

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

Appeal Nos. 106-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOHN E. PEREZ, SR., Appellant,

v.

Agency: Department of Public Works, Solid Waste Management, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, John E. Perez, Sr., shall be referred to as "Appellant." Department of Public Works, Solid Waste Management shall be referred to as "Department" or "Solid Waste." The City and County of Denver shall be referred to as "City." Collectively they shall be referred to as "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held October 6, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and appeared *pro se*. The Agency was represented by Robert A. Wolf, Assistant City Attorney, with Jan Meese serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Gary Price, James F. Oakley, Rita Murphey, Marcel Linne, Steve Garcia

The following witnesses were called by and testified on behalf of the Appellant:

Appellant

The following exhibits were offered and admitted into evidence on behalf of the Agency:

2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 19, 20, 21, 23, 25, 26, 27(pp. 1-3), 28, 30

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

None

The following exhibits were admitted into evidence by stipulation:

None

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

None

NATURE OF APPEAL

Appellant is appealing his disqualification, claiming disability and age discrimination. Appellant is requesting reinstatement to a position he previously held in Street Maintenance and back pay and benefits.

ISSUES ON APPEAL

Whether Appellant was properly disqualified from his employment with Solid Waste?

Whether Appellant's disqualification was based upon a discriminatory (age and disability) bias?

If Appellant was improperly disqualified, can he be reinstated to a position in Street Maintenance that he held prior to his transfer to Solid Waste?

PRELIMINARY MATTERS

None.

FINDINGS OF FACT

1. Appellant was employed by the Department of Public Works for seventeen years, the last fourteen as an equipment operator. At the time of his disqualification, he was assigned to the Solid Waste Management Division, to which he had been transferred on October 29, 2002. Prior to that, he worked in the Street Maintenance Division of the Department.

2. As an equipment operator, Appellant is expected to drive a tandem axel vehicle, which, in Solid Waste, is a rear-load collection vehicle. He would be required to share in loading the trash into the truck, even if he were responsible for the driving. The loading duties include large item pickup as well as the regular trash pickups. Trash can run 50 pounds or more per item.

3. Appellant was transferred to Solid Waste because he complained about his supervisor in Street Maintenance, Steve Garcia, and no longer wanted to work with Mr. Garcia. The transfer was made to provide Appellant with a fresh start.

4. Appellant appeared for work on October 29, 2002. He spent the day observing the routine on the Solid Waste truck and the job of the manual collection crew assigned to the truck.

5. Solid Waste has only two automated systems. Those routes are handled by

equipment operator specialists, a higher classification than equipment operator.

6. Appellant did not indicate any physical limitations to any supervisory personnel at the beginning of the shift before he went out on the run.

6. At the end of the day, Appellant went into the office of Gary Price, Director of Solid Waste Management. He told Mr. Price he could not work. When Mr. Price asked "why?" Appellant indicated that he had a shoulder injury that required surgery. This was the first Mr. Price learned Appellant might have a medical condition that could limit his ability to perform the essential duties of the job. Mr. Price indicated to Appellant that he would be placed on administrative leave until those limitations could be discerned.

7. Appellant completed the necessary medical releases.

8. His doctor submitted a form, noting the following work restrictions: "Avoid repetitive motion. No lifting more than 20 lbs. Avoid stooping and bending due to neck pain and wrist pain." (Exhibit 2)

9. The interactive process was begun by Rita Murphey, ADA Coordinator for the Career Service.

10. Appellant was sent for an independent medical evaluation at Denver Medical Center Occupational Health Clinic. Dr. Aylor, the physician who saw him there, restricted Appellant to lifting no more than 20 pounds on an occasional-to-seldom basis, not above chest level, and no repetitive use of left arm above shoulder level. (Exhibit 15)

11. As a result of the work restriction placed by Appellant's physician and Dr. Aylor, Ms. Murphey determined that Appellant was not disabled under the Americans with Disabilities Act. Therefore, he was not entitled to a reasonable accommodation through the interactive process. However, Ms. Murphey made an attempt to locate a job within the Department or anywhere else in the City for a three-month period. She looked to see if reasonable accommodations were possible for any job at the Department, even though she was not required to by either statute or CSR provision. She looked at a "Service Technician" at Street Maintenance, but Appellant did not meet the minimum qualifications. In the end, she determined that there were no jobs available for which Appellant had the necessary qualifications. She found that his request that someone else do all the heavy lifting and that he merely drive the truck or that a hoist be placed at the back of a tandem truck to assist with the lifting were not reasonable accommodations. (Exhibits 17, 19 20, 21, 23)

12. Ms Murphey testified that Appellant is not entitled to modified duty under workers' compensation since his injury is not work related.

13. James F. Oakley, Senior Safety and Loss Analyst for the Department, analyzed the essential job functions for an equipment operator in Solid Waste. He looked at the operation of the truck, the duties required pre-trip and post-trip, as well as federal and state rules concerning safety requirements for persons performing the job. He observed persons performing the job, in addition to obtaining specifications from web site research.

14. Mr. Oakley concluded that the job specifications for an equipment operator in Solid Waste required agility and physical strength. Lifting, carrying, pushing and pulling weights 0-20 lbs and 20 -50 lbs are listed as "constant"; they are "frequent" for 50 to 100 lbs (except for

carrying that weight, which is assessed as "occasional." (Exhibit 3. pp. 13-14)

15. Mr. Oakley assessed the job requirements for a senior utility worker in Waste Management. The physical strength requirements are similar to those for equipment operator. The job also requires constant reaching above the shoulder. (Exhibit 7)

16. Mr. Oakley looked at the physical strength requirements for an equipment operator in Solid Waste "Recycling" and for the driver of a rear loader truck. (Exhibits 8 and 9) The physical strength and reaching requirements are similar to those given above.

17. Mr. Oakley testified that Appellant did not meet the physical strength requirements for any equipment operator position, whether in Solid Waste or Street Maintenance. All equipment operators need a "pull weight" ability of 50-60 lbs. just to be able to lift the hood (which weighs 40 lbs.) and get into the truck to inspect it before and after runs.

18. Marcel Linne, safety analyst with Street Maintenance, testified Appellant did not meet the physical strength requirements for any equipment operator positions within Street Maintenance. He reached this conclusion based upon his fourteen years experience as a safety analyst and his observations of persons working in Street Maintenance. He prepared job requirements analyses for the Sweeping Crew, the Rotomill Crew, the Paving Crew, and the Selective Maintenance Crew. (Exhibit 17, pp. 4-20) All the equipment operator positions within Street Maintenance require the ability to occasionally lift, carry, push and pull up to 100 lbs. They also require occasional reaching above the shoulder.

19. Mr. Linne gave the example of preparing a truck for snow duty to explain the physical strength required of members of Street Maintenance. In order to ready a truck, the tailgate has to be removed with a 5 lb. sledgehammer used to hit out the holding pins. Mr. Linne estimated it takes 60-70 lbs of force to remove the pins. A forklift is used to remove the tailgate as it weighs 500 lbs. The plow, which is mounted with the assistance of a lever to lock it in front of the tandem truck, weighs 2000 lbs.

20. At the time Appellant told Mr. Price he could not perform the job, he said he wanted his old job back with Street Maintenance since he could perform that job. He claims that, at Street Maintenance, everyone works together, so if someone can't lift the hood of the truck, another person would help out. He agreed that the job with Waste Management required the person to be in good physical condition. He stated that it was a job for a younger man than he and that giving him a job in Waste Management constituted age discrimination.

21. Appellant also stated that his problem with Mr. Garcia was Mr. Garcia's alleged "unfair labor practices." He testified that he still did not want to work with Mr. Garcia.

23. Mr. Garcia testified that Appellant never told him he had any physical disabilities or injuries that would limit his ability to perform his job. He never considered Appellant to have a disability while Appellant was with Street Maintenance. Despite Appellant's testimony that he had an excellent record while at Street Maintenance, Mr. Garcia pointed out that Appellant had been cited for misconduct numerous times and received a 45-day suspension for various violations of the CSR.

22. Appellant suffers from carpal tunnel in his left wrist and has a related shoulder injury in his left shoulder. He had carpal tunnel surgery in 2002, but the condition did not improve. He also has a prosthetic right shoulder.

23. As of the date of the hearing, Appellant still did not have a medical release stating he could lift more than 20 lbs.

24. Appellant was sent notice of contemplation of his disqualification on June 4, 2003. (Exhibit 27) A meeting was initially scheduled for June 16, but it was rescheduled for June 24 at Appellant's request. Appellant appeared at the meeting, along with Doug Wells, a security guard with Wastewater Management, Jan Meese, Human Resources, and Mr. Price. After the meeting, Mr. Price determined that disqualification was appropriate. Notice of Disqualification was issued to Appellant on July 1. It was effective at the end of that day. (Exhibit 30) Appellant filed his appeal to the Hearing Officer in a timely manner on July 7, 2003. (Exhibit 31)

DISCUSSION AND CONCLUSIONS OF LAW

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

This is an appeal of a disqualification under CSR §14-20. Therefore, the Agency has the burden of proof.

CSR §14-21 permits an employee be separated from employment without fault if the employee has a physical impairment that prevents satisfactory performance of the essential functions of the position. Prior to disqualification for a physical impairment or incapacity, if it is determined that the employee is disabled within the meaning of the Americans with Disabilities Act, the agency must make an effort to make a reasonable accommodation. If a reasonable accommodation cannot be provided or if the employee rejects the reasonable accommodation, disqualification is permitted. If an employee is not disabled within the meaning of the ADA, the agency need not attempt to make a reasonable accommodation before initiating the disqualification. CSR §14-22 provides that an employee may be disqualified when the employee becomes unable to perform the essential functions of the position because of mental or physical impairment or incapacity.

The Agency has shown through its evidence that Appellant was unable to perform the essential job functions of an equipment operator, either in Solid Waste Management or in Street Maintenance, due to a physical impairment. All equipment operator positions require incumbents to be able to lift, carry, push and pull weights in excess of the twenty-pound restriction placed upon Appellant by two different physicians.

The Agency has also shown that Appellant is not disabled within the meaning of the ADA. While Appellant has limitations on his ability to lift weights in excess of 20 lbs., such limitation is not a substantial impairment of a life activity necessary for the ADA to apply. *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 117 (10th Cir 2003) Appellant did not present any evidence, either prior to the disqualification or during the hearing, that he is unable to perform tasks central to daily life, such as household chores, bathing or brushing one's teeth. *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197 (2002). Therefore, there was no need for Solid Waste to seek to make a reasonable accommodation prior to disqualifying Appellant.

In any case, Rita Murphey, during the interactive process, looked at alternative job assignments and other reasonable accommodations for Appellant. She was unable to find any jobs, either within Solid Waste or Street Maintenance or in any other City agency that Appellant was able to perform given his qualifications and physical restrictions. She also looked at possible reasonable accommodations for Appellant, but she could not find any.

Mr. Linne and Mr. Oakley confirmed the absence of any alternate jobs within Street Maintenance and Solid Waste. All equipment operator and senior utility worker jobs, positions for which Appellant is qualified by experience and training, require the ability to lift weight in excess of 20 lbs.

Appellant is not entitled to modified duty to accommodate his condition because his injury is not job related.

Based upon the foregoing actions and reasons presented by the Agency, disqualification was appropriate under the circumstances of this case.

Appellant bears the burden to establish discrimination. The requirements for establishing an employment discrimination case were originally set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Appellant bears the burden to prove that he was discriminated against on the basis of his being member of a suspect or protected class. The burden would then shift to the Agency to show that there was a *bona fide* business reason for its actions. If the Agency shows a *bona fide* business purpose, then Appellant has to show that the *bona fide* business purpose is pretextual. See also *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center et al. v. Hicks*, 509 U.S. 502 (1993).

Mere assertions of discrimination are not sufficient to meet the burden. Appellant presented no evidence of age discrimination. The fact that men younger than he might be more physically fit, and therefore more able to lift trash and other objects, is not age discrimination. That claim fails.

As for the disability discrimination claim, the record is replete with the efforts made by the Agency and Ms. Murphey to accommodate Appellant's medical condition even though he was not a qualified individual with a disability within the meaning of the ADA. Appellant was unable to produce any evidence that the Agency discriminated against him because of a disability. The claim fails.

Appellant argued during the hearing that he was transferred from Street Maintenance to Solid Waste in order to disqualify him. The Hearing Officer disagrees with this conclusion.

The credible evidence is that Appellant hid his physical limitations. As a result, no supervisor became aware of them prior to his transfer to Solid Waste.

He was not transferred so that he would fail due to his physical limitations. It is clear to the Hearing Officer that Appellant was transferred to Solid Waste because Appellant demanded not to be supervised by Steve Garcia, the manager of Street Maintenance, anymore. The reason for the transfer given by Mr. Price and Mr. Garcia, to give Appellant a fresh start in another division of Public Works, is reasonable given Appellant's admitted dissatisfaction about working with Mr. Garcia. The fact that Appellant's physical restrictions could no longer be hidden from his supervisors through the cooperation of his co-workers, as it apparently had been through the "team work" in Street Maintenance Appellant described, does not mean that his transfer to Solid Waste

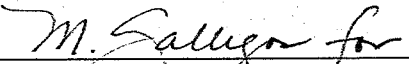
was part of a nefarious plot.

Given that Appellant is not qualified to work as an equipment operator or in any another classification in either Solid Waste or Street Maintenance due to his physical limitation, the Hearing Officer need not address whether Appellant should be allowed to return to his former job in Street Maintenance, the job prior to his transfer to Solid Waste.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer DISMISSES the appeal in its entirety and DENIES the relief requests.

Dated this 12th day of January 2004.



Robin R. Rossenfeld
Hearing Officer for the
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 the same in the U.S. mail, this 14 day of January 2004, addressed to:

John E. Perez, Sr.
4589 Decatur Street
Denver, CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 14 day of January 2004, addressed to:

Robert A. Wolf, Esq.
Office of the City Attorney
Employment Law Section

Bill Miles
Department of Public Works

Gary Price
Solid Waste Management

