

BEFORE THE HEARING OFFICER OF THE CAREER SERVICE AUTHORITY OF  
THE CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 300-01

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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IN THE MATTER OF THE APPEAL OF

**John R. Zocholl, Appellant**

v.

**Agency:** Department of Health and Hospitals, Denver Health Medical Center.

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**Nature of Appeal**

Appellant is appealing a denial of his second step grievance seeking to change his Performance Enhancement Program (PEPR) rating for the period from May 1<sup>st</sup>, 2000, through May 1<sup>st</sup>, 2001.

**Introduction**

The rules of the Career Service Authority will be abbreviated CSR with a corresponding number.

**Agency:** The City and County of Denver and Denver Health and Hospital Authority (Agency)

**Appellant:** John R. Zocholl

A hearing on this appeal was held before Michael A. Lassota, Hearing Officer for the Career Service Board. Appellant was present pro se. The Agency and the City and County of Denver was represented by Assistant City Attorney (ACA) Mindy L. Wright, Esq., with Dr. Michael P. Earnest serving as advisory witness on behalf of the Agency and City.

The following witnesses testified at the hearing: Appellant John R. Zocholl testified on his own behalf, Dr. Michael P. Earnest, Medical Director, Quality Review and Improvement (Q.R.I.) and Stephanie Thomas, Chief Operating Officer both of the Denver Hospital and Health Authority.

Appellant exhibits A,B,E and F were admitted by stipulation. Exhibit C was admitted when offered and without objection; Exhibits D and E when offered over the objection of the ACA. Agency exhibits 2-6 and 9 and 10 were admitted when offered without objection.

### **Issues on Appeal**

1. Whether Appellant proved, by a preponderance of the evidence, the appeal of his "Below Expectations" PEPR rating was arbitrary, capricious, and without rational basis or foundation violating Career Service Rule (CSR) § 19-10 (e).
2. Whether the Agency violated CSR § 9-44 (a)(1) Performance Enhancement Program Report, Anniversary date of appointment.
3. Whether the Agency violated CSR § 13-23 Levels of Performance.
4. Whether the Agency violated CSR § 13-60 Procedure When Anticipated Rating will be Lower Than "Meets Expectations".
5. Whether CSR § 13-70 is a 60 day grace period for timely filing a PEPR.

### **Jurisdiction**

CSR § 13-50 provides for the filing of a grievance, as it relates to a PEPR, in accordance with CSR Rule 18 Grievance Procedure and CSR Rule 19 Appeals. All requirements to file a timely appeal have been met. Under CSR § 19-27 the Hearing Officer has authority to affirm, reverse or modify the actions of the Agency giving rise to this hearing.

### **Relevant Facts**

1. Appellant is employed as a Career Service Authority employee, with the Denver Health and Hospital Authority at the Denver Health Medical Center as the Quality Review Improvement Administrator.
2. On January 25, 2001, Appellant received a written reprimand for his failure to provide appropriate leadership and support during the Colorado Department of Public Health and Environment/Healthcare Financing Administration validation survey conducted on October 11-12, 2001.
3. On April 17<sup>th</sup>, 2001, Appellant's supervisor, Dr. Michael P. Earnest, M.D., wrote a Memo to File regarding Appellant's repeated failure to resolve and complete tasks, resulting in Dr. Earnest completing the tasks.
4. On June 1<sup>st</sup>, 2001, Appellant received a "Below Expectations" PEPR.

5. On June 8<sup>th</sup>, 2001 Appellant filed a grievance seeking to have his PEPR changed to a minimum rating of "Meets Expectations".
6. On June 18<sup>th</sup>, 2001, Appellant's supervisor, Dr. Michael P. Earnest, denied Appellant's first level grievance.
7. On June 22<sup>nd</sup>, 2001, Appellant filed a second level grievance with Agency Head, CEO/Medical Director, Dr. Patricia A. Gabow.
8. On June 26<sup>th</sup>, 2001, Dr. Gabow upheld the "Below Expectations" rating, and agreed to re-issue Appellants PEPR with adequate notice as required by the CSR.
9. On June 28<sup>th</sup>, 2001, after proper notice, the Agency reissued Appellant's PEPR giving him a "Below Expectations" rating.
10. On July 6<sup>th</sup>, 2001, Appellant filed an appeal of the denial of his second step grievance with the Hearing Officer.
11. On July 31<sup>st</sup>, 2001, the Hearing Officer issued a Prehearing Order and Notice of Hearing.

### **Discussion**

At the hearing on November 1<sup>st</sup>, 2001, Appellant challenged his "Below Expectations" PEPR for the period from May 1<sup>st</sup>, 2000, through May 1<sup>st</sup>, 2001. Appellant alleged three violations of the CSR by the Agency, among other factors, as reasons to reverse the action which gave rise to the appeal.

First Appellant cites CSR § 9-44 Establishing Eligibility for Merit Increases CSR§ 9-44 provides in part:

- a) Performance Enhancement Program Report
  - 1) Anniversary date of appointment: A completed Performance Enhancement Program report shall be filed with the Career Service Authority on or before the annual anniversary date of the initial appointment to the class. ...

As a Career Service Employee, unless exempt, Appellant is not entitled to a merit increase in pay when a "Below Expectations" PEPR is received. The Agency violated this rule not issuing the PEPR until June 1<sup>st</sup>, 2001, possibly entitling Appellant to back pay.

The Agency cites CSR § 13-70 Effect of Late Filings of Performance Enhancement Program Reports

Failure to file Performance Enhancement Program Reports within 60 days of the due date results in a freeze on personnel requisitions as provided for in CSR § 4-22 . . . .

There no longer is a CSR § 4-22, so the Hearing Officer is unable to determine if CSR § 13-70 is a 60 day grace period for the filing of a PEPR as argued by the ACA.

Second Appellant cites:

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.     |

Concerning this rule, Appellant's position is that of the 14 pass/fail job responsibilities listed on his PEPR he passed 13 and failed 1. Appellant contends failing only 1 area is not failing "to meet a significant portion of the employee's expected accomplishments".

The Agency's position is quite contrary. The ACA asked Agency witness Dr. Earnest about the weight of the different job responsibilities listed on the PEPR. The response was all job responsibilities were of equal weight. For clarification the Hearing Officer asked Dr. Earnest what in the PEPR informed the Appellant which job responsibility had more weight than another. At first Dr. Earnest indicated the employee should know what responsibilities were more important than others. Then Dr. Earnest gave an example of a fire Captain leaving the station. A fire call came in while he was

gone. The next officer in charge (analogizing this position to Appellant) should know what to do when a fire call comes in.

The Agency's exhibit 10 is the complete PEPR of the Appellant. This appears to be a combination of both the Denver Health Management Performance Appraisal Process and the Career Service Authority Performance Evaluation System. Attached to the end of the exhibit is the Narrative Comments for 2000-2001 Annual Performance Appraisal and Supervisory & Co-worker Reviews. Page 2 describes 5 areas in the past year in which "John" did not meet expectations.

Number 1 explains how Appellant was given a written reprimand for not properly involving himself in the support on a combined Federal/State regulatory survey. His PEPR indicates a "fail" for job responsibility #14, Performs other duties as assigned by Medical Director of Q.R.I. However, under job responsibility #10, Supports agency-wide compliance with JCAHO et al regulatory bodies Appellant received a "pass" rating. Of the two areas #10 or #14, #10 was the more appropriate job responsibility to receive a "fail" rating. The other duties, #14, has no specific other duties listed. How was Appellant to know what his "other duties" might include and what the priorities were?

Number 2 explains how appellant was not effective in completing an assignment. Dr. Earnest testified he had to step in and resolve the issues. During cross examination by the Appellant, Dr. Earnest testified those issues are still not resolved. It is unclear to me how Appellant could be poorly rated for a still unresolved issue.

Number 3 refers to co-worker reviews. The Career Service Authority Performance Evaluation System does not provide for peer review as part of a PEPR. As such, this should not have been included and used adversely against the Appellant.

Number 4 refers to Appellant's late start preparing a Report to the City, yet on Appellant's PEPR under job responsibility #5, Prepares and Maintains reports, Appellant was given a "pass" rating. Any insufficiency in the preparation or distribution of this report should have been addressed under this job responsibility.

Third Appellant cites CSR § 13-60 Procedure When Anticipated Rating Will be Lower than "Meets Expectations" to bring to management's attention proper procedure was not followed.

CSR § 13-60 provides:

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...

Dr. Earnest testified that on June 26<sup>th</sup>, 2001, to become compliant, the proper notice regarding a "Below Expectations" PEPR and meeting was given to Appellant.

This was also the Agency's opportunity to amend the PEPR after meeting with the Appellant. On June 28<sup>th</sup>, 2001, Appellant was given another "Below Expectations" PEPR. The root of this "Below Expectations" PEPR was the written reprimand already discussed. Again, Appellant received a "fail" rating on job responsibility #14, Performs other duties as assigned by Medical Director of Q.R.I. Furthermore, in the more appropriate job responsibility #10 Appellant again received a "pass" rating. During cross examination of Dr. Earnest by Appellant, Dr. Earnest testified that Appellant was always available for the survey people during past surveys. During cross examination of Agency witness Stephanie Thomas by Appellant, Thomas testified Appellant did everything he was asked to do during the October, 2000 survey. It is puzzling to me how Appellant could receive a "Below Expectations" PEPR when the testimony was he did everything right.

### **Conclusions of Law**

The Career Service Authority publication Performance Evaluation System is the instruction manual for management to refer to regarding the Performance Evaluation System and for completing the PEPR. Because Appellant is a Career Service Employee this manual is to be used when completing his PEPR.

On page 8, Step 3, Prioritizing the Job Responsibility Statements, requires each job responsibility to be prioritized on 1 of 3 levels. Priority #1 is the most important and certainly how performance during a surprise, combined Federal/State survey should have been prioritized. Testimony revealed no job responsibilities of the Appellant's PEPR were prioritized as required by the Performance Evaluation System. This leaves the evaluator and the employee clueless as to whether the job responsibilities are #1, key, #2, important, or #3, less important to accomplishing the goals and objectives of the working unit. With neither evaluator and employee knowing what is expected we end up with exactly the situation that gave rise to this hearing.

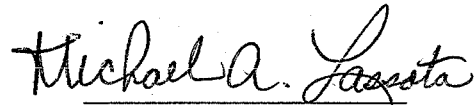
On page 28, Step 7, Completing the Performance Enhancement Program Report provides that a "Below Expectations" can only be given when an employee failed to meet performance standards set for any Priority 1 Job Responsibility. Appellant never knew what the priorities for his job responsibilities were.

On page 29, under this same heading, "when an employee achieves a 'Below Expectations' rating, the employee does not receive a merit increase. Progressive disciplinary action is taken." In this appeal, the written reprimand was the catalyst for the "Below Expectations" PEPR. Not to say it cannot happen that way. Had the job responsibilities been prioritized as required it would clearly support a "Below Expectations" rating. Finally, if Appellant's conduct during the October, 2000 survey was a problem significant enough to merit a written reprimand, did it take until January 25<sup>th</sup>, 2001, to issue the reprimand and why did Appellant not appeal it?

**Order**

For the reasons just discussed, I find that the Appellant has met his burden of proof. The Agency did not follow correct Career Service Authority procedure in the preparation of the Appellant's PEPR. The PEPR is determined to be arbitrary, capricious and without rational basis or foundation. Therefore, I reverse the "Below Expectations" PEPR. The Agency is ordered to issue a new "Meets Expectations" PEPR forthwith. It is further ordered that Appellant be granted back pay to his anniversary date if a merit increase was declined, and the Agency comply with the Performance Evaluation System requirements before Appellant's next PEPR.

Dated this 5<sup>th</sup> day of November, 2001



Michael A. Lassota  
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 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 7 day of November, 2001, addressed to:

John R. Zocholl  
561 Franklin St.  
Denver, CO 80218

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 7 day of November, 2001, addressed to:

Mindi L. Wright  
Assistant City Attorney  
Employment Law Section

Dr. Patricia Gabow  
Denver Health and Hospital Authority

Office of General Counsel  
Denver Health and Hospital Authority  
660 Bannock St. 5<sup>th</sup> Floor MC 1919

*Virginia Granado*