

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 45-10 A.

FINDINGS AND ORDER ON MOTION TO STAY

IN THE MATTER OF THE APPEAL OF:

VERONON HOWARD,

Appellant/Respondent,

vs.

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

Agency/Petitioner.

The Agency's request to stay the Hearing Officer's Decision of June 16, 2011, is **GRANTED** on the grounds outlined below.

FINDINGS

In its motion to stay, the Agency indicates that it is unclear about the conditions under which it may be required to bring Appellant back to work, whether it owes back pay, or the amount of back pay. Agency's Motion, par. 11. As the Board has noted in previous decisions, issues related to the payment or potential recovery of back pay are not grounds for granting a stay of a hearing officer's decision under CSR 19-66. *See, In re Mestas et al*, Appeal No. 64-07 (CSB, 6/30/08). However, the uncertainty about reinstatement during the pendency of this appeal is an issue that needs to be addressed.

Although the merits of the Hearing Officer's decision are not before us, we must rely on the Hearing Officer's findings in deciding this motion. Specifically, the Hearing Officer found that performing manual tasks, lifting and bending were essential functions of Appellant's job. Decision, p. 9. Further, the Hearing Officer found that when Appellant was disqualified on June 16, 2010, he was medically restricted from lifting over 20 pounds and engaging in repetitive lifting, bending or stooping. Decision, p. 3. And finally, there are no findings by the Hearing Officer as to the existence or feasibility

of a reasonable accommodation that would enable Appellant to perform all the essential functions of his former job, or perform all the essential functions of a re-assigned job.¹

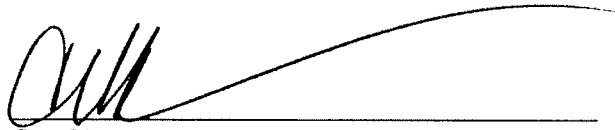
Thus, reinstating Appellant to his former position during the pendency of this appeal creates a significant dilemma: either the Agency would have to reinstate Appellant and not require him to lift or bend, or reinstate him and require him to perform activities he cannot perform. The first scenario would require the Agency to do what the ADA does not require it to do: eliminate, modify or reassign essential job functions. *Duvall v. Georgia Pacific Consumer Products LP*, 607 F.3d 1255, 1262 (10th Cir. 2010); *Hennagir v. Utah Dept. of Corrections*, 587 F.3d 1255, 1264 (10th Cir. 2009); *Rehrs v. Iams Co.*, 486 F.3d 353, 358 (8th Cir. 2007); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 153 (1st Cir. 2006). The second scenario would require Appellant to perform activities he is unable to perform. Given these circumstance, the Agency, Appellant, or both would be harmed by a reinstatement at this time.

ORDER

IT IS THEREFORE ORDERED that the Agency's Request to Stay the Hearing Officer's Decision of June 16, 2011, is **GRANTED**. This stay will remain in effect until the Board issues its final decision on the Agency's Petition for Review.

SO ORDERED by the Board on August 18, 2011, and documented this
13th day of September, 2011.

BY THE BOARD:



Co-Chair

Board Members Concurring: Nita Henry, Michelle Lucero, Amy Mueller, Colleen M. Rea and Patti Klinge.

¹ During the interactive process, the City's ADA Coordinator, Rita Murphey, explored a transfer to a clerical position but found no clerical positions that did not require filing (bending) activities. Decision, pp. 10-11.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **Findings and Order on Motion to Stay** on September 13, 2011, in the manner indicated below, to the following:

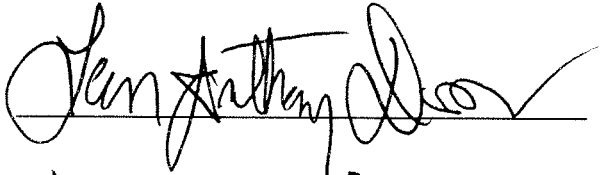
Vern Howard, P.O. Box 200488, Denver, CO 80220 (via U.S. mail)

Whitney Traylor, Esq. wtraylor@traylorlawgroup.com (via email)

City Attorney's Office dlefilng.litigation@denvergov.org (via email)

HR Services HRServices@denvergov.org (via email)

CSA Hearings Office CSAHearings@denvergov.org (via email)


Leon A. Duran