

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

Appeal No. 65-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: JEFFREY HARNDEN

And

Agency: DEPARTMENT OF GENERAL SERVICES, PUBLIC OFFICE BUILDINGS,
and The City and County of Denver, a municipal corporation.

NATURE OF APPEAL

Appellant is appealing the denial of his second step grievance relating to his "Below Expectations" Performance Enhancement Program Report (PEPR) rating for the period from March 1st, 2001 through March 1st, 2002.

CONCLUSION

The "Below Expectations" PEPR is affirmed. Appellant failed to prove, by a preponderance of the evidence, the rating was arbitrary, capricious, and without rational basis or foundation as required by Career Service Rule (CSR) 19-10 e.¹

¹ 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.

- e. Grievance of Performance Enhancement Program Reports: If the grievance of 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. If such an express finding is made, the Hearing Officer shall require the department to issue a new Performance Enhancement Program Report in conformance with the Hearing Officer's decision.

INTRODUCTION

Appellant is appealing the denial of his second step grievance relating to his "Below Expectations" PEPR. Appellant, a career service status employee, received this rating for the period covering March 1st, 2001 through March 1st, 2002 on February 28th, 2002, effective March 1st, 2002. Appellant filed his first step grievance on March 7th, 2002 requesting the rating be changed to "Meets Expectations," that all documentation surrounding this rating be removed from his file, and he be made whole. On March 13th, 2002, Appellant received a letter denying his first step grievance. His second step grievance was filed on March 14th, 2002 with a denial letter hand delivered to Appellant on March 18th, 2002. Appellant filed his appeal with the Hearings Office on March 28th, 2002.

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board, on June 18th, 2002. Appellant was present and represented by Cheryl Hutchison. The Agency was represented by Assistant City Attorney, R. Craig Hess, Esq., with Willie F. (Faye) Cleveland serving as advisory witness for the Agency.

The following witnesses testified at the hearing: Appellant, and Faye Cleveland, Supervisor of Administrative Support, for the Agency.

Exhibits 1,2, and 4 through 10 were admitted into evidence by stipulation. Exhibit 3 was not admitted.

ISSUES ON APPEAL

1. Whether Appellant proved, by a preponderance of the evidence, his "Below Expectations" PEPR rating was arbitrary, capricious, and without rational basis or foundation violating CSR 19-10 e.
2. Whether the Agency violated CSR 13-23 Levels of Performance.
3. Whether Appellant violated CSR 13-50 Grievances and Appeals Relating to Performance Enhancement Program Reports.

JURISDICTION

CSR 13-50² provides for the filing of a grievance, as it relates to a PEPR, in accordance with CSR 18 Grievance Procedure³ and CSR 19 Appeals. All requirements to

file a timely appeal have been met. Under CSR 19-27 the Hearing Officer must affirm, modify, or reverse the actions of the Agency giving rise to the appeal.⁴

² Section 13-50 Grievances and Appeals Relating to Performance Enhancement Program Reports

An employee may file a grievance pursuant to Rule 18 GRIEVANCE PROCEDURE, and may appeal that grievance in accordance with Rule 19 APPEALS, insofar as it relates to Performance Enhancement Program Reports, but may not grieve or appeal the Performance Enhancement Program, as such.

³ Section 18-12 Grievance Procedure

If a work related dispute was not resolved through alternative dispute resolution or if alternative dispute resolution was not previously attempted and a career service employee has a grievance as defined in Section 18-10 a of this rule, the employee may file a grievance in accordance with the following procedures:

1. Form: The grievance shall be presented in writing and be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought. The grievance form shall have a certificate of mailing or certificate of hand delivery which indicates the date the grievance was placed in the mail or was hand delivered to the immediate supervisor.
2. Filing with Supervisor: The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) days give the employee dated, written notice of the decision. The immediate supervisor's written decision shall contain a certificate of mailing... The period of time shall be computed in accordance with subparagraph 19-22 a) 2).
3. Filing with Agency Head: If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, the employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) calendar days after receiving the decision of the immediate supervisor. The grievance form filed with the head of the agency or designee must contain a certificate of mailing or certificate of hand delivery.

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in writing to the head of the agency or designee no later than two (2) calendar days after the supervisor's response was due....

The head of the agency, or designee, shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate of mailing or certificate of hand delivery....

4. Filing with the Career Service Authority: If the employee still feels aggrieved after receiving this decision, or the agency head has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances of the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service board in accordance with Rule 19 APPEALS....

⁴ 19-27 Decision of Hearings Officer

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 on the parties.

RELEVANT FACTS

On February 28th, 2002 Appellant received a "Below Expectations" PEPR, effective March 1st, 2002, for the period from March 1st, 2001, through March 1st, 2002. The Agency must notify an employee of an anticipated "Below Expectations" PEPR at least two days in advance of the meeting to review the PEPR to comply with CSR 13-60. Appellant attended the meeting with representation, as allowed by the rule.

Appellant disagreed with the rating, stating that some of the items included were not under his control. Also, he received additional work, which displaced other work, that the prevailing wage and duplicate payment problems were not under his control and items that were previously grieved were included in this PEPR. Of the 8 areas evaluated, 4 are Priority I, 2 are Priority II, and 2 are Priority III. The higher the "Priority," the more important the job responsibility. Appellant received a "Below Expectations" rating in 7 areas, 3 in Priority I.

Appellant received the first "Below Expectations" because payment vouchers were not processed on time to the Auditor's Office, resulting in \$423 penalty to the Agency. Also, 4 vouchers were returned for duplicate payment and 1 original invoice was missing. The Expected Accomplishments are to submit vouchers to the Auditor's Office within 5 days of receiving them, with no more than 2 errors per year. Twice during the rating period Appellant needed help to get the vouchers processed because he was behind.

The second "Below Expectations" rating involved the petty cash fund. The petty cash fund is never to go below \$250 and reimbursed at least once a month, with no errors. Three times during the rating period Appellant failed to reimburse petty cash, and the December 2001 receipts were not sent in for reimbursement until February 2002. Appellant admitted this fact in the meeting mentioned above. On May 16th, 2002 Appellant received a written reprimand for not following the petty cash procedures.

The third "Below Expectations" rating involved record keeping for employee uniforms, shoes, and safety glasses. Appellant did not maintain the records monthly as required. Appellant admitted not maintaining these records monthly.

The fourth "Below Expectations" rating was because Appellant did not maintain accounting files and records. These jobs were routinely given to co-workers to do.

Appellant received the fifth "Below Expectations" for not adhering to the Work Order phone policy. Answering this phone by the third ring is required. Appellant left his work area when this phone was ringing, leaving it for someone else to answer, or would wear earphones so he could not hear it ringing. Appellant was counseled about answering the phones in 2000, 2001, and 2002.

A sixth "Below Expectations" was received for Appellants atrocious punctuality. Appellant arrived at work late so often, he was offered the opportunity to change his work hours, which he declined. The expectation is to arrive at work within seven minutes of the starting time with no more than one tardy per month. Appellant averaged ten late arrivals per month during this rating period. Appellant admitted to habitually arriving at work late.

Appellant received a seventh "Below Expectations" rating for not keeping a clean work area although continually reminded to do so. Appellant admitted a clean work area was a low priority for him.

On February 21st, 2002 the Agency notified Appellant of the anticipated "Below Expectations" rating and a meeting to review the supporting reason was scheduled for February 26th, 2002. Appellant was present at the meeting with his AFSCME (American Federation of State County and Municipal Workers) representative Cheryl Hutchison. They met with Agency Director, Dan Barbee and Appellant's immediate supervisor Faye Cleveland to discuss the anticipated rating.

On February 28th, 2002 Appellant received a "Below Expectations" rating. His first-level grievance was presented to his supervisor, Faye Cleveland, on March 7th, 2002. On March 13th, 2002 Appellant received the denial of his first-level grievance. The second-level grievance was presented to Agency Director Dan Barbee on March 14th, 2002. On March 18th, 2002 Appellant received the denial of his second-level grievance. Appellant file his appeal on March 28th, 2002.

DISCUSSION

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 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).⁵ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (Colorado Civic Jury Instruction 3:5).⁶ 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

⁵ 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.

⁶ The content of this instruction was approved as an instruction in *Swaim 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 ed, 1984).

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 has the burden of proving the Agency was arbitrary, capricious, and without rational basis or foundation when compiling his "Below Expectations" PEPR.

Appellant alleges the Agency violated CSR 13-23 Levels of Performance⁷ by giving him a "Below Expectations" PEPR. This rule simply defines the levels of performance the Agency uses when rating an employee. There is no way for the Agency to violate this rule.

Appellant testified that when he went to work for the Agency 5 years ago, he never saw any rules or regulations for the Agency. Moreover, there are no written procedures for how to handle work that goes to the Auditor's Office, only a photocopy of rules regarding petty cash and that there is no rule other than Faye's rule (Faye Cleveland) about petty cash being replenished more than once a month. However, a review of Appellant's August, 2001 Performance Evaluation Plan Worksheet (plan) explains the guidelines for processing vouchers to the Auditor's office and petty cash. Faye Cleveland testified that from 1998 through August, 2001 the same plan was in effect and that Appellant knew what was expected of him. The August 2001 plan had no substantial changes. For this appeal, the plan is equivalent to written rules or regulations.

Appellant's 1999 PEPR was "Meets Expectations," he did everything that was expected of him, he knew how to do his job. The rating for petty cash was "Exceeds Expectations." In 2000, 2001 and 2002, Appellant was "Below Expectations" in the area of voucher processing to the Auditor's Office. Cleveland testified that none of the other employees processing vouchers to the Auditor's Office were "Below Expectations." Petty cash for 2000, "Below Expectations," 2001, "Meets Expectations," 2002, "Below Expectations." On all of these PEPR's, in the areas that were "Below Expectations," there are comments explaining what was not done correctly.

⁷ CSR § 13-23 Levels of Performance

An employee's performance shall be rated according to the following criteria:

Outstanding -	Consistently exceeded accomplishments of the job and made a major contribution to the agency.
Exceeds Expectations -	Consistently exceeded accomplishments of the job.
Meets Expectations -	Consistently met expected accomplishments of the job.
Below Expectations -	Employee failed to meet a significant portion of the employee's expected accomplishments.

During cross-examination, Appellant testified he doesn't remember if he read the 2000 PEPR completely. He didn't read it before receiving the 2001 PEPR, that he was told it contained some "Below Expectations" and what he needed to work on. Appellant also testified he did not grieve the May 16th, 2001 written reprimand for violating the petty cash rules. The reprimand was for allowing the petty cash fund to drop below the \$250 limit after repeated warnings not to. When asked about this, his reply was: "This was not a City policy, it was Faye's (Cleveland) policy." Although not clarified, the implication was that because this was not a City policy he did not have to follow it even though it was part of his plan. Moreover, Appellant did not follow the procedure to only disburse petty cash once a week. He did it daily so people didn't have to wait to get their money back. Although this practice was favorable to the employees, it was against policy.

Appellant has had similar problems throughout his employment with the City. Excerpts from the "Areas for Improvement for 1998," from his 1997 "Exceeds Expectations" PEPR from the Department of Excise and Licensing illustrate this point: "Jeff takes it upon himself to create new procedures when there are already procedures in place. He also needs to learn to follow instructions from his supervisor. Jeff needs to focus on the task at hand and allow his co-workers to ask for his assistance." He was not on time for that job either. "I also expect Jeff will start coming in on time everyday."

Appellant attributed his "Below Expectations" to many circumstances:

- Faye was not approachable.
- Faye was not helpful.
- Contractors did not return calls.
- Contractors did not turn in paperwork.
- The fax machine does not date things.
- The computer does not allow him all the info he needs.
- He was never told exactly what his job was
- Answering the phone took time away from the job he was on.
- The phone system doesn't give the same information as the old system.

Appellant exhibited either selective or evasive memory of events negative towards him. When asked on direct examination about his 2002 PEPR, he stated he had no indication from Faye he would get a "Below Expectations" PEPR. I specifically asked

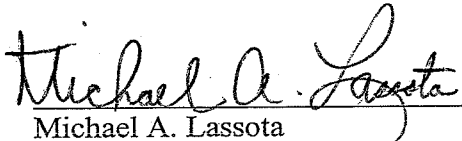
if he remembered getting at least two days notice before receiving that PEPR. I asked the question three times before Appellant finally said he didn't remember getting two days notice. The 2002 PEPR has a paragraph devoted to the meeting, attended by Appellant and his representative, about the anticipated "Below Expectations" PEPR, two days before he received it.

Appellant did not violate CSR 13-50.⁸ There was no testimony regarding how Appellant allegedly violated this rule. Also, the job responsibilities Appellant admitted he performed at a "Below Expectations" level will not be discussed further.

ORDER

Appellant has not proved by a preponderance of the evidence the Agency was arbitrary, capricious, and without rational basis or foundation in the preparation of his 2002 PEPR. The "Below Expectations" PEPR is affirmed.

Dated this 12th day of July, 2002.


Michael A. Lassota
Hearing Officer
Career Service Board

⁸ Section 13-50 Grievances and Appeals Relating to Performance Program Reports

An employee may file a grievance pursuant to Rule 18 GRIEVANCE PROCEDURE, and may appeal that grievance in accordance with Rule 19 APPEALS, insofar as it relates to Performance Enhancement Program Reports, but may not grieve or appeal the Performance Enhancement Program, as such.

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 12th day of July, 2002 addressed to:

Cheryl Hutchison
AFSCME
3410 Quebec St. Suite 7500
Denver, CO 80207

Jeffery N. Harnden
909 Pearl St. #306
Denver, CO 80203

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 12th day of July, 2002, addressed to:

R. Craig Hess
Assistant City Attorney
Employment Law Section

Tom Migaki
Department of General Services

Dan Barbee
Public Office Buildings Division

Virginia Gamado