

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

Appeal No. 164-02

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

HENRY V. GOOD, Appellant,

Agency: DEPARTMENT OF PUBLIC WORKS, WASTEWATER MANAGEMENT
DIVISION, and THE CITY AND COUNTY OF DENVER,
a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Henry Vernon Good filed September 9, 2002. Appellant challenges the Department of Public Works, Wastewater Management Division's denial of a grievance Appellant initially filed on August 8, 2002.

For purposes of this Decision, Mr. Good shall hereinafter be referred to as "Appellant." The Department of Public Works, Wastewater Management Division, shall be referred to as "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

Appellant's grievance concerns the Agency's failure to grant him an extension of time to find available representation to accompany him during a meeting with his supervisor. The substance meeting concerned Appellant's "Meets Expectations" PEPR.

A preliminary hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on December 3, 2002 at the Career Service Authority Offices.¹ Appellant was present and was represented by N. Nora Nye, Esq. The Agency was represented by Assistant City Attorney Robert D. Nesor, with the Agency's Accounting Services Manager, Ronald J. Angle, present for the entirety of the proceedings as advisory representative for the Agency.

Appellant testified on his own behalf, and called Career Service Authority's Personnel Director, Jim Yearby.

¹ Evidence and testimony taken during the hearing are considered here only for purposes of establishing jurisdiction.

The Agency made a Motion to Dismiss following the close of Appellant's case. Because the hearing officer granted that Motion, the Agency called no witnesses during the hearing.

The parties stipulated to the admission of Appellant's Exhibit A, pp. 11 through 15, and Agency Exhibits 1 through 5, and 8.

Appellant's Exhibit A, p. 4 (letter by Jim Yearby on the Career Service's policy concerning representation at meetings) was admitted over the Agency's objection of relevance.

Agency Exhibit 9 (a policy memorandum on employee rights to representation) was admitted over Appellant's objection based on Mr. Yearby's testimony that he had not authored it.

No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Agency's Motion *in Limine*.

Because Appellant's PEPR rated Appellant's performance as "Meets Expectations," the Agency moved for an Order *in Limine* prohibiting Appellant from offering any testimony or evidence relevant to the substance of his PEPR pursuant to CSR 19-10 e). That rule states in relevant part:

- e) Grievance of Performance Enhancement Program Reports: If the grievance of a Performance Enhancement Program Report is appealed to the Career Service Hearing Officer, the only basis for reversal of the Performance Enhancement Program Report shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation. *Only overall ratings of "Below Expectations" may be appealed...*

(Emphasis added.) Appellant did not object to this Motion. The hearing officer entered an Order prohibiting such testimony and evidence.

2. The Hearing Officer's Jurisdiction

Section 19-10 Actions Subject to Appeal, sets forth as follows in relevant part:

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 Service, or the Career Service Personnel Rules... 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).

In this case, Appellant alleges a violation of Provision C5.25-2(4) of the Charter of the City and County of Denver (hereafter "Sec. 9.1.5 (B) (iv)" as that Provision is restated thereunder). That Provision states that "(e)mployees may designate agents to represent them in dealing with their supervisors, the Career Service Hearings Officer, the Career Service Board, the City Council, the Mayor, or any thereof."

During the hearing, after Appellant presented his case-in-chief, the Agency moved to dismiss alleging that Appellant had not shown such a violation. In addition, the Agency alleged that the relief Appellant requested was not within the hearing officer's jurisdictional authority. After considering Appellant's evidence, the Agency's Motion to Dismiss, and the parties' arguments on the Motion, the hearing officer concluded that she lacked jurisdiction and granted the Motion to Dismiss. The reasons for the hearing officer's decision are discussed fully below in the Discussion section.

ISSUES

The only issue reached in this case is whether the Hearings Office has jurisdiction over the issues raised in Appellant's grievance and appeal. To establish jurisdiction, Appellant must show four things:

- a) The Agency engaged in some "action" or failure to act;
- b) There is no prohibition against jurisdiction over the substance of the Agency "action" (or failure to act) in question;
- c) The "action" (or failure to act) constitutes a violation of a CSR rule, Charter Provision or Ordinance relating to the Career Service; and
- d) The hearing officer has the authority to grant the relief requested.

FINDINGS OF FACT

1. Appellant has been a Senior Accountant for the Agency since 1996.
2. It is undisputed that a Performance Enhancement Program Report ("PEPR") that is more than sixty days late results in the automatic issuance of a "Meets Expectations" rating under CSR 13-70. Appellant's PEPR was approximately 120 days late at the time of the relevant events.
3. On Wednesday, July 24, 2002, Accounting Services Manager Ronald J. Angle sent Appellant an e-mail informing him of a meeting scheduled for Monday, July 29, 2002. The only purpose of the meeting was to discuss Appellant's performance evaluation (hereinafter "PEPR") for the previous work year, and a new PEP Plan for the coming work year (Exhibit 8, p. 1).

4. Appellant had already left for the day and did not receive the e-mail of Wednesday, July 24, 2002 until the following morning, Thursday, July 25.
5. On Thursday, July 25, 2002, Appellant received a copy of the PEPR in his interoffice in-box. The PEPR indicated a rating of "Meets Expectations." The PEPR was signed by Mr. Angle and Director of Finance Administration, Samuel J. Atwood. Appellant took the PEPR to his desk and examined it. A copy of the PEP Plan was not attached to the PEPR.
6. Because Appellant and the Agency had been scheduled for mediation over the issue of his performance ratings and other issues in the past (which mediation had been cancelled), Appellant elected to contact his attorney on how to proceed with regard to the meeting. Appellant tried but could not reach his attorney.
7. On or around July 25, 2002, Appellant called Mr. Angle to ask permission to have counsel present at the meeting, but learned from Mr. Angle's voice mail that Mr. Angle would be on vacation until July 29, the day of the meeting.
8. On Friday, July 26, 2002 Appellant sent an e-mail to Mr. Atwood, asking if the Agency had any objection to the attendance of Appellant's representative at the meeting. Appellant's e-mail also requested a copy of the PEP Plan in advance of the meeting, and inquired as to the procedures for changing the PEPR. By 2:30 p.m. Appellant had not heard from Mr. Atwood. At that time he called Mr. Atwood, who said he was waiting on a response to Appellant's questions from Human Resources.
9. By the time Appellant left for the day on July 26, 2002, he still had not heard from Mr. Atwood concerning the presence of his representative at the meeting and other questions. He sent another e-mail requesting the meeting be postponed (Exhibit 8, p. 2).
10. On July 26, 2002 Mr. Atwood responded to Appellant's e-mail of the same date confirming that the meeting of July 29, 2002 was postponed and that he was seeking answers to Appellant's questions (Exhibit 8, p. 2). Appellant had left for the day and did not receive this e-mail until he returned to the office the following Monday.
11. On the morning of Monday, July 29, 2002 Appellant spoke with Mr. Angle, who had returned from vacation. Mr. Angle told Appellant he would get back to him concerning the responses to Appellant's questions. At 11:51 a.m. that morning Mr. Angle sent Appellant an e-mail responding to Appellant's questions (Exhibit 8, p. 3). Mr. Angle's e-mail indicated the Agency had no objection to the presence of Appellant's representative at the meeting, and that the contents of Appellant's PEPR would be discussed at the time of the meeting. A copy of Appellant's PEP Plan was attached to the email of that date. The e-mail further informed Appellant that the meeting on Appellant's PEPR was rescheduled for Wednesday, July 31, 2002 at 9:00 a.m.
12. After receiving Mr. Angle's e-mail of July 29, 2002 at 11:51 a.m. Appellant again tried to contact his attorney, and learned at that time the attorney had been out of state on a pre-arranged vacation for several weeks, and was not to return by the date of the meeting.

Appellant then called Cheryl Hutchinson of the AFSCME, but Ms. Hutchinson was unavailable for the meeting on July 31 on such short notice.

13. At 12:15 p.m. on July 29, 2002 Appellant e-mailed Mr. Angle to notify him that he could not secure a representative on such short notice. The e-mail offered to work with Mr. Angle on coordinating any other time both Mr. Angle and Appellant's representative would be available. (Exhibit 8, p. 3.)
14. Mr. Angle contacted Appellant and told him the meeting set for Wednesday would not be postponed.
15. On July 30, Appellant sent Mr. Atwood and Jan Meese in the Human Resources Department an e-mail explaining that he had been granted permission to have a representative present at the meeting set for July 31, 2002, but that Appellant was unable to secure a representative for the meeting on such short notice, and Mr. Angle had denied Appellant's request to postpone the meeting. (Exhibit A, p. 14.) Appellant again requested an extension of the meeting time. Appellant received no response to this e-mail.
16. Appellant prepared a written statement concerning his understanding of his right to have a representative present during the meeting. The written memorandum included a restatement of Section 9.1.5 (B) (iv) (*see*, Exhibit A, pp. 12-13).² Appellant gave Mr. Angle a copy of the memo on Wednesday, July 31, 2002 approximately fifteen minutes before the meeting was to begin. Mr. Angle reviewed the memo and reiterated the meeting would take place as scheduled.
17. Appellant met with Mr. Angle as scheduled on July 31, 2002 at 9:00 a.m. Appellant's representative was not present at the meeting.
18. Appellant timely filed a step-one grievance on Thursday, August 8, 2002 (Exhibit 2). Appellant's grievance cited Sec. 9.1.5 (B) (iv) of the City Charter (*above*). The grievance requested that he "be made whole." The grievance further requested that the Agency allow employees to have representatives present at meetings with supervisors in accordance with the City Charter, and that there be a discussion between the Career Service, AFSCME and the Agency for "a rule change to comply with the City Charter."
19. Mr. Angle denied Appellant's grievance on August 13, 2002 (Exhibit 3).
20. Appellant timely filed his second-step grievance with Mr. Atwood on August 20, 2002 (Exhibit 4) setting forth the same allegations and requested remedies.
21. Mr. Atwood denied Appellant's second-step grievance on August 29, 2002.
22. Appellant timely filed his appeal on September 9, 2002 (Exhibit 1). Appellant's appeal sets forth that the basis of the appeal is that a "conflict exists between the Career Service Rules and the City and County of Denver's Charter regarding representation of a CSA employee in

² Appellant's e-mail cites this item as (iii). However, it is the fourth item and this citation is a typographical error.

any meeting with their supervisors.” Under “Remedy Sought,” Appellant requests that the hearing officer:

- 1) Void all results and directives of the July 31, 2002 meeting with Ronald J. Angle in which Appellant was denied representation and allow a second meeting to take place where Appellant will have representation;
- 2) Direct CSA to correct CSA Rules to comply with the Charter;
- 3) Publish findings that CSA and Public Works violated the Charter; and
- 4) Provide such other relief to Appellant that is deemed just and appropriate.³

23. Appellant testified that from his understanding of the Charter, he had a clear right to representation during the meeting in question.
24. At the hearing, CSA Personnel Director Jim Yearby testified to his role in the rulemaking process as follows. He is charged with the responsibility to assure a complete exploration of any change in the CSR rules, whether the change is a new rule, an update, or a consolidation. Before he takes a rule or rule change before the Career Service Board, he reviews it to make sure it complies with existing parameters. In this review, he takes into consideration all commentary received from employees, Human Resources managers, and the City Attorney’s Office regarding the legality and acceptability of the rule or rule change, and to make sure all concerns have been addressed. He then recommends to the Board that the rule be either adopted or posted. If existing concerns have been addressed, he typically recommends adoption. If opposition has been expressed, the rule is posted for a public hearing. The Board is then required to consider objections expressed during the public hearing. Therefore, the Director takes the proposed rule or rule change before the Board for review before he makes a final recommendation concerning adoption of the rule. Mr. Yearby testified he has the authority not to take a rule to the Board until he is satisfied with its adequacy.
25. On August 9, 2000 Mr. Yearby signed a letter to the Department of Human Services Union Steward, Debra L. Ruiz, (Exhibit A, p. 4) stating that a city employee need not have a disciplinary action pending in order to have representation present during a meeting with a supervisor under Sec. 9.1.5 (B) (iv) of the City Charter and CSR 17-21.⁴ Mr. Yearby testified he reviewed the letter at the time he signed it, but was not its author. He could not recount the particulars of the request to which it purports to respond.
26. On October 9, 2000 Mr. Yearby issued a policy memorandum to “All Appointing Authorities and Human Resources Managers” titled “Employees’ Rights to Representation” (Exhibit 9). The memo states that all employees have a right to have representation present at any

³ Appellant testified that the terminology in his Request for Relief in the appeal is slightly different than the iteration in his grievance because he fashioned it according to the type of relief he believed the hearing officer would be able to grant. The hearing officer finds Appellant’s grievance substantially sets forth his complaint, sufficiently for a reasonable administrator to clearly understand the nature of the complaint. See, In the Matter of Martha Douglas, Appeal No. 317-01 (Order entered 3/22/02). Appellant’s complaint is therefore perfected for purposes of this appeal.

⁴ CSR Rule 17 formerly restated Sec. 9.1.5 (B)(iv) of the City Charter (set forth below). CSR Rule 17 has since been eliminated in its entirety and various portions are now referenced elsewhere in the rules. Sec. 9.1.5 (B) (iv) no longer appears anywhere in the text of the CSR rules.

meeting “during a meeting in which the city employee believes might result in discipline,” regardless of their union or non-union status. The memo reiterates Sec. 9.1.5 (B) (iv).

27. Mr. Yearby testified that he does not perceive any conflict between Sec. 9.1.5 (B) (iv) and CSR 16-30 E. 5) (requiring the right to representation during a pre-disciplinary meeting) or CSR 13-60 (requiring the right to representation during meetings concerning “Below Expectations” PEPR’s). Nor does he perceive any conflict between the August 9, 2000 letter (Exhibit A, p. 4) and the October 9, 2000 memo (Exhibit 9). He testified that around the time the Office of the Director received Ms. Ruiz’ request giving rise to the August 9, 2000 letter, there was some discussion between himself and the Board about employees being allowed to have representation at meetings, even when such meetings are not related to discipline. Mr. Yearby testified he recalls that a topic of this discussion was the apparent broadness of Sec. 9.1.5 (B) (iv). He testified that to his recollection, they concluded that an employee can have representation present even if no disciplinary action against the employee was pending. However, the Agency is not burdened to wait for the employee to find a representative (as would be the case in disciplinary actions and “Below Expectations” PEPR’s).
28. There is no evidence in the record tending to suggest Appellant had any disciplinary action pending at the time of the incidents relevant to this case. The hearing officer finds no evidence in the record tending to suggest that Appellant had any reason to believe the meeting scheduled for July 31, 2002 “might result in discipline.” Appellant testified that during the meeting, there was no discussion whatsoever concerning discipline or proposed discipline. It is clear from the evidence that Appellant’s evaluation remained “Meets Expectation” after the meeting.

DISCUSSION

1. Elements required for Hearings Office jurisdiction over a given case.

Jurisdiction of the Career Service Hearings Office is strictly a creature of regulation. The hearing officer has repeatedly found that four elements must be shown before the Hearings Office to assume jurisdiction over the merits of a given case:

- a. that the Agency took (or failed to take) some action that is the subject of the appeal;⁵
- b. that there is no regulatory or other restriction on Hearings Office jurisdiction over the subject of the appeal,⁶
- c. that the action (or inaction) complained of was in violation of some relevant CSR rule, Charter Amendment or Ordinance;⁷ and

⁵ See, e.g., CSR 19-10; In the Matter of Charlesetta Crutchfield, Appeal No. 13-01 (Dismissal entered 4/3/01).

⁶ See, e.g., CSR 19-10 e) (*above*) prohibiting the appeal of any PEPR rating above that of “Below Expectations.”

⁷ See, CSR 19-10 d), which states that an employee may appeal “(a)ny grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career

- d. that the hearing officer has the power to grant a remedy by *affirming, modifying or reversing* the Agency action in question.⁸

These conditions are all necessary. The absence of any one of them destroys Hearings Office jurisdiction.

At the close of Appellant's case, the Agency moved to dismiss for lack of jurisdiction, and failure to request any remedy the hearing officer has the authority to grant. Appellant agrees that the hearing officer lacks jurisdiction in items number 2 and the portion of 3 concerning directives to order changes in the CSR rules, as set forth in his request for relief (*see*, Finding Number 22, above). However, he argues it is within Hearings Office jurisdiction to enter a decision finding that the Agency violated the Charter, set aside the original meeting (and all conclusions reached as a consequence of the meeting) and order that another meeting be held.⁹

The hearing officer ruled from the bench as follows with respect to these four elements of jurisdiction in this case. She now memorializes the bench ruling, with further elucidation of the reasoning behind that ruling set forth below.

a. The Agency took an action that is the subject of the appeal.

The "action" that is the subject of the appeal, as Appellant has framed it, is the Agency's refusal to postpone the meeting despite the unavailability of Appellant's representative, and holding the meeting in the absence of the representative. This element of jurisdiction is satisfied, but alone is not sufficient to establish jurisdiction without the remaining three elements.

b. There are no apparent regulatory or other restrictions on Hearings Office jurisdiction over the subject of the appeal.

As to the second element, assuming there had been an action in violation of the City Charter which the hearing officer could affirm, modify or reverse, there is no express prohibition against Hearings Office jurisdiction over this issue.¹⁰ This jurisdictional element is therefore satisfied, but is still not sufficient to establish jurisdiction without the remaining two elements.

Service Personnel Rules..." *See also*, In the Matter of Charlotte Marin, Appeal No. 64-02 (Dismissal entered 5/19/02), *citing* In the Matter of Darrel D. Delimont, Appeal No. 315-01 (Dismissal entered 9/26/01).

⁸ CSR 19-27 Decision of Hearings Officer states in relevant part:

The Hearings Officer shall issue a decision *affirming, modifying or reversing* the action, which gave rise to the appeal...

⁹ During opening statements, Appellant further requested that the existing PEPR be reversed, which is the only conceivable reason for holding another meeting. *See also*, Appellant's requested remedy set forth in the last page of Appellant's appeal (Exhibit 1), in which he requests that the hearing officer "void all results and directives" of the meeting. For the reasons set forth below, the hearing officer lacks jurisdiction over this requested remedy.

¹⁰ While Appellant alleges the violation in this case was of the City Charter, the relief he has requested includes reversal of the PEPR that was the subject of the meeting. Under CSR 19-10 e), discussed more fully below, the hearing officer lacks jurisdiction over this issue and cannot grant the relief requested.

c. Appellant has not shown the action that is the subject of the appeal was in violation of some relevant regulation.

As to the third element, Appellant argues the Agency's action constitutes a constructive denial of an absolute right as it is set forth in the City Charter, that being the right to the presence of a representative during any interactions with a supervisor. As discussed more fully below, this right is not absolute. The determination of when this right exists and whether it was violated requires a reasonable application of Sec. 9.1.5 (B) (iv). Based on the hearing officer's analysis and conclusions concerning the governing regulations and precedents, Appellant has not shown that the Agency action complained of was in violation of this Charter Provision, or any other relevant regulation. This jurisdictional element has therefore not been satisfied.

d. The hearing officer had no power to grant any remedy by affirming, modifying or reversing the Agency action in question.

As to the fourth element, Appellant wishes the hearing officer to order a new meeting about the PEPR, at which Appellant can arrange to have a representative present. Appellant has effectively requested a remedy that is meaningless without the reversal of Appellant's "Meets Expectations" PEPR (also included in his request for relief), which is not an action the hearing officer has the authority to grant. For the reasons discussed more fully below, this jurisdictional element has therefore not been satisfied.

2. Analysis of the regulatory authority governing Appellant's right to the presence of a representative during the meeting in question (element c, above).

The City Charter, Sec. 9.1.5 (B) (iv), reads as follows in relevant part:

"Employees may designate agents to represent them in dealing with their supervisors, the Career Service Hearings Officer, the Career Service Board, the City Council, the Mayor, or any thereof."

Appellant argues that this Provision of the City Charter places no conditions on its applicability. He asserts that he had to "deal with" his supervisor during the meeting, and that he therefore had the right to representation. Appellant posits that the Agency's failure to postpone the meeting to permit him time to secure representation constitutes a constructive denial of that right.

The Agency concedes that an employee has a right to ask his representative to join him at any time under the Charter. It argues, on the other hand, that when reading the entire regulation, it is clear that it presumes an adversarial or negotiations context. Thus, the Agency asserts, Appellant's interpretation requiring the postponement of any meeting to secure the presence of a representative, notwithstanding the circumstances of the meeting, is overly broad and unreasonable.

The fundamental question presented by this case is whether Appellant's right to representation during the meeting about his "Meets Expectation" PEPR is absolute, or whether there are any conditions on that right, and if so, what those conditions would be. The hearing officer's fundamental responsibility in interpreting regulations is to find and give effect to the promulgator's intent in enacting the regulations. Reg'l Transp. Dist. v. Lopez, 916 P.2d 1187, 1192 (Colo. 1996); Lakeview Assocs. v. Maes, 907 P.2d 580, 584 (Colo. 1995). To determine the promulgator's intent, the hearing officer must look first to the "plain and ordinary meaning" of the language in question. Jones v. Cox, 828 P.2d 218 (Colo. 1992). Words and phrases should be given effect based on that "plain and ordinary meaning," unless this would lead to an absurd result. Farmer's Insurance Group Inc. v. Williams, 805 P.2d 419 (Colo. 1991). If this is the case, then the hearing officer may look to well-established canons of statutory construction.¹¹ She may rely on other factors to determine the meaning of the regulation, including prior case law, the consequences of a given construction, and the end to be achieved by the regulation. *See*, § 2-4-203, 1 C.R.S. (1999); Schubert v. People, 698 P.2d 788, 793-94 (Colo. 1985).

The essence of Appellant's position is that the "plain meaning" of Sec. 9.1.5 (B) (iv) permits an employee to require the delay of any meeting between an employee and a supervisor, despite the nature and substance of the meeting, to arrange for representation. Such an absolute right becomes nonsensical upon closer examination. This interpretation could grind city government to a halt, lead to excessively litigious relationships between employees and their supervisors, even in the absence of any potential dispute, and ultimately could cost untold taxpayer dollars without any demonstrated justification or purpose. To apply this regulation as an absolute right would clearly lead to an absurd result that cannot have been intended by the promulgators of the City Charter.

There are CSR rules which apparently do presume the right to counsel during meetings in certain contexts. While the rules on this issue may not be directly relevant to Appellant's case for various reasons, the hearing officer "should give effect to each word and construe each provision in harmony with the overall statutory design, whenever possible." City of Florence v. Bd. of Waterworks, 793 P.2d 148, 151 (Colo. 1990). An examination of those rules relevant to the right of employee representation may be helpful in ascertaining the scheme they intend to establish, and may even illuminate the promulgators' intent behind Sec. 9.1.5 (B) (iv).¹²

CSR Rule 16 provides as follows in relevant part:

Section 16-30 Pre-disciplinary Notification of Contemplation of Suspension, Involuntary Demotion or Dismissal and Notice of Pre-disciplinary Meeting.

¹¹ *See*, Regular Route Common Carrier Conference v. Public Utilities Commission, 761 P.2d 737, 745 (Colo. 1988) which case applies the canons of statutory construction to administrative regulations.

¹² The CSR rules notwithstanding, it is important to recall that the City Charter controls. It cannot be amended by the CSR rules. Rather, the rules exist to affect the Charter mandates. Therefore, in harmonizing the Charter and the CSR rules, the hearing officer cannot interpret the CSR rules in a manner inconsistent with the Charter. In the event of a conflict, the Charter prevails. Therefore, the fundamental issue in this case remains the appropriate application of Sec. 9.1.5 (B) (iv).

...E. Notice of contemplation of disciplinary action and pre-disciplinary meeting.

The notice of contemplation of disciplinary action and pre-disciplinary meeting shall contain the following:

- ...5. That the employee is entitled to *have a representative* of his or her choosing present *at the meeting*. It is not necessary for the representative to be an employee of the City and County of Denver.¹³

(Emphasis added.) Similarly, CSR 13-60 states as follows in relevant part:

Section 13-60 Procedure When Anticipated Rating Will Be Lower Than “Meets Expectations”

If the anticipated rating is lower than “Meets Expectations,” the agency shall advise the employee of the anticipated rating a reasonable time in advance, but in no event less than two (2) working days, *and shall allow representation at the meeting* to review the Performance Enhancement Program Report in accordance with Section 17-20 Representation.¹⁴

(Emphasis added.)

CSR 17-21, which previously set forth the text of Sec. 9.1.5 (B) (iv), was excluded when the entire Rule 17 was eliminated and recodified in other sections of the CSR rules. Thus, while CSR 13-60 specifically provides for representation at a meeting when the anticipated rating is “*Below Expectations*,” and is silent as to higher PEPR ratings, it still refers to the old CSR Section 17-20 in which the City Charter provision was restated.

The Agency argues that based on the elimination of CSR 17, the only remaining rule that is possibly relevant to Appellant’s case is CSR 15-93. That rule states as follows:

15-93 Representation

The representative of an employee, including officers and business agents of unions or other associations to which an employee belongs, shall be given the same rights to speak on behalf of the employees during *any type of meeting* with the employee’s supervisor or manager as would be given the employee.

¹³ Because there is no evidence in this case tending to suggest that Appellant had any reasonable expectation that substance of the meeting in question related to any potential disciplinary action, this rule is not directly relevant to Appellant’s case.

¹⁴ Appellant argues that the Agency’s failure to provide Appellant with two working day’s notice of the meeting at issue was in violation of this regulation. This rule applies only to “Below Expectations” ratings. Appellant’s rating was “Meets Expectations.” Therefore, the hearing officer finds this rule inapplicable to Appellant’s case.

(Emphasis added.) The Agency argues that it did not prohibit Appellant from having representation at the meeting, or would not have prohibited the presence of the representative if Appellant had appeared with one, and that it told Appellant as much in its e-mails of July 29, 2002 (Exhibit 8, p. 3). Therefore, the Agency posits its actions were not in violation of this rule.

The hearing officer notes that while this rule does reference “any type” of meeting, the focus of the rule addresses the employee’s representative’s right to speak on behalf of the employee. The suggestion that the employee has a right to have the representative present at any type of meeting is therefore secondary to the apparent purpose of the rule. This rule can therefore be read to presume that the presence of the representative has occurred. It does not specifically state that employees have a right to demand postponement of a meeting in order to arrange for the presence of that representation, and therefore sheds no more illumination on when the right of postponement arises than does Sec. 9.1.5 (B) (iv) itself does.

The hearing officer notes that Sec. 9.1.5 (B) (iv) does not expressly limit its applicability to the context of “meetings” or otherwise provide any context. On the other hand, CSR 13-60 and 16-30 E. 5) appear to provide a right to the presence of representation at any such meetings. Under CSR 16-50 A. 19), an employee may face termination in the event of three consecutive rating periods in which (s)he fails to meet expected standards of performance. Thus, the thing these two regulations have in common is that *the substance of the meeting may have some effect on the employee’s employment status or rights.*

On questions of regulatory interpretation, the Agency responsible for administering the program is entitled to deference “if it is based on a permissible construction of the statute.” Swonger v. Surface Transp. Bd., 265 F 3d 1135 (10th Cir. 2001), *citing* Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The hearing officer is inclined to defer to the Agency officials responsible for administering the regulations where those regulations are a matter of Agency expertise, unless the Agency’s interpretation is arbitrary or clearly inconsistent with the stated objectives of the rule.¹⁵

The Director of the Career Service Authority testified as to his interpretation of what is a reasonable interpretation of Sec. 9.1.5 (B) (iv). It is clear that employees have a right to representation when interacting with supervisors at any time they reasonably believe it will be necessary to protect their legal interests (such as meetings involving potential disciplinary actions, which suggest a potential ramification to their property interests). In the Director’s opinion, that right is more limited with respect to meetings in which no such ramifications to an employee’s legal interests are reasonably anticipated. Under the Director’s interpretation, the nature of the meeting (and therefore the potential ramifications to the employee’s rights) is a factor to be considered in determining whether the employee’s right to the presence of a representative is substantial enough to warrant postponement of the meeting, if representation is not available.

Thus, the essence of Mr. Yearby’s interpretation is that, in the absence of any reasonably foreseeable potential ramifications to an employee’s employment rights or interests, the

¹⁵ In this case, the “Agency” responsible for administering the personnel regulations, and therefore in possession of such expertise, is the Career Service Authority.

employee has a right to have representation present at any meeting with a supervisor, *if he or she can arrange for the presence of the representative within the time allotted for the meeting.*

While Mr. Yearby did not promulgate the relevant Provision of the City Charter, the hearing officer nonetheless finds his interpretation, as the Personnel Director responsible for administering the Career Service Personnel system, reasonable and entitled to deference. The hearing officer is not only inclined to concur with the opinion of the Director, she is at a loss for a more reasonable solution. For these reasons, the hearing officer concludes that Sec. 9.1.5 (B) (iv) does not grant an absolute, unqualified right to representation at any meeting or other interaction between an employee and his or her supervisor, despite the nature of the meeting or interaction. Rather, it is clear that the promulgators' intent was that employees have the right to seek assistance *in the protection of their rights* at all times. This presumes some potential danger or threat to those rights may be on the horizon, before the circumstances give rise to a heightened right to counsel requiring postponement of a meeting.

The hearing officer further concurs that this interpretation is not inconsistent with existing CSR rules expressly guaranteeing the right to representation under conditions clearly warranting a heightened right to representation. CSR 16-30 E. 5) specifically references disciplinary actions. CSR 13-60 references "Below Expectations" PEPR's. The right to the presence of counsel is *presumed* in the context of meetings having such potential impact to the employee's status or rights, thus clearly invoking the right to representation. Because of that presumption, the employee's right to representation in turn presumes that any meeting on such topics *should* be postponed in the event a representative cannot arrange to be present. These regulations are not inconsistent with the general provision of the right to representation under the City Charter as it is interpreted here. They are merely more specific as to when that right must be provided for, rather than merely permitted.

Based on the above analysis, the hearing officer interprets Sec. 9.1.5 (B) (iv) of the City Charter to provide as follows. An employee has a right to appear with representation at any time under the City Charter. However, the nature of the meeting or interaction is a determining factor that must be considered when ascertaining the extent of the right to have representation present. The employee cannot demand delays in order to achieve that representation unless (s)he can articulate some reasonably foreseeable impact to an employment right or interest, giving rise to the heightened right to have representation present. If the employee does articulate justification for the heightened right, then the Agency is bound under Sec. 9.1.5 (B) (iv) to postpone the meeting.¹⁶ The burden of showing this is on the employee. If the employee cannot articulate any reasonably foreseeable impact to his or her rights, then it is his or her burden to arrange for representation to be present by the time of the meeting or interaction as it is originally scheduled.

¹⁶ The two most obvious examples of such cases are disciplinary actions and "Below Expectations" PEPR's. Representation during meetings on these topics is already provided for in the relevant regulations. However, there may be other types of meetings at which the employee's legal interest also requires the presence of representation. Because the hearing officer cannot foresee all potential circumstances, in light of the general language in Sec. 9.1.5 (B)(iv) she is not prepared to limit the right to demand a delay for purposes of securing representation to these two scenarios. However, the burden of showing an employee's interest rises to the level requiring the presence of representation rests with the employee.

The Agency, on the other hand, runs the risk of running afoul of the City Charter and violating the employee's right to representation, where the employee requested a postponement of a meeting with a supervisor and has articulated a reasonably foreseeable impact to his or her rights, but was denied. In such cases, where an employee can show an adverse affect to his or her interests resulted, the Agency may face reversal of any action it takes in the absence of the employee's representative.¹⁷

In the present case, no such potential impact to Appellant's employment status or other legal interest has been shown.¹⁸ The only potential damage to his interests that Appellant has been able to articulate, in his grievance and appeal documentation as well as through testimony, is his dissatisfaction with the "Meets Expectations" PEPR. The CSR rules afford no express remedy to Appellant for any potential impact to his employment rights or interests, and he has not shown any such potential damage might otherwise have arisen from meeting with his supervisor without representation. Appellant has therefore failed to show that the Agency's refusal to allow an extension for the procurement of a representative was in violation of the right afforded under the City Charter.

Finally, even if Appellant had articulated a reasonably foreseeable impact to his rights justifying a postponement of the meeting in question, the hearing officer lacks jurisdiction over Appellant's requested remedy.

2. Lack of jurisdiction over Appellant's requested remedy (element d).

Appellant insists that this case is about his right to representation, and does not ultimately boil down to a reversal of the PEPR. The hearing officer is persuaded that this case is largely a matter of principle for Appellant, if not for the Agency as well. Nonetheless, Appellant requests that Agency's decision to hold the meeting about his PEPR in the absence of Appellant's representative be "reversed" and that the Agency be ordered to reschedule and re-conduct the PEPR meeting with Appellant's representative present. The ultimate flaw in Appellant's argument is revealed when examining Appellant's requested remedy. Appellant's requested relief belies that he alleges a regulatory violation under one theory (the alleged Charter violation) while seeking relief under another theory (reversal of the PEPR).

It is undisputed that the hearing officer has no jurisdictional authority over "Meets Expectations" PEPR's under CSR 19-10 e) (set forth above). Under that rule, the hearing officer is barred from granting Appellant's relief for two reasons. First, she is jurisdictionally prohibited at the outset from reviewing any evidence concerning a "Meets Expectations" PEPR. This was

¹⁷ This still assumes, however, that the remedy requested is one over which the hearing officer has jurisdiction and the authority to grant a meaningful remedy.

¹⁸ When pressed during oral argument on the Agency's Motion to Dismiss what actual damages Appellant suffered as a result of the meeting occurring without his representative present, Appellant made a somewhat vague allusion to harassment and discrimination. This allegation was not raised in the grievance nor in the preparation procedures for this hearing, and had never come up until the hearing officer asked Appellant point-blank what interest of Appellant's had been damaged. The hearing officer therefore disregarded this oblique allegation as not timely raised and unsupported by any evidence in the record. See, Martha Douglas, above.

the basis for the Agency's Motion *in Limine*, which the hearing officer granted without objection from Appellant.

Second, and as a result of this prohibition, there no evidence in the record on the substance of Appellant's PEPR. Yet the rule expressly states that "the *only* basis for reversal of the Performance Program Enhancement Report *shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation.*" (Emphasis added.) The hearing officer cannot find Appellant's PEPR arbitrary and capricious, with no evidence tending to support this.

The meeting Appellant requests be revisited would be meaningless without a reversal of the PEPR in question. Appellant cannot create jurisdiction over his "Meets Expectations" PEPR by seeking its reversal using an unrelated legal theory. If the hearing officer were to find element d (that she has jurisdiction and the power to grant a remedy under this theory), such a finding would effectively reverse the hearing officer's finding that element b (requiring no express prohibition against Hearings Office jurisdiction over the subject of the appeal). Thus, the hearing officer lacks jurisdiction to reverse the only Agency action that would give any meaning to Appellant's requested remedy that the meeting take place again.

Finally, even assuming there were some remedial value in "reversing" the Agency's decision to hold the meeting, and ordering another meeting be held notwithstanding reversal of the PEPR, the hearing officer lacks jurisdiction over the management style and decisions of an agency, unless and until those actions constitute a violation of the governing regulations over which the Hearings Office had jurisdiction. *See, Darrel Delimont, above.* Therefore, the hearing officer would have had to conclude that the Agency's action in holding the meeting was in violation of a regulation before she could "reverse" it. The hearing officer has concluded that the meeting was not in violation of the City Charter as Appellant alleges. She therefore has no grounds for "reversing" the Agency's action.

For these reasons, the hearing officer concludes that she lacks jurisdiction to grant Appellant's requested remedy.

CONCLUSIONS OF LAW

1. Appellant has shown two elements necessary for a finding of Hearings Office jurisdiction over his grievance appeal:
 - a) that the Agency took an action, and
 - b) there is no express prohibition against jurisdiction over the subject action.
2. Appellant has failed to show two elements necessary to establish jurisdiction:
 - c) that the Agency action that is the subject of Appellant's complaint was in violation of some relevant CSR rule, Charter Amendment or Ordinance; and

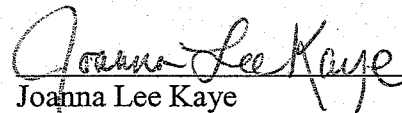
- d) that the hearing officer has the power to grant a remedy by *affirming, modifying or reversing* the Agency action in question.
3. In the absence of a showing of two elements necessary to establish jurisdiction over this case, the hearing officer concludes she lacks jurisdiction.

DECISION AND ORDER

Based on the above analysis, the hearing officer GRANTS the Agency's Motion to Dismiss for lack of jurisdiction.

This case is hereby DISMISSED.

Dated this 9th day of December, 2002.


Joanna Lee Kaye
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 **ORDER OF DISMISSAL** by depositing same in the U.S. mail, postage prepaid, this 10th day of November, 2002 addressed to:

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

Henry Vernon Good, Jr.
8766 E. Frontier Place
Denver, CO 80237

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in the interoffice mail, this 10th day of November, 2002, addressed to:

Robert D. Nespor
Assistant City Attorney
Employment Law Section

Bill Miles
Department of Public Works
Human Resources Dept 609

Virginia Annado