

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

Consolidated Appeal Nos. 100-06, 101-06, and 102-06

DECISION

IN THE MATTER OF THE APPEAL OF:

JOAN WHITE

Appellant,

vs.

**DEPARTMENT OF COMMUNITY DEVELOPMENT AND PLANNING,
NEIGHBORHOOD INSPECTION SERVICES,**

and the City and County of Denver, a municipal corporation,
Agency.

The hearing in this appeal was held on March 20, 2007 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by James E. Freemyer, Esq. The Agency was represented by Assistant City Attorney Robert Nespor, and Janice Alexander served as the Agency's advisory witness. 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 a Senior City Inspector for the Denver Department of Community Planning and Development. On Nov. 17, 2006, Appellant filed three appeals challenging her needs improvement Performance Enhancement Program Report (PEPR) dated Sept. 27, 2006. The appeals also raise issues of discrimination and harassment based on age, mediation and a worker's compensation claim, and retaliation for her participation in mediation processes. On Dec. 12, 2006, the appeals were consolidated for hearing. At the commencement of the hearing, the parties stipulated to the admissibility of all exhibits presented by the parties, which are Agency Exhibits 1 - 23, and Appellant Exhibits A - G. During the hearing, Appellant moved to withdraw CSA Appeal No. 101-06. The Agency did not object, and the motion was granted. As a result of that withdrawal, Appellant withdrew all claims related to Appellant's use of FMLA leave.

II. ISSUES

The issues presented in this consolidated 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, mediation or worker's compensation claim,

3) Did Appellant establish that the Agency harassed her on the basis of age, mediation or worker's compensation claim, and

4) Did Appellant prove that the rating was in retaliation for her age or participation in the mediation process?

III. FINDINGS OF FACT

Appellant has been a Senior City Inspector for the Agency's Neighborhood Inspection Service (NIS) for seven years. Appellant inspects properties within her assigned neighborhood to enforce the city's ordinances on property maintenance, parking, zoning and building code issues. On Sept. 27, 2006, Appellant's performance was given an overall rating of "needs improvement". [Exh. 11.]

Appellant received her first unsuccessful evaluation in Sept. 2005 based on several setback errors she admitted making in May 2005, one of which cost the city \$100,000 to settle with the property owner. [Exh. 5, p.1.] The evaluation required Appellant to undergo remedial training to prevent recurrence of these problems, as well as quarterly reviews to monitor her progress. On Dec. 6, 2005, a month before the first quarterly review, Appellant was injured on the job. She returned to work half-time on Jan. 9, 2006, and was back on a full-time basis by Jan. 23rd. On Jan. 31st, Appellant met with Section Manager Tom Kennedy and was given a below expectations rating in her quarterly review. Based on her extended absences, Appellant was given additional time "to demonstrate her ability to perform all of the essential duties in her field assignments." [Exh. 23, p. 2.]

After her return to work in January, Appellant found that her inspection files were not in her office. Appellant's supervisor, Chief Inspector Mike Bradshaw, told Appellant that other inspectors had been assigned to cover her complaints in order to keep up with their deadlines. He advised her to reconstruct the paperwork rather than ask each inspector to return it to her.

Appellant was on modified duty during part of the period covered by the second quarterly review, which was January to March 2006. Mr. Bradshaw

accompanied Appellant on several inspections and observed her performance. He determined that Appellant had improved her performance in the areas previously noted as deficient, and concluded that Appellant had the technical knowledge and ability to perform her duties. Mr. Bradshaw believed that Appellant was back on track, and as a result he allowed her to return to work to manage her assigned inspection district. [Exh. 8; testimony of Mr. Bradshaw.]

At a May 2006 team meeting, Mr. Bradshaw offered Appellant the assistance of the team to help with any work she needed to complete. Appellant did not respond to that request or ask Mr. Bradshaw for any help. After she began her leave in June, Mr. Bradshaw found about 100 complaints and other matters on her desk, many of which were overdue for action or follow-up. Thereafter, Mr. Kennedy returned one of Appellant's files to Mr. Bradshaw for correction of an erroneous average front setback. Mr. Bradshaw confirmed that Appellant had made simple mathematical errors in calculating that setback. Mr. Bradshaw was surprised by these discoveries, given Appellant's years of experience and her recent successful quarterly review.

As a result of these developments, Mr. Bradshaw gave Appellant an overall rating of needs improvement for the period Sept. 2005 to Sept. 2006. [Exh. 11.] The Agency complied with CSR § 13-40 by serving Appellant with a seven-day notice and scheduling a meeting with Appellant for Oct. 31, 2006 in order to review the PEPR. [Exh. 4.] Appellant arranged for her union representative to attend the meeting, but declined to attend herself in person or by telephone because she was suffering from severe depression. Appellant is unaware of what information was exchanged during that meeting. The PEPR rated Appellant as needs improvement in the areas of general standards, communication, customer service, decision-making, dependability, job capacity, planning and organization, productivity, teamwork, timeliness, public contact, inspection backlog, prioritization of inspections, and complaint investigation, which constitute 14 out of the 18 job responsibilities applicable to her position.

Appellant filed three appeals after the denial of her three grievances challenging the PEPR. The grievances were served on Mr. Kennedy, Mr. Bradshaw, and Agency Human Resources Manager Janice Alexander. The three appeals, now consolidated for hearing, appeal the denial of the PEPR grievance, and raise discrimination and harassment claims based on age, mediation and a compensable injury, and retaliation for her age and participation in mediation processes.

Appellant conceded at hearing that the Agency acted fairly in evaluating her field work for an entire rating year by reviewing three months of field work. Appellant stated the Agency knew her work based on her eight years on the job. Her supervisor talked to her, observed her in the field, and reviewed her log sheets and office work. The year's Daily Activity Logs show that Appellant worked a substantial number of days in both the office and the field during the rating period.

[Exh. D.]

As to the existence of a work backlog, Appellant did not deny that 100 of her assigned files were not current when she began her leave for surgery in June 2006. Appellant said that situation occurred after her first leave in Dec. 2005. She informed her supervisor she did not have enough work to do, and he instructed her to retrieve the paperwork on her cases from the inspectors who had covered her caseload during her leave. Appellant did not reconstruct the files or catch up on the overdue work during the intervening six months until her next leave, or take advantage of her supervisor's May offer of help from the team.

Appellant said she was never notified of any specific performance deficiencies between May 30th, the date of her successful quarterly review, and the September PEPR. This led her to believe that the needs improvement PEPR might possibly be caused by her age or the fact that she filed a worker's compensation claim, since she could think of no other logical reason for the unfavorable evaluation. Appellant testified that, after she returned from leave, Mr. Bradshaw asked her, "What are you doing here? When are you retiring and getting out of here?" She recalled that Mr. Kennedy made a similar statement, and told her that he himself was being discriminated against based on his age.

Appellant's former supervisor, Vincent Gomez-Ferrer, testified that Appellant was a satisfactory employee, but that he agreed with the 2005 below expectations evaluation, and agreed Appellant's performance continued to be below expectations during Sept. 2005, the last month he served as her supervisor. Mr. Gomez-Ferrer stated that the city's policy was to specify performance deficiencies in an evaluation in order to give employees notice of the areas where improvements are needed.

IV. ANALYSIS

In this de novo appeal of a grievance upholding 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, harassment and retaliation claims. C.R.S. 24-4-105(7); CSR § 19-10 B. 1.

1. Appeal of Needs Improvement PEPR

Appellant claims that the PEPR is arbitrary because 1) she was given no notice of specific performance deficiencies between her last successful quarterly report and the issuance of the PEPR, and 2) the backlog mentioned in the PEPR was due to her absences for a workplace injury.

The evidence demonstrates that the 2005 PEPR and January quarterly review gave Appellant clear advance notice of the nature of performance deficiencies. The 2006 PEPR specifically brought to Appellant's notice that it was her failure to maintain her caseload in a current condition that led to the unfavorable rating. Appellant's intervening successful quarterly review was solely a review of her performance in the field to address her past deficiencies. [Exh. 8; Testimony of Mr. Bradshaw.] As an experienced inspector independently managing her area, Appellant was in the best position to know that she had a backlog of overdue cases. Appellant cannot rely on the May field review to support a claim that she was not given notice of the grounds for her negative PEPR.

Appellant does not dispute that she was responsible for all complaints in her assigned neighborhood, or that she could have reconstructed the most current documents produced by the inspectors who covered her work during her December leave of absence. Moreover, Appellant did not rebut the Agency's evidence that Mr. Bradshaw offered the team's help to clear up any backlog before her June leave of absence. Appellant's written response to the PEPR did not address the existence or reasons for the backlog. [Exh. F, pp. 23 – 24.] Appellant did not submit a written or oral statement at the PEPR meeting, or communicate with her representative to determine the nature of the performance deficiencies discussed at that meeting.

Appellant testified that her workload was larger than any of the other inspectors, since she performed 250 out of the 750 inspections done by the NIS. However, Appellant produced no evidence as to the average workload per inspector, and thus no conclusion can be drawn from this information. Appellant raised this issue in her unfiled grievance of the 2005 PEPR, but did not raise it in her response to the 2006 PEPR. [Attachment to CSA 100-06 appeal form, 10-31-06 letter to Tom Kennedy; Exh. F, p. 23.]

In light of her previous unsatisfactory PEPR and quarterly review, Appellant acted unreasonably in failing to take steps to assure that each of her cases were current, and in failing to request assistance if her absences made that impossible. I find that Appellant failed to assume responsibility for the work clearly assigned to her, and that the Agency's needs improvement PEPR was not arbitrary, capricious, or without rational basis or foundation.

2. Discrimination and Harassment Claims

Appellant testified that she believed the PEPR may have been the product of discrimination based on her worker's compensation claim or her age because a fellow employee and two managers expressed surprise when she returned from leave after her injury, and asked her when she was going to retire.

The Career Service Rules prohibit discrimination or harassment based upon age "or any other basis protected by federal, state or local law or regulation." CSR § 15-101. Colorado courts have recognized that a tort of public policy wrongful discharge lies if an employer discharges an employee for exercise of a right protected as a matter of public policy, such as the right to receive worker's compensation benefits. Cronk v. Intermountain Rural Electric Association, 765 P.2d 619 (Colo. App. 1988); Lathrop v. Entemann's, Inc., 770 P.2d 1367 (Colo. App. 1989). However, that tort has been held to apply only to a discharge or constructive discharge. Freeman v. United Airlines, 2002 U.S. App. LEXIS 24184 (10th Cir. 2002). Therefore, a claim based on an adverse performance evaluation fails to establish that essential element of a claim of public policy wrongful discharge.

An age discrimination claim 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). The evidence that Mr. Bradshaw and Mr. Kennedy asked Appellant when she planned to retire was not supported by any other evidence, circumstantial or otherwise, from which I could conclude that the Agency's motive was discriminatory. Mr. Kennedy's comment about his belief that he was being discriminated against indicates solidarity with Appellant rather than discriminatory intent. Appellant's failure to handle her large backlog despite the opportunity to do so and the Agency's need to control the flow of its work demonstrates that the Agency had solid business reasons to support the needs improvement PEPR.

Harassment requires proof of an atmosphere of hostility based on age "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment'". Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (quoting Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982)). Appellant did not submit any additional evidence that would indicate she was the victim of hostility based upon her age. I conclude that Appellant failed to establish the existence of a hostile work environment based on her age.

3. Retaliation Claims

Appellant also claims that the agency retaliated against her based on her age or her participation in the mediation process. A claim of retaliation must be supported by an allegation that an employer took adverse action because an employee engaged in a protected activity. Neither age nor any other protected status can serve as the basis of a retaliation claim. Finally, Appellant submitted no evidence in support of her charge that the PEPR was caused by her participation in the mediation process.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. Based upon Appellant's unopposed motion to withdraw CSA 101-06, that appeal is dismissed.
2. The Agency's PEPR dated Sept. 27, 2006 is affirmed.
3. The claims of discrimination, harassment and retaliation contained in CSA 100-06 and 102-06 are dismissed.

Dated this 16th day of April, 2007


Valerie McNaughton
Career Service Hearing Officer

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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.

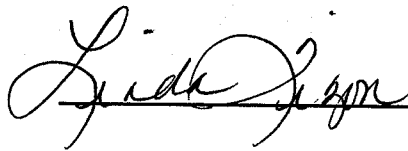
CERTIFICATE OF DELIVERY

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** to the following:

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A handwritten signature in cursive script, reading "Linda J. Lynn", is written over a solid horizontal line.