

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

Appeal No. 138-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

DEBORAH COX, Appellant

Agency: DENVER HEALTH AND HOSPITAL AUTHORITY.

A hearing in this matter was held by Hearing Officer Joanna Lee Kaye on January 14 and 15, 2004 in the Career Service Hearings Office. Assistant City Attorney Richard A. Stubbs represented the Denver Health and Hospital Authority (DHHA or Agency). Deborah Cox (Appellant) was present and represented herself.

MATTER APPEALED

Appellant, formerly an Administrative Support Assistant II for the Agency, challenges the Agency's decision to disqualify her from her position.

For the reasons set forth below, the Agency's action is **AFFIRMED**.

PRELIMINARY MATTERS

1. The Hearing Officer has jurisdiction over this case.

The Hearing Officer finds she has jurisdiction over this case pursuant to Section 19-10 Actions Subject to Appeal, which states as follows in relevant part:

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... disqualification... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

2. Appellant withdrew her discrimination claim and it is dismissed.

On her appeal form, Appellant checked the box marked "discrimination" and added a category titled "Career Service Employee" under the discrimination column. "Career Service Employee" is not one of the protected classes under CSR 19-10 c) or any other legal authority under the CSR rules, or state or federal law. Prior to the beginning of the hearing on the merits in this case, the Agency objected to Appellant's discrimination claim, arguing that Appellant has articulated no basis for a claim of discrimination against her because of her membership in a protected class, in her appeal or prehearing documents. Appellant responded by withdrawing her discrimination claim. This claim is therefore dismissed.

3. Burden of proof.

On December 2, 2003 the Agency filed a Motion to Place the Burden of Proof on Appellant. Appellant filed a Response to this Motion on December 11. Upon review of the case law governing this issue, the Hearing Officer ruled at the hearing that the burden of proof in any administrative action by an agency is on the Appellant. The Hearing Officer now memorializes that ruling as follows.

Although in disciplinary actions the burden of proof is on the Agency to show cause for an action against an employee, the disqualification of an employee is an administrative action not specific to an employee's conduct or performance. See, Velasquez v. Dept. of Higher Education, ___ P. 3d ___, WL 22097754 (Colo. App. 2003). There is a presumption of "validity and regularity" in administrative actions. Id.; see, Garner v. Colo. State Dept. of Personnel, 835 P.2d 527 (Colo. App. 1992).

The "proponent of an order" is the person who brings the action in question. See, Velasquez, above. The proponent of a challenge to an administrative action (Appellant in this case) therefore bears the burden to prove the administrative action was *not* valid or regular. Garner, above; see, Dept. of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The proponent must prove by a preponderance of the evidence that the Agency's action was arbitrary, capricious, or contrary to rule or law. See, Renteria v. Colo. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991.)

In Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001), the Colorado Supreme Court specifically restated that the arbitrary or capricious exercise of discretion by an administrative agency can arise in only three ways:

"(a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it. (b) By failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion. (c) By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable [persons]

fairly and honestly considering the evidence must reach contrary conclusions.”

Lawley, above at pp. 1252, quoting Van DeVeight v. Board of County Comm'rs, 98 Colo. 161, 55 P.2d 703 (1936).

For these reasons, the burden of proof is on Appellant to show by a preponderance of the evidence that the Agency's decision to disqualify her was arbitrary or capricious in one of the three ways set forth above in Lawley, or that it was contrary to rule or law.

4. Appellant's request for an extension of time to file her written closing statement is denied.

At the close of the hearing in this case, the Hearing Officer requested that parties both file written closing arguments by January 30, 2004. The Agency filed its written closing argument on that date. As of the date of this decision, Appellant has not filed a written closing argument.

On February 23, 2004 Appellant contacted the Hearings Office by telephone. She stated she had an out of town emergency involving a family member which prevented her from timely filing her closing argument, and requested an extension of time. Appellant did not indicate how much time she was asking for, or explain why she had not contacted the Hearings Office until 23 days after the due-date of the written closing argument. The Hearings Office has tried to contact Appellant on numerous occasions since that time but has been unable to reach her.

On February 27, 2004 the Agency filed an Objection to Appellant's request for an extension of time to file her written closing argument. Appellant has since not filed a written closing argument, nor has she filed a written request for an extension to do so. Appellant's request for an extension is therefore denied.

ISSUES

The only issue in this case is whether the Agency's action was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. Appellant was an Administrative Support Assistant II "clerical worker" for DHHA. She was a twenty-year veteran of the city system, and was in her fifteenth year with DHHA at the time of her disqualification. Her longevity of service entitled her

to an accrual of fourteen hours per month vacation leave, and eight hours per month sick leave, totaling 22 hours of leave accrued per month.

2. At some point during 1998, Appellant experienced an injury to her respiratory system while on duty. Appellant filed a Worker's Compensation claim as a result of this injury. Her treatment for the injury has been ongoing since that time.
3. DHHA comprises a main campus and several satellite clinics located throughout the Denver Metro area. All the Agency's facilities undergo minor construction projects and repairs. These maintenance activities are frequent and sometimes unpredictable. The activities produce various levels of ambient substances, like dust or solvent vapors. The engineering department processes 20,000 work orders per year for the 33 buildings they service.
4. During the years 2001 through 2003, the main campus was undergoing major reconstruction. In September of 2001, Appellant was working in the Davis Pavilion located in the main campus of the hospital. She experienced an episode of difficulty breathing due to construction dust. Appellant saw Stephen Hessel, M.D. (Dr. Hessel) who issued her a Return-To-Work (RTW) pass effective September 20, 2001 with restrictions against exposure to dust, smoke and vapors (Exhibit 18).
5. On October 23, 2001 industrial hygienist Stephen B. Andrews conducted an ambient test of the Davis Pavilion using state-of-the-art equipment typically used to conduct such tests (Exhibit 19). He found less than 0.061 milligrams per cubic meter of air. The level of acceptable dust and Occupational Health and Safety standards is 15 milligrams per cubic meter.
6. Appellant continued to experience respiratory symptoms while at work. On November 12, 2001 Appellant saw Jill Jamison, M.D. (Dr. Jamison) at Kaiser Permanente. Dr. Jamison issued Appellant an RTW pass restricting her to a work atmosphere free from dust and solvents (Exhibit 20).
7. On December 14, 2001 Appellant again saw Dr. Jamison, who issued her an RTW pass restricting her to a work environment free of excessive dust or irritants, away from construction either within or immediately outside the building, to include the main campus (Exhibit 21).
8. On December 20, 2001 the Agency held an interactive process meeting pursuant to CSR 5-84 E and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1990) (ADA). In attendance were ADA coordinator Rita Murphey (Murphey), Human Resources Representative Julie Ammon (Ammon), Appellant and her supervisor. Appellant presented documentation of her work restrictions against exposure to major construction activity at that time, including Exhibits 18, 20 and 21.
9. Murphey did not determine that Appellant was "disabled" within the meaning of the ADA. Ammon and Murphey nonetheless coordinated to find a suitable placement

for Appellant that would accommodate her work restrictions. The only suitable position they could find was in the Clerical Float Pool, a unit of clerks temporarily assigned as needed to the main campus or satellite facilities. Float Pool Supervisor Richard Castro (Castro) agreed that he could employ Appellant as a Float Pool Clerk in the satellite facilities because there was no major construction occurring at these facilities.

10. Appellant was on leave without pay from December 24, 2001 to January 18, 2002 (Exhibit A).
11. On January 18, 2002 Murphey sent Appellant a letter offering Appellant a reassignment to the Float Pool. Appellant signed this document indicating she accepted the position (Exhibit 1).
12. From January 25 through 31, 2002 Castro assigned Appellant to the Federal Pediatric West-Side Clinic. On January 31 Appellant reported paint fumes from painting going on in the facility one level below the location of her assignment.
13. Castro reassigned Appellant to the Park Hill Clinic effective February 1, 2002.
14. At some point during her assignment at Park Hill, Appellant called Castro from the Park Hill Clinic to report trouble breathing because of dust in medical records room. Appellant also complained to the Park Hill supervisor about the dust. Based on Appellant's complaint, the Agency had the medical records room cleaned.
15. On March 1, 2002 Castro reassigned Appellant to a school-based clinic in Cheltonham School. Appellant experienced no medical complications during her assignment at Cheltonham School.
16. On March 23, 2002 Appellant's temporary assignment at Cheltonham School ended for reasons unrelated to her medical restrictions. Castro assigned Appellant to the Montbello Clinic on March 24, 2002.
17. On April 24, 2002, Appellant called Castro from the Montbello Clinic and reported that construction occurring on the floor below her was causing her discomfort.
18. As of April 24, 2002 Castro had no more placements for Appellant that would not violate her work restrictions as he then understood them. He sent Appellant home, then contacted Murphey and requested the interactive process again be initiated with Appellant to determine her restrictions, disability status and placement options.
19. On May 3 and 17, 2002 the Agency's Assistant General Counsel Leonard Segretti (Segretti) sent Appellant letters setting an interactive meeting for May 29, 2002 and asking Appellant to bring medical information concerning her restrictions (Exhibits 3, 23).

20. The interactive meeting scheduled for May 21, 2002 did not take place because Appellant's doctors were not prompt in responding to her requests for the necessary medical documentation. The meeting was postponed indefinitely pending procurement of the necessary medical documents.
21. From April 24 through September 19, 2002 Appellant remained off duty on various types of leave. Appellant repeatedly exhausted her vacation and sick leave during this period. She was on Family Medical Leave (FML) or leave without pay for a large part of this time period (Exhibit A).
22. On September 19, 2002 Appellant saw Dr. Jamison again at Kaiser. Dr. Jamison gave Appellant an RTW pass which restricted her from working at any location with any construction exposure (Exhibit 24).
23. From September 19 until November 20, 2002 Appellant remained off work, using all her vacation leave as it accrued, and either leave without pay or FML each time her vacation leave was exhausted (Exhibit A).
24. On October 9, 2002 Murphey sent an ADA questionnaire to Dr. Jamison, requesting answers concerning limitations on Appellant's major life activities, her diagnosis, and necessary work accommodations. Dr. Jamison partially completed the request and returned it to Murphey. She indicated Appellant's diagnoses were "reactive airway disease, Obesity, Asthma, and Anxiety Disorder," also noting "duration unknown." Dr. Jamison did not respond to the questions concerning limitations to Appellant's major life activities, whether she was able to perform the essential functions of her position, whether Appellant had any restrictions at that time, and what if any reasonable accommodations would allow Appellant to perform at her job. (Exhibit 4.)
25. On October 2, 2002 Appellant was evaluated at National Jewish Hospital by independent medical examiner Karin Pacheco, M.D. (Dr. Pacheco).
26. On November 7, 2002 Murphey sent Dr. Pacheco an ADA questionnaire. Dr. Pacheco completed the questionnaire and returned it to Murphy on November 14, 2002. In the questionnaire, Dr. Pacheco indicated that Appellant's diagnoses were as follows: "1. Work-related irritant mucosal symptoms and vocal cord dysfunction. 2. No evidence for asthma. 3. Grass allergy." Dr. Pacheco indicated that the expected duration of these conditions was "unknown," that Appellant could return to full duty, that no major life activities were substantially impaired by her condition, and that she was capable of performing the essential functions of her position. Pacheco indicated that Appellant should not be placed in an environment with ambient dust levels above normal, and that she should not be directly exposed to construction dust. (Exhibit 5.)
27. On November 21, 2002 the Agency held a meeting with Appellant. Also present were Segretti, Ammon, Castro and Murphey. At the meeting, Murphey informed Appellant that based on Dr. Pacheco's assessment, Appellant was not "disabled"

within the meaning of the ADA, and further that placing Appellant at locations where no construction of any kind was occurring was not a reasonable accommodation because of the Agency's inability to control all environmental factors at its facilities. Murphey told Appellant that she was concluding the interactive process and returning Appellant to duty as a Float Pool Clerk. Finally, Murphy instructed Appellant to report to the Occupational Health and Safety Clinic (OHSC) if she should become ill as a result of exposure to any irritant while on the job (Exhibit 6).

28. Castro reassigned Appellant to the Montbello Clinic on November 21, 2002. Appellant reported to work, but continued to use her sick and annual leave as it accrued (Exhibit A). On December 23, 2002 Appellant reported to the OHSC after having developed coughing, wheezing and congestion at the Montbello Clinic due to dust from new construction taking place there. (Exhibit 7). The attending physician released Appellant to return to work the same day with a restriction prohibiting dust exposure (Exhibit 8).
29. From December 23, 2002 to May 5, 2003 Appellant was assigned to the East Side Clinic, La Mariposa Clinic, and the Westwood Clinic. There was no current construction at any of these clinics during Appellant's assignments at them. However, Appellant continued to exhaust her sick leave as it accrued during these months, and to use most of her vacation leave as it accrued (Exhibit A).
30. On May 5, 2003, Cox visited Robert Harvey, M.D. (Dr. Harvey) at Kaiser. Dr. Harvey said Appellant is "highly reactive... to construction dust and chemical odors..." and was experiencing "asthma symptoms." Dr. Harvey noted that vapors from glues used during construction linger from 6 to 12 months, and restricted Appellant's working conditions as follows: "For the next 6-12 months this person should work in a nonconstruction older area of the medical facility." (Exhibit 11.)
31. Castro determined that due to ongoing or recent construction projects at the DHHA facilities, Dr. Harvey's restriction effectively prohibited Appellant from working in any of the clinics other than La Casa Clinic, where there happened to be no recent construction and a temporary opening at that time. The only suitable assignment he had was to La Casa Clinic. He assigned Appellant there on May 6, 2003.
32. To ascertain whether Appellant was covered under the ADA given her new work restrictions set forth by Dr. Harvey on May 5, 2003 (see, Exhibit 11), Castro again initiated an interactive process with Appellant by his letter of May 28, 2003 (Exhibit 12). Castro stated in the letter that the Agency needed further clarification from Appellant's health care provider about her restrictions and limitations. The letter set an interactive process meeting for June 11, 2003. The letter had a medical release attached which Appellant was instructed to sign and give to the Agency. The letter also had a Medical Diagnosis questionnaire for Appellant to give to Dr. Harvey to fill out. The letter instructed Appellant to bring this completed form to the interactive process meeting as well (Exhibit 12).

33. The interactive process meeting scheduled for June 11, 2003 did not occur because Appellant's representative, Jesus Hernandez (Hernandez), was unable to attend and Appellant declined to participate in the meeting without him. Murphey prepared a letter to Hernandez on June 13, 2003, requesting that he provide the necessary medical documentation from Dr. Harvey before June 30, 2003 so the Agency could re-schedule the interactive meeting (Exhibit 13).
34. Murphey left several telephone messages with Hernandez after she sent the letter of June 13, 2003 (see, Exhibit 13). These messages went unanswered.
35. As of July 14, 2003 Murphey still had not received the medical documentation requested in the Agency's letter of May 28, 2003 (see, Exhibit 12) which she needed to determine Appellant's limitations and disability status. Appellant had not signed and returned the medical release attached to the May 28 letter. This prevented Murphey from directly asking Appellant's doctors for the medical documentation. Murphey sent Appellant a letter terminating the interactive process for "bad faith" because neither Appellant nor Hernandez had provided the requested documentation (Exhibit 14; see, Exhibits 12 and 13).
36. When Appellant became aware that the Agency had requested more specific medical documentation from Dr. Harvey, she tried to contact Dr. Harvey. The first time she tried to do this was sometime before the end of June, 2003. Appellant was told that Harvey was on vacation. Appellant tried again later and was told that Dr. Harvey had retired effective June 30, 2003. Appellant cannot recall when she made these attempts to contact Dr. Harvey. Appellant did not tell the Agency she was trying to contact Dr. Harvey at any time before the hearing in this case.
37. On July 25, 2003 Castro sent Appellant a letter notifying her that the Agency was contemplating disqualification. The letter set forth a synopsis of the above-found facts as the basis for the contemplation, set a disqualification meeting for August 14, 2003, and stated that the purpose of the meeting was to provide Appellant an opportunity to respond.
38. Appellant continued to work at La Casa Clinic from May 6 to August 6, 2003. Appellant experienced no work-related medical reactions, however she continued to empty her sick leave bank on a monthly basis, and continued to use nearly all her vacation leave as it accrued (Exhibit A).
39. On August 6, 2003, Appellant learned that work crews were scheduled to install a desk near her work space the following day. Installation of the desk required sawing the surfaces to fit them into the work space, mounting the desk into the drywall and gluing the new surface on the desktop. Appellant called Castro to express her concerns that working near the installment procedure would violate her work restrictions.

40. As of August 6, 2003 Castro had no other assignments at any facility that would not violate Appellant's current work restrictions based on Dr. Harvey's RTW pass of May 5, 2003 (Exhibit 11). He sent Appellant home.
41. The disqualification meeting was held on August 14, 2003. Present were Appellant and her attorney Thomas J. Roberts, Employee Relations Manager Chuck King, and Castro. Appellant stated during the meeting that there was no change in her medical restrictions. She stated that her medical condition was the same or worse, but did not provide any new documentation from Dr. Harvey concerning her current medical condition. Appellant did not tell the meeting participants that she had tried to contact Dr. Harvey or that Dr. Harvey had retired. She did not otherwise specifically explain her failure to provide additional documentation concerning her most recent restrictions in the RTW pass of May 5, 2003 (Exhibit 11; see also, Exhibit 16).
42. Castro was the designated decision-maker in Appellant's disqualification case. As of August 14, 2003 he was in possession of conflicting medical reports. The most recent restrictions from Dr. Harvey in his May 5, 2003 RTW pass (Exhibit 11) limited Appellant from working in any environment where construction had occurred within the last 6 to 12 months. Castro had no more work locations that would accommodate Appellant's work restrictions on a predictable basis, and determined that any further placements he had would violate the restrictions.
43. The Agency sent Appellant a Letter of Disqualification on August 20, 2003 (Exhibit 16). Appellant timely appealed on August 28, 2003.
44. During the year prior to August 20, 2003, Appellant exhausted her entire twelve-week FML allotment. As of August 20, 2003, Appellant's sick leave bank had 8 hours in it, and her vacation leave bank had 20.25 hours in it. (Exhibit A.)

DISCUSSION

1. The Agency's decision to terminate the interactive process was not arbitrary, capricious or contrary to rule or law.

Appellant argues that she was not medically disabled and could have reported to work. She argues she tried to get the documentation to show this during the interactive process during the summer of 2003. She asserts the Agency's allegation that she was not participating in the interactive process in good faith is erroneous, and that the Agency wrongfully terminated the process. Appellant posits that if the Agency had not wrongfully terminated the process, she could have established her ability to work through accurate medical documentation indicating her ability to do so.

The CSR rules governing the interactive process read as follows in relevant part:

14-21 General

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.

* * *

CSR 5-84, Reasonable Accommodations for Individuals with Disabilities Policy states:

E. Interactive Process

1. If an employee (1) provides notice that the employee needs a reasonable accommodation to perform the essential functions of the employee's position; or (2) the agency has actual or constructive notice that an employee may have a disability for which the employee needs reasonable accommodation, the agency or department shall initiate an interactive process... The purpose of the interactive process shall be to determine if the employee (1) is disabled within the meaning of the ADA; and (2) if so, whether the employee can be reasonably accommodated in his or her position. The interactive process requires good faith participation from both the employee and the department or agency. The Career Service Authority designee shall make a final determination, after consulting with the department or agency, as to whether the employee is disabled under the ADA and can be accommodated in his or her position.
2. In making the determination that an employee has a disability within the meaning of this rule, the Career Service Authority, department or agency may request and review medical records and other documentation in the possession, custody, or control of the employee or his or her health care providers...
3. If the employee is determined not to be disabled within the meaning of this rule, disqualification proceedings may be initiated if the employee nevertheless is unable to perform the essential functions of the position.
4. If the employee is determined to be disabled within the meaning of this rule, the Career Service Authority, department or agency, and the

employee shall endeavor to identify any reasonable accommodations the employee may need to perform the essential functions of his or her position...

Once the Agency received Dr. Harvey's May 5, 2003 RTW pass (Exhibit 11) restricting Appellant from being near any site where construction had occurred within the last 6 to 12 months, it was required to engage in the interactive process to determine whether Appellant was "disabled" within the meaning of the Act. It scheduled an interactive process meeting for June 11, 2003. Appellant declined to participate in this meeting because her representative, Hernandez, was unable to attend. Murphey prepared a letter to Hernandez on June 13, 2003, again requesting that he provide the necessary medical documentation from Dr. Harvey before June 30, 2003 so the Agency could re-schedule the interactive meeting (Exhibit 13). Thereafter, Murphey left several telephone messages with Hernandez. As of July 14, 2003, these requests for information had all gone unanswered. Only then, after two letters, an attempt to schedule and reschedule the meeting, and multiple unanswered messages from Murphey over the period from May 28 to July 14, did the Agency assert "bad faith" on Appellant's part, terminate the interactive process (Exhibit 14), and pursue disqualification.

Appellant now argues that she tried several times during this period to contact Dr. Harvey, but that he was first on vacation, and then retired without responding to her requests. She asserts that the Agency therefore was in error when it abandoned the interactive process on July 14, 2003 based on Appellant's alleged bad-faith.

The Hearing Officer is not persuaded. Appellant failed to tell the Agency of her attempts to get this information at any point during the Agency's attempts to engage in the interactive process. Then on July 25, 2003 Castro sent Appellant a letter notifying her that the Agency was contemplating disqualification. The letter set forth a synopsis of the events leading to the contemplation, including its series of failed attempts to gather the required medical documents. The letter further stated that the purpose of the meeting was to provide Appellant an opportunity to respond with any additional information she thought was relevant. The meeting occurred on August 14, 2003. Appellant therefore had yet another opportunity, yet she still provided no additional medical documentation, nor did she tell the meeting participants she was trying to contact Dr. Harvey for such documentation.

Findings in several circuits establish that both parties must participate meaningfully in the interactive process, and that the employee bears equal responsibility to communicate with the employer during the process. In Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, at 1285 (7th Cir. 1996) the Seventh Circuit held that an employee's request for a reasonable accommodation requires communication between the parties, and that both parties bear the responsibility for determining what accommodation is necessary. See also, Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (*holding that an employer cannot be held liable merely for not engaging in the interactive process until the employee shows reasonable accommodations were available*).

The Court's ruling in Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (2001) is further instructive on this issue:

"To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith."

Id. at 418; *citing* Taylor v. Phoenixville School District, 184 F.3d 296, 315-316; 319-320 (3d Cir. 1999).

In this case, the Agency made several good-faith attempts to establish what Appellant's disability status and special needs were before it pursued disqualification. The Hearing Officer concludes that the Agency used reasonable diligence and care in its attempts to procure the evidence it needed to make a determination concerning Appellant's disability status. See, Lawley, *above*. Appellant bore equal responsibility to communicate with the Agency and procure the necessary medical information, but she failed to do these things. Therefore, the Agency's decision to terminate the interactive process was not arbitrary, capricious or contrary to rule or law.

2. Appellant is not entitled to "reasonable accommodations" because she has not shown she is "disabled" within the meaning of the ADA.

Appellant further asserts her sick leave was not exhausted at the time of her disqualification. She argues that the Agency should have accommodated her by continuing to place her according to the Float Pool rules, allowing her to get sick and use her sick leave if it became necessary. It is true that under certain circumstances, specific requests for temporary leave can be considered a "reasonable accommodation" (see, e.g., Rascon v. U.S. West Comm., 143 F.3d 1324 (10th Cir. 1998)). However, the Hearing Officer is unpersuaded by this argument for two reasons.

First, Appellant is not entitled to reasonable accommodations unless and until she can show she is "disabled" within the meaning of the ADA. To prove she is "disabled," Appellant must show that a) she suffers from some impairment that substantially limits one of more major life activities, and b) that she is capable of performing the essential functions of a position with or without reasonable accommodations, despite the disability. See, Fail v. Community Hosp., 946 P.2d 573 (1997); AT & T Technologies v. Royston, 772 P.2d 1182 (Colo. App. 1989). Major life activities include, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, reading, touching, learning and working." See, Fail (*above*).¹ As of the time of the hearing, Appellant still

¹ Substantial limitations to one's ability to work do not qualify the individual as "disabled" if she cannot perform the essential functions of her position.

had no medical documentation or other evidence showing substantial limitation of a major life activity. Therefore, she has not shown she is "disabled."

Furthermore, controlling case law in the Tenth Circuit and persuasive authority in numerous other jurisdictions confirms that the *employee* bears an affirmative responsibility of requesting *and describing* reasonable accommodations. See, e.g., *White v. York International Corp.*, 45 F.3d 357, 360 (10th Cir. 1995) (*noting that the employee must describe the reasonable accommodations making it possible to perform his or her duties*); *id.* at 363 (*the employer does not have to engage in the interactive process unless the employee shows that a reasonable accommodation is available*). See also, *Willis v. Conopco, Inc.*, *above* at 285 (11th Cir. 1997) (*holding that a plaintiff must show that reasonable accommodations were available*).

Even if Appellant had shown she is "disabled" and therefore entitled to reasonable accommodations, a request for indefinite leave for a condition of uncertain duration is not considered a "reasonable accommodation" under the governing case law. See, *Rascon*; *above*. It is apparent that Appellant continually used nearly all her leave (22 hours per month) as it accrued during the year before her disqualification (Exhibit A). Appellant further exhausted her entire twelve-week FML allotment, and had been on leave without pay on a number of occasions because she had insufficient leave available. Finally, Appellant's argument would require the Agency to continue placing Appellant in violation of known restrictions by her doctors, thus risking further injury to her.

The Hearing Officer concludes that Appellant failed to show she is "disabled" within the meaning of the ADA and therefore entitled to reasonable accommodations. In addition, Appellant's request to continue being placed in areas where there was current or recent construction, and to continue indefinitely going on leave for uncertain periods of time, is not a "reasonable accommodation." Appellant has not described any alternative reasonable accommodations. CSR 5-84 E. 4 (*above*).

3. Appellant's restrictions prevented her from being present at the workplace, and therefore rendered her "disqualified" under the CSR rules.

Section 14-20 Disqualification reads as follows in relevant part:

14-21 General

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.

* * *

14-22 Grounds for Disqualification

An employee shall be disqualified if any of the following conditions occur:

- ... B. Physical or mental impairment or incapacity: When an employee becomes unable to perform the essential functions of the position because of mental or physical impairment or incapacity.

* * *

Appellant asserts that she is capable of performing the essential functions of her position. She argues that the Agency sent her home on several occasions not because she was actually having physiological reactions to the work environment, but because she was simply reporting potential violations of her work restrictions as the Agency doctors directed her to.

Appellant further posits that Dr. Harvey's diagnosis of "asthma" the May 5, 2003 RTW pass is incorrect, and that Dr. Pacheco's November 14, 2002 documentation contains the correct diagnosis (Exhibit 5). Since the work restrictions in Dr. Harvey's RTW pass are the Agency's basis for disqualifying Appellant, she asserts that the Agency's action was based on a misdiagnosis and was erroneous. Appellant argues she could have continued working despite Dr. Harvey's diagnosis and restrictions. She asserts that therefore, she is not actually disqualified by her medical condition.

The Hearing Officer is unpersuaded. It is true that the Agency had before it conflicting diagnoses from multiple physicians. However, conditions, and therefore diagnoses, change over time. The Agency had to consider the most recent medical information it had; the May 5, 2003 RTW pass (Exhibit 11). That document suggested more restrictive conditions on Appellant's tolerance to exposure than her previous medical documents did, prohibiting Appellant from working anywhere that had construction within the last 6-12 months. Appellant's present opinion that she could have worked around current or recent construction dust, without any contemporaneous medical evidence to support this assertion, is not as persuasive as the most recent medical documentation, the May 5, 2003 RTW pass by Dr. Harvey (Exhibit 11).

For Appellant to be able to perform her duties, she had to provide medical documentation showing her ability to be present at work. She failed to do so. In the absence of any additional information, the Agency was left with no alternative but to act on the RTW pass of May 5, 2003. Given the frequency of construction and maintenance projects in all the facilities, combined with the unpredictability of the location and duration of Float Pool assignments, the latest restrictions by Dr. Harvey effectively prohibited future placements.

The Hearing Officer concludes the Agency gave candid and honest consideration of the only evidence it had available to it after using reasonable diligence to procure as much evidence as it could. Based on that evidence, the Agency determined that Appellant was disqualified because she could not be present at virtually any worksite.

on a reasonably predictable basis, and therefore was not capable of performing the essential functions of her position. The Hearing Officer concludes that in determining Appellant was "disqualified" under CSR 14-21 (*above*), the Agency did not exercise its discretion in such a manner that reasonable persons would be compelled to reach a contrary conclusion. See, Lawley, *above*.

For all these reasons, the Agency's decision to disqualify Appellant was not arbitrary, capricious, or contrary to rule or law.

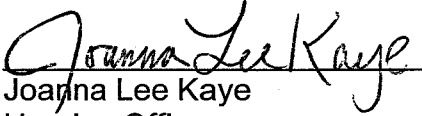
CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to hear this case and render a decision.
2. The burden of proof is on Appellant to prove the Agency's administrative action in disqualifying her was arbitrary, capricious, or contrary to rule or law.
3. Appellant failed to show that the Agency's action in disqualifying her was arbitrary, capricious, or contrary to rule or law.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's action is AFFIRMED.

Dated this 12th day of March, 2004.


Joanna Lee Kaye
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 12TH day of March, 2004, addressed to:

Deborah B. Cox
9265 E. Oxford Drive
Denver, CO 80237

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the interoffice mail, this 12TH day of March, 2004, addressed to:

Richard A. Stubbs
Assistant City Attorney
Employment Law Section

Office of General Counsel
Denver Health and Hospital Authority
660 Bannock Street, 5th Floor, MC 1919
Denver, CO 80204

Charles A. Smith