HEARINGS OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 165-04

DECISION

IN THE MATTER OF THE APPEAL OF:

THOMAS CULLEN III,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Thomas Cullen III, appeals his employer's decision to disqualify him from employment on November 16, 2004. The Appellant filed a timely appeal on November 22, 2004. A hearing concerning this appeal was conducted on May 22 and 23, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant was present throughout the hearing, and was represented by David Bruno, Esq. The Appellant's employer, the Denver Sheriff's Department (Agency) was represented by Joseph DiGregorio, Assistant City Attorney. Capt. Horner served as the Agency's advisory witness. Agency exhibits 1-22, and 25 were admitted by stipulation, while Agency exhibits 23 and 24 were admitted over objection. Appellant's exhibits A-Q and T-W were admitted by stipulation, while his exhibits R and S were withdrawn. The Agency presented the following witnesses: Capt. Mike Horner, Ms. Rita Murphy, and former Undersheriff Fred Oliva. The following witnesses testified for the Appellant: Major Keilar, Sgt. Romero Christopher Hicks, MD, and the Appellant.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant had a mental or emotional impairment or incapacity, occurring or discovered after his appointment, which prevented the satisfactory performance of the essential functions of his position;

B. if the Appellant had such an impairment or incapacity, whether the Agency was justified in disqualifying him from employment.

III. FINDINGS

The Appellant was a deputy sheriff with the Denver Sheriff's Department for 16 years, from 1987 to November 16, 2004. His annual performance reviews always rated him at or above expectations. During the last 10 years of his employment, his ratings were above expectations ("Strong" or "Above Expectations") for 9 years in a row, before his final year, in which he received a "Meets Expectations." [Exhibits B-Q]. One supervisor credibly testified "when I put Officer Cullen on a post I knew it was going to be done, and it was going to be done correctly." [Romero testimony]. The only prior disciplinary matter introduced into evidence was a 2004 written reprimand for failing to submit timely paperwork for leave.[1]

The Appellant is an alcoholic by admission and by medical diagnosis. [Appellant testimony, Exhibit 22, p.7, Hicks testimony]. The Appellant drank heavily during the three-days-off portion of his three-on, four-off schedule, but given his aforementioned work evaluations, it is evident the Appellant's alcoholism did not prevent him from performing well his essential duties when he worked. In addition, because the Appellant could perform the essential functions of his position without accommodation, [Hicks testimony, Exhibit V, p.2, Exhibit W], he was not disabled within the meaning of the Americans with Disabilities Act of 1990. 42 U.S.C. 12101 *et seq*. (1990).

The Appellant suffered from a host of physical and emotional ailments, some of which were related to his alcoholism. The Appellant had occasional seizures caused by his periods of heavy drinking, and also had seizures induced by withdrawal during his various attempts to stop drinking. As a likely consequence of his seizures, the Appellant suffered a pulmonary embolism[2] March 14, 2003. As a result of the blood-thinning regimen to treat his embolism, the Appellant was unable to work for two weeks in April, 2004. In addition to treating his embolism, the Appellant's doctor also prescribed Lorazepam to treat the Appellant's anxiety.

In addition to his alcohol-related physical and emotional issues, the Appellant also incurred various other physical injuries. He tore his Achilles tendon, had multiple knee surgeries, a shoulder surgery, a broken ankle, and arthritis in his knees, feet and hands. He was hit by a semi tractor-trailer as a pedestrian. Except for two seizures in 2003 and 2004, it was not clear when the injuries occurred, and it was not clear what percent of them, if any, affected his attendance at work, or for what duration.

During 2003 and 2004, the Appellant was absent more than he worked. In 2003 he was absent 875 hours. [Exhibit 3, p.2]. In January through September 21, 2004, the Appellant worked 665 hours, and was absent 860 hours. 480 of the 860 hours the

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[1] In pre-hearing filings and during hearing, much was made of the Appellant's application for, and eventual granting of leave under the Family Medical Leave Act, 29 U.S.C. §§ 2601 to 2654 (2000)(FMLA). The Hearings Officer finds the evidence and testimony concerning FMLA is irrelevant to the ultimate issue in this case and therefore declines to address the portion of the record related to it.

[2] A pulmonary embolism is a blood clot in the lungs which can be triggered by alcoholic seizures.

Appellant was absent were authorized Family Medical Leave, and almost all the rest, 380 hours, were taken as authorized sick leave without pay. [Exhibit 24].

Captain Horner is the human resources director for the Agency. He was assigned the task of abating the rampant abuse of leave within the Agency in 2003 and 2004. Notably, Horner identified the Appellant as one of the individuals abusing leave in 2003 and again in 2004. [Horner testimony]. He implemented a new policy, effective May 2004, which required progressive discipline for the abuse of sick leave. The Appellant was never disciplined for abuse of leave, even after being identified as abusing leave in 2003 and even after the new policy went into effect in 2004. The Agency did not state why it did not discipline the Appellant.

The Appellant gave, and the Agency did not rebut, the following reasons for taking sick leave in 2004. In February, during which he worked 2.82 out of 157.53 hours, the Appellant was suffering from the effects of his embolism and Cumadin regime. [Exhibit 24, p.2, Appellant testimony]. The Appellant's five days of leave in March were accounted for by the Appellant's use of his intermittent FMLA leave. *Id* at p.3].[3] For one week in April, the Appellant stated he was ill with the flu, [Appellant testimony], and for two other weeks he was medically unable to work due to his Cumadin treatment [Hicks testimony, Exhibit 24, p.4]. Regarding his next series of absences beginning the last week of May, the Appellant stated he took leave due to a relapse in his drinking. He remained absent during the first two weeks of June for the same reason. [Exhibit 24, p.6]. By June 15, the Appellant had already used 438 of his intermittent FMLA leave, prompting a letter from Horner which warned the Appellant after using 480 FMLA hours, any additional leave would be deemed "Leave Without Pay," and would subject the Appellant to disciplinary action up to dismissal. [Exhibit 12]. After receiving Horner's letter, the Appellant returned to work until the first week of July. [Exhibit 24, p. 6-7]. In July, during which he was absent 133.75 out of 178.82 hours, the Appellant stated his absence was due to some unspecified combination of his treatment for the embolism, and having to take care of his mother. [Appellant testimony]. By July 16, the Appellant's intermittent FMLA leave was exhausted.[4] The Appellant contended he was absent the entire month of August due to his being placed on investigatory leave by the Agency, [Exhibit 24, p.7], but the evidence does not support this contention, and the Hearings Officer finds the Appellant's absence the entire month of August was authorized leave without pay for unspecified reasons.[5]

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[3] On March 4, 2004, the Agency granted the Appellant one year of intermittent FMLA leave, beginning retroactively on February 3, 2004. [Exhibit 9].

[4] The Hearings Officer calculates this date from the Agency's June 15 letter, [Exhibit 12], which stated the Appellant had used 437.82 hours of FMLA leave, and the Appellant's subsequent attendance record [Exhibit 24, pp 6,7]. The Appellant did not dispute the Agency's Exhibit 24 designation of which days the Appellant worked and which days he took as sick/FMLA.

[5] The only evidence submitted concerning leave imposed by the Agency during this period was evidence from both the Agency and the Appellant that agreed he was placed on administrative leave beginning September 22, following his false report of shooting and killing someone on September 16. [Appellant testimony, Exhibit 24, p.9, Exhibit 22. p.2]. No other evidence explained the Appellant's absence for the entire month of August 2004. On the other hand, Horner acknowledged that, anyone during this period could simply call in sick and sick leave would be automatically granted, [Horner cross-examination], quite at odds with Horner's June 15 letter warning the Appellant his

On September 16, 2004, the Appellant made two telephone calls, one to his sister and one to two police officer friends, a married couple. In both calls he stated "he needed money because he was on suspension due to the fact that he had come upon a domestic violence incident and had shot [and killed] someone." [Exhibit 22]. The reported incident was false, and the Appellant denied any recollection of it, but the calls concerned the recipients sufficiently to prompt calls to the Denver Sheriff and Police Departments. Consequently, the Appellant was placed on administrative leave pending the out come of a Fitness for Duty evaluation. Dr. Tasci, whose qualifications were not in dispute, conducted a Fitness for Duty evaluation which she completed September 27, 2004. Tasci did not testify at hearing, but her report was admitted into evidence. [Exhibit 22].

In her report, Tasci stated the Agency approached her "due to concern about Deputy Cullen's chronic leave abuse, his overall job performance and whether his alcohol consumption was impacting both of these areas." [Exhibit 22, p1]. Dr. Tasci stated "this evaluation was provided to answer the following questions: 1. What is Deputy Cullen's emotional and psychological level of functioning? 2. What is Deputy Cullen's current use of alcohol/drugs and does he meet the criteria for a diagnosis of dependency? 3. Is Deputy Cullen capable of returning to full duty at this time? 4. What, if any counseling or treatment would be recommended for Deputy Cullen?" *Id.* Tasci concluded the Appellant was unfit for duty. Based largely upon Tasci's report, but also based upon the Appellant's excessive absenteeism, and his failure to qualify as disabled under the ADA and Career Service Rules, the Agency determined it had no choice but to disqualify the Appellant. The Agency notified the Appellant of his disqualification on November 16, 2004. [Exhibit 1]. This appeal followed on November 22, 2004.

IV. ANALYSIS

At the heart of this case is the interpretation and application of the rule on disqualification which reads 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.

CSR 14-21.

Thus, there are four elements to the rule: (1) a legal, physical, or emotional impairment (2) the impairment occurred or was discovered after appointment (3) the impairment prevented satisfactory performance (4) of the essential functions of the position. If all four elements are met, then disqualification is required under the rule.

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continued use of leave could lead to dismissal. [Exhibit 12]. Despite the cautionary tone of this letter, Horner's testimony at hearing acknowledged the Appellant's sick leave for August was authorized, albeit without pay.

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A. Impairment

It is not apparent from a plain reading of the rule whether alcoholism is a mental impairment. No guidance is provided elsewhere in the Career Service Rules, and neither party addressed the issue. Detailed definitions exist in other administrative arenas and serve here as instructive guidance.

The Social Security Administration (SSA) has extensive guidelines for determining whether a mental impairment exists so that the degree of consequent disability may be determined. "A mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings." 20 CFR 404.1508 §404.1528. "Symptoms" are defined as the applicants own description of his impairment, which the regulations state is insufficient to establish impairment. 20 CFR 404.1528. Psychiatric "signs" are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception. They must also be shown by observable facts that can be medically described and evaluated. "Laboratory findings" of mental impairment are psychological phenomena which can be shown by the use of medically acceptable diagnostic techniques, such as psychological tests. 20 CFR 404.1528.

1. Symptoms. The Appellant admits to being alcoholic, but denies he is impaired as to performing the essential functions of his job.

2. Signs. The Agency based its decision to disqualify the Appellant in large measure upon Tasci's conclusions. Her evaluation purports to answer four questions, the first three of which meet the same criteria as "signs" under the SSA. The Hearings Officer enters the following findings regarding each question

a. What is Deputy Cullen's current emotional and psychological level of functioning?

Dr. Tasci's report did not answer this question in a way that relates to the ultimate question to resolve in this case: whether the Appellant was physically, mentally, or emotionally impaired so as to prevent the satisfactory performance of his essential work functions.

b. What is Deputy Cullen's current use of alcohol/drugs and does he meet the criteria for a diagnosis of dependency?

There was no dispute that the Appellant was alcohol dependent at the time of the evaluation; however that conclusion also leaves unanswered the question whether the Appellant's alcoholism was a physical, mental, or emotional impairment that prevented the satisfactory performance of his essential work functions.

c. Is Deputy Cullen capable of returning to full duty at this time?

Tasci's report concluded the Appellant was not fit for duty at the time of her evaluation; however without Tasci's testimony, even a close reading of her evaluation leaves unanswered the ultimate question: whether the Appellant's alcoholism or other cited problems constitute a physical, mental, or emotional impairment that prevents the satisfactory performance of his essential work functions. Analogously, had Tasci found the Appellant had a severe, prolonged flu and therefore was unfit for duty, she would have been correct, yet still not answered the question which is critical to the determination of this case.

Based on the discussion immediately above, it was unclear from Dr. Tasci's Fitness for Duty evaluation whether the Appellant exhibited signs of mental impairment such as abnormalities of behavior, mood, thought, memory, orientation, development, or perception. 20 CFR 404.1508, 1528. In addition, SSA regulations require a duration of at least 12 months before an abnormality may be considered a sign of impairment. "Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement." 20 CFR 404.1509. Since there was no evidence the reported shooting, on September 16, 2004, was any more than an isolated incident, and no evidence linked the incident to alcohol consumption, or any particular physical or mental abnormality, then an isolated incident does not meet the duration requirements of a mental impairment. Logically, a duration requirement should hold true in any forum, otherwise even a brief cold or illness would be sufficient grounds for disqualification.

3. Laboratory findings. Dr. Tasci concluded the Appellant was unfit for duty based, in part, upon the following psychological tests she administered to the Appellant.

a. Minnesota Multiphasic Personality Inventory-2. From the results of this test, Dr. Tasci concluded the Appellant belongs to a group who "tend to be impulsive, dramatic, emotional and are easily restless and agitated," "are prone to substance abuse problems and they usually enter treatment under duress."

b. Millon Clinical Multiaxial Inventory III. From the results of this test, Dr. Tasci concluded the Appellant belongs to a group who are "overly dramatic, with strong needs to be the center of attention...are emotionally labile and prone to emotional outbursts...are very gregarious, assertive, and socially outgoing, but they manipulate people for approval and affection," and are self-centered.

c. Triage Assessment for Addictive Disorders. From the results of this test, Dr. Tasci concluded the Appellant is alcohol dependent.

d. Worker's Wide-Range Assessment of Problems. Dr. Tasci concluded the results of this test "reflect a high score for problems endorsed in the alcohol category and a moderate score in the rationalization category."

None of these test results address the ultimate question in this case. Moreover, even assuming the propriety of Tasci's diagnosis of alcoholism, the diagnosis alone fails to answer whether alcoholism constitutes an impairment within the meaning of CRS 14-20. In the context of Social Security Disability, the psychological diagnosis of a condition alone is insufficient to prove a mental impairment. *See* Chambers v. Barnhart, 2003 U.S. App. LEXIS 22823 (10th Cir. 2003), ("we must consider all evidence of impairment, without regard to indications of alcohol involvement"), Wilson v. Barnhart, 68 Fed. Appx. 169, 170 (10th Cir. 2003) (which considered "Plaintiff's mental impairment, both with and independent of his alcoholism"). Because the Agency was obligated to show how Tasci's evaluation proved the Appellant's symptoms signs and laboratory results were indicative of an impairment, the Agency did not prove the first element for disqualification, that the Appellant had a legal, physical, mental or emotional impairment or incapacity.

The federal Department of Health and Human Services and the Americans with Disabilities Act define impairment as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 CFR § 84.3(j)(2)(i) (1997), CFR 1630.2 (h)(2). The Agency did not present any evidence which links alcoholism to this definition.

The Appellant countered the Agency's assertions regarding his absenteeism by his alternate explanations for his absenteeism, including: his uncontraverted evidence the Agency required him to take sick leave for some undefined period in 2003 while subject to a restraining order[6] [Appellant testimony]; Dr. Hicks' testimony that the Appellant's pulmonary embolism caused his absence for two weeks in April, 2004; Dr. Hick's unchallenged testimony that the Appellant's alcoholism did not prevent him from performing the essential functions of his job [Hicks testimony]; the Appellant's unchallenged assertion that he tore his Achilles tendon, had multiple knee surgeries, a shoulder surgery, a broken ankle, arthritis in his knees, feet and hands, and had two withdrawal seizures, both of which occurred at work.

Although the Appellant's explanation for his absences do not establish what combination of the reasons above caused the Appellant's absence, the Agency did not prove, by a preponderance of the evidence, what portion, if any, of the Appellant's absences could be causally attributed to his alcoholism. The Agency's other argument, that absenteeism is proof of impairment, would render all absent employees subject to disqualification for any reason, including injury or illness. Thus a doctor's note that excuses an employee for an illness could become the all the evidence needed to disqualify the employee. The Career Service Rules already have a means to protect the good of the agencies and the City of Denver from excessive or unwarranted absenteeism in CSR 16-50 A. 13), which allows for discipline up to and including dismissal.

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[6] Deputies are required to carry weapons. Since the restraining order prohibited the possession of weapons, the Appellant was not allowed to work.

B. Discovered after employment.

There was no evidence presented that established or even inferred whether the Agency was aware of an impairment at the time the Appellant began working at the Agency.

C. Whether the impairment prevented satisfactory performance

Since the Agency failed to establish whether the Appellant had physical, mental, or emotional impairment within the meaning of CSR 14-21, it could not establish this prong. Even assuming the Agency had established the Appellant's alcoholism was an impairment, the Agency did not prove, by a preponderance of the evidence, the Appellant's absenteeism was prevented by his impairment. Since the word "prevented" infers causation, this prong of the rule requires the Agency to establish causation between an employee's impairment and unsatisfactory work performance. The Agency's reliance on Tasci's report is misplaced since her stated tasks did not include establishing causation between the Appellant's alcoholism and his absenteeism.

Aside from Tasci's report, the only other evidence concerning whether the Appellant's alleged impairment prevented satisfactory performance of his duties came from the Agency's interactive process meeting with the Appellant, which it undertook following the Appellant's September 16 "shooting" incident. According to the Agency, the purpose of the interactive meeting was, *inter alia,* "to determine whether you could perform the essential functions of your position..." The Agency's ADA coordinator, Rita Murphey, concluded "you were able to perform the essential functions of your position as a Deputy Sheriff with the Denver Sheriff Department..." [Exhibit 18]. Although Murphey also wrote "[i]t appears your continued alcohol abuse is affecting your ability to perform your job", her letter presented no evidence that established this causation, she did not testify at hearing, and she has no apparent expertise in psychology that might lend weight to her statement.

D. Which essential function of his position the Appellant failed to perform.

The Agency cited the Appellant's absenteeism as the essential function the Appellant failed to perform. Excessive absenteeism is a performance issue properly addressed by disciplinary rules, *e.g.* CSR 16-51 A. 3), (abuse of sick leave).

CONCLUSION

The rule on disqualification may not substitute for discipline. The proof for each is substantially different. In a disqualification it is imperative to establish a causal link between an impairment as defined within CSR 14-21, and the failure to perform an essential duty of an employee's position. Without an interpretive analysis of Dr. Tasci's evaluation, the Agency was not able to establish any of the elements of the rule on disqualification by a preponderance of the evidence. The Appellant's alcoholism would not, by itself, have protected him from disciplinary action for excessive absenteeism,

See Nielsen v. Moroni Feed Co., 162 F.3d 604 (10th Cir. 1998) ("Unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the Americans with Disabilities Act or the Rehabilitation Act"); however, for undisclosed reasons, the Agency elected not to pursue its disciplinary options.

ORDER

The Agency's disqualification of the Appellant on November 16, 2004 is REVERSED. The Appellant is reinstated to the position he occupied at the time of disqualification. What remains to be determined is the remedy for Appellant's pay and benefits. The goal of a reversal is to restore what was unjustly taken from the Appellant by his agency. Because the Appellant was under a "Not Fit for Duty" restriction at the time of his disqualification, and because some of the delay in this case may be attributed to the Appellant, the *status quo ante* for back pay and benefits is not apparent. The parties or their representatives shall confer to resolve, within 30 days, the issues of back pay and benefits. If that endeavor is unsuccessful, either party may move for a hearing to determine to what pay and benefit relief the Appellant is entitled.

DONE this 7th day of July, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or facsimile transmission as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX: 720-913-5720. Transmissions of more than ten pages will not be accepted.

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