

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

Appeal No. 07-01

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

Appellant: **KIM STEWART,**

And

Agency: **CAREER SERVICE AUTHORITY, and the City and County of Denver, a municipal corporation.**

NATURE OF APPEAL

The Appellant Kim Stewart, ("Appellant") is a Career Service Employee. Through the grievance process she has challenged her "below expectations" rating on her performance evaluation (PEPR) for the period 11/16/99 -11/16/00. Appellant claims the performance evaluation is arbitrary and capricious and did not have a rational basis. She further asserts that it was based upon harassment, discrimination due to race and disability and retaliation. She requests that her evaluation be changed to a rating of "outstanding". The Career Service Authority, ("Agency") denied her first and second step grievances.

The Agency generally denies Appellant's allegations, contends that she has the burden of proof and requests that she be put on strict proof.

INTRODUCTION

The rules of the Career Service Authority are applicable, and shall be abbreviated as "CSR" with a corresponding numerical citation. A hearing on this appeal was held before Michael L. Bieda, Hearing Officer for the Career Service Board. Appellant was present, pro se. Assistant City Attorney Ms. Sybil R. Kiskan, Esq. represented the Agency, with Ms. Marcia Cunningham and Mr. James Nimmer serving as the advisory witnesses on behalf of the Hospital.

The Appellant testified at hearing. The Agency exhibits 1-9 were admitted by stipulation. Appellant offered exhibits A-J but offered no foundation. The Agency objected and was sustained. Therefore there were no exhibits

admitted into evidence on behalf of the Appellant.

ISSUES ON APPEAL

- Whether the Appellant proved by preponderance of the evidence that the PEPR given by the Agency was arbitrary, capricious, or without rational basis or foundation?
- Whether the Appellant proved by a preponderance of the evidence that her PEPR was the result of harassment, or discrimination based upon race and disability or otherwise retaliatory?
- Whether the Appellant was entitled to an "Outstanding" rating on her performance evaluation for the period of 11/16/99 to 11/16/00?

JURISDICTION

Along with the exhibits, the Hearing Officer will take judicial notice of the Hearing Office file, and the documents filed with the appeal. It is unclear when the Appellant received the PEPR. Her immediate supervisor signed the PEPR on 11/29/00. An "other reviewing official" signed it on "11/30/00". The Appellant did not sign the PEPR and the form filed with the appeal indicates "employee will not sign". There is no indication as to when the Appellant first received the PEPR or refused signature. Assuming that both her supervisor and the other "reviewing Official" signed off the PEPR before it was given to Appellant, the PEPR would not have been delivered to Appellant before 11/30/00. Based upon the limited evidence provided, the Hearing Officer determines that the Appellant received the PEPR on 11/30/00.

According to her appeal form, she filed her first step grievance with her immediate supervisor on December 11, 2000. Since the tenth day was a Sunday, the first step grievance was filed within the ten days required under Career Service Rules.¹

The agency responded with a written response dated December 19th, 2000. The Agency's written response bears no certificate of mailing indicating when the response was either mailed or hand delivered to the Appellant. The only evidence indicates that it was dated December 19th, which leaves the inference that it was either mailed or delivered that same day or afterwards. In any event the Agency has not challenged the timeliness of any of the grievance

¹ CSR 18-12 (2) requires the filing of a first step grievance within ten calendar days of agency action. It makes no provision for the tenth day falling on a non-workday. However, CSR 19-22(a) (2) (d) provides that in the case of an appeal, if the tenth day falls on a day when Career Service is not open, the next working day shall be the final date. By analogy the Hearing Officer applies the same rule to the grievance process.

steps.

According to the response from Ms. Sherer Murtiashaw, the Appellant filed her second step grievance on December 21, 2000. That response, which denied the grievance, was hand delivered to Appellant on January 8, 2001. The Appellant then filed her appeal with the Career Service hearing office on January 10, 2001.

Based upon these findings, the Hearing Officer concludes that the Appellant adhered to the grievance process, that this appeal has been timely filed, and that under CSR §§ 19-10 (b) and 19-27, the Hearing Officer has jurisdiction and authority to affirm, reverse or modify the Appellant's PEPR.²

RELEVANT FACTS

The Hearing Officer has considered the exhibits and testimony, assessed the credibility of the witnesses and now makes the following findings of fact which were established by a preponderance of the evidence.

Background

It appears from the exhibits that Appellant has been a career employee since 1988. The Appellant's title is Agency Support Technician. Her primary responsibilities revolve around the administration of the Education Refund Program (ERP) for employees of the City and County of Denver. She received

² CSR §19-10(b) provides:

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.

* * *

CSR §19-27 provides:

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 upon all parties.

* * *

a "below expectations" performance enhancement program report (PEPR) from her supervisor Marcia Cunningham.

According to her Performance enhancement program, (PEP) she has four job responsibilities:

1. Researches, compiles and analyzes statistical reports pertaining to the Education Refund Program.
2. Performs internal audits of the Education Refund Program routinely and develops the procedures for completing the audits.
3. Monitor and evaluate the effectiveness of existing methods and procedures and make recommendations for modification or implementation of new procedures.
4. Furnish the public with information, advice, and/or resolution of problems encountered with the program.

She received a "below expectations" rating in three of the four categories (1,2, & 4). She received a "meets expectations" rating in category three. Regarding job responsibility #1, the report indicated that Appellant had not conducted the statistical research and analysis required. It further alleges issues as to the lack of accuracy of the data on the program furnished by Appellant to the committee that oversees the program. It details one particular incident where Appellant failed to properly track the amount remaining in the budget:

However, just two weeks prior to this PEPR date, Kim determined the budget to be "overdrawn" by \$18,837 and as a result, she made the decision to hold 134 already approved reimbursement requests without supervisory knowledge and/or approval. It was uncovered that in reality, Kim neglected to add in the 2000 city contribution of \$150,000 (annual rollover) to the ERP budget. These actions and decisions initiated a big customer service problem that should have and could have certainly been avoided.

Regarding job responsibility #2, the report indicates that an issue arose as to the eligibility of an employee, Diana Smith. Appellant denied Smith reimbursement under the program. The committee later reversed her decision and ordered the employee reimbursed. Apparently the Appellant objected to the decision, failed to follow the decision of the committee and insisted on further documentation, all in contravention of the committee's decision and instructions.

Regarding job responsibility #4, the report indicates that Appellant had a

number of customer service issues. According to the report, she failed to communicate effectively with employees. She is alleged to have failed to develop and implement an effective marketing strategy to the 16,000 city employees. She is alleged to have used old and outdated bookmarks and brochures and other written materials in the marketing process. Finally, in support of its "below expectations" performance evaluation, the Agency asserts in the PEPR that Appellant had been instructed to prepare marketing and promotional pieces for the employee newsletter, the *Spotlight/Pathways*. This was not accomplished. As a result of the Appellant's poor performance, an executive decision was made to relieve Appellant of budgetary/accounting responsibilities for the ERP program.

In a written response to the PEPR, (Exhibit 6) the Appellant raises a number of serious issues, which, if proven could well bear on the evaluation she received. For example, she mentions an "on the job injury", without detailing the injury, the date of the injury, prognosis, circumstances, or effect on her ability to perform her duties. She alleges that the Performance Enhancement Program (PEP) upon which her evaluation is based, was never communicated to her or agreed to by her. She seems to be asserting that the program she was following was different than that which formed the basis of her evaluation. She also claims "flagrant prejudices" and "retaliation" against her. However, perhaps due to her unfamiliarity with legal process the Appellant failed to address these issues in her testimony or with other evidence during the administrative hearing.

She concludes that she deserves an Outstanding evaluation:

Because, I have maintained in this position, performed the duties required for the position, provided my customers with timely responses, information, reimbursements, etc. I made sure the committee and my supervisor were informed about scheduled meeting dates. I coordinated and scheduled all information meetings, I produced the programs applications report, budget report, additional requested reports, responded to employees issues and complaints, assisted in the training department. I provided the agencies with pamphlets and applications to be distributed within their agencies.

I have done all this in my position. I have worked with the injury I sustained on this job. I say this because, that injury is what permanently damaged disc in my back leaving me with a permanent partial injury. So, yes I believe I deserve an outstanding this year.

(See Exhibit 6). Other than in conclusory fashion, none of these statements were addressed in her testimony.

DISCUSSION AND CONCLUSIONS OF LAW

Analysis

The City Charter, §C5.25 (4) and CSR §2-104 and §2-10 (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 factual disputes. *Turner v. Rossmiller*, 35 Co. A. 329, 532 P. 2d 751 (Colo. Ct. of App., 1975).

It is well established that the party advancing a position or claim has the burden of proving that position. In civil proceedings, including administrative hearings such as this, that burden is 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 (See Colorado Civil Jury Instructions, 3:1).³ The number of witnesses testifying to a particular fact does not necessarily determine the weight of the evidence (See Colorado Civil Jury Instructions, 3:5).⁴ The ultimate credibility of the witnesses and the weight to be 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 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).

The Appellant claims in her appeal that the Agency's performance evaluation is arbitrary, capricious, and without a rational basis. The Appellant therefore has the burden of proving, by a preponderance of the evidence, these allegations as well as those in her response letter referred to above.

Agency's Motion for Directed Verdict

At the conclusion of the Appellant's case the Agency moved for a directed verdict in favor of the Agency and against the Appellant. After due consideration, the Hearing Officer grants the motion.

A motion for directed verdict is generally controlled and provided for by Rule 50 of the Colorado Rules of Civil Procedure. In passing upon a motion for

³ 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.

⁴ 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, 3 P. 423 (1884) and C. McCormick, EVIDENCE § 339, at 957 (E. Cleary 3 ded. 1984).

a directed verdict, the trial court must view the evidence in the light most favorable to the party against whom the motion is directed. *Gossard v. Watson*, 122 Colo. 271, 221 P.2d 353 (1950); *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992). A motion for directed verdict should be granted only in the clearest of cases when the evidence is undisputed and it is plain that no reasonable person could decide the issue against the moving party. *Evans v. Webster*, 823 P.2d 951 (Colo. App. 1991).

Since Career Service Rules neither allow nor prohibit a "directed verdict", the Hearing Officer will follow the provisions of the Colorado Rules of Civil Procedure, Rule 50. In this case, the Hearing Officer will view the evidence presented in the light most favorable to the Appellant. The Appellant introduced no exhibits. She did testify, however her testimony was very general and did not detail any facts in support of her claim. She did not address the specific problem areas alleged in the PEPR as outlined above. She did not explain her written response letter to the PEPR (Exhibit 6). She provided little or no credible evidence of discrimination, harassment or retaliation.

The Agency correctly asserts that Appellant has the burden of proving by a preponderance of the evidence, that her PEPR was arbitrary and capricious or did not have a rational basis. This she failed to do. Appellant has failed to meet her burden of proof. Moreover, in reviewing the narrative portion of the PEPR, it appears that the Agency had legitimate concerns about the Appellant's performance. Those concerns form a rational basis for the Agency's action. Allegations such as inadequate customer service, inadequate marketing strategy, lack of communication with employees, failure to track the budget, lack of organization, and refusal to follow and implement decisions by the committee, all, if true, support the Agency's action.

In the absence of any evidence to show these conclusions by the Agency were not supported by the facts and circumstances, it would appear that the Agency's action was not arbitrary, capricious, or without rational basis. Given the dearth of evidence presented by Appellant, no reasonable or rational person could conclude that the Agency action was arbitrary or capricious. Likewise, no reasonable person could conclude from the lack of evidence that Appellant was the victim of harassment, retaliation or discrimination at the hands of the Agency. Accordingly, the Hearing Officer has no choice but to grant the Agency's motion for directed verdict in favor of the Agency and against Appellant.

CONCLUSION

1. The Appellant has failed to prove, by preponderance of the evidence, that the Agency's performance evaluation was arbitrary, capricious, or without rational basis.

2. The Appellant has failed to prove, by a preponderance of the evidence, that the Agency's performance evaluation was the result of harassment, discrimination based upon race or disability, or otherwise retaliatory.
3. That Appellant has failed to prove, by a preponderance of the evidence, that she should have received an "Outstanding" rating on her performance evaluation.

ORDER

For the foregoing reasons, the action of the Career Service Authority giving Appellant a "below expectations" performance evaluation (PEPR) for the period of 11/16/99 to 11/16/2000, is hereby AFFIRMED, without modification.

Dated this 20 day of
November 2001.



Michael L. Bieda
Hearing Officer for the
Career Service Board