

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal Nos. 08-09, 09-09

DECISION

IN THE MATTER OF THE APPEAL OF:

PATRICIA VASQUEZ AND COLIN LEWIS,
Appellants,

vs.

DEPT. OF GENERAL SERVICES, THEATRES AND ARENAS,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

In these consolidated actions, Patricia Vasquez and Colin Lewis appeal the denial of their grievances concerning the calculation of merit increases accruing to them based on their 2008 performance reviews known as PEPRs. A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on April 9, 2009. The Appellants appeared pro se, while the Agency was represented by Assistant City Attorney Joseph Rivera. Agency exhibits 1-17 were admitted as were Appellants' Exhibit A-C. The Appellants called the following witnesses: Appellant Lewis, Jennifer Macy, Jeff Dolan, and Ed Sholz. The Agency called Appellant Vasquez, Pete Garritt and Jack Finlaw. For reasons stated below, the Agency action in awarding one-step increases to both Appellants is affirmed and the Appellants' appeals are dismissed.

II. ISSUES

There are two issues to resolve: the Agency's motion to dismiss for lack of subject matter jurisdiction; and whether the Appellants proved the Agency's interpretation of Rule 13 was arbitrary, capricious, or contrary to rule or law. Specifically, the Appellants' contend their 2008 performance ratings, "exceptional," entitle them to a three step (Lewis) and two-step (Vasquez) increase in pay, so that the Agency's interpretation of Rule 13, as allowing only for one step increases, improperly denies the correct increases.

III. FINDINGS

Colin Lewis is Manager of Finance for the Agency. In 2008 he was an exempt employee with a pay step 10. Patricia Vasquez is the Senior Financial Management Analyst, Theatres and Arenas, and reports directly to Mr. Lewis. In 2008 she was an exempt employee with a pay step 13. Both were hired January 1, 2005. Both have consistently received "Exceptional" ratings on their PEPRs (Performance Enhancement Program Report). (Exhibits 15-16). On his PEPR cover sheets, Appellant Lewis' PEP Evaluation Start Date has consistently been entered as "1/1/year", with End Date entered as "1/1/following year." [Exhibit 15]. With the exception of her PEPR for the year 2008, Appellant Vasquez' start and end dates have also followed this pattern. [Exhibit 16]. On her PEPR cover sheet for the year 2008, the start date entered is 1/1/2007 and the end date entered is 12/31/2007. (Ex 16-4).

Due to the current budget crisis, merit pay raises for 2009 are capped at a one-step increase by Denver City Council Bill 44 (CB 44), [Exhibit 11], even if an employee's PEPR rating is "exceptional." CB 44 is retroactive to 1/1/09, so that employees who were otherwise entitled to more than a one step merit increase "due in 2009" are capped, or limited to a single step increase.

IV. ANALYSIS

A. Motion to Dismiss.

The Agency moved to dismiss the Appellants' appeal during hearing. No decision was made at that time. The Agency basis for its motion is lack of subject matter jurisdiction under CSR 13-50 C., which must be read in conjunction with the immediately preceding rule.

Section 13-50 Grievances and Appeals Relating to PEPRs.

A...

B. An employee may appeal a grievance of a "Needs Improvement" rating in accordance with Rule 19 APPEALS. Appeals of grievances of other ratings are not permitted.

C. An employee may not grieve or appeal any other aspect of the Performance Enhancement Program.

First, it is apparent the Appellants do not challenge any aspect of the Performance Enhancement Program per se, but merely the application of it to their particular set of facts. Second, they claim the failure to grant their requested three and two step increases violates CSR 13-60 B., the result of which negatively impacts their pay. That claim is all that is required to acquire subject matter jurisdiction. "Any grievance which results in an alleged violation of the Career Service Rules...and negatively impacts the employee's pay...." CSR 19-10 A. 2. b. i. Because the Appellants have stated a claim for relief under the

jurisdictional rules, the Agency's motion is DENIED.

B. Whether Appellants' one-step merit increase for their 2008 PEPR was arbitrary, capricious, or contrary to rule or law.

The issue to resolve here is the application of the phrase "PEPRs due in 2009" in Denver City Council Bill No. 44 (CB 44). [Exhibit 11]. The pertinent language reads:

Notwithstanding any Career Service rule to the contrary, during fiscal year 2009, no merit increases in excess of one step for Performance Enhancement Plan Reports (PEPRs) due in 2009 shall be awarded to any employee in the Career Service...Employees who would have been entitled to receive more than a one step merit increase under the Career Service rules for a PEPR due in 2009 will only receive a one step increase under this provision.

The Agency alleged the Appellants' 2008 PEPR merit date was January 1, 2009. Impliedly, the Agency alleged the Appellants' merit date must also be their "due date" under CB 44. The Agency's position was supported by testimony by Pete Garritt, supervisor of records and relations for the Career Service Authority. His duties include the drafting and interpreting of Career Service Rules. Garritt testified "merit date" is the date an employee becomes eligible for a merit increase. According to Garritt that date for the Appellants is January 1 each year. [Garritt testimony]. The January 1 date derives indirectly from CSR 13-10 F. which reads "[f]or employees hired prior to January 1, 2008 it [the merit date] is the PEPR Evaluation end date they had as of December 31, 2007".¹ The term "PEPR Evaluation End Date" is no longer defined; however, the 2007 rules revision defined "PEPR Evaluation End Date" with identical words to those in the 2008 definition for Merit Date: "[t]he date the employee's annual evaluation period concludes." In turn, the 2007 definition of PEP Evaluation End Date reads "[f]or employees hired prior to January 1, 2006, it is the PEPR date they had as of December 31, 2005." [Exhibit 7]. The personnel actions for both Appellants in 2005 listed their PEPR dates as January 1. [Exhibits 13, 16].

Garritt presented a compelling business efficiency reason PEPR dates are limited to two days per month: in order to simplify pay periods. By limiting merit increase processing to two days per month - the first and sixteenth - merit increase paperwork is not required to be run on the anniversary date for each employee. If merit increases were awarded according to the Appellants' interpretation, merit increase paperwork would have to be run virtually every day of each month, depending on the anniversary date each employee, rather than on the two days specified by the CSA. [Garritt testimony].

¹ Although, the dangling pronoun "it" in the second sentence of the definition may refer either to "merit date" or "the date the employee's annual evaluation period concludes" in the previous sentence.

Garritt also testified there is an interest in consistency and fairness to the current system. The Appellants' interpretation would open the door to change the merit date for all CSA employees. *Id.*

There is a presumption of validity in administrative actions. See Velasquez v Dept. of Higher Education, 93 P.3d 540 (Colo. App. 2003); Garner v Colorado State Department of Personnel, 835 P.2d 527 (Colo. App 1992); Renteria v. Colo. State Dept of Personnel, 811 P.2d 797 (Colo. 1991). Consequently, the underlying question to resolve is not whether the facts may or should support the Appellants' claim, that they are entitled to three and two step increases, but whether the limitation of the Appellants' 2008 merit increases to one-step, was arbitrary, capricious, or contrary to rule or law. *Id.* The Appellants presented the following evidence to support their claim that the limitation of their 2008 merit increases to one step was wrongful.

1. The Appellants allege since they were hired January 1, 2005, their yearly evaluation end date, pursuant to CSR 13-10 F., falls on December 31 each year. They base this claim upon a plain reading of CSR 13-10 F. which reads, in pertinent part

Merit Date. The date the employee's annual evaluation period concludes. For employees hired prior to January 1, 2008, it is the PEPR Evaluation End Date they had as of December 31, 2007.

CSR 13-10 F. Despite the Appellants' contention, their PEPR end dates are clearly indicated as January 1, not December 31, for each year since the Appellants were hired, [Exhibits 15, 16], with one exception, which apparently became the focus of the Appellants' appeal. Exhibit 16-4 shows Vasquez' end date as 12/31/2007. Since it was the only exception, and no other rule change or other explanation satisfactorily explained the discrepancy, the most logical conclusion is that of Garritt, who explained the non-complying PEPR was a clerical error.

2. The Appellants also claimed testimony from the Director of Admissions and Theaters and Arenas, Jennifer Macy, supported their interpretation of CSR 13-10. Macy's duties include interpretation of the Career Service Rules. It was her opinion that CB 44 did not apply to Vasquez. (4/9/09 @ 9:06:32). Macy's interpretation of the Career Service Rules, while appropriate for internal purposes, is not binding on the Career Service Board, which delegated its *de novo* review authority to hearing officers. Denver City Charter 9.1.1.

3. In addition, Jeffrey Dolan, Executive Director of CSA, testified that, as Lewis' hire date was 1/1/05, his PEPR evaluation period would begin 1/1/05 and conclude 12/31/06, with the same sequence going forward. (Dolan testimony 9:39:44). For reasons stated immediately above, Dolan's conclusion is not binding on this decision.

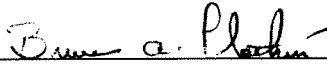
4. Finally, the Appellants argue the evaluation period proposed by the Agency is 366 days (1/1/08 through 1/1/09) and such a yearly period is inconsistent with any other annual measurement used by the City. They argue that, by the use of the phrase "PEPR due in 2009", CB 44 clearly did not intend to affect compensation for 2008. This is the strongest allegation in favor of the Appellants' claim. A 366 day period is uncommon. In addition, the language of CSR 13-10 F. is imprecise, and was therefore understandably confusing to Macy and Dolan. It is not possible to apply the rule to employees hired before 2008 without reference to earlier versions of the rule, and earlier rule versions are not readily available to employees. Nonetheless, a lack of precision and lack of definition within a rule do not render it invalid if it is susceptible to a fair interpretation that is consistent with the other Career Service Rules.

The Appellants failed to prove the Agency's interpretation of CB 44 to include the Appellants' 2008 PEPRs was wrongful by a preponderance of the evidence. Therefore, the Agency's administrative action in awarding the Appellants one step increases was not arbitrary, capricious or contrary to rule or law. The Appellants are entitled only to what they already received, a one-step increase. Consequently their claims must be denied.

V. ORDER

For reasons stated above in this Decision, the Agency action in awarding one-step merit increases for Appellants' 2008 PEPRs is AFFIRMED, and Appellants' appeals are DISMISSED WITH PREJUDICE.

DONE May 20, 2009.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with CSR 19-60, 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. All petitions for review must be filed by mail or by hand delivery as follows:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
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