

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

Appeal No. 23-03

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**JOHN COHEN, Appellant,**

v.

Agency: Community Planning and Development Agency and the City and County of Denver, a municipal corporation.

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**INTRODUCTION**

For purposes of these Findings and Order, John Cohen shall be referred to as "Appellant." Community Planning and Development Agency shall be referred to as "CPD." The City and County of Denver shall be referred to as the "City". They will be referred to collectively as the "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 May 29, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by Mindi Wright, Esq., Assistant City Attorney, with Janice M. Alexander 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 Appellant:

Appellant, Thomas Neil Kennedy, Gregory B. McKnight,

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

Janice M. Alexander

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

A & B

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

1-17

The following exhibits were admitted into evidence by stipulation:

A, B, 1-16

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

None

### **NATURE OF APPEAL**

Appellant claims he worked out-of-class for almost a year without appropriate compensation, in violation of CSR §§9-94, 7-80 and Rule 18. He is seeking compensation for the out-of-class work, either as a supervisor or as a lead worker. He is also seeking reimbursement of monies he spent for clothing and equipment for his participation in the Denver Sheriff's Academy in January 2003.

### **ISSUES ON APPEAL**

Whether Appellant worked out-of-class for almost a year without appropriate compensation?

If Appellant worked out-of-class, is he entitled to compensation either as a supervisor or as a lead worker?

Whether Appellant is entitled to reimbursement for monies he spent for clothing and equipment for his participation in the Denver Sheriff's Academy in January 2003?

### **PRELIMINARY MATTERS**

None.

### **FINDINGS OF FACT**

1. During the relevant period, Appellant was classified as a Consumer Protection Specialist with the Community Planning and Development, Neighborhood Inspection Services. He began this job in September 1995. From March 8, 2002 through January 15, 2003, Appellant held the internal CPD title of Police Liaison Unit ("Unit") Supervisor. Appellant worked with the Unit previously for approximately one year, then went to Public Information for approximately one year before returning to the Unit to take this position.

2. The Unit was responsible for working with police at various types of houses and businesses that have criminal activities associated with them (*i.e.*, theft rings, methamphetamine and other drug labs, illegal zoning issues).

3. Appellant testified that when he was working as a Consumer Protection Specialist during his previous tenure, he was responsible for specific issues in consumer protection, such as food or housing issues.

4. Appellant described his activities when accompanying the police to crime scenes. When he would go with the police to a meth lab, he would need to get into protective clothing check the house for staining before the crime scene investigators went in or the clean up was

done. He would put up placards marking the house as unsafe and check once a week to make sure that they were still up. He also described an instance when someone wielding a knife attacked him and the SWAT team had to be called in.

5. According to Appellant's Individual Performance Enhancement Program (PEP) Plan Worksheet for this position signed on December 12, 2002, the Priority 1 Category General Standards for this position requires:

The Police Liaison Unit Supervisor of Neighborhood Inspection Services is expected to plan, organize, direct and coordinate the operation of the Police Liaison Unit. He/she is expected to operate with a substantial degree of independence and to exercise discretion and use the highest standards of judgment in the functions of the Police Liaison Program. Coordinate the assigned work group's inspection activities with other governmental and enforcement agencies (City, State and Federal).

(Exhibit 8, p. 1)

6. Under the Job Responsibility "Team Work" (which is another Priority 1), the PEP provides:

Actively cooperates with other managers/supervisors as a team player in accomplishing assigned and/or joint tasks and functions. All Police Liaison related inspections for the PMZ Inspectors will be assigned to the Inspectors through their assigned Chief Inspector. PL Supervisor also participates in problem solving activities, looks for solutions and actively supports agency and departmental decisions. Participate in problem-solving activities when appropriate, looks for solutions and actively supports agency and Division decisions. Inappropriate or unprofessional behavior, which disrupts team interaction, is unacceptable.

(Exhibit 8, p. 2)

6. Another Priority 1 category on the PEP is "Establish Quality Standards for Liaison Unit and Supervise Police Liaison Staff." It provides:

- Assign work duties for work group in a logical and equitable manner.
- Review daily Police Liaison Activity Logs to insure the information is timely, accurate and compatible with the City View tracking system.
- Review all work from assigned work group for completeness and adherence to Ordinance requirements and agency policies.
- Track and monitor proficiency, performance and output of assigned work group.
- Monitor the assigned Inspectors development and potential and provide timely evaluations based on documented observations.
- Prepare all PEP's and PEPR's on schedule. No late submittals.
- Maintain complete records regarding work performance of assigned work group.
- Train new employees, Consumer Protection Specialists, Senior City Inspectors and Associate City Inspectors as pertinent to Police Liaison enforcement.

- Provide continuing resource support for member of the NIS work group.
- Performs complex tasks and duties that require more substantive knowledge or expertise.

(Exhibit 8, p. 3)

5. This PEPR was developed by Appellant and R.D. Sewald, who was his supervisor through November 30, 2002, and who was responsible for forming the Unit.

6. Mr. Sewald sent a memo to Mayor Webb, all City Council members, Jennifer Moulton, Director of CPDA, Ari Zavaras, Manger of Safety, Gerry Whitman, Chief of Police, Daniel O'Hayre, Division Chief and all the district police captains on March 8, 2002, in which he wrote that Appellant was the unit supervisor for the Police Liaison Unit. (Exhibit 11)

7. According to Appellant, during his tenure in this position, he supervised the one full-time and one part-time employee assigned to the Police Liaison Unit, as well as being responsible for two districts himself. He signed the PEPR's and leave slips for the two employees.

8. Appellant is at level 809, as is the person who shares supervisory responsibility over the person assigned to Appellant part-time. The persons supervised by Appellant were classified as paraprofessionals at level 617 or 619.

9. When Appellant was talking to Mr. Sewald about rejoining the Police Liaison Unit, they discussed Appellant attending the Sheriff Department's Academy, training that had been provided to several others in the Police Liaison Unit, including Mr. Sewald and Bernell Saiz, a previous Unit Supervisor, and Gregory B. McKnight, Consumer Protection Supervisor. This discussion actually dated back to when Appellant first belonged to the Unit. He requested to take approximately thirty of the forty-two blocks offered by the Academy, covering all topics other than the handling of prisoners. The areas he sought to take included the handling and maintenance of the integrity of crime scenes, testimony, report writing, arrest control, unarmed defense, and weapons.

10. Thomas Kennedy became Appellant's direct supervisor after Mr. Sewald retired from the Department.

11. After Mr. Sewald left the Department, Appellant spoke to Mr. Kennedy and Mike Bradshaw about his participating in the Academy. Mr. Kennedy testified that the request was discussed with Acting Director Myrna Hipp and Kevin Patterson, Director of Administrative Services. They approved Appellant's attendance because it was free. A memo was sent from the Department to the Academy. (Exhibit A)

12. After these discussions, Appellant enrolled in the Academy that started on January 6, 2003. He purchased clothing and equipment for the Academy. He did not have receipts for these purchases with him at the time of the hearing.

13. Appellant submitted a request for reimbursement of these incidental expenses. At that time, Mr. Kennedy, Ms. Hipp and Mr. Patterson discussed Appellant's duties and the appropriateness of the Academy. Mr. Kennedy, who had supervised the Unit at one time, admitted that he did not like the police liaison concept. During this discussion, the three of them decided that they did not know why Appellant needed to take the Academy and decided to

transfer him to the Neighborhood Inspection Services Division, Northeast Satellite Office.

14. Appellant was notified of his reassigned duties on January 10, 2003, one week into the Academy. At that time, Appellant left the Academy.

15. Ms. Hipp sent Appellant a memo on January 14 confirming that during a meeting on January 13, she decided to transfer Appellant due to the information she obtained at that meeting, budget constraints and conversations she had with the Police Department. The transfer was effective January 15.

16. Appellant was not a party to the meeting with Ms. Hipp and was never questioned by either Ms. Hipp or Mr. Patterson about his job duties.

17. The Police Liaison Unit has been eliminated and the work is handled by other units.

18. The Department's witnesses agreed that lead workers might develop PEPR's for other employees, but that only supervisors signed them. Janice Alexander, Human Resources Director for the Department, stated that a team leader may recommend discipline while a supervisor is responsible for both recommending and initiating discipline. Ms. Hipp stated that supervisors prepare work plans and evaluations, sign leave slips, and direct persons on a day-to-day basis while lead workers lead a team on a project.

19. The Consumer Protection Specialist classification states, in relevant part:

***General Statement of Duties***

Leads public health inspection and investigation teams; provides specialized expertise in plans review, education and training, or foodborne illness response; and perform as assigned inspections and investigations to enforce compliance with federal law, state statutes, municipal ordinances, rules and regulations and established policies for health and safety.

***Job Responsibilities and Knowledge, Skill, and Ability Requirements***

1. Serves as a lead worker and provides subject matter expertise in plans review, foodborne illness response, or education and training.
  - o *Skill in communicating and presenting factual information related to the work assigned.*
  - o *Skill in establishing and maintaining effective working relationships with other employees and the public.*
  - o *Knowledge of supervisory theories and methods sufficient to be able to perform a variety of supervisory functions.*
  - o *Knowledge of public health requirements, building codes, and epidemiology sufficient to be able to provide education and training on public health issues, determine and implement*

*response to foodborne illnesses, and review plans and blueprints to determine compliance with public health and consumer protection requirements.*

\* \* \*

7. Formulates yearly goals in specialty area for team development, productivity, and quality improvement, and develops implementation procedures for new training, intra-departmental communications, activity tracking, and methods for working with the regulated industry and other governmental agencies.
  - o *Skill in exercising initiative, judgment, and decision making in solving problems and meeting organizational objectives.*
  - o *Skill in independently adapting, interpreting, and applying written guidelines, precedents and standardized work practices to a variety of unprecedented and problematic situations.*
8. Plans, schedules, coordinates, and assigns work; establishes goals and priorities for subordinate employees; resolves work problems and provides written input for employee performance review and discipline.
  - o *Knowledge of supervisory theories and methods sufficient to be able to perform a variety of supervisory functions.*
9. Reviews work upon completion for adherence to guidelines and standards.
  - o *Skill in reviewing work for accuracy and completeness.*

\* \* \*

13. Assists in training and checking the work of other employees on various projects.
  - o *Knowledge of supervisory principles and practices sufficient to be able to establish priorities, assign and review work and resolve problems.*

\* \* \*

### **Job Requirements**

**Level of Supervision**            Leads two or more employees.

(Exhibit 9)

20. The Consumer Protection Supervisor classification, which is at level 811,

provides, in relevant part:

**General Statement of Duties**

Directs and supervises the inspection of such facilities as child care homes and centers, personal care boarding homes, public swimming pools, retail food establishments and similar facilities.

**Essential Duties and Knowledge, Skill and Ability Requirements**

1. Supervises the work of Staff and Senior Consumer Protection Inspectors, Consumer Protection Specialist and support staff involved in the inspection and regulation of a variety of public and private facilities.
  - o *Knowledge of supervisory theories and methods sufficient to be able to perform a variety of supervisory functions.*
2. Plans, schedules, coordinates, and assigns work and establishes goals and priorities for subordinate employees.
  - o *Knowledge of supervisory theories and methods sufficient to be able to perform a variety of supervisory functions.*
3. Reviews work upon completion for adherence to guidelines and standards.
  - o *Skill in reviewing work for accuracy and completeness.*
- \* \* \*
5. Initiates and recommends disciplinary action for employees as necessary.
  - o *Knowledge of supervisory principles and practices sufficient to be able to determine the most appropriate course of action in handling grievances and discipline for subordinate staff.*
6. Develops the performance evaluation program for functions within the unit, monitors and documents employee performance, provides ongoing feedback regarding levels of performance and formally evaluates employees in relation to performance.
  - o *Knowledge of supervisory principles and practices sufficient to be able to establish and implement subordinates' performance evaluation programs.*
- \* \* \*
11. Trains employees in day-to-day procedures.

- o Skill in training others to perform the duties of the work assignment.

\* \* \*

### **Job Requirements**

**Level of Supervision** Supervises two or more employees who do not supervise.

21. Consumer Protection Supervisors supervise persons at the 807 (Senior Consumer Protection Inspectors) and 809 (Consumer Protection Specialists) levels.

22. When Appellant was notified of the change of assignment, he filed his grievance. The gravamen of this grievance was that Appellant served as a supervisor, which was not part of his general classification description. He was not compensated as either a lead worker or as a supervisor for the work he performed between March 2002 and January 2003. He requested compensation for his out of classification work. He also requested reimbursement of the money he spent on uniforms and equipment for the Academy and that he be transferred back to the Wellington Webb Building.

23. The request to transfer back to the Wellington Webb Building is moot.

24. In the step one grievance, Mr. McKnight wrote that the money Appellant was requesting as reimbursement for Academy expenses was denied because the Department did not require attendance. With regard to the out-of-classification issue, Mr. McKnight wrote:

Career Service Authority job specification for the Consumer Protection Specialist position contemplates the performance of lead work. Therefore, if you performed lead work duties of any type while assigned to the "Police Liaison Section," those duties are within the scope of your current classification. You were never "working out of class" and are not entitled to additional pay.

(Exhibit 4)

25. The grievance was denied at step one by Ms. McKnight. Ms. Hipp denied the grievance at step two. This appeal was filed with the Hearing Officer in a timely manner.

### **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)

Because this is a grievance appeal of a non-disciplinary matter, Appellant has the burden of proof in this case.

Appellant withdrew the request to transfer back to the Wellington Webb Building because it

was moot. At the conclusion of Appellant's case-in-chief the Hearing Officer dismissed the request for reimbursement for the uniform and equipment for the Sheriff's Academy because Appellant could not produce any documentation to substantiate his alleged expenditures. Therefore, he was unable to meet his burden on the issue.

The only issue that remains for the Hearing Officer to determine is whether Appellant is entitled to pay either as an uncompensated lead worker or supervisor for the period of March 8, 2002 through January 14, 2003.

The question the Hearing Officer must resolve is whether Appellant was working outside his job classification when he functioned as the Police Liaison Unit Supervisor and, if he was, was entitled to 6.9% pay differential for compensation as a lead worker (see, CSR § 9-94 E.) or as compensation as a work assignment outside his job classification by performing the functions of a Consumer Protection Supervisor for more than thirty days (see, CSR § 7-80).

The Team Lead Assignment scheme is set out in CSR §9-94. It states, in relevant part:

The appointing authority, with the prior approval of the CSA Director or designee, may assign a qualified exempt individual team lead responsibilities or ask a qualified exempt individual to perform in a lead capacity, with the following provisos:

- A. The individual employee assigned to lead a team of employees or to serve in some other lead capacity must have a minimum of three years City experience at the senior or top level in the classification series for which he or she will exercise a leadership role and three successive performance evaluations of "meets expectations" or higher.
- B. The section, unit or department must perform multiple complex functions and a clear justification must be shown as to why the supervisor is unable to carry out the tasks proposed for the team leader. An example of an acceptable justification for assigning a team leader is to maintain a reasonable supervisor/subordinate span of control within a work group or crew.
- C. The duties assigned to the team lead must not conflict with the duties normally assigned to a first level supervisor. Examples of acceptable team lead duties/tasks include: assigning work priorities for a team, providing in-service and orientation training for employees, handling the most complex or difficult work assignments of a unit and approving leave requests.
- D. The term of lead worker assignment is continued at the discretion of the appointing authority. Team lead assignments may be made for up to one calendar year. Extensions may be granted upon review for good cause and approval of the CSA Director or designee.
- E. Compensation for the team lead assignment shall be a 6.9 percent differential.

\* \* \*

- G. A team lead assignment shall not be a substitute for a permanent classification.

\* \* \*

- I. Team lead assignments are accomplished through a job assignment process.... The team lead assignment is not a new classification.

This rule does not apply to individuals presently classified in supervisory or management positions.

The question is whether Appellant's position qualifies as a lead position entitled to the additional compensation. On the one hand, the Agency did not internally classify it as a "lead work" assignment because apparently it was treating it as a permanent assignment. Even though Appellant held it for less than a year, the position was in place for several years. The Agency never asked the CSA Director to treat the Police Unit Supervisor assignment as a "team lead" assignment during any of the years that it was in existence.

On the other hand, the position provided a reasonable supervisor/subordinate span of control within a work group that acted independently from the other work groups under Mr. McKnight's supervision. This independence is evidenced by the fact that none of Appellant's supervisors, either at the first, second or third level, really understood his job duties and gave descriptions that varied considerably from Appellant's own description. Appellant also assumed the tasks of assigning work priorities, providing training, handling the most complex assignments and approving leave requests.

The real problem here is that Appellant's CSA classification, Consumer Protection Specialist, already provides that persons working in the classification are providing lead work for a team of public health inspection and investigation teams. Since the classification is for a lead worker, Appellant is not entitled to additional compensation for the duties he is already required to perform as part of his assigned classification. Therefore, he is not entitled to 6.9% pay increase for his performance of lead worker responsibilities.

The next question is whether Appellant was actually working outside of his classification and performing the duties of Consumer Protection Supervisor. If he was working outside of his classification, he would be entitled to 6.9% increase for out of classification work for the eleven months he held the position, pursuant to CSR §7-80 A).

CSR §7-80 provides, in relevant part:

An appointing authority may assign the duties of a vacant higher-level job classification to an employee in a lower job classification for a period of 180 consecutive calendar days. Assignments for periods longer than 180 consecutive calendar days require the approval of the Personnel director or designee.

- A) Assignments outside of the job classification can be made for up to thirty (30) consecutive calendar days without a change to pay status of the affected employee. On the 31<sup>st</sup> day, and for the duration of the temporary assignment, the employee shall receive 6.9% above his or her regular pay. However, the employee's job classification

will not change when the 6.9% pay increase goes into effect.

- B) An employee assigned work above his or her job classification must meet the following criteria:
1. Demonstrated ability to perform all of the duties and accept all of the responsibilities for the higher level assignments; and
  2. Receive approval of the appointing authority.

\* \* \*

In support of his position that he was working outside of his job classification as a Consumer Protection Supervisor, Appellant pointed to his Agency title of Police Liaison Unit Supervisor, including the references in his PEP as a "supervisor," and the fact that he was responsible for the preparation of the PEP's and PEPR's for the two persons he supervised.

The Agency agreed that his internal title was "supervisor" and that he signed the PEP's for the two persons in question, but it also pointed out that supervisors have responsibility to initiate and recommend disciplinary action. Appellant agreed that he did not discipline the two people working with him, but there was no indication that either of these persons was disciplined by anyone during the time Appellant was "supervisor." Therefore, his right to initiate or recommend discipline, or lack thereof, was hypothetical. As final proof that Appellant was not working as a Consumer Protection Supervisor, the Agency presented evidence that the persons who are supervised by Consumer Protection Supervisors are at higher CSA classification levels (*i.e.*, levels 807 and 809) than those who are led by Consumer Protection Specialists (*i.e.*, level 609). The persons supervised by Appellant are at the lower level.

The Hearing Officer has considered the evidence provided by both parties. Appellant has the burden of proving that he was performing duties out of classification for more than thirty days in order to be entitled to the 6.9%. It is clear that he demonstrated the ability to perform all the duties of the Police Liaison Supervisor and accepted those responsibilities while he held the position. CSR § 7-80 B. However, the Hearing Officer finds that the fact that he prepared the PEP's and PEPR's for two subordinates, the factor he points to as showing he was a "supervisor" and not a "lead worker," is insufficient to raise him to the level of Consumer Protection Supervisor when the job classification requirements are reviewed as a whole.

CSA classifications are set up to best match the duties to the classification and the fact that someone might perform one task that falls within the higher classification is not enough to elevate the incumbent into the higher classification. Job classifications are made based upon the predominant duties of the position. These are the duties that make up 50% or more of the incumbent's job assignments.

Appellant's PEP (Exhibit 8) is a source for determining Appellant's predominant duties. While preparing PEP's and PEPR's are among the accomplishments listed for the Priority 1 responsibility in his PEP described as "Establish Quality Standards for Liaison Unit and Supervise Police Liaison Staff" (see, Exhibit 8, p. 5), this "accomplishment" does not constitute a great deal of Appellant's actual time (*cf.*, the other accomplishments for this responsibility regarding day-to-day supervision fall within the job classification requirements and form the bulk of Appellant's actual job assignment). The Hearing Officer concludes that the preparation of the PEP's is an insufficient *indicium* to establish that Appellant was performing the duties of the Consumer Protection

Supervisor rather than the Consumer Protection Specialist classification.

The Hearing Officer also concludes that CSR § 7-80 does not apply to Appellant because the position was not a "vacant higher-level" job classification when Appellant took the assignment. It appears that the position has always been classified by the CSA as a Consumer Protection Specialist position. Nor was this a "temporary assignment." The fact that Appellant held the position for less than a year is a matter of circumstances (*i.e.*, the position being eliminated in January 2003) rather than another person being hired into the job or Appellant being promoted into the position at the higher level.

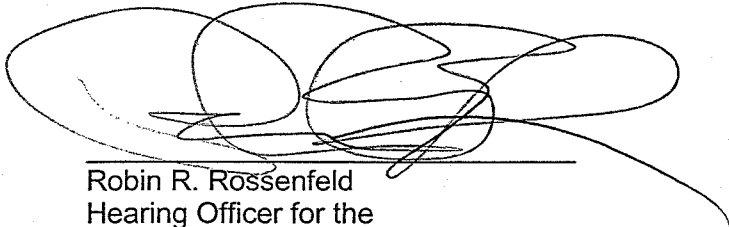
Because the job was never classified at the higher level, the only way Appellant might have been entitled to a higher classification was to ask the Agency to request an audit of the position. Then, and only then, could the position be reviewed by the CSA personnel with the expertise necessary to determine whether the job assignment was within the correct classification or not. The Hearing Officer, however, does not have the power to conduct what is basically an audit of the position and require the Agency to reclassify it for the period Appellant was the incumbent.

Based upon the foregoing, the Hearing Officer concludes that Appellant was correctly classified as a Consumer Protection Specialist and that he is not entitled to a 6.9% pay differential either as a lead worker or as a Consumer Protection Supervisor. This case must be dismissed.

#### ORDER

Therefore, for the foregoing reasons, the Hearing Officer DENIES the appeal in its entirety. It is DISMISSED with prejudice.

Dated this 10<sup>th</sup> day of September 2003.



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 11<sup>th</sup> day of September 2003, addressed to:

John Cohen  
5036 Uvalda St.  
Denver, CO 80239

Cheryl Hutchison  
AFSCME  
3401 Quebec St., # 7500  
Denver, CO 80207

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 11<sup>th</sup> day of July 2003, addressed to:

Mindi L. Wright, Esq.  
Office of the City Attorney  
Employment Law Section

Janice Alexander  
CPDA

Andrey Lenke