

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

Appeal No. 108-06

DECISION

IN THE MATTER OF THE APPEAL OF:

ELEANOR GARCIA

Appellant,

vs.

**COMMUNITY PLANNING AND DEVELOPMENT – ZONING AND NEIGHBORHOOD
INSPECTIONS**, and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on March 22, 2007 before Hearing Officer Valerie McNaughton. Appellant was present and represented herself. The Agency was represented by Assistant City Attorney Joseph A. DiGregorio. Having considered the evidence and arguments of the parties, the following findings of fact and conclusions of law are entered herein.

I. INTRODUCTION

Appellant is an Associate City Inspector for Zoning and Neighborhood Inspections within the Denver Department of Community Planning and Development. On Dec. 6, 2006, Appellant filed this appeal challenging her needs improvement Performance Enhancement Program Report (PEPR) dated October 26, 2006 after her grievance of the rating was denied. The appeal also raises issues of discrimination on the bases of age and religion, harassment, and retaliation based on her age. On Dec. 20, 2006, Appellant voluntarily withdrew the harassment claim.

At the commencement of the hearing, the parties stipulated to the admissibility of Agency Exhibits 1 - 16, and Appellant Exhibits A, B and page 1 of Exh. C. After the hearing, Appellant submitted Exh. 17 and E. The Agency has not submitted an objection to the latter exhibits. I find they are relevant to issues raised in the appeal and are therefore admitted.

II. ISSUES

The issues presented in this appeal are as follows:

- 1) Did Appellant establish by a preponderance of the evidence that her needs improvement PEPR rating was arbitrary, capricious and without rational basis or foundation under Career Service Rule (CSR) § 19-10 B. 3.,
- 2) Did Appellant prove the rating was caused by discrimination on the basis of age or religion, and
- 3) Did Appellant prove that the rating was in retaliation for her age?

III. FINDINGS OF FACT

Appellant Eleanor Garcia is an Associate Senior City Inspector for the Agency who was hired in June 2000. Appellant performs neighborhood inspections to enforce compliance with city ordinances. On Oct. 26, 2006, Appellant's performance for the rating period Oct. 1, 2005 to Oct. 1, 2006 was rated at the needs improvement level, and she was placed on a 90-day Performance Improvement Plan (PIP) to complete additional training in customer service, writing, personal development and team-building. [Exhs. 5, 9.] Appellant filed a grievance based on the PEPR, which was denied on Nov. 24, 2006. [Exhs. 2, 3.] This appeal followed.

The PEPR rated Appellant's performance of her communication, customer service, decision-making, teamwork, and public contact duties as unsatisfactory. The evaluation alleged unprofessional conduct and lack of judgment during the rating period, including the following incidents: 1) Appellant reacted inappropriately at a meeting to discuss the results of her complaint against a union representative, resulting in a written reprimand, 2) Appellant revealed the identity of the complainants to persons charged with code violations, in violation of policy, 3) Appellant threatened retaliation against complainants, and 4) Appellant engaged in confrontations with her co-workers.

The evidence revealed that on May 8, 2006, Appellant had an angry exchange with the union representative regarding another employee's PEPR. During the conversation, the representative said, "Doesn't your religion tell you not to lie?" Appellant replied, "You are the last one that should be talking about religion." [Exh. 14-32.] The representative admitted he "went for the jugular" and mentioned Appellant's religious beliefs because he believed Appellant was attacking him. The representative and two co-workers who overheard the exchange believed that Appellant's comment was an offensive reference to the representative's sexuality. [Exhs. 14-29, 14-32, 14-34.] Appellant testified that she did not make a comment to the representative about his being gay. The union representative testified on Appellant's behalf that because of job stress, "we both lost our cool", but they later met and apologized to each other in the presence of co-worker Claudia Willis so they could work together. Barbara Coffman confirmed that both Appellant and the representative were loud, angry and unprofessional during the May incident.

Appellant is a devout Christian, and she took offense to the representative's remark

about her religion. Appellant made a complaint to the Agency that the representative attacked her based on her religion. The Agency determined that both Appellant and the representative had acted inappropriately, and both were counseled to cease this type of behavior. Manager Tom Kennedy told Appellant, "I know you have your religious beliefs, but it would be a good idea to keep them to yourself." When Appellant was informed of the results of the investigation at an August 2nd meeting with her supervisor and two managers, Appellant expressed her dissatisfaction with the Agency's decision not to discipline the representative. She responded that she would be contacting the District Attorney's office about it. [Appellant's testimony.] Her supervisor Joaquin Gonzales and Mr. Kennedy testified that Appellant became very upset at the meeting, said she was going upstairs to file charges, and slammed the door behind her. [Exh. 16-4.] Appellant then filed another complaint regarding the same matter with the Career Service Authority (CSA). The witnesses were re-interviewed, and CSA concluded that their statements did not substantiate Appellant's complaint of religious discrimination. As a result of Appellant's actions at the August 2nd meeting, Appellant was given a written reprimand. [Exh. 14.] At hearing, Appellant denied slamming the door, but admitted she became upset at the meeting, and that she informed the managers she was going to go to the D.A.'s office about this. She explained that she went to the D.A.'s office, but merely spoke to her sister, who works there.

On July 25, 2006, Appellant talked to Mr. Gonzales about her request to Abatement Crew supervisor Becky Esquibel for clean-up of a certain property. Appellant told him she objected to a comment made by Ms. Esquibel during their conversation, and told Mr. Gonzales, "If that's the way she wants to be, I will turn this address in to the City council office." Mr. Gonzales instructed Appellant not to do that, but advised her instead to issue a new citation and send it in for abatement. [Exh. 16-14.] Appellant testified she believed there was a miscommunication between herself and Ms. Esquibel, since the property was cleaned up after she asked the city council representative for help. Appellant added that she believed this incident was used against her because Mr. Gonzales supervises Ms. Esquibel.

On August 3, 2006, Inspector Shelly Gonzales, AKA Ortiz, asked Appellant about a notice she served on Ms. Gonzales' uncle for unattended vegetation. Ms. Gonzales had been to her uncle's house over the previous weekend and had not seen any weeds over six inches. Ms. Gonzales asked Appellant to tell her where the weeds were. Appellant responded defensively that they were along the rear alley, and that she had taken pictures. Ms. Gonzales asked if the pictures could have been taken at a previous inspection, since there were no weeds at that location now. Appellant angrily stated she thought it was a conflict of interest for Ms. Gonzales to talk to her about her uncle's notice, and said she thought they should include their supervisor in their discussion. Ms. Gonzales informed Appellant that their supervisor had suggested she talk to Appellant. [Exh. 16, pp. 17-19.]

Ms. Coffman submitted a statement that Appellant "took offense". [Exh. 16-17.] Senior City Inspector David Whitley also overheard the exchange, and sent an email to Mr. Gonzales that "the conversation was intended to be very simple, there was a question over what was needed for compliance. . . . It sounded to me like [Appellant] took this inquiry as a challenge to her ability and became needlessly defensive and aggressive toward Gonzales." [Exh. 16-19.] Appellant stated at hearing that she believed this

incident was mentioned in her needs improvement PEPR because Joaquin Gonzales supervises Inspector Gonzales.

In late August, the Agency received several complaints from Appellant's assigned area that Appellant had revealed to persons charged with code infractions the names of the parties who had filed the complaint against them, in violation of Agency policy. [Exh. 16, pp. 6-8, 11-13.] During that same time, a member of the neighborhood organization reported that Appellant had fined or threatened to fine a complainant while taking her complaint about a vacant property. [Exh. 16, pp. 9-10.] Margaret Escamillo, an officer of the neighborhood organization, reported that Appellant had told a neighbor against whom Ms. Escamillo had filed a complaint that she "was going to give [Ms. Escamillo] a citation to see how [she liked] it!" [Exh. 16-16.]

Appellant responded at hearing that she did not reveal complainants' names, but said only that the homeowners' association had registered a complaint. She further testified that the names of complainants are public record, and can be found by looking in the Agency's file on each code violation. Appellant testified that she gave Ms. Escamillo a citation for weeds and sheds on her property, and that Ms. Escamillo went to hearing on the citations. Appellant believes that after Ms. Escamillo declared her intention to go to the Mayor's office, Mr. Kennedy and Mr. Gonzales met and decided that they had better "turn on Eleanor". Appellant said Mr. Kennedy and Mr. Gonzales represented Ms. Escamillo at the hearing, and that she therefore won. Appellant believes that she was retaliated against in this manner for doing her job conscientiously.

Appellant asserts that she was never notified of any performance problems before her PEPR meeting. Mr. Kennedy testified that he informed Appellant of the neighborhood complaints that she was retaliating against complainants. Mr. Gonzales testified that he discussed a majority of the incidents included in the PEPR with Appellant immediately after they occurred, and that some of the events occurred very close to the end of the rating period.

Appellant believes the incident with the union representative was held against her because her supervisor is indifferent to religion. When Appellant attempted to talk to Mr. Gonzales about the benefits of religious belief, Mr. Gonzales responded, "I don't want to hear about religion. I'm a heathen." Thereafter, Appellant did not mention religion to her supervisor. Appellant also argued that Mr. Kennedy may have used the May incident as a basis for the PEPR, since he advised her to keep her religion to herself. Appellant stated the PEPR may have also been imposed for political reasons because Ms. Escamillo stated she was going to complain about Appellant to the Mayor's office.

Appellant submitted an illegible 2004 charge of discrimination as an exhibit, but offered no evidence that it was relevant to this appeal. [Exh. A.] Appellant obtained an exceeds expectations evaluation in both 2003 and 2005, and a meets expectations rating in 2004. [Exh. A, pp. 23, 39, 46.]

IV. ANALYSIS

In this de novo challenge to a needs improvement PEPR, the employee bears the burden to prove by a preponderance of the evidence that the rating was arbitrary, capricious, and without rational basis or foundation. CSR § 19-10 B. 3; In re Macieyovski, CSA 62-06 (12/4/06). As the proponent of the order, Appellant also has the burden of proof as to the discrimination and retaliation claims. C.R.S. 24-4-105(7); CSR § 19-10 B. 1.

1. Appeal of Needs Improvement PEPR

Appellant does not deny that the above incidents occurred, although Appellant testified she did not mention the representative's sexuality in May, or slam the door at the August meeting with her supervisors. Appellant claims that the PEPR is arbitrary because she was given no notice that the incidents were considered performance deficiencies until the meeting with her supervisor to discuss the anticipated needs improvement PEPR. Appellant states that notice of the areas in which she was considered deficient would have allowed her to correct them before it affected her pay and bonuses.

Employees are given notice of the criteria by which their performance will be judged in their annual Performance Enhancement Plans (PEPs). In re Padilla, CSA 25-06, 10 (9/13/06). Appellant's PEP covering the rated year lists communication, customer service, teamwork, and public contact all as high priority tasks for the job of a city inspector. The PEP states that two or more confirmed and validated incidents of failure to comply with the stated expectations will lead to a below expectations rating for that category. [Exh. A, pp. 53-59.]

The communications category includes the expectation that inspectors will "accept and follow instructions and/or directions for their supervisor". [Exh. A-53.] Appellant's failure to maintain professional relationships with representatives of the neighborhood organizations on three occasions required a below expectations rating for this category. [Exh. 9-2.] The customer service job responsibility includes the expectation that inspectors will "meet customer service needs in accordance with agency, division and section policies and procedures." [Exh. A-53.] Appellant violated that standard when Appellant communicated the complainants' names to the person charged with a code violation on three occasions. [Exh. 9-2.]

As a part of teamwork, Appellant is expected to "actively cooperate with manager/supervisors and coworkers", and "participate in problem-solving activities when appropriate." [Exh. A-55.] The PEPR cited "a practice of making disturbances with co-workers", and her receipt of a written reprimand for the May incident. [Exh. 9-3.] The Agency supported the rating by evidence of the confrontations with the union representative, Ms. Esquibel, and Ms. Gonzales. In addition, Appellant reacted angrily during the meeting to discuss the PEPR with Mr. Gonzales and Human Resources Manager Janice Alexander. [Exhs. 11, 12.] As the latter incident occurred outside the rating period, it is not relevant to this appeal. The three angry exchanges with co-workers and her supervisors during the rating period amply support the needs improvement rating

for this category of performance. In all three, Appellant took offense during a fairly ordinary conversation, and then confronted her co-workers in an aggressive manner.

The decision-making section of the PEPR also stated that Appellant's decisions were delayed, and that she failed to obtain relevant facts or examine alternative solutions. Appellant denied this, and the Agency presented no evidence on this issue.

In light of the nature of Appellant's job as a public enforcement officer who must have the ability to work with residents and co-workers, I cannot conclude that the overall PEPR rating was arbitrary, capricious, and without rational basis or foundation as a result of Appellant's needs improvement rating in these four high priority job responsibilities.

2. Religious and Age Discrimination Claims

A claim of discrimination requires proof of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence supporting an inference that the adverse action was caused by the employer's discriminatory intent. In re Jackson, CSA 103-04, 5 (6/13/05).

Appellant claims that her supervisor and manager gave her an unfavorable performance rating because of her religion. Appellant points to her manager's advice that she should avoid talking about religion in the workplace, and the Agency's failure to discipline the union representative for his reference to her religion.

A single comment by a co-worker that could be considered critical to Appellant based on her religion does not support a claim of religious discrimination or religious harassment. Robinson v. City and County of Denver, 30 P.3d 677, 682 (2000), citing Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). Since the investigation revealed that both employees acted unprofessionally during the angry exchange, the Agency took appropriate remedial steps by counseling both participants to avoid such comments in the future.

Appellant testified that she attempted "reaching out to [her supervisor] and trying to make him see the good part of life, and how easy it is if you just believe." Mr. Gonzales asked her not to discuss her religion with him because, he told her, "I'm a heathen." Appellant interpreted his comment to mean he is against religion. Appellant testified that she believes Mr. Gonzales and Mr. Kennedy gave her a negative performance rating because of the May incident.

Both Appellant and the union representative testified that some employees exchange emailed prayers on a regular basis, and discuss the Christian religion at work. The union representative finds this "a touchy subject", and objects to conversations that he sees as preaching. Appellant, on the other hand, testified that she believes the emails "could help the environment in the city agency if people would take the time to read it about what's going on in the world with the Lord." After her supervisor asked her not to talk about religion to him, Appellant has not brought up the subject with him.

An instruction to avoid religious discussion in the workplace does not demonstrate an intent to discriminate against an employee who holds religious views. Appellant did not present any evidence that the Agency treated her differently than other employees based on her religion, or failed to accommodate her religious practices. Therefore, Appellant failed to establish that religious discrimination was the cause of the negative performance rating.

Appellant failed to present any evidence relevant to a claim of age discrimination, and therefore that claim is dismissed.

3. Retaliation Claim

The appeal form alleges the rating was given in retaliation for her age. A claim of retaliation must be supported by proof that Appellant engaged in a protected activity, and that the Agency then took adverse action in order to punish Appellant for that action and discourage similar action. CSR § 15-106. Age is not a protected activity, but is rather a status that is protected from discrimination. In re White, CSA 100-06, 6 (4/16/07).

At hearing, Appellant testified that she believed the PEPR was in retaliation for her participation in mediation with five other female inspectors. At that meeting, Appellant complained of intimidation by male supervisors. Appellant did not sign the agreement that resulted from the mediation. [Exh. 17.] Appellant testified that a promised follow-up meeting was never scheduled, and that Ms. Gonzales and Mr. Kennedy were not pleased to have to meet with a mediator because of the allegations made by the female inspectors.

Participation in a mediation intended to report and resolve sex discrimination issues is a protected activity that can support a retaliation claim under CSR § 15-106. However, Appellant failed to present any evidence that the five signatories to the mediation agreement likewise suffered disparate treatment based on their participation in the mediation, or to present any other evidence that would support an inference of discrimination. In addition, the needs improvement rating was supported by several incidents of inappropriate conduct, as determined above. I conclude that the Agency would have taken the same action even if Appellant had not participated in the mediation. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered the Agency's PEPR dated Oct. 26, 2006 is affirmed, and Appellant's discrimination and retaliation claims are dismissed.

Dated this 7th day of May, 2007


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY PERSONAL DELIVERY:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:

(720) 913-5995

Fax transmissions of more than ten pages will not be accepted.

CERTIFICATE OF DELIVERY

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** on this 7th day of May, 2007 to the following:

Eleanor Garcia
8007 S. Iris Way
Littleton, CO 80218

Joseph A. DiGregorio
Assistant City Attorney
201 West Colfax Avenue Dept. 1108
Denver, CO 80202 (via interoffice mail)

Janice Alexander
Community Planning and Development


