

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

Appeal No. 25-06 A

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MARY LOUISE PADILLA,

Appellant/Respondent,

vs.

RISK MANAGEMENT, DEPARTMENT OF BUDGET AND MANAGEMENT,
Agency, and the City and County of Denver, a municipal corporation,

Agency/Petitioner.

This matter is before the Career Service Board ("Board") on the Agency's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** in part and **MODIFIES** in part the Hearing Officer's Decision dated September 13, 2006, on the grounds outlined below.

FINDINGS

This appeal involves a "needs improvement" PEPR under Career Service Board Personnel Rule ("CSR") 19-10 (B)(3), which provides that "the only basis for reversal of the PEPR shall be an express finding that the rating was arbitrary, capricious, and without rational basis or foundation." The Board agrees with the Hearing Officer that agency action is considered arbitrary and capricious if a reasonable person, fairly and honestly considering the same evidence the agency considered, would be compelled to reach a contrary conclusion. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1245-1246 (Colo. 2001). The Hearing Officer's finding that the Agency's rating was arbitrary and capricious is supported by the evidence in the record.¹

In its opening brief, the Agency focuses on two central arguments: 1) there was insufficient evidence to support a finding that Appellant should have received an 85%

¹ The Board has reviewed the Hearing Officer's decision on the grounds of sufficiency of the evidence under CRS 19-61(D). Although the Agency raised alternative grounds for appellate review, it did not articulate how CSR 19-10 (B)(3) may have been erroneously interpreted, nor did it sufficiently demonstrate a policy setting precedent and therefore the Board declines to review the decision on those grounds.

score on the audit review, and 2) there was insufficient evidence to support a finding that Mr. Hutchins harbored personal animosity toward Appellant. The Board will address both arguments but notes that the Hearing Officer's decision was based on multiple evidentiary findings and to the extent the Agency did not address those other findings, it has waived any argument as to the sufficiency of the evidence that supports them.

On the Agency's audit review, Appellant needed an overall score of at least 80% to achieve a "meets expectations" rating, while Mr. Hutchins gave her an overall score of 78%.² The evidence was undisputed that this rating was based on an audit of 60 cases. Transcript, Vol. II. 76:2-4; Exhibit Notebook, pp. 74, 93. Appellant, however, introduced into evidence the audit results of only 13 cases. (Exhibit Notebook, pp. 108, 111, 114, 124, 128, 136, 140, 143, 146, 150, 155, 158, 161). The Hearing Officer determined that Mr. Hutchins made errors in scoring some of the audit results and Appellant should have been given 5 additional points, which would have increased her score to 85%. While the Board accepts these findings, there is insufficient evidence in the record to determine whether the 5 additional points would have increased Appellant's overall score to 80% or higher when neither party introduced into evidence the other 47 audits which comprised the Agency's total audit review. Consequently, the Hearing Officer's conclusion, based on a review of only 13 cases, that Appellant should have received a score of 85% in the Agency's review of 60 cases is unsupported by the record.

Nevertheless, there is ample additional evidence in the record to support the Hearing Officer's finding of arbitrary and capricious. A PEPR must be fairly based on PEP standards in order to give an employee adequate notice of the criteria by which her performance will be measured. As the Hearing Officer found, there are inconsistencies between the six PEP standards and the seven categories and twenty-eight subcategories measured on the claim review forms. Further, it is unclear whether Mr. Hutchins's audit review comprised the entire basis of the PEPR, or only set the scores for those four categories in the PEP that use the 80% standard. Moreover, the errors the Hearing Officer found in 13 audit reviews were not only careless but some appear arbitrary: i.e., faulting Appellant for failing to return a telephone call on a city holiday and faulting Appellant for using the wrong injury code when her investigation notes seem to indicate it was the correct code. Because customer service is one of the PEP standards, surveys should have been sent out early enough to receive responses well before the PEPR review date. However, customer service surveys were not sent out until the same day Mr. Hutchins sent Appellant notice that he anticipated giving her a "needs improvement" rating and Mr. Hutchins refused to consider a favorable survey received on the PEPR review date. In addition, the PEPR narrative on customer service does not track the PEP standards for customer service.

The September PIP review points to "demonstrated areas of sustained improvement" with only two areas needing further improvement: contacting parties

² The 78% rating was based on the following averages: initial investigation 78%; reserving 76%; medical issues 87%; claims handling issues 74%; data issues 86%; DOWC/timeframe issues 70%. Hearing Officer's Decision, p. 8. Although neither party nor the Hearing Officer addressed this issue, the average of these six factors is actually 78.5%, which should have given Appellant an overall score of 79%.

within one day of assignment and regular reserve reviews. Although the review promised a follow-up meeting in November, no meeting was ever held, nor was Mr. Hutchins' two-page evaluation of Appellant's progress ever shared with her, creating a reasonable impression that by November 2005 Appellant was meeting performance standards. Following the "needs improvement" rating on February 28, 2006, Appellant did not receive a PIP for forty-one days, despite the requirement of CSR 13-40 (C) that a PIP shall be provided no later than 10 days after the PEPR review date. More significantly, the PIP Appellant did receive in April 2006 repeated almost verbatim the 2005 PIP without removal of any of the problem areas that Appellant had corrected during the last rating period.

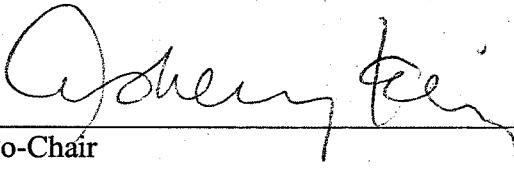
Finally, turning to the Agency's second argument, the Hearing Officer found, based on the testimony of Appellant's co-workers, that Mr. Hutchins actively disliked Appellant. The Agency spent the greater portion of its brief disputing this finding; however, it is certainly within the Hearing Officer's province to judge the credibility of witnesses and the Board will not disturb this finding which is supported by evidence in the record. Mr. Hutchins' personal feelings toward Appellant, coupled with the inconsistencies between the PEP and the PEPR, the errors in the audit review, the procedural carelessness of the PEPR and corresponding PIP's, all contribute to the conclusion that Appellant was arbitrarily deprived of an objective, good faith evaluation of her performance.

ORDER

IT IS THEREFORE ORDERED that the Agency's Petition for Review is **DENIED**, the Hearing Officer's Findings are **MODIFIED** in part and **AFFIRMED** in part, consistent with the Board's Findings, and the Hearing Officer's Decision of September 13, 2006, reversing the "needs improvement" rating and ordering a "successful" rating for the period February 1, 2005 to February 1, 2006, is **AFFIRMED**.

SO ORDERED by the Board on February 1, 2007 and documented this
15th day of February, 2007.

BY THE BOARD:



Co-Chair

Board Members Concurring:

Luis Toro
Nita Henry
Tom Bonner

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the foregoing **FINDINGS AND ORDER**, postage prepaid, this 15th day of February, 2007 to:

Lauren Cabot Oray, Esq.
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And **VIA INTEROFFICE MAIL** this 15th day of February, 2007:

Robert A. Wolf
City Attorney's Office
Litigation Section, Dept. 1108

Margaret Brown
Office of Budget and Management

Raymond Sibley
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