

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 83-06

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**ANTHONY MARTINEZ**

Appellant,

vs.

**DEPARTMENT OF PARKS AND RECREATION,**  
and the City and County of Denver, a municipal corporation,  
Agency.

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**I. INTRODUCTION**

The Appellant, Anthony Martinez, appeals his disqualification from the Department of Parks and Recreation (the Agency). A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on December 5, 2006. The Appellant appeared *pro se*. The Agency was represented by Joseph A. DiGregorio, Assistant City Attorney, with Mr. David Jarrow serving as advisory witness. Agency Exhibits 1-14 were admitted. The Appellant offered no additional exhibits. The Agency presented the following witnesses: the Appellant as an adverse witness, Ms. Gloria Mestas-Mondragon, Mr. David Jarrow, and Ms. Jill Coffman. The Appellant offered no additional witnesses. Having considered the testimony of the witnesses, exhibits, and file documents, I affirm the Agency's disqualification.

**II. ISSUES**

The only issues to decide in this case are whether the Agency's disqualification of the Appellant, on September 21, 2006, substantially complied with the Career Service Rule on disqualification, CSR § 14-20 *et seq.*, and if so, whether any exception applies to the Appellant's circumstances.

**III. FINDINGS**

The Appellant was a Senior Utility Worker at the Agency. His duties included driving large mowers in the parks, utility vehicles, power sweepers, and pickups. [Exhibit 14]. The Appellant acknowledged his obligation to maintain a current class R

driver's license as a condition of his job. [Exhibit 14-2, Appellant testimony].

On March 4, 2006, the Appellant was arrested for driving under the influence of alcohol and for making an unsafe lane change. On June 13, 2006, he pled guilty to a reduced charge, Driving While Ability Impaired (DWAI), an 8 point violation. Three days after his March 4 arrest, the Appellant was charged with a vehicular accident, for which he later pled guilty to a 2 point defective vehicle violation. As a result of the accumulated points for these and previous driving violations, his license was suspended on September 19, 2006 for nine months, until June 18, 2007.

Gloria Mestas-Mondragon is the Senior Loss and Safety Analyst for the Agency. Because Denver is self-insured, part of Mestas-Mondragon's duties for the Agency includes regularly checking the license status of all Agency employees who are required to drive as part of their duties. A DWAI conviction, even without a suspension, raises concerns for the Agency, since if the employee were subsequently involved in an accident, the City could run an increased risk of liability. The same concern holds true for employee license suspensions. Thus, when the Appellant notified his immediate supervisor about his suspension, the supervisor informed Mestas-Mondragon.

On September 21, 2006, the Agency sent a pre-disqualification letter to the Appellant. A pre-disqualification meeting, pursuant to Career Service Rule (CSR) § 14-23, was held on September 11, 2006. The Appellant appeared *pro se* and presented a notice of his upcoming Motor Vehicle Division (DMV) suspension hearing. On September 19 the Appellant presented the results of his DMV hearing to the Agency: a nine-month suspension, from September 19, 2006 through June 18, 2007. [Exhibit 8]. The Agency subsequently delivered a notice of disqualification to the Appellant on September 21, 2006. [Exhibit 11]. This Appellant filed this appeal timely on October 5, 2006.

#### IV. ANALYSIS

##### A. Disqualification. CSR §14-20 et seq.

In pertinent part, CSR §14-20 requires agencies to disqualify employees who have a legal impairment that prevents them from performing the essential functions of their positions. CSR §14-21, §14-22 C, §14-23. Since one of the Appellant's essential functions was to maintain a valid license in order to drive city vehicles and equipment, then a suspension of his driving privilege would require the Agency to disqualify him as long as no exception applies, and as long as the Agency complies with required disqualification procedures. CSR §14-23. The Appellant did not dispute that his license was suspended for nine months beginning September 19, 2006. [Appellant testimony, Exhibit 8]. Neither did he dispute that the Agency complied with the procedures required under CSR §14-23. Nonetheless, the Appellant claims he is entitled to an exception to mandatory disqualification for several reasons. I address each claim in the order presented.

B. Others with a "red" license were not disqualified.

The Appellant claimed "there are other people that have a red license and it should be equal for all employees." [Appellant's pre-hearing statement]. At hearing, the Appellant stated he knew of one supervisor who was convicted of an alcohol offense but was permitted to take a desk job during his suspension. [Appellant testimony]. The Appellant did not present any evidence to whom he referred, if the other person or persons was an Agency employee, under what circumstances their driving was restricted, or any other information from which two situations might be compared so as to determine if the Agency engaged in a selective enforcement of CSR §14-20 *et seq.*, or treated two similarly situated employees differently. The Appellant claimed his immediate supervisor, Coffman, told him there was an arrangement whereby a supervisor was allowed to remain under a "red" license. [Appellant testimony]. However, Coffman stated she recalled merely supporting the Appellant's decision to appeal if he felt he needed to do so. She also stated she remembers telling him employment decisions should be fair. [Coffman cross-exam]. Coffman's testimony falls well short of affirming the Appellant's claim.

In addition, the Agency responded that only in cases where a suspension is 30 days or less for an alcohol conviction, the Agency might enter into an agreement (stipulation) to allow an employee to continue working during the suspension, in exchange for the employee's agreement to submit to random drug-testing for three to five years. [Jarrow testimony]. The Appellant did not qualify as he was under a point, not an alcohol suspension, and his suspension was nine months, so that neither criterion applied to him.

C. DMV would have allowed the Appellant to obtain a restricted license to drive at work with approval of his Agency, but such approval was denied by the Agency.

The Appellant claimed the DMV hearing officer told him at his revocation hearing that if his employer submitted a letter approving work-related driving, the DMV hearing officer could approve a restricted license for that purpose. Jarrow has been the Agency's Senior Agency Personnel Analyst for five years. In that capacity he is familiar with driver license requirements for Agency employees. He also was the Agency's decision maker in the Appellant's disqualification. [Exhibit 11-3]. Jarrow stated he does not recall an arrangement, as described by the Appellant, at any time in the Agency. [Jarrow cross exam]. The Appellant did not dispute this testimony. This claim, therefore, fails.

D. The restraint on Appellant's license was a suspension, not a revocation as claimed by the Agency.

The Appellant protested that the Agency mischaracterized his driving restraint as a "revocation" rather than as a "suspension." [Exhibit 11-2]. This discrepancy did not affect any Agency action toward the Appellant. Jarrow testified the difference was inconsequential to the Agency's decisions in this case, [Jarrow testimony], and his

testimony was uncontroverted. Moreover, the information was corrected in later documents. [Exhibit 5-2, 8]. For these reasons, the Appellant's claim is without merit.

E. The Appellant should be given a second chance.

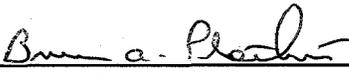
The Appellant asks to be given a second chance to retain his job, given his otherwise good disciplinary history. [Appellant Pre-hearing Statement, Appellant testimony]. The decision to disqualify depends neither upon wrongdoing nor a lack of it, In re Aguirre, CSA 03-04, 19 (8/16/04). Therefore, the Appellant's claim, that disqualification was too harsh in light of his disciplinary record, is without merit. Also, the Appellant's request to continue working at his position would require special accommodation by the Agency for which there was no provision, as stated above. Finally, when an employee is unable to perform an essential job function, in this case driving on the job, the Agency is not obligated to provide reasonable accommodation prior to disqualification. In re Montabon, CSA 122-03, 9 (3/31/05).

**V. CONCLUSIONS AND ORDER**

The Appellant believes he was treated unfairly by the Agency, and felt the Agency should accommodate him; however, the Appellant's poor driving choices were clearly the cause of his legal disqualification. His driving record, [Exhibit 7], shows he was suspended in 1999 for excessive points, yet he continued to accumulate eight violations between 2000 and 2006, culminating in another point suspension, in large measure due to his alcohol violation. There was no evidence the Appellant has taken responsibility for his poor driving. This is significant because the Agency and the City could have been at significant risk under a theory of negligent entrustment<sup>1</sup> if the Appellant were in an accident while on duty.

For reasons stated above, I conclude the Appellant had a legal impairment, his license suspension, which occurred during his employment, which prevented him from satisfactorily performing the essential functions of his position. He was therefore subject to mandatory disqualification. CSR §14-21. The Appellant failed to show he qualified under any exception. Accordingly, the Agency's disqualification of the Appellant on September 21, 2006, is AFFIRMED.

DONE this 27<sup>th</sup> day of December, 2006.

  
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Bruce Plotkin  
Hearing Officer  
Career Service Board

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<sup>1</sup> The elements of negligent entrustment in Colorado have been defined by the courts as: (1) a supplier permitting a third party to use a thing or engage in an activity; (2) which is under the control of the supplier; and (3) the supplier giving such permission either knowing or having reason to know that the third party intends or is likely to use the thing in such a manner as to create an unreasonable risk of harm to others. Milbank Ins. Co. v. Garcia, 779 F.2d 1446, 1449 (10th Cir. 1985)(internal cites omitted).