

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

Appeal No. 82-06

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**CAROL CRESCENTE**

Appellant,

vs.

**DEPARTMENT OF HUMAN SERVICES,**

and the City and County of Denver, a municipal corporation,  
Agency.

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The hearing in this appeal was held on Dec. 19, 2006 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself. The Agency was represented by Assistant City Attorney Dianne L. Briscoe. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant Carol Crescente was a Special Education Teacher for the Family Crisis Center of the Denver Department of Human Services from Aug. 30, 2004 until her separation as a result of disqualification on Sept. 14, 2006. Agency's Exhibits 1, 3 – 13, and Appellant's Exhibits A – C, E – R, and T were admitted into evidence by stipulation of the parties.

II. ISSUE

The only issue in this appeal is whether the Agency established by a preponderance of the evidence that Appellant's disqualification from her position complied with the Career Service Rules.

III. FINDINGS OF FACT

Appellant's job, Special Education Teacher, requires that she provide special education services to students/patients in the Family Crisis Center (FCC) in accordance with Colorado State Department of Education Rules & Regulations and FCC policies. The essential duties of the position are teaching, testing, developing individual treatment and transition plans, attending staff meetings, billing expenses, and developing curricula. [Exh. 13, pp. 4 - 5.]

On Jan. 11, 2006, Appellant's endocrinologist informed the Agency that he was treating Appellant for Grave's Disease, also known as hyperthyroidism, the symptoms for which include fatigue, difficulty sleeping, irregular heart palpitations, irritability, and weight loss. The doctor advised that Appellant's adjusted medication had returned her thyroid levels to normal, but that her symptoms may vary for the next year. [Exh. C.] On Jan. 23, 2006, the Agency conditionally granted Appellant leave starting on Jan. 12<sup>th</sup> under the federal Family and Medical Leave Act (FMLA), 29 USC § 2612. [Exh. E.] On Feb. 3<sup>rd</sup>, Appellant's physician, Dr. Ann Smith-Rudnick, submitted a certification that Appellant was receiving treatment for hyperthyroidism, and that as a result she would be unable to work for two months. [Exh. 4.] On the basis of that certification, Appellant was given final approval to take FMLA leave from Jan. 17 to March 16, 2006. The approval required Appellant to present a fitness-for-duty certificate from her health care provider on her first day back. [Exh. F.]

On March 14<sup>th</sup>, Dr. Smith-Rudnick approved Appellant to return to work three days a week, with a medical re-evaluation in four to six weeks. Appellant was granted intermittent FMLA leave to commence March 17<sup>th</sup> and end May 12, 2006. [Exh. 5.] On April 13<sup>th</sup>, Appellant's doctor approved her to continue working three days a week, with re-evaluation in three to four weeks. [Exh. G.]

In late April, Appellant asked her supervisor, Social Caseworker Manager Ron Mitchell, if she could start her work day earlier so she would have more effective planning time in the morning before classes. That request was denied. Appellant then asked if the traffic in and out of the room she used for planning could be controlled. Mr. Mitchell suggested a "do not disturb" sign, but Appellant informed him that she had tried that and it was ineffective.

Later, Appellant spoke with FMLA Coordinator Paul Sienkiewicz about the availability of other resources to allow her to do her job better. Mr. Sienkiewicz referred her to ADA Coordinator Rita Murphey. Appellant informed Ms. Murphey of her medical conditions and her desire to learn of any available resources to help her do her job. Ms. Murphey explained that the city had an interactive process to determine whether an employee is disabled, and, if so, whether reasonable accommodation may be available.

The evidence from Appellant, Mr. Mitchell, Ms. Arter and Ms. Murphey establishes that Appellant did not specifically request reasonable accommodation or use of the interactive process. Mr. Mitchell interpreted Appellant's question about uninterrupted planning time as a request for reasonable accommodation. Mr. Mitchell believed that Appellant was unable to perform the full time job, since she been released to work on only a part-time basis by her doctor. He therefore asked Senior Agency Personnel Analyst Deb Arter to initiate the interactive process.. Appellant was placed on FMLA leave for nine days until the interactive process meeting, which occurred on May 10, 2006. Thereafter, Appellant was placed on unpaid interactive process leave until that process ended on Aug. 28, 2006. [Exhs. 7, 8, 12.] It is undisputed that Appellant did not request either an extension of her FMLA leave or interactive process leave. In fact, Appellant asked Ms. Arter, Mr. Mitchell and Ms. Murphey during her interactive process leave if she could return to work. Ms. Murphey testified that in

practice an employee is placed on leave during the interactive process if a medical condition impacts the ability to work.

On May 5, 2006, in response to the Agency's request for information about Appellant's ability to work, Dr. Smith-Rudnick reported that Appellant's diagnoses include hyperthyroidism, adult ADHD and depression, which together affect her organizational and communication skills. "Major life activities of learning, communicating and interacting with others are affected by this." [Exh. 3-2.] "Would recommend part time work to adjust to above 1 → 2 months?? Then can return to full time with restrictions." [Exh. 3-3.] When asked to specify what reasonable accommodations would enable Appellant to perform her job, the doctor mentioned communication within a structured setting, maintenance of the state-determined teacher/student ratio, and uninterrupted time to complete paperwork. [Exhs. 3, 6.]

On May 24, 2006, Ms. Murphey requested further clarification regarding Appellant's ability to work as a special education teacher. In response, Dr. Smith-Ruddick stated that Appellant has the mental acumen to create the structure for the teaching environment, and is capable of performing her job when the required teaching aides are consistently available in the classroom. The doctor stated that Appellant is substantially limited in the major life activity of working, but not in learning. No accommodation was said to be needed for teaching, but the doctor suggested four methods of enhancing working relationships with staff. Appellant was cleared to return to work full time by July 10, 2006 "with above accommodations." [Exh. M, p. 4.]

On July 18, 2006, Ms. Murphey asked for more details about the nature of the administrative support needed to allow Appellant to perform her duties. [Exh. 10.] The doctor replied by writing a letter explaining that Appellant needed the same paraprofessional support as any other teacher in that setting, and the same uninterrupted planning time as required in the public school system. Dr. Smith-Rudnick further explained the symptoms of ADHD and hyperthyroidism. "The combination of symptomatic Hyperthyroidism with ADHD could certainly have overwhelmed Ms. Crescente's coping ability. As her Hyperthyroidism is controlled and she learns additional coping methods, the magnification of her symptom complexes will dissipate. This is why Ms. Crescente was released to return to work part-time. . . . Hopefully Ms. Crescente would quickly transition to full-time work." [Exh. N.]

On Aug. 28, 2006, Ms. Murphey recapped the results of the interactive process in a letter to Appellant. Ms. Murphey repeated that Dr. Smith-Rudnick stated "you are substantially limited in the major life activity of working," and that Appellant was capable of performing the essential functions of her position. No other medical information was considered. Ms. Murphey concluded that Appellant was not disabled, and referred the matter back to the Agency. [Exh. O.]

On Aug. 29, 2006, the Agency sent Appellant official notification that it was considering disqualification from her position based upon the following facts:

As of May 4, 2006 you have exhausted your rights under Family Medical Leave, having used 12 weeks of Leave since January 17, 2006.

As of this date, you have not been released to return to work in full time capacity. . . . On August 28, 2006, Ms. Murphey informed you by letter that your doctor stated that you are not capable of performing the essentials (sic) functions of your job. Based on the information your doctor provided Ms. Murphey, she determined that you are unable to work in full time capacity and that her services are not indicated at this time. Ms. Murphey referred the matter back to Denver Human Service for resolution.

[Exh. P.]

Appellant brought her doctor's Reasonable Accommodation Questionnaire to the pre-disqualification meeting, which stated that Appellant was physically capable of performing the essential functions of her position, and advised that Appellant could return to full time work after one to two months. [Exh. 3.] Appellant was disqualified by letter dated Sept. 14, 2006, which added that "it has not been determined that you are disabled within the meaning of the Americans with Disabilities Act." [Exh. 1.]

At hearing, Director of Family and Children's Division Allen Pollack testified that he was the decision-maker in this case. He stated that a disqualification action is a determination that Appellant would no longer be able to be employed at the Crisis Center. He based his decision to disqualify on three factors: 1) Appellant was absent from work for about seven months, 2) her supervisor reported that Appellant was having performance problems, and 3) Appellant requested reasonable accommodation in the form of an additional classroom aide, for which there was no funding. Mr. Pollack was aware that Appellant returned to work three days a week at some point, but believed that she was absent on some of her assigned days during that time. He was not aware that Appellant's absences from late April until her disqualification in September were caused by her involuntary placement on interactive process leave. He believed she was having some medical issues that prevented her from returning to work as they expected. Mr. Pollack conceded that he would not have needed to disqualify her if she had returned to work and improved her performance.

Ms. Arter testified that she was directed by Appellant's supervisor to write a performance action plan in Nov. 2005 and a written reprimand in Jan. 2006 based on Appellant's communication problems with her students. In the spring of 2006, Mr. Mitchell asked Ms. Arter to prepare a letter placing Appellant on interactive leave and commencing the interactive process based on Appellant's modified work schedule and the Center's need for a full-time teacher. The doctor's note requested that Appellant be allowed to work three days a week. [Exh. G.]

Ms. Arter confirmed that Appellant was placed on interactive leave because her doctor indicated she could not do the job full time, and it was a full time job. For the same reason, the Agency ultimately determined that Appellant could not perform the

job. Ms. Arter stated that generally the Agency does not require an employee to be on leave during the interactive process unless the medical information shows he or she cannot perform the job. Another employee, a cancer patient who requested reasonable accommodation in the form of modified work hours to attend doctors' appointments, was permitted to work full-time during the interactive process. That employee later withdrew the request after rescheduling the appointments outside of her work hours. In Ms. Arter's opinion, that situation was different from Appellant's because that employee was able to do her job.

Mr. Mitchell testified that he placed Appellant on an action plan for performance issues in Jan. 2006. Appellant was approved for FMLA leave from Jan. 17 to March 14, 2006. When she returned on a part-time basis in March, he began to receive staff complaints of performance issues similar to those identified in the action plan. At about the same time, he informed Human Resources of Appellant's request for less traffic in her planning room. Human Resources advised that Appellant should be placed on leave until the interactive process meeting. Mr. Mitchell stated that the FMLA coordinator also advised him to place Appellant on continuous leave because she was on a modified (part-time) schedule, and the facility needed the position to be full time.

Mr. Mitchell further testified that during the interactive process he provided Ms. Murphey with information about the nature of the position of special education teacher and Appellant's recent performance issues. After the process was concluded, he signed the letter drafted by Human Resources which notified Appellant that disqualification was being contemplated. He took that action because he believed Appellant was able to perform the essential functions of her job, but was not doing so consistently, as shown by her performance problems in March and April. Mr. Mitchell did not proceed with enforcement of the action plan because the interactive process "brought it to a stop." Mr. Mitchell believes that disqualification can be imposed if an employee is unable to perform the job for any reason. He recommended disqualification based on his observations that Appellant's performance problems were causing a chaotic and unsafe environment for the students. That led to his conclusion that Appellant was not able to do her job in accordance with the action plan. Mr. Mitchell did not base his recommendation on Ms. Murphey's letter summarizing the interactive process, which he does not recall seeing at the time of the pre-disqualification meeting.

Appellant testified that she was hired in 2004, and received a lot of compliments for her performance during her first year. In late 2005, she received complaints from co-workers about how she was coming across to them. After receiving a written reprimand on Jan. 2006, Appellant went to see her doctor, and it was discovered that her thyroid levels were elevated. Appellant attributed her physical weakness, anxiety, irritability with co-workers, and difficult in organizing her thoughts to a combination of her active Grave's disease and her ADHD. She applied for FMLA leave, which was ultimately approved. Her doctor recommended two months off the job to allow her medical condition to stabilize, then a transitional period of part-time work, with regular medical reviews.

When Appellant returned in March, she experienced some resistance from co-workers because of her part-time status. She reported what she believed was sabotage by two co-workers to her supervisor, and received no response. At the time, she thought her co-workers were exaggerating their complaints about her. Later, she realized her disorganization and fatigue were affecting her work and work relationships. Appellant was told during a staff meeting that some thought she was not doing her job, but she was not served with any disciplinary action.

During this modified work schedule, Appellant was still adjusting to the new medication, and learning about how her conditions affected her work and home life. As a part of that, she requested permission to combine her 45-minute morning and afternoon planning periods into one 90-minute period taken in the morning. That request was denied. Appellant then asked if her supervisor could limit access to her planning room so she could concentrate better. Mr. Mitchell told her that could be done only by putting a "do not disturb" sign up.

In her effort to develop strategies to perform her teaching duties, Appellant then asked FMLA coordinator Paul Sienkiewicz to suggest some other resources. He referred her to Ms. Murphey. Shortly thereafter, Appellant was placed on unpaid interactive process leave. After exhausting her other leave, she asked Mr. Mitchell and Ms. Arter if she could come back to work. The day after the interactive process was concluded, the disqualification process started, and Appellant was not notified about whether she could return to work.

Appellant testified that the six weeks of part-time work was not enough time for her to develop the strategies she needed to adjust to her medical conditions. Appellant believed she and her doctor were requesting only what should have already been in place on the teaching job, including the required teacher/student ratio in the classroom, and the same amount of planning time as is required by the state laws and regulations governing education. Appellant testified that shortly after the disqualification action, her doctor gave her a medical authorization to return to work full-time.

#### IV. ANALYSIS

Jurisdiction of this direct appeal of Appellant's disqualification lies under CSR § 19-10 A. 4. The Agency has the burden of proof to establish by a preponderance of the evidence that the disqualification complied with the Career Service Rules governing disqualifications. CSR § 14-20 *et. seq.*; C.R.S. 13-25-127(1) (2006). See In re Cullen, CSA 165-04 (CSB 1/18/07).

"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 § 14-41. "An employee shall be deemed to 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." CSR § 14-22 B.

A disqualification action must be supported by proof of the following elements: "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." In re Cullen, CSA 165-04, p. 3 (CSB 1/18/2007).

The Agency disqualified Appellant from her position based on its conclusions "that you are not capable of performing the [essential] functions of your job", and that Appellant was unable to work full time. [Exh. 13, p. 2.] The issue then is whether the Agency established that this constitutes proof of an impairment after appointment that prevents satisfactory performance of the essential functions of Appellant's position.

A. Existence of an impairment

The disqualification rule uses the same definition of the word "impairment" as that used in the Americans with Disabilities Act (ADA). That rule "is clearly intended to comply with the ADA". In re Cullen, *supra* at 3. For this reason, we may look to cases interpreting the ADA for guidance in disqualification actions.

The Supreme Court has identified two sources of guidance when interpreting the ADA's definition of "disability", which requires proof of an impairment: regulations issued by the Department of Health, Education, and Welfare (HEW) implementing § 504 of the Rehabilitation Act of 1973, and the EEOC regulations interpreting the ADA. See Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 194-195 (2002).

The Career Service Board has determined that an impairment within the meaning of CSR § 14-21 is the same as the definition of impairment given in the Americans with Disabilities Act, as follows:

(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, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-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); In re Cullen, *supra* at 3 - 4.

The Agency submitted into evidence the reasonable accommodation questionnaire completed by Appellant's doctor, which stated that Appellant has been diagnosed with hyperthyroidism, ADHD and depression. The parties agree that Appellant suffered from these conditions at all times relevant to this appeal. All three have been recognized as impairments as that term is defined by the ADA. Harris v. H&W Contracting Co., 102 F.3d. 516, 519 – 520 (11<sup>th</sup> Cir. 1996) (hyperthyroidism is a

disorder affecting the thyroid gland, an integral part of the endocrine system); Knapp v. City of Columbus, 192 Fed.Appx. 323 (6<sup>th</sup> Cir. 2006) (ADHD qualifies as a physical or mental impairment under 45 C.F.R. § 84.3(j)(2)(i)(A); Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37 (D. Me. 1996) , affirmed 105 F.3d 12 (1st Cir. 1997) (depression constitutes a mental impairment under the ADA). The Agency has therefore established the first element it was required to prove in the disqualification proceeding.

B. Discovered after employment

The Agency produced evidence that it first discovered Appellant's diagnosis of hyperthyroidism when she requested FMLA leave in Jan. 2006 to obtain treatment from an endocrinologist, and learned of her ADHD and depression in April 2006 as a result of her doctor's submission of a reasonable accommodation questionnaire. Both of those events occurred after her hire date of July 2004. Thus, the Agency has proven the second necessary element for disqualification.

C. Whether impairment prevented satisfactory performance of essential job functions

The third and last element needed to support a disqualification decision is that the impairment "would be expected to prevent performance of essential job functions in the future." In re Cullen, *supra* at 5. This requires proof of a causal connection between the impairment and an employee's inability to perform essential job functions.

1. Ability to perform essential job functions

In support of its decision, the Agency made two findings: 1) "On August 28, 2006, Ms. Murphey informed you by letter that your doctor stated that you are not capable of performing the [essential] functions of your job", and 2) "Based on the information your doctor provided Ms. Murphey, she determined that you are unable to work in [a] full time capacity." [Exh. 1-2.] On the contrary, the letter from the ADA coordinator accurately stated Dr. Smith-Rudnick had concluded that "you are capable of performing the essential functions of your Special Education Teacher position." [Exh. 12, emphasis added.] In addition, Ms. Murphey reported that Dr. Smith-Rudnick released Appellant "to work part-time transitioning to full-time work." [Exh. 12.] The Agency produced no other evidence, medical or otherwise, in support of the two findings supporting its disqualification decision. The only evidence supports the opposite conclusion: that Appellant was capable of performing the essential functions of her position, and that the recommendation for a short period of part-time work did not prevent her from performing her duties on the basis of her impairments.

The disqualification action was also based on several other incorrect assumptions of fact by Agency decision-makers. First in order of occurrence, Mr. Mitchell placed Appellant on interactive leave because Appellant's doctor had not returned her to work on a full-time basis. Mr. Mitchell assumed that unpaid interactive leave was appropriate because Appellant was working part time in a job that was funded as full time, and she was therefore unable to perform that job. The applicable rule states that leave may be used "if an employee is unable to perform his or her

existing job.” CSR § 5-84 G. The Agency did not show that an inability to perform a job should be interpreted differently with regard to interactive process leave than it is defined in the disqualification rule, requiring that an impairment “prevents satisfactory performance of the essential functions of the position.” CSR § 14-21. The same phrase is used to define the existence of a disability under CSR § 15-84 D, which states that “[a] qualified individual with a disability is an individual with a disability who can perform the essential functions of the position he or she holds . . . with or without accommodation.” See also CSR § 5-84 F. 6. (safety and essential functions of a proposed reassignment must be identified in decision denying reassignment.)

The Agency’s practice was to remove an employee from the workplace during the interactive process only if it was necessary from a medical or safety standpoint. Ms. Arter testified that the Agency allowed an employee undergoing cancer treatment to work full time during an interactive process begun to request time off to attend doctors’ appointments. Similarly, Appellant’s doctor requested that Appellant be allowed to work part-time. The Agency did not show that there is a basis for a distinction between time off for medical treatment and time off to allow an employee to adjust gradually to her medication and work demands. In either event, the employee is not working a full-time schedule. In their testimony, Ms. Murphey and Ms. Arter verified that the Agency considers an employee’s medical condition as the focus in determining whether an employee should be placed on leave during the interactive process. Here, the Agency instead used Appellant’s temporary part-time status as the determining factor. This construes CSR § 5-84 G. in a manner inconsistent with the rule on reasonable accommodation as well as the Agency’s past practice.

As a result of being placed on involuntary interactive leave until the process was completed, Appellant was prevented from using the remainder of her FMLA leave, and was not given the opportunity to learn additional coping methods for the four months consumed by the interactive process. In addition, that four months of absence was used to support Mr. Pollack’s erroneous assumption that Appellant was off due to medical reasons during that time, and his conclusion that she was therefore unable to perform the essential functions of her job. Absent this leave, Appellant could have continued on a part-time basis until the expiration of her FMLA intermittent leave, which ended May 12<sup>th</sup>. By that time, her doctor could have determined whether her full-time return to work was medically advisable. This chain of events illustrates the importance of the decision to place an employee on involuntary leave during the interactive process, as it may adversely affect the determinations made on the issues of disability, reasonable accommodation and disqualification.

In ending the interactive process, Ms. Murphey assumed that Dr. Smith-Rudnick restricted Appellant from teaching a class of 14 - 21 children “unless there are two teacher [aides] constantly available in the classroom.” [Exh. O.] The only information stated in support of this conclusion was the medical reports from Dr. Smith-Rudnick, who stated only that Appellant should be given the same planning time as other teachers are given, and the same number of aides as other special education teachers. [Exh. N.] This misreading of the doctor’s report was communicated to Mr. Pollack, who testified that he based his decision to disqualify in part on his belief that Appellant was requesting an additional aide in her classroom as an accommodation.

Ms. Murphey also concluded that Appellant was not disabled, despite her findings that Appellant was substantially limited in the major life activity of working, and capable of performing the essential functions of her position. The Career Service Rules and the ADA share a definition of a disabled person that requires both of those findings: a physical or mental impairment that substantially limits a major life activity, and the ability to perform the essential functions of the position held. Therefore, the findings should have led to a determination that Appellant was disabled. In that event, the next step would have been for the parties to identify reasonable accommodations necessary to allow Appellant to perform her essential functions. CSR §5-84 E. 4. Here, disqualification proceedings were initiated as a result of the conclusion that Appellant was not disabled.

In support of the disqualification decision, Mr. Pollack made four assumptions that were not borne out by the evidence. He assumed Appellant was off work for medical reasons during the four-month interactive process, not, as it happened, because she was placed involuntarily on interactive process leave. Mr. Pollack also believed Appellant was sometimes absent in March and April when she was working part-time. Mr. Pollack concluded that Appellant's absences for the seven months from the beginning of her FMLA leave to her disqualification rendered her unable to hold the full-time job.

Mr. Pollack testified that he believed Appellant had used up all her FMLA leave. In fact, Appellant had taken 60 days from Jan. 17 to Mar. 16, and another 12 days while working three days a week from Mar. 17 to Apr. 27. Appellant was placed on FMLA leave for nine days until the interactive meeting. Therefore, Appellant was eligible to take another three days before exhausting the 84 days (12 workweeks) permitted by the FMLA. 29 U.S.C.S. § 2612(a).

Mr. Pollack based his decision in large part on reports from other employees that Appellant was experiencing performance problems when she was working part-time in April. He saw incident reports that indicated she was not following the behavior modification program for students, was not supporting fellow staff, and that her classroom was sometimes out of control. He concluded that "there was enough evidence about her performance, and its impact on the kids and on the staff, that [disqualification] was an easy decision to make." He testified that "very little [of the decision] was based on her medical conditions." He concluded that Appellant's performance problems could not be corrected because she was not at work. The Agency did not present any evidence that Appellant was made aware of these performance problems through disciplinary action. Even if Appellant failed to comply with standards of performance, that fact would not establish that an impairment prevented Appellant's performance of essential job functions in the future. The Agency must apply the rules, procedures and precedent developed under Rule 16 in enforcing its performance standards, and disqualification is not a substitute for discipline. See In re Cullen, supra, at 6.

Mr. Pollack also testified that his decision was based in part on Appellant's request for special accommodations in the form of an extra aide in her classroom, over

and above their funded staffing level. After the ADA Coordinator determined that Appellant was not disabled, Mr. Pollack found that this accommodation was not required. A request for reasonable accommodation under the ADA and CSR § 5-84 may not be used as a basis for disqualification.

The medical information about the anticipated date of Appellant's return to full-time work varied over time. In March and April, Dr. Smith-Rudnick requested that Appellant be permitted to extend her FMLA leave by working three days a week for two months, with medical reviews from three to six weeks thereafter to review her progress. [Exh. G.] The doctor answered the reasonable accommodation questionnaire by explaining that the impairments were permanent, but that part-time work for one to two months was recommended to allow her to adjust. [Exh. H-3.] In late May, the doctor anticipated her return to full-time work by July 10th. [Exh. M-4.] The medical estimates of Appellant's anticipated return to full-time work were dependent on her condition as it changed with time and opportunities to adjust. In any event, the doctor's response to the reasonable accommodation questionnaire and its follow-up requests was a recommendation of a reasonable accommodation that could assist Appellant to perform her job if she was determined to be disabled, not a work restriction. More importantly, a restriction from working full time for a maximum of two months does not support a conclusion that Appellant would be unable to perform her essential job functions in the future, as required to prove the third element for disqualification.

## 2. Causal connection between impairment and inability to perform

In addition, the Agency failed to demonstrate a causal link between Appellant's impairments and its conclusion that Appellant was unable to perform her job. The letter of disqualification did not allege that Appellant's impairments caused an inability to perform the essential functions of her job.

Mr. Pollack testified that he disqualified Appellant for two reasons: her attendance over the past seven months, and her performance problems. Mr. Pollack testified that, because Appellant was not at work, she could not perform the duties of her position. However, the evidence is clear that the reason Appellant was not at work for four out of the relevant seven months is that the Agency placed her on interactive leave, effectively preventing her from coming to work either full time or part time. The remaining three months of absence were approved by the Agency as FMLA leave, both full time and intermittent. Federal law protects employees from termination based on their approved use of FMLA leave for a serious health condition. 29 USCS § 2612; Bachelder v. American West Airlines, Inc., 259 F.3d 1112, 1119 (9<sup>th</sup> Cir. 2001). There is no evidence that Appellant's impairments were the cause of her absences.

Mr. Pollack's second reason was that Appellant was still having performance problems on her return from FMLA leave. The only evidence on that subject was provided by Appellant's supervisor Mr. Mitchell, who stated that co-workers complained Appellant was not teaching as many classes as contained in the plan, and was not keeping students in her line of sight. The Agency presented no evidence that those performance problems were caused by any impairment, or that those problems prevented her from satisfactorily performing the essential functions of her position. Thus, the Agency failed to connect the

performance issues to the grounds needed to support disqualification.


The Agency's stated reasons for the decision reveal that there was confusion about the nature of disqualification and disciplinary action. The latter requires that an employee shall be notified of the nature of inadequate performance or misconduct under Career Service Rules 16 and 13, as applicable. A disqualification may not be used as a substitute for disciplinary action. In re Cullen, supra at 6. Substandard performance may trigger disciplinary action under CSR § 16-60 S. It may also be caused by an impairment, and lead to the interactive process and eventual disqualification under CSR §§ 5-84 and 14-40. However, an agency cannot support a disqualification by the mere existence of performance issues. Here, the Agency failed to prove that hyperthyroidism, ADHD or depression would cause Appellant to be unable to satisfactorily perform the essential functions of her job in the future.

The evidence is undisputed that Appellant's impairments did not cause the absences unprotected by FMLA, and that Appellant was capable of performing the essential functions of her position. Therefore, the Agency's disqualification decision is not supported by the evidence.

#### ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency disqualification action dated Sept. 14, 2006 is reversed.

Dated this 2nd day of February, 2007

  
Valerie McNaughton  
Career Service Hearing Officer

Cases/Crescente/decision.doc

#### 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](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax 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 [*Fax transmissions of more than ten pages will not be accepted.*]

**CERTIFICATE OF SERVICE**

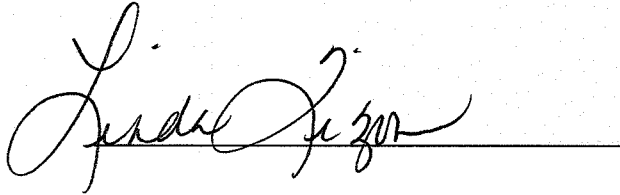
I hereby certify that I have forwarded a true and correct copy of the foregoing DECISION by depositing it in the U.S. mail, postage prepaid, this 5<sup>th</sup> day of February, 2007, addressed to:

Carol Crescente  
3201 W. Radcliff Ave.  
Sheridan, CO 80110

I further certify that I have forwarded a true and correct copy of the foregoing DECISION as indicated below via e-mail this 5<sup>th</sup> day of February, 2007, addressed to:

Dianne Briscoe  
Assistant City Attorney  
Denver Department of Human Services  
1200 Federal Blvd. 4<sup>th</sup> Floor

Jennifer Fairweather  
Department of Human Services

A handwritten signature in black ink, appearing to read "Jennifer Fairweather", is written over a horizontal line. The signature is cursive and stylized.