the ADA, the agency or department need not attempt to make a reasonable accommodation and disqualification may be initiated.

This rule requires three elements of proof: 1) the employee has a legal, physical or mental impairment; 2) the impairment occurred or was discovered after appointment, and 3) the impairment prevents the satisfactory performance of the essential functions of the position. Further, because city agencies must make determinations regarding disability and reasonable accommodations prior to initiating disqualification proceedings, CSR 14-21 is intended to facilitate and comply with the ADA.

The Hearing Officer, however, sought to define "impairment" in CSR 14-21 by using the definition of "impairment" found in the Social Security Act (SSA).¹ Although the SSA and ADA both deal with disabilities, they have different statutory schemes and serve different purposes. *Weigel v. Target Stores*, 122 F.3d 461, 465-468 (7th Cir. 1997) (SSA definition of "total disability" is inherently different from ADA definition of a "qualified individual with a disability"); *Krouse v. Amer. Sterilizer Co.*, 126 F.3d 494, 503 (3rd Cir. 1997) (the ADA and SSA have different purposes and have no direct application to one another); *Iwata v. Intel Corp.*, 349 F. Supp. 2d. 135, 146 (D. Mass. 2004) (the SSA will only provide benefits to an individual with a disability so severe she is unable to work, while the ADA provides reasonable accommodations so an individual with a disability can work).

Thus, the two statutes do not employ the same criteria in assessing whether an individual is disabled. Adopting the SSA's definition of "impairment" in CSR 14-21 could potentially place city agencies at odds with the ADA's requirement of an individualized assessment of disability through an interactive process dialogue. Because CSR 14-21 is clearly intended to comply with the ADA, not the SSA, the Hearing Officer erred in relying on SSA regulations in interpreting the city's disqualification rule.

A. Impairment.

The Board finds that the definition of "impairment" found in CSR 14-21 is the same as the definition of "impairment" used in the ADA:

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal,

¹ The Board notes, as did the Hearing Officer, that neither party provided the Hearing Officer with any legal analysis as to how an "impairment" under CSR 14-21 should be interpreted.

special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 CFR 1630.2 (h) (1) (2).

Although the Hearing Officer discussed the ADA definition of "impairment" in his decision, he concluded that the Agency had failed to prove that alcoholism fits within this definition. While some medical conditions may require expert testimony linking the condition to the ADA definition, alcoholism is not one of them. The Agency was not required to prove that alcoholism is an impairment under the ADA because, as a matter of law, alcoholism is recognized as such. *Bragdon v. Abbott*, 524 U.S. 624, 632-33 (1998); *Moorer v. Baptist Memorial Health Care System*, 398 F.3d 469, 479 n.4 (6th Cir. 2005); *Bailey v. Georgia Pacific Corp.*, 306 F.3d 1162, 1167 (1st Cir. 2002); *Poindexter v. Atchison*, 168 F.3d 1228, 1230-31 (10th Cir. 1999); *Miners v. Cargill Communications, Inc.* 113 F.3d 820, 823 n.5 (8th Cir. 1997). (See also the legislative history to the ADA, H.R.Rep. No. 101-485 (II) at 51 (1990), noting that "physical or mental impairment" includes "drug addiction and alcoholism.")

Thus, the Hearing Officer's conclusion that the Agency needed expert testimony to prove that alcoholism is an impairment under the ADA was incorrect. By introducing into evidence Dr. Hicks' reasonable accommodation questionnaire with its diagnosis of recovering alcoholism and Dr. Tasci's evaluation with its determination of alcohol dependence, the Agency met the first element of proof in a disqualification proceeding.

B. Discovered after employment.

The Hearing Officer's discussion of the second element is summed up in one sentence: "There was no evidence that established or even inferred whether the Agency was aware of an impairment at the time the Appellant began working at the Agency." The Board notes that CRS 14-21 does not place upon the Agency the burden of trying to prove a lack of knowledge about an impairment at the time of hiring, but rather, requires the Agency to prove that the impairment was discovered, or occurred, some time after hiring. Here, there is no direct evidence in the record as to when the Agency actually discovered that Appellant was an alcoholic and it is unclear whether the Hearing Officer's one sentence was intended to be a finding on the second element of proof. Nevertheless, the Board finds that it is unnecessary to remand for further clarification, based on its decision in Section C.

C. Whether the impairment prevented the satisfactory performance of essential job functions.

The Agency takes the position that because Dr. Tasci determined Appellant was unfit for duty, it satisfied the third element of proof for disqualification. The Agency, however, misperceives what it needed to prove at the hearing. Under CRS 14-21, the Agency needed to prove that the alleged impairment, here alcoholism, "prevents satisfactory performance of the essential functions of the position," here by causing excessive absenteeism, that would be expected to continue into the future. The Hearing Officer's determination that the Agency failed to prove that Appellant's alcoholism caused him to be unfit for duty is supported by the evidence.²

The Board notes that Dr. Tasci did not testify at the career service hearing.³ Because disqualifications must be analyzed on a case by case basis, the Board does not decide whether in other disqualification hearings expert testimony would be required, but simply observes that when expert testimony is not provided, the expert's report, or other evidence, must prove the necessary requirements of CSR 14-21. Here, Dr. Tasci's report fails to do so.

The Agency's problem stems from the fact that Dr. Tasci's evaluation focused on Appellant's psychological fitness for duty while the disqualification focused on Appellant's alcoholism and absenteeism. Simply put, the Agency failed to connect the necessary dots. Nowhere in her report does Dr. Tasci express an opinion that Appellant's psychological lack of fitness is the result of his alcoholism, as opposed to some other mental or physical illness or disorder. (See, Dr. Tasci's Report, Exhibit Notebook, pp. 219-227). The report does not provide any diagnosis for Appellant's psychological condition and Dr. Tasci's recommendations do not help clarify the issue: the recommendation of a neurological evaluation suggests Appellant's psychological condition may be related to some undiagnosed neurological disorder, while the recommendation of an alcohol treatment program suggests it may be related to alcoholism. Thus, the report, standing alone, does not link the finding of psychological unsuitability to the definition of "impairment" under CSR 14-21.

Further, Dr. Tasci's report does not contain an opinion that Appellant's psychological unsuitability or his alcoholism prevented him from satisfactorily performing the essential functions of his position. The Agency provided Dr. Tasci with a copy of Appellant's June 2004 performance evaluation which lists essential job functions, including the essential function of carrying a firearm. (Exhibit Notebook, pp. 220-221, listing collateral data; pp. 372-378, June 2004 PEPR). Given the concerns raised about Appellant's psychological well-being following his telephone calls on September 16, 2004, it is surprising that the disqualification hearing did not focus on Appellant's fitness to carry a firearm. Instead, the Agency focused exclusively on attendance at work as the job function at issue for disqualification. But Dr. Tasci's report contains no opinion that

² The Board does not agree with the Hearing Officer that the Agency was required to apportion the number of Appellant's absences that were attributable to alcoholism or establish that the Appellant had been impaired for a full year. Under the CSA rule, the Agency was required to establish that Appellant had an impairment that would be expected to prevent performance of essential job functions in the future, and this it failed to do.

³ The record shows that Dr. Tasci was present at the hearing, but the Agency elected not to call her as a witness in the interests of saving time. Transcript, Vol. 1, pp. 121-123.

Appellant's unspecified psychological condition or his alcoholism prevented him from coming to work. Moreover, Appellant's testimony at the hearing raised a myriad of alternate explanations for his absenteeism that the Agency did not rebut. Accordingly, the Hearing Officer correctly determined that the Agency failed to prove an impairment that prevented the satisfactory performance of essential job functions necessary for a disqualification under CSR 14-21.

The Agency's attempted disqualification in this case illustrates the difficulties employers face when confronted with alcoholism as a disability and alcohol-related conduct. An employer may hold an alcoholic employee to the same standards of job performance and behavior that it holds other employees, even if the unsatisfactory conduct is alcohol related. *Nielson v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998). On the other hand, an employee's status as an alcoholic may be protected under the ADA. *Williams v. Widnall*, 79 F.3d 1003, 1005-1006 (10th Cir. 1996) (Under the Rehabilitation Act, alcoholism is a disability entitling the employee to the reasonable accommodation of time off from work to participate in a treatment program.); *Renaud v. Wyoming Dept. of Family Services*, 203 F.3d 723, 729-731 (10th Cir. 2000) (Under the ADA, alcoholism may be a disability entitling the employee to the reasonable accommodation of time off to participate in a treatment program).⁴

Here, because Appellant's misconduct was not protected by the ADA, the Agency could have addressed his long standing performance problem – absenteeism – through disciplinary action, even if the Agency suspected it was alcohol related. The Agency chose instead to address Appellant's status as potentially disabled under the ADA by engaging in an interactive process dialogue. Once it started down that path, the Agency needed to complete CSR 14-21's requirements regarding reasonable accommodations before moving to a disqualification. Because Dr. Tasci's report contains new information about Appellant that was not explored in the first interactive process meeting, and because the cause of his new psychological unfitness is unclear, the ADA Coordinator should have reopened the interactive process to determine whether Appellant was now disabled within the meaning of the ADA (i.e., whether he now had an impairment that substantially limited any major life activity) and whether he was entitled to a reasonable accommodation (i.e., a leave of absence for a definite period of time to participate in a treatment program, as Appellant requested during his pre-disqualification meeting, and as Dr. Tasci recommended.) (Exhibit Notebook, pp. 156, 226-227).

Having chosen to pursue a disqualification, instead of discipline, it was incumbent upon the Agency to comply with the interactive process requirements of CSR 14-21 as well as to satisfy all three elements of proof for disqualification under the rule.

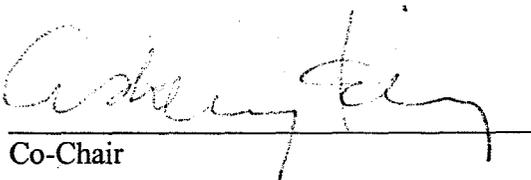
⁴ The dichotomy between disability and disability-related conduct exists only for drug and alcohol use, not for any other disability under the ADA. *Nielson*, 162 F.3d at 608-609.

ORDER

IT IS THEREFORE ORDERED that the Agency's Petition for Review is **DENIED**, the Hearing Officer's Findings are **REVERSED** in part and **AFFIRMED** in part, consistent with the Board's Findings, and the Hearing Officer's Decision of July 7, 2006, reversing Appellant's disqualification and reinstating Appellant to his former position is **AFFIRMED**.

SO ORDERED by the Board on January 4, 2007 and documented this 18th day of January, 2007.

BY THE BOARD:


Co-Chair

Board Members Concurring:

Luis Toro
Nita Henry
Tom Bonner

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the foregoing **FINDINGS AND ORDER**, postage prepaid, this 17th day of January, 2007 addressed to:

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And **VIA INTEROFFICE MAIL** this 19th day of January 2007:

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