

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

Appeal No. 70-02

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FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

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IN THE MATTER OF THE APPEAL OF:

Appellant: CHARLENE GARCIA

And

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, and The City and County  
of Denver.

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CONCLUSION

Appellant did not prove, by a preponderance of the evidence, that the Agency violated Career Service Rule(s) (CSR) when she received an additional "Below Expectations" PEPR and did not receive an action plan. The Agency action is affirmed.

NATURE OF APPEAL

Appellant, Charlene Garcia, a Career Service employee, has challenged an additional three month Performance Enhancement Program Report (PEPR). The allegation is her supervisor did not give her the full three months (90 days as alleged in the appeal) review period as required by CSR 13-41.<sup>1</sup>

Appellant's anniversary date is December 1<sup>st</sup>. That is the date her PEPR's are due. In this appeal, the first "Below Expectations" PEPR was dated January 30<sup>th</sup>, 2002, 60 days after it was due. The second "Below Expectations" PEPR was February 19<sup>th</sup>, 2002. Appellant also alleges her supervisor failed to give her an action plan violating CSR 13-10<sup>2</sup> and 13-40.<sup>3</sup>

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<sup>1</sup> CSR 13-41 Quarterly Reports

Whenever the overall evaluation of a Performance Enhancement Program Report is "Below Expectations," an additional report shall be required at the end of three (3) months time and each three (3) months thereafter until the employee has achieved a rating of "Meets Expectations" or above.

## INTRODUCTION

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present and represented by Mark A. Schwane, Esq., Colorado Federation of Public Employees. The Agency was represented by Assistant City Attorney, Niels Loechell, Esq., with Diane Devose serving as advisory witness for the Agency.

The following witnesses were called and testified at the hearing: Charlene Garcia and Diane Devos.

Exhibits 5 and 6 were admitted into evidence and considered in this decision.

## ISSUES ON APPEAL

Whether Appellant proved, by a preponderance of the evidence, that the Agency violated CSR's 13-10, 13-40 and 13-41, by giving her an additional "Below Expectations" PEPR.

Whether Appellant proved, by a preponderance of the evidence, that her supervisor violated CSR's 13-10 and 13-40 by not giving her an action plan.

What is the correct method for calculating the three month time period between an original "Below Expectations" PEPR and an additional "Below Expectations" PEPR.

## JURISDICTION

The action which gave rise to this appeal, was an additional "Below Expectations" PEPR given to Appellant on February 19<sup>th</sup>, 2002. Appellant filed a first step grievance, with the supervisor who prepared that PEPR, Diane Devose, on February 26<sup>th</sup>, 2002. Devose did not answer, so on March 15<sup>th</sup>, 2002 Appellant filed a second step grievance with Dr. Chris Veasey, Phd., Manager of the Agency. On March 26<sup>th</sup>, 2002 Dr. Veasey responded to Appellant's second step grievance. Appellant filed her appeal with the Career Service Hearings Office on April 5<sup>th</sup>, 2002. All steps conformed to the requirements CSR 18-12 Grievance Procedure.

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<sup>2</sup> CSR 13-10 Purpose

The evaluation of an employee's performance is intended to assist the employee in becoming a more effective worker. This evaluation is designed to inform the employee of the manner in which he or she is meeting standards of performance established by the supervisor. In no event shall an employee's performance rating be a substitute for disciplinary action under Rule 16 DISCIPLINE for unsatisfactory work performance. The Performance Enhancement Program Report is intended to cover overall performance during a specific period of time.

<sup>3</sup> CSR 13-40 Below Standard Ratings (This is all there is under this heading)

Based upon these facts, I find that this appeal has been timely filed under CSR 19-22.<sup>4</sup> CSR 19-10 d) was complied with; under CSR 19-27, I have the authority to affirm, reverse, or modify the actions of the Agency.<sup>5</sup>

### RELEVANT FACTS

Appellant's annual performance rating, here the 1<sup>st</sup> PEPR, was scheduled for her anniversary date 12-01-01, but not given to her until January 31<sup>st</sup>, 2002. Because the PEPR was "Below Expectations," CSR 13-41 requires an additional PEPR at the end of three months. Appellant was given this PEPR, also "Below Expectations" on February 19<sup>th</sup>, 2002, effective March 1<sup>st</sup>, 2002.

### DISCUSSION AND CONCLUSIONS OF LAW

The City Charter, §C5.25 (4) and CSR §2-104 (b)(4) require the Hearing Officer to determine the facts in this matter "de novo". The Colorado Courts have held that this requires an independent fact-finding hearing considering evidence submitted at the *de*

#### <sup>4</sup> CSR 19-22 Time Limitation and Form of Appeal

a) Time Limitation

- 1) Every appeal shall be filed at the office of the Career Service Authority within ten (10) calendar days from the date of the notice action, which is the subject of the appeal.

#### <sup>5</sup> 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.

- d. Grievances resulting in rules violations: Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Services, or Career Service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of Section 18-12 Grievance Procedure. The appeal form must state with specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal may be dismissed if the appellant fails to cite the alleged rule violation(s).

CSR § 19-27 provides:

The Hearings Officer shall issue a decision in writing affirming, modifying, or reversing the action, which gave rise to the appeal. This decision shall contain findings on each issue and shall be binding upon all parties.

*novo* hearing and a resolution of the factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 535 P.2d 751 (Colo. App., 1975).

The party advancing a position or claim, in an administrative hearing like this one, has the burden of proving that position by a “preponderance of the evidence”. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not (Colorado Civil Jury Instruction, 3:1).<sup>6</sup> The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).<sup>7</sup> The ultimate credibility of the witnesses and the weight given their testimony are within the province of the Administrative Law Judge or Hearing Officer. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). As the trier of fact, the Hearing Officer determines the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In this appeal Appellant alleges the Agency violated CSR’s when it gave her an additional PEPR and did not give her an action plan. Therefore, Appellant has the burden of proving the allegations contained in the appeal by a preponderance of the evidence.

There was considerable testimony from Appellant regarding her inability to do her job. There was considerable testimony from the Agency that Appellant’s work was “Below Expectations.” Appellant was on notice as early as November, 2001 she was not performing her job up to expectations and again in the meeting before Appellant was given the first “Below Expectations” PEPR. The dispute is whether the second PEPR, the one issued February 19<sup>th</sup>, 2002, effective March 1<sup>st</sup>, 2002, is premature because it was issued effective three months after Appellant’s anniversary date, not three months from the issuance of the first PEPR.

This same type of issue, with similar facts, was discussed and ruled on previously by Hearing Officer Robin R. Rossenfeld. In *In The Matter of The Appeal of: Terri Garrett McCarley*, Consolidated Appeal Nos. 395-01, 25-02, 76-02, 84-02, quoting *In the Matter of the Appeal of Mary L. Schafer*, Appeal No. 123-98, Hearing Officer Rosenfeld clearly explains how to determine the three month time period. I agree with her determination.

Hearing Officer Rossenfeld says in *Mc Carley*:

The only real question is whether the second PEPR, the one issued in December 2001, is premature because it was issued ninety days after the anniversary date, not ninety days from actual issuance.

<sup>6</sup> The notes on use of Instruction 3.1 state: Generally, in all civil cases, “the burden of proof shall be by a preponderance of the evidence,…” citing C.R.S. § 13-25-127.

<sup>7</sup> The content of this instruction was approved as an instruction in *Swain v. Swanson*, 118 Colo. 509, 197 P.2d 624 (1948). The rule stated is also supported by *Green v. Taney*, 7 Colo. 278, 3P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded, 1984).

This question was previously addressed by the Hearing Officer in *In the Matter of the Appeal of Mary L. Schafer*, CSA Appeal No. 123-98. It is exactly on point. Ms. Schafer argued that CSR §13-41, which requires a quarterly review to occur three months after a "below expectations" evaluation, should be read to run from the date of the PEPR meeting, not the last date of the period under review. Ms. Schafer argued that such a reading was necessary in a case such as this when the PEPR meeting occurred almost two full months after the end date for the prior review. She argued that it was unfair that she should be required to make improvements in her performance when she did not know for two-thirds of the time included in the ninety-day interim PEPR that her performance did not meet expectations or, presumably, how to improve. The Agency in that case argued that CSR §13-41 required the quarterly review after a "below expectations" PEPR runs from the end of the period under review. Like Appellant, Ms. Schafer knew that there were concerns about her work prior to the original PEPR; she had notice of the possible deficiencies in her performance and knew how to correct them. Like Appellant, Ms. Schafer was an experienced employee. She should have been aware what was expected of her, even without the PEPR in hand, and made the necessary improvements.

Quoting from *Schafer*:

To determine intent, one must first look to the statutory language and give words and phrases their plain and ordinary meaning. *See Climax Molybdenum Co. v. Walter*, 812 P.2d 1168, 1173 (Colo. 1991). If the language of the statute is plain and unambiguous, there is no need to reach beyond that language to determine intent. *See Mason v. People*, 932 P.2d 1377, 1380 (Colo. 1997). Courts should not interpret a statute or ordinance to mean that which it does not express. *Rancho Colorado, Inc. v. City of Broomfield*, 196 Colo. 444, 586 P.2d 659 (1978). *See also Sandomire v. City and County of Denver*, 794 P.2d 1371 (Colo.App. 1990).

The plain meaning of the language of CSR §13-41 is that it requires quarterly reviews after a "below expectations" PEPR until the employee's performance improves to meet expectations. The fact that the PEPR meeting is more than fifty days after the end of the performance period does not change this timing, just as it would not reset the annual review back two months. If this weren't the case, then annual performance reviews would become "approximately annual reviews" and employees would not know when they were subject to formal review. That is clearly not the evaluation system the CSA Rules contemplates. Therefore, the Hearing Officer finds that, based upon the plain meaning of CSR §13-41, the quarterly evaluation ran from the end date of the prior evaluation period, or from April 1 through July 1, 1998.

*Ibid*, at page 12.

The Hearing Officer reaffirms her decision in the *Shafer* appeal. Appellant had notice of what was expected of her and what her probable performance deficiencies were ...

In this appeal, the three months time period would be from December 1<sup>st</sup>, 2001 through March 1<sup>st</sup>, 2002. In other words, the second "Below Expectations PEPR was not due until March 1<sup>st</sup>, 2002 giving Appellant a full three months to improve. Appellant argued, that because she was given the second "Below Expectations" PEPR on February 19<sup>th</sup>, 2002, effective March 1<sup>st</sup>, 2002, she did not have a full three months to improve. The Agency argued that it would have made no difference to wait until March 1<sup>st</sup>. Appellant was so far behind in her work she could not possibly catch up enough between February 19<sup>th</sup> and March 1<sup>st</sup> to improve to "Meets Expectations."

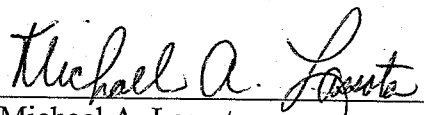
Appellant knew what was expected of her as early as November 2001, yet she still did not perform up to expectations. The second PEPR was issued in conformance with the time guidelines of CSR 13-41. Appellant's contention the Agency violated this CSR is denied.

Appellant next contends her supervisor violated CSR's 13-10 and 13-40 when the supervisor did not give her an action plan. Nowhere in the CSR's is a supervisor required to give an employee an action plan. Appellant's contention the Agency, through Appellant's supervisor, violated these CSR's is denied.

ORDER

The action of the Agency is affirmed.

Dated this 31st day of July, 2002.

  
Michael A. Lassota  
Hearing Officer  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 10<sup>th</sup> day of August, 2002 addressed to:

Mark A. Schwane  
Attorney at Law  
CFPE  
1580 Logan St. Suite 310  
Denver, CO 80203

Charlene Garcia  
1200 Federal Blvd.  
Denver, CO 80204

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 13<sup>th</sup> day of August, 2002, addressed to:

Niels Loechell  
Assistant City Attorney  
Denver Department of Human Services

Diana Smith  
Denver Department of Human Services

City Attorney's Office  
Employment Law Section

*Virginia Granado*