

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

Appeal No. 12-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

ROBERT STONE, Appellant

Agency: DEPARTMENT OF AVIATION, DENVER INTERNATIONAL AIRPORT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation

INTRODUCTION

This matter comes before the Career Service Board on appeal by Robert Stone (hereinafter "Appellant") filed January 19, 2001. Appellant challenges the Department of Aviation, Denver International Airport's (hereinafter "Aviation Department" or "Agency") decision to terminate his employment based on disqualification resulting from his inability to renew his Commercial Driver's License ("CDL").

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Wilkerson ("hearing officer") on March 26, 2001 at the Career Service Authority Offices. Appellant was present and represented himself. The Agency was represented by Assistant City Attorney Mindy Wright, with the Aviation Department's Risk Administrator, Susan Christensen, present for the entirety of the proceedings and serving as advisory representative for the Agency.

Witnesses for the Agency included Ms. Christensen, Aviation Human Resources Assistant Manager James Thomas, and Aviation's Acting Director of Maintenance, Dan G. Brown.

Appellant testified on his own behalf and did not call additional witnesses.

The Agency stipulated to the admission of Appellant's Exhibits C, D, E and G. Agency's Exhibits 2, 4, 5, 6, 8 through 13, and 15 through 18, and Appellant's Exhibit F, were admitted without objection.

Agency's Exhibit 14 was admitted over Appellant's objection that it contained inaccurate information. Appellant's Exhibit H was admitted over the Agency's objection that the author (Mr. Brown, one of the Agency's witnesses) had been on the stand and Appellant had not laid a foundation for the admission of this exhibit before Mr. Brown was excused. The hearing officer

admitted the document as a business record clearly bearing Mr. Brown's signature as it appears in Exhibits 2 and 8, also offered by the Agency and admitted without objection by Appellant.

The Agency objected to the form of Appellant's Exhibits A (containing narrative and hearsay) and B (an unsigned memo purportedly from Appellant's supervisor, with no foundation). The hearing officer sustained the objections and those documents were not admitted, nor have they been included in the hearing officer's consideration.

Agency's Exhibits 1, 3, and 7 were not offered or admitted.

For purposes of the Findings and Order, the Rules of the Career Service Authority shall be abbreviated as the "CSR" with a corresponding numerical citation. The Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (1990) shall be abbreviated as "ADA."

NATURE OF THE CASE

The Agency posits that its decision to terminate Appellant based on his disqualification was not arbitrary or capricious. Appellant's classification of Heavy Equipment Service Technician (hereinafter "HEST") requires the test-driving of heavy equipment under repair. One of the necessary special requirements of the position is the possession of a current CDL. Due to Appellant's hypertension condition which began in 1997 and persists to the present day, Appellant has not been able to renew his CDL. Appellant also initially had several physical restrictions placed on him, which prevented him from performing several other functions of his position. The Agency placed Appellant in a temporary modified duty assignment in anticipation of his doctor's prognosis that eventually Appellant's blood pressure could be controlled with medication. Appellant would presumably eventually be able to renew his CDL, fully perform his other physical duties, and return to full duty in his HEST position. However, Appellant's blood pressure was never brought to within the normal range required for a CDL to be reissued.

The Agency further posits that it initially treated Appellant's case as covered by the Americans with Disabilities Act ("ADA") and corresponding CSR Rules. Pursuant to those authorities, it made attempts to find a suitable permanent transfer for Appellant which did not require a CDL. Once Appellant's other physical restrictions were eventually lifted, the Agency determined he was no longer qualified as disabled, and the transfer provision in the Rules no longer applied. The Agency concludes that eventually it had no choice but to terminate Appellant based on his disqualification for lack of a CDL.

Appellant responds that his termination was the result of two instances of health discrimination. First, Appellant argues that his original transfer to the alternate position was treated as permanent from the beginning. He posits that he functioned in a full-duty capacity during the entire period of his tenure at the alternate position, which lasted for fourteen months. Appellant points to the fact that no one ever notified him, in writing or verbally, that the transfer was temporary. Furthermore, the Agency never communicated either with him or his treating doctor concerning his medical progress during this entire period.

Appellant additionally argues that there were openings in the section he was working in during his tenure at the transfer site, and that he would have applied for them if he had known he did not already have a permanent job there. Appellant asserts that the first time he knew of a problem was when he became ill and was placed on medical leave for a one-month period. When he returned to work he was sent back to his original position for reasons unknown to him, despite that he still could not get the CDL required in that position.

Appellant asserts that his supervisor at the alternate position was angered when he was placed on medical leave for a one-month period during one of the busiest months of the year. Appellant alleges this was the basis for his transfer back to the original unit, not that it was temporary as the Agency asserts. Therefore the transfer was an act of disability discrimination.

Furthermore, Appellant posits that the Agency subsequently began processing his transfer to a new position, but the supervisor refused. Appellant argues that he was fully qualified for the position and no reasons have been given for the failure to complete the transfer, other than Appellant's previous medical restrictions, despite that those restrictions had been lifted. Appellant therefore asserts this was an act of disability discrimination.

Appellant finally argues that during the ensuing confusion concerning his fate, the Agency allowed him to continue believing that he would be transferred to this alternate position during yet another extended period of time. Based on that belief, he again did not apply for other openings during this time period for which he believed himself qualified.

The Agency replies as follows. First, its intent that the first transfer was temporary is demonstrated by the totality of evidence. Second, Appellant's return to the original section after his medical leave was because the assignment was temporary, not because Appellant's supervisor was acting in discrimination against Appellant. Third, the Agency responds that once it was determined that Appellant was not qualified under the ADA, it was under no duty to continue pursuing Appellant's transfer into the new prospective position.

ISSUES

1. Whether the Agency demonstrated its disqualification of Appellant for the position of his original hire was not arbitrary or capricious.
2. Whether the ADA standards and associated CSR Rules have been appropriately applied to Appellant's circumstances.
3. Whether Appellant has demonstrated a *prima facie* case of discrimination.
 - a) If so, whether the Agency has demonstrated a legitimate business reason for its allegedly discriminatory actions.
 - b) If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

4. Whether the hearing officer has jurisdiction to grant Appellant relief for his assertions of equitable estoppel, based on allegations that he relied to his detriment on the Agency's actions regarding Appellant's transfers.

FINDINGS OF FACT

1. Appellant was an employee of the Aviation Department from September 1, 1995 until January 14, 2001, the effective date of his dismissal due to disqualification (*see*, Exhibit 2). He was classified as a Heavy Equipment Service Technician ("HEST") during the entire period of his employment. He began his tenure in the Department's Fleet Maintenance Section.
2. A central duty of a HEST is the test-driving of vehicles, defined by state and federal law as "heavy equipment," which have been repaired or require maintenance. One of the requirements of the classification specifications for this position is therefore a valid Commercial Driver's License or CDL (Exhibit 4).
3. The State of Colorado issues CDL's based on the Federal Department of Transportation's ("DOT") guidelines and requirements. One of the requirements for a CDL is the procurement of a Medical Certification Card, which documents that the CDL applicant meets certain medical standards, including a consistent blood pressure reading within the normal range, below 140/90 (*see*, 49 CFR §391.41(b)(6)).
4. The duties of a HEST also include a number of physically demanding tasks, such as constant standing and walking, frequent climbing, bending, and moving objects weighing a hundred pounds (*see*, Exhibit 8, attachment entitled "Aviation Department Physical Requirements Assessment").
5. Appellant began suffering from hypertension some time late in 1997. He began visiting the Agency's contract medical source, Denver Health Medical Center's Occupational Health and Safety Clinic ("OHSC") in September of 1997. Apparently the OHSC recommended that Appellant be restricted from climbing ladders, no lifting greater than 30 pounds, limitations on pushing and pulling, and no work on above-ground-level work (*see*, Exhibit 15).
6. On October 13, 1997, Appellant's Medical Certification Card expired. Appellant was therefore unable to renew his CDL due to high blood pressure resulting from hypertension (*see*, Exhibit 17). Appellant therefore could not perform the duty of test-driving the Fleet Maintenance vehicles.
7. Appellant's condition was made known to the Agency's Risk Administrator, Susan Christensen (*see*, Exhibit 17). Ms. Christensen testified that it is Risk's responsibility to notify an employee's supervisory chain of health or other problems presenting a danger to the employee. Ms. Christensen notified then Special Assistant to the Deputy Director, Ed Currier, of Appellant's status by a memorandum dated December 17, 1997 (Exhibit 17). Appellant was placed on light duty around that time.

8. In December of 1997, Appellant's personal physician, Dr. James Wilk, determined that Appellant's blood pressure was 178/106, and that Appellant should remain on light duty (Exhibit 18).
9. Apparently sometime in February 1998, Appellant was issued a return-to-work pass by the OHSC, in which the physical restrictions placed on him were indicated as being "permanent" (*see*, Exhibit 14). This pass was not included in the Agency's exhibits, but its contents are repeatedly referenced elsewhere and were eventually duplicated in the OHSC's return-to-work pass issued to Appellant on October 14, 1999 (Exhibit 12).
10. On April 27, 1998, Dr. Wilk notified Ms. Christensen that he had reviewed documentation from the OHSC clinic placing certain activity restrictions on Appellant, and that Dr. Wilk concurred with those restrictions with the exception that he felt Appellant could safely climb a ladder (Exhibit 15).
11. In May of 1998, the Agency transferred Appellant to the Bridge Crew section, which is another maintenance section in the Aviation Department whose positions do not require the employees to possess CDL's. The Agency's witnesses testified that the intent of this transfer was to place Appellant on "temporary modified duty" pending the treatment and resolution of his hypertension, the eventual renewal of his Medical Certification and CDL, and ultimately his return to Fleet Maintenance.
12. It is clear from credible testimony by all the Agency's witnesses that the Agency was of the belief, at all relevant times, that Appellant was performing modified duties as indicated by his medical restrictions while working at Bridge Crew.
13. Appellant recalls the time of his transfer to Bridge Crew as follows. Bridge Crew's section supervisor, Steve Draper, approached Appellant shortly after he had lost his CDL and shortly before he was transferred. Mr. Draper said something to Appellant leaving him with the impression that Mr. Draper wanted Appellant to come work at Bridge Crew. Mr. Draper indicated to Appellant that he would not need a CDL to work at Bridge Crew. Appellant's understanding was that he was being offered this position because there was no CDL requirement.
14. Appellant worked at Bridge Crew for fourteen months, from May of 1998 until July of 1999. During this entire time, Appellant performed all the functions of a full Bridge Crew employee (who are commonly classified as Maintenance Technicians) in a full-duty capacity, including moving tires and other objects weighing several hundred pounds, constant standing, walking, bending, and climbing and repairing jetways (the loading platforms used to board airplanes). During this time, Appellant's supervisors never discussed Appellant's restrictions with him or restricted his duties in any way. Appellant performed without regard to his restrictions, and without approaching his supervisors about them. Appellant continued to be treated for high blood pressure and admits that he never received word from his doctor that his previous working restrictions had been lifted during this time. However, according to Appellant's testimony his blood pressure continued to improve, and even dropped to within the normal range for approximately two months during his tenure at Bridge Crew.

15. Ms. Christensen testified that it is both the supervisor's and the employee's responsibility to limit a work assignment to within medical restrictions. The supervisor should not assign duties beyond the restrictions, and the employee should bring it to the supervisor's attention if the assignment exceeds those restrictions. However, there is no written policy or regulation specifically assigning the responsibility of limiting work assignments in this manner.
16. Appellant was aware during his entire tenure at Bridge Crew that his classification remained HEST, and that he continued to receive compensation commensurate with that classification instead of the higher pay of a Maintenance Technician (the classification of other Bridge Crew employees performing similar duties). However, Appellant was aware of an occupational survey audit of the entire Bridge Crew section that was being performed during a large portion of this time period. It was his understanding that his classification would not be changed until the section survey was completed. Appellant further anticipated that the pay difference would be paid to him in the form of back pay once his position was eventually audited and reclassified as a Maintenance Technician. Appellant had conversations with then Bridge Crew supervisor, Howard Hill, of uncertain nature, which conversations left Appellant with the impression that this was a possibility.
17. Human Resource Manager James Thomas testified that Appellant's position was not included in the Bridge Crew Audit because Appellant's assignment was a temporary modified duty assignment. Mr. Thomas testified that it was intended from the beginning that Appellant was to remain a HEST precisely because they anticipated his eventual return to full duty in Fleet Maintenance upon the resolution of his high blood pressure.
18. At no time did anyone give Appellant any written documentation explaining the nature of this transfer to Bridge Crew as temporary, or otherwise explain to him that this transfer was temporary.
19. The Agency presented no evidence of any attempts to communicate with Appellant or his physician, or otherwise ascertain Appellant's medical progress and CDL status from April 27, 1998 until October 7, 1999, a period of a year and a half (*see*, Exhibits 14 and 15).
20. Based on the totality of the evidence, the hearing officer finds that Appellant reasonably understood and believed from the beginning that his transfer to Bridge Crew was permanent.
21. During his tenure at Bridge Crew, Appellant's condition continued to improve, even to the point for a couple of months during which Appellant's blood pressure dropped below 140/90. Appellant further knew of vacancies in the Bridge Crew which were filled during his tenure there. Appellant, thinking he already had a position with Bridge Crew, saw no need to apply for a position he already possessed. He therefore did not apply for consideration of these permanent positions.
22. In July of 1999, Appellant had an allergic reaction to some of his medication. He was removed from duty by his doctor for a one-month period while they adjusted Appellant's medication and brought the reaction under control.

23. In August of 1999, Appellant called Bridge Crew supervisor, Mr. Hill, and informed him Appellant was able to return to work. Mr. Hill informed Appellant that he was to report back to Fleet Maintenance when he returned to work. Mr. Hill did not explain to Appellant why he was to return to Fleet instead of Bridge Crew.
24. Appellant reported to Fleet. Appellant testified that no one at Fleet seemed to know why he had been transferred. He was placed back on restricted duty there under the supervision of Bob Campbell. Appellant asked Mr. Campbell why he had been transferred but Mr. Campbell left Appellant with the impression that he did not understand the reason behind the transfer. While these conversations are hearsay, the upshot of them is that they left Appellant without understanding of the reasons behind the transfer, and the hearing officer finds Appellant's assertion that he did not understand credible.
25. In August or September of 1999, Dan Brown became the Acting Director of Aviation Maintenance, succeeding Mr. Currier. Around that time, the Agency was undergoing a reorganization, and Mr. Brown assumed duties previously held by both Mr. Currier and Mr. Draper. He consulted with both these gentlemen, who informed him that Appellant had been placed in a temporary modified duty assignment for an extended period because of his blood pressure complications, in order to allow time to stabilize his condition and return to Fleet Maintenance. Mr. Draper told Mr. Brown Appellant was still under medical restrictions and could not get his CDL. Mr. Brown testified that at that time he suggested Appellant be transferred back to Fleet, given another chance to fulfill his requirements, and that the Agency should proceed with disqualification if this could not be achieved.
26. Since there is no evidence to demonstrate that the Agency made any attempts to ascertain Appellant's medical progress from April 27, 1998 to October 7, 1999, Mr. Draper's hearsay assertion to Mr. Brown in August or September of 1999, that Appellant was still under medical restrictions, if accurate, was unsubstantiated. However, it assists in establishing Mr. Brown's state of mind concerning his understanding of Appellant's dilemma, and that Mr. Brown believed that continuing Appellant's temporary modified duty at Bridge Crew in anticipation of his improvement would have been futile.
27. Around the beginning of October, 1999, Appellant received a call either from Ms. Christensen or from Jackie Davis in Risk Administration inquiring as to the status of Appellant's CDL. Appellant responded that he hadn't received his CDL yet. He was informed during this conversation that he remained under the same modified duty restrictions as were in place back in October of 1997.
28. On October 8, 1999, Appellant's supervisor gave Appellant a work assignment involving activity from which Appellant was medically restricted. In light of his recent conversation with Risk Administration, Appellant told his supervisor he could not perform the function due to his restrictions. Appellant's supervisor notified Mr. Brown, who immediately placed Appellant on leave and required him to procure documentation detailing the specifics of his condition from the OHSC (Exhibit 13).

29. On October 14, 1999, Appellant visited the OHSC, which generated a return-to-work pass (Exhibit 12) detailing Appellant's previous restrictions as they existed in October 1997. Appellant testified that OHSC did not examine him or ascertain his present physical condition before generating this document, but rather evidently referred to Appellant's medical file, and apparently specifically to the February 1998 return-to-work pass (which was not offered as an exhibit). The document indicates that the OHSC deferred to Appellant's personal physician (Dr. Wilk) who was to perform tests and ascertain whether these restrictions were permanent, or whether Appellant's status may change (*see also*, Exhibit 11).
30. It is clear from the testimony of all its witnesses that the Agency thought the October 14, 1999 return-to-work pass (Exhibit 12) was based on a current examination and not on historical documents. It is further apparent that the Agency failed to recognize that the OHSC intended to defer to Appellant's doctor and the results of tests that doctor would perform (*see*, Exhibit 11). Ms. Christensen testified that between OHSC diagnoses and conclusions and those of a private physician, the Agency will rely on its contract clinic (OHSC) conclusions *vis* those of the private physician. It is not clear from the record, given this practice, why the OHSC failed to examine Appellant on October 14 and instead expressed its intent to defer to Appellant's private physician (*see*, Exhibits 11 and 12). At any rate, the Agency continued to handle this case based on the assumption that Appellant remained under the restrictions set forth in the October 14, 1999 return-to-work pass.
31. In October or November of 1999, Appellant met with Dr. Wilk, who detected a heart problem and referred Appellant to a cardiologist. Appellant subsequently went to the cardiologist, who ascertained that Appellant was suffering from a heart infection. The doctor placed Appellant on medication and sent him home for recovery. Dr. Wilk documented that Appellant must remain off duty until January 2000, to allow the infection to clear (Exhibit 10).
32. On January 19, 2000, Ms. Christensen sent Appellant a letter indicating that he had an appointment at the OHSC on February 1, 2000 to ascertain his current medical condition and expectations concerning his return to work (Exhibit 9). Appellant told the Agency he did not have enough advance notice and could not keep the appointment (*see*, Exhibit 8).
33. Appellant and the Agency representatives both testified they both rescheduled several appointments at the OHSC. Apparently, two more appointments were rescheduled, on February 8 and March 17 (*see*, Exhibit 8). Appellant failed to show up for one and cancelled the other without rescheduling. Appellant never returned to the clinic.
34. There is no evidence in the record that the Agency made any attempts either to communicate with Dr. Wilk or to solicit medical updates from Appellant from March until June of 2000. There is no evidence in the record that Appellant made any attempts to communicate with the Agency concerning his medical or job status during this same period.
35. The Agency remained under the impression that Appellant had permanent restrictions described in the October 14, 1999 return-to-work pass (Exhibit 12) until June of 2000. Appellant remained off duty and did not return to work during this time, apparently because

of this as well as the fact that Appellant was suffering from the heart infection during an uncertain portion of this time period. Appellant continued treatment during this time under the care of the private cardiologist. It is unclear from the record when the heart infection was resolved, but it was some time prior to the month of June, 2000.

36. On June 13, 2000, Mr. Brown sent Appellant a Notice of Contemplation of Disqualification ("Contemplation letter 1") (Exhibit 8). Two grounds were set forth for the contemplated disqualification of Appellant. First, Appellant became medically incapacitated subsequent to his appointment to the position of HEST under CSR Rule 14-22 b) (assuming the restrictions were permanent), and second, he was unable to maintain the special requirement of a CDL necessary to remain qualified for the position under CSR Rule 14-22 f). A pre-disqualification meeting was set for June 19, 2000.
37. Appellant retained Ms. Cheryl Hutchinson of the AFSCME to represent him in the disqualification process. During the dialogues surrounding the June 19, 2000 meeting and at the meeting, Ms. Hutchinson asserted that Appellant's circumstances qualified him as covered under the Americans with Disabilities Act, 104 Stat. 328, 42 U.S.C. 12101 *et seq.* (hereinafter "ADA"). The Agency proceeded thereafter under the assumption that this case was an ADA case for a period of time. During the June 19 meeting, they also scheduled a medical evaluation appointment for Appellant at OHSC for June 26, 2000 (Exhibit G).
38. Mr. Brown testified that he was instrumental in promulgating regulations governing the City and County of Denver's treatment of cases which qualified under the ADA. He testified that he was on the team which created the procedure for handling employees in a state of temporary disability, which procedure is known as "temporary modified duty assignment." He was therefore very familiar with the City's requirements at the time. Although the regulations relevant to the ADA had not yet been adopted, the Agency attempted to satisfy the proposed requirements, in locating a new position for Appellant which was at or below the pay grade (612) of his existing classification of HEST. Mr. Brown testified that pursuant to CSR Rule 9-62 f), he consulted with Career Service Authority's Senior Personnel Analyst, Tyrone Abeyta, who generated a list of positions for which Appellant met the basic qualification requirements (Exhibit F). It is clear from the record that none of these positions required a CDL. Mr. Brown determined that there were openings for two of these positions in the Aviation Department at that time: Material and Parts Technician (pay grade 612), and Automotive Service Technician (pay grade 611).
39. On June 26, 2000, the OHSC examined Appellant as scheduled at the June 19 meeting, and issued him a full duty return-to-work pass indicating no restrictions (Exhibit 6). Appellant testified that at this time his blood pressure was running in the neighborhood of 138/92, acceptable for purposes of the OHSC's clearance to return to his general duties, but still two points over the threshold required for Appellant to get his CDL renewed.
40. On July 5, 2000, Mr. Brown sent Appellant a letter setting a meeting for July 13, 2000 to discuss the vacancies presently available for Appellant's transfer (Exhibit H).
41. At some point prior to July 13, 2000, Appellant had procured applications for the same two vacant positions not requiring a CDL which had posted vacancies: Automotive Service

Technician and Material and Parts Technician. Appellant was in the process of preparing the application paperwork for these positions as of July 13, but had not yet submitted the paperwork.

42. On July 13, 2000, Mr. Brown met with Appellant and Ms. Hutchinson. The meeting was very short. Mr. Brown informed Appellant that there were presently no openings at the Bridge Crew section, which was Appellant's first preference. However, Mr. Brown told Appellant of the two positions for which there were currently openings, and asked Appellant if he was interested. Appellant accepted the Material and Parts Technician position. Mr. Brown noted to Appellant that this position did not require a CDL. Because of this, Mr. Brown said something to the effect that they were "past the CDL issue."
43. Appellant testified that during the meeting on July 13, Mr. Brown left him with the clear impression that the transfer was "a done deal." Both Mr. Brown and Appellant testified that Mr. Brown told Appellant Mr. Thomas was out of town at the time of this meeting and would be returning the following week. Appellant was told that when Mr. Thomas returned, he would begin processing the paperwork for Appellant's transfer, and the details would be completed at that time. Mr. Brown told Appellant to wait for notification from Mr. Thomas of the time of his first shift. In light of the totality of this evidence and testimony, the hearing officer finds Appellant's assertion, that he believed the transfer was a certainty, to be very credible.
44. Because he believed he had been placed in the Material and Parts position already, Appellant did not submit the applications referenced above in Finding 41.
45. Appellant testified he called Mr. Thomas approximately one week after the July 13 meeting with Mr. Brown to find out any news on when he was to report to work as a Material and Parts Technician. Mr. Thomas did not answer. Appellant left a message on Mr. Thomas' answering device. Mr. Thomas did not call Appellant back. Appellant again called Mr. Thomas approximately two weeks after the July 13 meeting. Again, Mr. Thomas was not there. At that time Appellant called Mr. Brown to try and find out the status of his transfer. Mr. Brown did not answer and Appellant left him a message. Mr. Brown did not call him back. Appellant then e-mailed and faxed Mr. Thomas in an attempt to correspond, but he got no response.
46. Mr. Brown testified that he and Mr. Thomas began processing the paperwork for Appellant's transfer when Mr. Thomas returned to town. A series of dialogues began between Mr. Brown, Mr. Thomas, and Mr. Noe, the Technical Services Director in whose section the Material and Parts Technician position was open. Mr. Noe objected that Appellant's restrictions prohibited Appellant from doing many of the duties of that position, despite that Mr. Brown had sent him Appellant's full-duty return-to-work pass issued on June 26, 2000. Mr. Brown believed that because Appellant was presumably covered under the ADA, Mr. Noe was under a duty to accept Appellant as a new employee. However, Mr. Brown testified under direct and cross-examination that the express reason behind Mr. Noe's resistance was Appellant's previous physical restrictions.

47. After having been asked several times while on the stand, Mr. Brown added that he recalled Mr. Noe also may have expressed some reservations about Appellant's qualifications for the job. There is no evidence that Mr. Noe ever provided Appellant an interview or otherwise directly communicated with him in any way.
48. Appellant testified that back in 1998, he tested for a Material and Parts Technician position classified the same as the one contemplated for his transfer, and that he passed the examination and was placed on the potential hire list. Except that the titles and classifications were the same, Appellant offered no additional evidence substantiating the degree of similarity between the position for which he previously tested and the one contemplated for his transfer. Similarly, the Agency offered no evidence demonstrating the positions were different in their duties, and no evidence that Appellant was not qualified for the potential transfer position.
49. Neither Mr. Brown nor Mr. Thomas explained in their testimony why there was no communication with Appellant, despite his repeated attempts to contact them and ascertain what was happening, from July 13, 2000 until some time in August of 2000.
50. Approximately a month after the July 13 meeting, Appellant successfully contacted Mr. Brown's secretary. Brown called Appellant back and told him there were complications with the transfer, but that Appellant should in the meantime return to Fleet doing all duties not requiring a CDL.
51. The hearing officer finds that the Agency never specifically notified Appellant that Mr. Noe's stated reason for his resistance to Appellant's transfer was due to his past physical restrictions, until the time of the hearing in this matter.
52. In August of 2000, Appellant returned to work in Fleet, performing all duties except the test-driving of heavy equipment. From August until November of 2000, Appellant continued to wait for the transfer process to be completed, believing during this time that he would eventually be transferred to the Material and Parts position discussed at the July 13 meeting. During this time, Appellant learned of three additional vacant positions for which he believes he would have been qualified, and asserts he would have applied for them if he had known he would not be transferred as expected.
53. At some uncertain time around October of 2000, Mr. Brown and Mr. Thomas consulted with the Agency's legal department, who opined that Appellant was not covered under the ADA for several reasons. First, Appellant had been given a full-duty return-to-work pass on June 26, 2000. Second, Appellant's circumstances did not substantially impair a "major life activity" as required for the application of federal ADA standards. Third, the condition of high blood pressure was presumably correctable with medication, and correctable conditions are excluded under the ADA. At that time the Agency stopped trying to process the transfer for Appellant.
54. In November of 2000, Mr. Thomas contacted Appellant and told him they were "back to square one" and that Appellant would have to procure a CDL to remain in Fleet as a HEST. Appellant's blood pressure continued to run in the high range and was still just outside the

CDL medical requirements. He was therefore unable to renew his Medical Certification and CDL.

55. Neither party offered any evidence one way or the other concerning whether there was any question about Appellant's qualifications for the Automotive Service Technician opening, which was also offered to Appellant at the July 13, 2000 meeting (*see*, Finding 42). The hearing officer finds that the Agency never approached Appellant concerning this position as an alternative.
56. On December 18, 2000, Mr. Brown prepared and sent Appellant another Contemplation of Disqualification letter ("Contemplation letter 2") (Exhibit 5). The sole ground in this letter was Appellant's inability to maintain the required CDL under CSR Rule 14-22 f). Contemplation letter 2 set the meeting for December 27, 2000.
57. The parties met on December 27, 2000. At that time Appellant informed the Agency that he still could not procure a CDL. The meeting ended.
58. On January 13, 2001 the Agency sent Appellant a letter notifying him of his termination based on Appellant's disqualification due to his inability to fulfill a necessary special requirement under CSR 14-22 f); namely, the possession of a current valid CDL (Exhibit 2).
59. On January 19, 2001, Appellant filed his appeal of the Agency's decision to terminate him, alleging discrimination and noting the Agency's failure to complete his transfer to "the stock room" (referencing the Material and Parts Technician position).

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

a. Jurisdiction arising from disqualification actions

The hearing officer finds she has jurisdiction to hear this case as a disqualification case, pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

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.

Jurisdiction over Appellant's disqualification was not disputed by either party to this case.

b. Jurisdiction arising from Appellant's disability discrimination claims

Appellant in this case alleges he has been discriminated against due to his current and prior physical disabilities. Disability discrimination is prohibited by Federal law under the ADA (above), which protects disabled individuals from discrimination in the workplace, and requires that certain accommodations be made for them if those accommodations are not unduly burdensome. Appellant's representative framed this case as ADA-covered during Appellant's first disqualification process in June of 2000, and the Agency thereafter treated this case as covered by the ADA for a period of time.

Mr. Brown testified that CSR Rules addressing disability, presumably to include CSR Rule 1, defining "disabled individual," and Rule 9-62 f), governing disability related transfers, were promulgated to mirror federal ADA standards. Based on this express regulatory intent by one of its promulgators, the hearing officer finds she has jurisdiction to rely on federal interpretations and precedents in her application of the related CSR Rules, and to apply those standards to the Agency's actions in this case. These Rules are set forth below in relevant part in the context of the Discussion.

In addition, the hearing officer clearly has jurisdiction over issues contemplated in the CSR Rules and violations thereof, specifically CSR Rule 19-10 c), which includes claims of disability discrimination, as follows in relevant part:

Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of...disability including:

- 2) Not attempting to make reasonable accommodations to the known physical or mental disability of a job applicant or an employee unless the accommodation would impose an undue hardship...
- 3) Using tests, standards or criteria that screen out or tend to screen out individuals or groups of individuals with disabilities unless the criteria used are job related.

2. Burden of proof

It has been previously established that the Agency responsible for terminating a career service employee based on his disqualification bears the burden of establishing, by a preponderance of the evidence, that its action was not arbitrary or capricious. See, In the Matter of the Appeal of Eugene J. Schaetzel, Appeal No. 36-00 (Hearing Officer Michael L. Bieda, 9/29/00). If the Agency fails to demonstrate its actions were not arbitrary and capricious, Appellant's discrimination claim is moot because the Agency decision must be reversed.

In cases such as this one where Appellant counterclaims discrimination, if the Agency demonstrates its case by a preponderance of the evidence, Appellant then bears the burden of affirmatively establishing a *prima facie* showing of discrimination (i.e. a demonstration that the individual is a member of a protected class and that the act in question appears on its face to be

an act of discrimination). If Appellant makes such a showing, the Agency must then demonstrate a legitimate, non-discriminatory business purpose for its actions. If the Agency makes such a showing, Appellant must then establish that the Agency's non-discriminatory business purpose is a pretext for discrimination. See, In the Matter of the Appeal of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99); citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also, Schaetzel, above; In the Matter of the Appeal of Jessie E. Cannaday, Appeal No. 54-98 (Hearing Officer Anne E. Whitney, 11/27/98) (which cases apply the analysis of burden in McDonnell Douglas to several forms of discrimination).

DISCUSSION

1. The Agency's Case in Support of its Dismissal of Appellant.

The Agency posits that its termination of Appellant based on the loss of his CDL was proper under CSR Rule 14-22 Grounds for Disqualification, which states:

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

- ...f) Necessary special requirements: When a class specification lists necessary special requirements, and the employee fails to meet those requirements...

The Agency asserts that Appellant's original and only classification has been that of a HEST. A primary duty of this classification is the test-driving of the heavy equipment under repair, requiring a CDL. This requirement appears in the HEST Classification Specifications under the Job Requirements section entitled "Licensure and Certification" (Exhibit 4, p. 6). Appellant's inability to eventually renew his Medical Certification Card and CDL, even after a protracted period of time including the lengthy modified duty transfer, left the Agency with no choice but to pursue disqualification proceedings pursuant to CSR Rule 14-20, Disqualification.

The Agency maintains that these facts alone establish its termination of Appellant based on his disqualification was not arbitrary or capricious.

It is not clear from Appellant's appeal and arguments if he challenges his dismissal, based on his inability to renew his CDL, as itself discriminatory, or whether his challenge is based strictly on the circumstances leading up to the termination.

However, as the Agency has correctly pointed out, the limited circumstances of Appellant's termination as based on disqualification due to the loss of his CDL has already been settled by the United States Supreme Court in Vaughn L. Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). In that case the employee was dismissed based solely on his inability to procure and maintain a CDL as an essential requirement of the position. In Murphy, as in this case, high blood pressure was the underlying condition preventing the employee from keeping his CDL. However, no major life activity is impaired by high blood pressure as required by the federal ADA standards. Therefore, the Supreme Court ruled that the ADA does not apply to an employee's disqualification when it is based solely on his inability to renew his CDL.

The Agency therefore correctly asserts that Appellant does not have an ADA discrimination claim against it for his disqualification as it was based solely on the loss of his CDL. The hearing officer concludes that the Agency has demonstrated its disqualification of Appellant from his HEST position was not arbitrary or capricious, was not in itself an act of disability discrimination under the governing laws and regulations.

2. Appellant's Discrimination Claims.

The crux of Appellant's response is that his dismissal for want of a CDL would not have been necessary if the Agency had done what it should have done from the beginning. Appellant asserts that two prior actions leading him back to the position which required him to have a CDL were, separately and in themselves, acts of disability discrimination.

Appellant asserts that the first instance of disability discrimination was Appellant's transfer back to Fleet Maintenance after fourteen successful months of full duty at Bridge Crew, where no CDL was required. The second occurrence was the Agency's failure to complete Appellant's transfer into the Material and Parts position, also requiring no CDL, despite Appellant's release to return to full duty, and despite that he was qualified for the job.

a. Appellant's first transfer to Bridge Crew.

Appellant argues the Agency's actions tend to establish that his original transfer to Bridge Crew in May of 1998 was intended to be permanent until he became ill, requiring medical leave during one of the busiest months of the year. Appellant asserts that his supervisor at Bridge Crew was responsible for transferring him back to Fleet Maintenance as a retaliatory act of disability discrimination. The upshot of this argument is that the Agency's claim, that the transfer was always intended as temporary, is a pretext for the Agency's discriminatory behavior.

The evidence establishes by a preponderance that Appellant reasonably believed the transfer was permanent. He was never notified in writing, nor was it ever explained to him that the transfer was temporary. While he was admittedly aware that he was still a HEST during this entire time, he understood the delay in reclassifying his position resulted from the group audit occurring at the time. The sheer length of time of this alleged "temporary assignment" further supports the reasonableness of Appellant's presumption that the transfer was permanent.

The hearing officer is troubled that while the Agency maintains the transfer to Bridge Crew was a modified temporary assignment pending the resolution of Appellant's medical condition, neither anyone in Risk, nor in Appellant's supervisory chain, ever communicated with him or with his doctor concerning his status, progress, or physical restrictions at any time during the entire fourteen-month period.

However, the Agency proffered credible evidence establishing that the transfer was a legitimate business decision not motivated by disability discrimination. First, Mr. Brown testified that he, not Appellant's Bridge Crew supervisor, was responsible for initiating Appellant's transfer back to Fleet. Mr. Brown testified he was further instrumental in searching

for the modified duty assignment when Appellant's problem first arose, and that he intended the transfer to be temporary from the beginning. He testified that such an arrangement was his intent in his communications with Mr. Draper. There has been no evidence of motive on Mr. Brown's part to discriminate against Appellant. He only became aware of the situation again upon assuming his directory responsibilities during the reorganization in August of 1999 and took the actions he did at that time because he recognized the situation remained unresolved.

The Agency provided additional credible evidence that Appellant's transfer was intended to be temporary from the beginning. There is evidence tending to establish that the assignment arose from Appellant's loss of his CDL and his physical restrictions (*see*, Exhibits 15 through 18). The Agency supervisors and Risk Administration were clearly under the erroneous impression that Appellant was assigned restricted duties during this assignment (*see*, testimony of Ms. Christensen, Mr. Thomas, Mr. Brown). Finally, Appellant's classification and pay were never changed.

While it is understandable that Appellant, knowing only what he knew at the time of this transfer back to Fleet Maintenance, believed that this was an act of medical discrimination, the hearing officer factually concludes the following alternative based on the totality of the evidence and the sequence of events. After Appellant's temporary transfer to Bridge Crew, the Agency let Appellant's assignment slip through the cracks for fourteen months, until the case was again brought to its attention when Appellant had an allergic reaction requiring him to be placed on medical leave. The evidence suggests it is more likely than not that the Agency simply forgot about Appellant's transfer and status during the entire 14-month period, until it again surfaced when Mr. Brown assumed his supervisory duties.

The hearing officer concludes the Agency was not motivated by disability or other discrimination in this act. Rather, it was an attempt to correct a somewhat glaring oversight that had been brought by Appellant's illness to the attention of new management during the Aviation Department's reorganization.

Based on the foregoing, Appellant has not demonstrated a *prima facie* case that his transfer back to Fleet Maintenance was an act of discrimination. Furthermore, the Agency's evidence provides a legitimate business explanation for that transfer, and the evidence does not suggest the Agency's action was a pretext for discrimination. The hearing officer therefore finds no discriminatory action in Appellant's transfer back to Fleet Maintenance.

b. The Agency's plans to transfer Appellant to the Material and Parts position.

Appellant argues that the Agency's subsequent failure to complete his transfer to the Material and Parts position during the Fall of 2000 was an act of disability discrimination. Appellant points to the fact that he had a full-duty return-to-work pass, and that the Agency offered him a position for which it had determined him qualified by its own research. Then, despite his release to return to full duty, the supervisor of the prospective new position refused to hire him, for reasons clearly related to Appellant's health history. The Agency's own witness, Mr. Brown, stated several times that Noe's express reason for resisting the transfer was Appellant's history of disability. The Agency witness repeatedly stated that Noe "had

reservations" because of Appellant's past history of physical restrictions, despite that Mr. Noe was provided a copy of Appellant's full-duty return to work pass.

Furthermore, Appellant provided unrefuted testimony that he previously tested for a position possessing the same title and classification, passed the test and was placed on the list.

The Agency responds that the only reason it attempted to arrange the transfer in the first place was that it was laboring under the assumption that Appellant was covered under the ADA and corresponding CSR Rules. CSR Rule 9-62, Transfers (the regulation promulgated to mirror the ADA requirements), reads as follows in relevant part:

- f) Disability related transfers: ... Any appointing authority contemplating the disqualification of an employee on grounds related to health or disability shall assist that employee in seeking a suitable transfer.
 - 1) On the day the initial notice of intent to disqualify is given to the employee, the appointing authority shall:
 - (a) Give written notice to the Career Service Authority of the intent to disqualify the employee on grounds of health or disability, and identify the position held by the employee;
 - (b) Request, in writing, from the Career Service Authority, a list of positions the employee is qualified to perform and a list of agencies having vacancies in the positions listed.
 - 2) The appointing authority shall, immediately upon receipt from the Career Service Authority of a list of positions for which the employee is eligible, transmit to the employee considered for disqualification the response of the Career Service Authority to the request for information.

This is the procedure Mr. Brown followed surrounding the meeting of July 13, 2000. He consulted with Mr. Abeyta at Career Service, who provided him the list including the two open positions which did not require a CDL. He then offered Appellant those positions at the July 13 meeting, without any mention of the possibility of further qualification requirements. Appellant readily accepted the Material and Parts Technician position.

However, Mr. Noe then resisted Appellant's transfer into this position. The Agency apparently asserts that Mr. Noe's refusal is mooted by its determination that the ADA protections did not apply to Appellant's circumstances.

The Agency has basically asserted from the beginning that this case cannot be treated by the hearing officer as a disability discrimination case where no disability has been shown. The hearing officer understands that the initial presumption behind CSR Rule 9-62 f), by its title, Disability related transfers, is that the individual in question in fact suffers from some disability. The Agency argues that its failure to complete the transfer of Appellant into the position supervised by Mr. Noe cannot be considered "disability discrimination" because Appellant had

been given a full-duty return-to-work pass, and was therefore no longer qualified as "disabled" under the ADA and accompanying CSR Rules. The Agency asserts that the Murphy decision eliminates Appellant as a member of the protected class of disabled individuals intended to be covered by the Act.

However, the Agency's action of refusing to process Appellant's transfer is separate from that of his disqualification from the HEST position. That refusal had nothing to do with Appellant's CDL. The definition of "disabled individual" under CSR Rule 1, in relevant part, is:

An individual who (1) has a physical or mental impairment which substantially limits one or more major life functions; or (2) has a record of such impairment; **or (3) is regarded as having such an impairment....** (Emphasis added)¹

The hearing officer is charged with the reasonable interpretation of the regulations. Where the regulations appear ambiguous, unclear or apparently present conflicting meanings, the hearing officer must consider the regulatory scheme as a whole to render the most consistent, harmonious affect possible. It is clear from the use of the conjunctive "or," which is commonly construed by both legislative and judiciary minds to indicate an alternative, that part (3) of this definition is intended to stand alone as sufficient in itself to qualify an individual as protected under this definition. To interpret this definition otherwise would render this portion of it meaningless.

This interpretation is supported by the Supreme Court's decision in Sutton v. United Air Lines, Inc., 130 F. 3d 1185 (CA10 1999), aff'd, 527 U.S. 471 (1999). There the Court said that a person is "regarded" as disabled within the meaning of the ADA if "a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more life activities." *Id.* At 489. The Court continued:

An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity.

Id. at 490.

It is therefore irrelevant that the Agency began this transfer process under the mistaken assumption that Appellant was at that point covered by the ADA. While Appellant may not have had "a physical or mental impairment which substantially limits one or more major life functions," Mr. Noe's state of mind about accepting Appellant's transfer, as relayed by the Agency's own witnesses, clearly suggests that he "regarded" Appellant "as having such an impairment," which he clearly perceived as preventing Appellant from performing the major life activity of working in a simple stock room position.

The Agency's reasoning at this point unwittingly became circular. It disqualified Appellant from these protections as no longer disabled, yet one of its agents continued to discriminate against him for the alleged non-existent disability. To say that this is not disability

¹ This language is virtually identical to that found in the ADA's definition of disability, at 42 U.S.C. § 12102 (2).

discrimination would be similar to the Agency refusing to hire an individual because he used to be Catholic, then claiming its failure to hire is not religious discrimination because the individual had subsequently reformed to another religion. The Agency cannot treat Appellant as substantially impaired from working even though he is not, and then claim the discrimination protections do not apply. Clearly, this could not possibly have been the intent of the promulgators of the regulations, which are designed to prevent precisely this type of unfair treatment. The fact that Appellant was no longer under physical restrictions does not alleviate the Agency's obligation not to discriminate on such a basis. On the contrary, it only worsens the injustice of such discrimination since Appellant was capable of performing on a full-duty basis. This is precisely the reason for including "regarding" an individual as disabled, even though he is not, in subsection (3) of the definition.

Therefore, despite how Appellant's application came to Mr. Noe's attention, the moment he refused to consider the application because he *regarded* Appellant as substantially limited in the major life activity of working and incapable of performing the mechanical job in question, the Agency invoked subsection (3) of the definition by illegally refusing Appellant's application for transfer, thus placing him in the category of individuals protected by the law. Mr. Noe's state of mind was that he clearly perceived Appellant to be "disabled," whether that perception was accurate at the time or not.

The Agency's actions in this case are therefore distinct from those by the Agency in Murphy, above. In that case, the Agency clearly demonstrated to the lower court that it "did not regard Murphy as disabled, only that he was not certifiable under DOT regulations" to possess a CDL. *Id.*, citing Vaughn L. Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 882 (Kan. 1996). The Court of Appeals affirmed the lower court's decision, that the Agency "did not terminate petitioner 'on an unsubstantiated fear that he would suffer a heart attack or stroke,' but 'because his blood pressure exceeded the DOT's requirements for driver's of commercial vehicles.'" *Id.*, citing Vaughn L. Murphy v. United Parcel Service, Inc., 141 F. 3d 1185 (CA 10 1999).

The Agency has not demonstrated to the hearing officer in this case that "it did not regard Appellant as disabled." Unlike in Murphy, the Agency's failure to accept Appellant into the Material and Parts Technician position has nothing to do with his inability to procure a CDL. Indeed, one of the reasons the Agency offered him this position was because it *did not* require a CDL. Thus, while the Agency's action in disqualifying Appellant from his HEST position based on no CDL may not have been a violation of the ADA, the Agency's separate action of refusing to transfer Appellant based on its regard of him as disabled, in itself constitutes such a violation.

The hearing officer therefore concludes that Appellant has made a *prima facie* showing that the Agency unfairly discriminated against Appellant as a member of the class of individuals intended to be protected under the controlling regulations.

Once Appellant made a *prima facie* case of discrimination, the burden then shifted to the Agency to demonstrate a legitimate business reason for its failure to complete the transfer process by a preponderance of the evidence. The Agency's primary argument in this regard is its determination that Appellant was not qualified for ADA protection, and it was therefore no

longer required to process the transfer it had begun under 9-62 f). For the same reasons as set forth above, the hearing officer rejects this as a legitimate business reason.

The Agency offered additional evidence which was intended to justify its actions as a legitimate business decision. It claims that the list prepared by the Career Service Authority pursuant to CSR Rule 9-62 f) 2), which included the Material and Parts Technician position, was only based on "minimal screening" of Appellant's qualifications. However, the clear intent of the regulations at 9-62 f) 1) (b) is that the appointing authority is charged with the responsibility to consult with the Career Service Authority, who is in turn charged with the responsibility to identify positions for which Appellant "is qualified to perform." (Emphasis added.) This Rule clearly places the onus for locating alternate positions into which the employee can transfer on the Agency. It cannot now claim that the Career Service's review of positions may or may not have been complete, contrary to the requirements of the regulations.

That the Agency also thought this "minimal screening" was sufficient to establish Appellant was qualified for the position, was further evidenced by Mr. Brown's behavior and statements at the July 13, 2000 meeting, as testified to not only by Appellant but also by Mr. Brown himself. It is clear from Mr. Brown's testimony and his statements at the July 13, 2000 meeting that he also thought of the transfer as a "done deal," until he began meeting with Mr. Noe's resistance.

The Agency further attempted to justify this refusal as a "legitimate business decision" by suggesting that Mr. Noe may have expressed reservations about Appellant's qualifications. This suggestion came after Mr. Brown had testified many times that Mr. Noe's express reason for refusing Appellant's transfer was his health history. The claim came across as an afterthought in Mr. Brown's testimony. Finally, it is clear that Mr. Noe never interviewed Appellant, and the hearing officer is left only to conclude the he did not make reasonable attempts to establish Appellant's qualifications one way or the other. In light of the evidence on this issue, the hearing officer is not persuaded that Appellant's qualifications were of primary concern in Mr. Noe's state of mind.

Furthermore, Appellant offered unrefuted testimony that he tested for a position bearing the same title and classification in 1998, passed the test, and was placed on the list of qualified candidates. This fact in isolation does not automatically establish that Appellant was qualified for the present opening. However, when coupled with the Agency's own determination that Appellant was qualified, and in fact offered Appellant the position at the meeting of July 13, 2000, the totality of this evidence creates a rebuttable presumption that Appellant was, in fact, qualified for the job.

In light of Appellant's *prima facie* showing of discrimination, the burden shifted to the Agency to affirmatively demonstrate the legitimacy of its business reasons by a preponderance of the evidence. Yet the Agency offered no evidence whatsoever to demonstrate that Appellant was not qualified for this position. It failed to provide the class specifications for the position and cross-examine Appellant at to those requirements, and failed to call Mr. Noe to establish he had any legitimate reasons for not hiring Appellant. The Agency not only failed to rebut the presumption that Appellant was qualified, it actually proffered testimony from its own witness tending to establish that the reason for rejecting Appellant was not lack of qualifications, but

because it regarded Appellant as disabled based on his health history. Finally, it failed to call Mr. Noe to rebut the Agency's own evidence indicating that he refused Appellant's application because he regarded Appellant as substantially impaired from working.

The hearing officer rejects the Agency's response that Mr. Noe's refusal was somehow justified because there may have been additional job requirements, when no such requirements have been shown in the face of a discriminatory motive, especially where Appellant has demonstrated a rebuttable presumption that he was qualified for the job, and the responsible appointing authority never interviewed him to establish otherwise. The Agency's assertions are unsupported by any evidence, and are refuted by substantial credible evidence to the contrary. The Agency has therefore failed to establish, by a preponderance of evidence, that it had any legitimate business reasons here.

Finally, even conceding the Agency's assertion that Appellant was not disabled, CSR Rule 5, governing non-disabled transfers, strongly implies that a non-disabled career service employee has at least a heightened privilege to seek a transfer within the system. *See*, CSR Rules 5-62 6), omitting the probationary requirement in the transfer context; 5-72 d) 2), which defines a transfer to include the circumstances of this case, and 5-73 e), permitting for transition period during which a transfer can be reversed it is determined unsatisfactory, and protecting the employee's rights to return to his original position. The Agency did not even provide Appellant the opportunities provided for a non-disabled employee under these regulations.

Based on the foregoing, the hearing officer further concludes that the Agency's alleged legitimate business reasons for failing to complete Appellants transfer were a pretext for this act of disability discrimination.

3. Appellant's reliance on the appearance of permanency created by the Agency's actions.

Appellant argued that he believed with good reason that his transfer to Bridge Crew was permanent and that his employment complications were resolved. The totality of circumstances supports the reasonableness of this belief. Appellant was working full duty for fourteen months and, as he states, "everything was fine" until his allergic reaction in July of 1999 brought his situation back to the attention of the Agency. Appellant further asserts that the Agency then again led him to reasonably believe he was being transferred to the Material and Parts position, then failed to fully inform him that the transfer would not take place. Again, Appellant detrimentally relied on the Agency's created appearance that the transfer was a "done deal," then missed several opportunities to apply for other positions which were vacant at the time.

Appellant apparently did act in reasonable reliance on these appearances in both instances by not acting to secure a permanent position. It is distressing that the Agency carelessly created expectations upon which Appellant reasonably relied, not once but twice, then failed even on the second occasion, when it knew what was happening, to keep him informed.

However, while the hearing officer is sympathetic that the Agency created these expectations on which Appellant reasonably relied, she can find no CSR Rules or Ordinances speaking directly to the issue of equitable estoppel. The hearing officer's jurisdiction is created

by, and limited to, the parameters set forth in the CSR Rules. That jurisdictional grant of authority is limited to the affirmation, modification, or reversal of the Agency's action. She cannot make appointments to career service positions, which are governed by, and must be made in accordance with, the CSR Rules, Ordinances and Charter Provisions. Finally, even if Appellant had applied for the vacancies he knew of, there is no guarantee that he would have been chosen as the final candidate for any of those positions. While the hearing officer can order the Agency to lawfully consider Appellant's applications according to the governing CSR Rules, she cannot order it to hire Appellant because of these previously missed opportunities.

Therefore, the hearing officer has no authority to provide relief to Appellant based on his claims of detrimental reliance.

CONCLUSIONS OF LAW

1. The Agency demonstrated that its decision to disqualify Appellant from his HEST position based the loss of his CDL was not arbitrary or capricious.
2. Appellant failed to demonstrate a *prima facie* showing of disability discrimination arising from the Agency's transfer of from Bridge Crew to Fleet Maintenance in August of 1999.
3. Appellant demonstrated that the Agency "regarded" Appellant "as having such an impairment" under CSR Rule 1, when Mr. Noe refused to receive his transfer because of Appellant's history of disability, and that the Agency's actions therefore qualified him as a member of the class of individuals protected under the ADA and corresponding CSR Rule 9-62, governing the treatment and transfer of disabled employees. Therefore, the Agency failed to apply these regulations to Appellant appropriately.
4. Appellant demonstrated a *prima facie* case of disability discrimination by the Agency in violation of CSR Rule 19-10 c), prohibiting discriminatory actions because of disability, when Mr. Noe failed to receive Appellant as a transfer based on his medical history, thereby regarding Appellant as disabled from performing the functions of a heavy-duty mechanic.
 - a) The Agency failed to demonstrate a legitimate business reason for Mr. Noe's refusal to hire Appellant.
 - b) The Agency's justification for its failure to complete Appellant's transfer was a pretext for discrimination.
5. The hearing officer lacks jurisdiction to provide a remedy for Appellant's remaining claims respecting detrimental reliance.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant from his HEST position is MODIFIED as follows.


The Agency's decision to disqualify Appellant from his HEST position is AFFIRMED.

The Agency's termination of Appellant is REVERSED. The Agency is ORDERED to lawfully complete Appellant's application and transfer process, as governed by and in compliance with CSR Rule 9-62 f), concerning the position classified as Material and Parts Technician, or a suitable alternative in the event that this position is no longer vacant or if for other reasons such transfer cannot be lawfully completed.

Appellant is to be reinstated with back pay and benefits, and placed in a suitable temporary position pending the process of this transfer.

The hearing officer RESERVES JURISDICTION over this matter pending the resolution of the issue of Appellant's transfer, and will dismiss this case on a Motion by Appellant, or after a showing by the Agency that it has complied with the hearing officer's ORDER as set forth above.

Dated this 12th day of April, 2001.


Joanna L. Wilkerson
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 same in the U.S. mail, postage prepaid, this 13th day of April, 2001, addressed to:

Robert Stone
16258 E. Arkansas Dr.
Aurora, CO 80017

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 13th day of April, 2001, addressed to:

Mindi L. Wright
Assistant City Attorney

James Thomas
Denver International Airport

Charlotte A. Smith