FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

PHILLIP CEDILLO, Appellant,

v.

Agency: Department of Human Services and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Phillip Cedillo shall be referred to as "Appellant." The Department of Human Services shall be referred to as "the Department." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held June 19, 2002, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by Mark Schwane, Esq., Colorado Federation of Public Employees. The Department was represented by Niels Loechell, Esq., with Jane Saari serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, Kathleen Rodriguez, Jane Saari, Alan Herrera

The following witnesses were called by and testified on behalf of the Department:

Peter Dever

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

Exhibits A, B, C, D, E, L, M, O

The following exhibits were offered and admitted into evidence on behalf of the Department:

Exhibits 1, 6, 7, 10
The following exhibits were admitted into evidence by stipulation:

Exhibits A, B, C, D, E, L, M, 1, 6, 7

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

Exhibit 11

NATURE OF APPEAL

Appellant is appealing a "Below Expectations" Performance Enhancement Program Report ("PEPR"). He is seeking a "Meets Expectations" PEPR.¹

ISSUES ON APPEAL

Was the determination that Appellant's performance was "Below Expectations arbitrary, capricious, and without rational basis or foundation?"

PRELIMINARY MATTERS

Appellant filed an appeal with the Career Service Authority Hearing Officer on February 7, 2002. In this initial submission, Appellant did not comply with the requirements of the CSR that he submit the underlying documentation that formed the basis of the appeal with the Notice of Appeal. It was unclear to the Hearing Officer whether she had subject matter jurisdiction over the appeal. An Order to Show Cause was issued on February 22 in which Appellant was instructed to supply the required documentation and other information regarding the nature of his appeal. The Department was permitted to respond. The Department requested an extension of time to respond to the Order to Show Cause until after Appellant responded so that it would have the opportunity to review the basis of the appeal. The Hearing Officer granted this request on March 1.

The first problem noted by the Hearing Officer in the Order to Show Cause was procedural. Appellant did not provide the required underlying documentation, making it impossible for the Hearing Officer to determine whether Appellant had complied with the requirements of Rule 18 and 19. The documentation submitted in response to the Order to Show Cause shows that Appellant met with his supervisor on January 2, 2002, to go over his December 1, 2000 through November 30, 2001, PEPR. The overall evaluation was "Below Expectations." Appellant, through his representative, grieved this on January 9, 2002. The grievance was denied at Step 1 on January 18. The grievance was then filed at Step 2 with Dr. Chris Veasey on January 23. Randy Martinez, Dr. Veasey's designee, responded on February 1. The appeal was filed with the Career Service Hearing Officer on February 7. As all the steps below were complied with in a timely manner and the grievance appeal was filed with the Hearing Office within ten days of the agency head's denial,

¹ As discussed below, Appellant raised a claim of disability discrimination in his Notice of Appeal, but it was dismissed as untimely by the Hearing Officer in an Order dated April 3, 2002. Appellant raised the issue of failure to accommodate his disability for the first time in the Notice of Appeal. Even though this request cannot be considered as it is untimely, the Hearing Officer notes that, subsequent to the commencement of the instant action, Appellant and officials from the Department have met and, through the interactive process outlined in CSR §5-84, accommodation was made for the disability in January 2002.
the appeal of Appellant's "Below Expectations" PEPR is deemed timely.

The next issue before the Hearing Officer was the substantive claims in the Notice of Appeal. The Hearing Officer has jurisdiction to review the "Below Expectations" PEPR pursuant to CSR §19-10 e).

Appellant raised two other issues in this appeal. The first of these issues is the claim that the Department did not comply with CSR §13-24 in that it lacked documentation supporting the conclusion that "Appellant did not process a sufficient number of cases," which is the reason, at least in part, as to why Appellant did not meet expectations in his performance during the relevant period. The Hearing Officer found that CSR §13-24 does not create any rights or remedies for employees nor does it require that an agency provide documentation supporting the PEPR to its employees. The claim was dismissed.

The other issue raised by Appellant was a claim of medical discrimination and that his evaluation violated CSR §5-84. In his Notice of Appeal, Appellant made a bare assertion that he has a "medical condition." He subsequently provided documentation that he was claiming a disability related to "stress." As the Hearing Officer noted, Appellant did not raise his alleged medical disability as an issue in his grievances below. The Hearing Officer dismissed the discrimination claim as untimely.

**FINDINGS OF FACT**

1. Appellant has worked for the Department for approximately three and a half years. He is classified as an Administrative Support Technician IV. His internal Departmental title is Legal Technician III. He is assigned to the Intake Team for the Child Support Division.

2. Prior to his employment with the Department, Appellant was a general manager of a restaurant in Arvada, Colorado, and ran his own paralegal business.

3. Appellant's duties include assisting Temporary Assistance for Needy Families ("TANF") clients after they have completed their orientation. He assists them in their applications for temporary assistance and monitors their cases until they become financially active, at which time the case is sent up into the child support caseworker. More specifically, the duties at the time of the application include entering information into the computer, interviewing clients, preparing affidavits naming the father, if the father is not included on the birth certificate, which the client reviews and signs, preparing contact sheets.

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2 The text of the original grievance states, in its entirety:

On January 2, 2002, you provided Phil Cedillo with his PEPR evaluation. Pursuant to CSA section 18-12 and 13-50, Phil Cedillo is filing a grievance claiming his below expectations rating on his PEPR evaluation was arbitrary, capricious and without rational basis, in violation of CSA section 13-24. Specifically, the evaluation lacked documentation supporting the conclusion that Mr. Cedillo did not process a sufficient number of cases. Mr. Cedillo's other supervisor did not participate in the evaluation. Further, you failed to provide documentation concerning required production in the division. Mr. Cedillo seeks production of documentation concerning case production and correction of his PEPR evaluation to meets expectation or above.
4. Prior to May 2001, there were twelve technicians assigned into intake “teams,” each team working for a team of ten to twelve child support social caseworkers.

5. There was no Division Director for Child Support during the relevant period. Two program managers covered the duties of the Division Director.

6. Intake for Child Support is located on the first floor of the Department’s offices at 1200 Federal. The rest of Child Support, including the social case workers and additional technicians, work on the fourth floor, or “upstairs.”

7. In May 2001, the supervisors in Child Support were trying to fill technician vacancies “upstairs,” taking technicians out of Intake and laterally transferring them into the positions on the fourth floor. At that time, some of the tasks undertaken by the Intake staff were transferred to the upstairs technicians.

8. At this time, the number of technicians in Intake was reduced from twelve to nine. Appellant remained as one of the technicians in Intake.

9. Until May 2001, the Intake Technicians were responsible for monitoring ninety to one hundred and twenty cases. According to Appellant, the number was fairly constant. After some of the technicians went upstairs, both the old cases were redistributed on a rotation basis (i.e., redistributed as matters came due).

10. Prior to April or May 2001, Appellant and the other Intake Technicians were responsible for handling public assistance/TANF cases. In April or May, the Intake Technicians began training in handling non-public assistance/non-TANF cases, including Uniform Interstate Family Support Act (“UIFSA”) cases.

11. The supervisors took the TANF cases and the Intake Technicians took the UIFSA cases. In addition to no longer handling their own specific caseload, Intake Techs were assigned to work on cases on a rotational basis. According to Appellant, these changes have resulted in a doubling of the caseload for the Intake Techs. According to the Department’s witnesses, while the caseload might have increased, the workload has not; some of the old functions are now handled by other areas of the Division.

12. Appellant was supervised by Alan Herrera prior to May/June 2001. His title is Technical Support Supervisor. Over the summer of 2001, the team was “lead” by leadworder Mary Bullock. Jane Saari became Appellant’s supervisor in September 2001.

13. Ms. Saari, while having worked for the Department for 23 years, had no prior experience in Intake when she became Appellant’s supervisor. Her prior position was in the Finance Office.

14. Appellant testified that his stress level was very high throughout the late spring and summer of 2001 due to the changes in the Intake Unit and his lack of familiarity with the new types of cases. He admitted that he found it difficult to keep up with his caseload, which also increased his stress levels. Appellant said that he worked closely with the remaining Intake Technicians, asking them for assistance when he had problems. Appellant testified that other
Intake Technicians would also consult with him when they had problems. The team members would also confide in each other about how swamped they felt and for morale support.

15. Appellant went to Mr. Herrera for assistance. Appellant told Mr. Herrera that he was swamped and did not know what he was going to do. Mr. Herrera told him, “We are all swamped.” Appellant was disappointed in this response. He felt it was inappropriate for a Technical Support Supervisor to just say “We’re all swamped; do the best you can and go away.” He felt that Mr. Herrera should have supported him in resolving the problem.

16. Appellant testified that the increase in his stress levels lead to his being absent in order to recuperate from the stress. He brought medical notes in to explain his absences over the summer. However, his absences actually added to the stress because he fell further behind in his work.

17. Another reorganization of the Unit occurred during the summer of 2001. Peter Dever, the new Division Director, instituted a “cradle-to-grave” model for case management. This model means that, after the initial intake, the technician handling the case upstairs handles the case all the way through. Because of the changes in the “upstairs” technicians' duties, more were moved upstairs and the size of the Intake team was again reduced from nine to seven.

18. Kathy Rodriguez became Appellant’s supervisor in January 2002. She testified that the Intake Unit was in disarray and turmoil due to the transition when she took over supervision of the Unit.

19. Over the summer of 2001, all the technicians, including those in Intake, were required to be “State certified” to participate in “NFR” and “APA” conferences, which deal with getting the non-custodial parent to admit paternity. This meant that Appellant and the other technicians had to attend approximately one week of training classes conducted by the State Department of Child Support. Appellant attended classes on enforcement, remedies, and procedures. He learned about the administrative and judicial processes used to establish paternity.

20. Appellant took the written exams necessary for State certification and passed them; he had to take one of the tests over again because, despite the fact that he received a passing score (85%), his score was not high enough to satisfy Mr. Dever. Mr. Dever wanted his technicians to score at least 90% so he could say that the Department’s technicians were the best in the State. The second time Appellant took the test, he scored 97.5%.

21. Appellant was required to take the State certification courses and obtain the certification despite the fact that he did not need to know this information or skills since he was not upstairs handling the “cradle-to-grave” files.

22. In July 2001, Appellant was given a new assignment working with parolees. He was given this job because of his prior law enforcement experience. These new duties were removed after two days. Appellant did not know why this happened.

23. On September 6, 2001, Appellant received a written reprimand from Mr. Dever, for various violations of the CSR. This reprimand was based upon "a pattern of leave
management abuse” dating from November 2000. These included ten instances of sick leave and thirteen instances of vacation leave, and 240 hours of leave without pay and an undisclosed amount of FMLA leave. Mr. Dever noted that Appellant took two days off every month since November 2000; since April 2001, the two days occurred on the first two days of each month. Mr. Dever warned Appellant that his absences were affecting his work performance, that he currently had seventeen TANF/Medicaid cases out of compliance, and that Appellant had been advised by Mr. Herrera and Ms. Bullock on at least three occasions (April 30, June 8, and August 21) to work on bringing his cases into compliance. Appellant’s August statistical report was also noted to have been two weeks late, which affected the statistical reporting capabilities of the Unit. Appellant was instructed to immediately work on all cases currently out of compliance, document interviews immediately upon seeing a customer, review calendar reviews on a weekly basis, submit daily reports of his activities to his new supervisor, Jane Saari, (this was later changed, by mutual agreement of Appellant, Ms. Saari and Mr. Dever to weekly reports) and build his sick and vacation leave bank. (Exhibit 10)

24. During the meeting on the written reprimand, Appellant explained to Mr. Dever that he took the days off as they accumulated because he got into the habit when he was in the Service because he never knew when he was going to be shipped out.

25. Also during the meeting on the written reprimand, Mr. Dever reminded Appellant that his performance evaluation was coming due. He told Appellant that he would receive a “below expectations” evaluation at that point because Mr. Dever did not see how Appellant could become a “super tech” needed in order to get a “meets expectations.”

26. Appellant testified that he has had ongoing health issues since September 1999, when he suffered a brain injury during a “road rage” incident in which he was the victim. These health issues include nausea, vertigo, lethargy, muscle contractions, and stress triggers. He receives continuing medical care for these problems.

27. On October 1, Appellant grieved the written reprimand to Mr. Dever, who testified he did not know that the grievance had been filed. As a result of the filing of the grievance, an interactive meeting was set up with the Career Service Authority on October 12 to develop an accommodation for Appellant’s medical condition. Appellant chose not to pursue the grievance process any further because he felt that the interactive meeting and the resultant medical accommodations (which were made in or about January 2002) satisfactorily resolved the matter.

28. Ms. Saari admitted that the Intake Unit was “pretty stirred up” when she took over as the supervisor in September 2001.

29. Ms. Saari testified that the only direction she had from Mr. Dever about supervising Appellant was to make sure Appellant turned in his daily, and then weekly, time logs, a requirement that only Appellant had to perform.

30. Ms. Saari left a self-evaluation for Appellant for his PEPR late in the afternoon of November 26, 2001, after Appellant left on FMLA leave earlier in the day. Appellant did not receive the self-evaluation form until his return on January 2, 2002. In the interim, Ms. Saari spoke to Appellant and asked him if he was going to do the self-evaluation. Appellant indicated
that he thought it was pointless since it was clear to him that Mr. Dever had already decided Appellant would be receiving a "below expectations" rating.

31. According to Appellant's PEP plan, dated February 8, 2001, for the year ending October 31, 2001, his "Priority 1" job responsibility was "Performance Outcomes." The "Expected Accomplishments" provides:

Ensure the following:

1. All cases worked within State and Federal Mandated (sic) time frames.
2. Conduct thorough interviews, obtaining necessary paperwork/information on all cases.
3. Monitor "pending drawer" weekly, initiating/updating cases when appropriate, as cases are approved/denied.
4. Promptly work all required reports, including the MW-530, MW-440 & MW-449.
5. Work calendar reviews and locate responses weekly.
6. Transfer cases to the correct EST/ENF Tech, per XREF Procedure in a timely manner.
7. Clear & Concise (sic) chron messages entered/sent.
8. Logs completed/turned in daily. Monthly Statistics to supervisor by 3rd working day of the month.
10. Utilize all locate resources, meeting the goal of verified locates per month.

(accomplished on a consistent basis = meets expectations)
(accomplished without fail = exceed expectations)

The column for "Resource Control" indicates:

Obstacles beyond Phillip's control would influence his ability to accomplish these tasks effectively and efficiently (i.e. pro-longed (sic) staff and resource shortages).

The Action Plan for the period reads:

Phillip will make efforts to maintain a more structured work environment, (sic) that will enable him to improve time management, and focus on productivity. Unit program standards will be given top priority, to ensure that all compliancy measures are met or exceeded.

"Employee Empowerment" and Customer Service" are Priority 2 job responsibilities. Both indicate under Resource Control, that obstacles beyond Appellant's control would influence his ability to complete these tasks. No Action Plans are given for the tasks enumerated under these two job responsibilities. Appellant's final job responsibility, "Community Partnerships" is given a "priority 3" rating. No Resource Control or Action Plan information is included. (Exhibit 6)
32. Ms. Saari completed Appellant's PEPR evaluation for the year ending November 30, 2001, on or about December 12, 2001, while Appellant was still out on FMLA leave. While Ms. Saari did not designate the specific evaluation level for any of the four job priorities, she gave Appellant an overall "below expectations" rating. She noted that Appellant had not returned his self-evaluation. In the narrative, Ms. Saari stated that she supervised Appellant for only three months and that she consulted with previous supervisors and the Division Director in preparing the evaluation. Ms. Saari noted that on November 30, 2001, forty UIFSA cases were out of compliance despite prior warnings to Appellant in April, May and August that he get his cases into compliance ASAP. Ms. Saari also noted that Appellant had not been careful to obtain notarized affidavits of paternity when conducting his interview. During her testimony, Ms. Saari admitted that this happened only once. Ms. Saari also provided other examples of Appellant not completing his work in a timely manner. With regard to Customer Service, Ms. Saari reported that Appellant returned his phone calls in a timely manner but did not answer his chron messages (i.e., electronic notes attached to cases, e-mails, etc.), that he was responsive to customers, but not always his co-workers, and that she witnessed one occasion "when I felt he was somewhat rude." Under Employee Empowerment, Ms. Saari discussed Appellant's attendance problems. She stated that, while Appellant was told not to work overtime without prior approval, she had seen him stay late to do his work and then put his regular hours down on his time sheet (not apply for the overtime). Appellant requested assistance of others when needed but was unable to help co-workers with their backlogs. She noted that Appellant did not identify work processes that would assist in the achievement of individual goals as well as Unit goals. Ms. Saari testified that other employees had made such contributions to the Unit. Under Community Partnership, it is noted Appellant conducts orientation about child support as needed in the Unit. Attached to the narrative were the September 6, 2001 written reprimand from Mr. Dever, as well as a reprimand from 1999, January 2000 (both outside the relevant evaluation period) and "written warnings" from Mr. Herrera from 2001.3

33. Appellant was given his PEPR on December 26, 2001. (Exhibit A) A meeting was held upon his return from FMLA leave on January 2, 2002. (Exhibits A and B) He grieved the PEPR, through counsel, on January 9, 2002. (Exhibit B) The grievance was denied at Step One on January 18, 2002. (Exhibit C) He requested further review of the grievance, through counsel, on January 23, 2002. (Exhibit D) That was denied on February 1, 2002. (Exhibit E) This appeal was filed with the Hearing Officer on February 7, 2002.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 13 governs Performance Enhancement Program Ratings. It provides, in relevant part:

3 Other than the September 6, 2001, written reprimand, none of the other documents noted were admitted into evidence. The Department did not attach the listed documents as exhibits, despite its knowledge of their existence, in its Prehearing Statement and did not provide Appellant with copies despite a timely discovery request covering them. The Department tried to have a witness read at least part of those documents into the record, but was excluded from doing so for the same reasons.
§13-10 Purpose

The evaluation of an employee's performance is intended to assist the employee in becoming a more effective worker. This evaluation is designed to inform the employee of the manner in which he or she is meeting standards of performance established by the supervisor. In no event shall an employee's employment performance rating be a substitute for disciplinary action under Rule 16 DISCIPLINE. It may be used, however, to establish attempted non-disciplinary corrective action in support of subsequent disciplinary action under Rule 16 DISCIPLINE for unsatisfactory work performance. The Performance Enhancement Program Report is intended to cover overall performance during a specific period of time.

§13-20 Performance Reporting Requirement

§13-22 Performance Reporting requirement Following End of Probation

Every employee holding an unlimited or limited full-time or part-time position...shall have his or her performance formally evaluated at least once a year and a report on this performance submitted to the Career Service Authority. This report shall be submitted by the appointing authority in accordance with the procedure and form or forms prescribed by the Personnel Director.

§13-23 Levels of Performance

An employee's performance shall be rated according to the following criteria:

Outstanding - Consistently exceeded expected accomplishments of the job and made a major contribution to the agency.

Exceeds Expectations - Consistently exceeded expected 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.

§13-24 Documentation of Rating

Whenever the overall evaluation of a Performance Enhancement Program Report is "Outstanding," "Exceed Expectations" or
"Below Expectations" documentation specifically detailing the reason(s) for the rating shall be provided to the Career Service Authority.

Failure to provide such documentation shall result in the evaluation being returned to the appointing authority.

§13-50 Grievances and Appeals Relating to Performance Enhancement Program Reports

An employee may file a grievance pursuant to Rule 18 GREIVANCE PROCEDURE, and may appeal that grievance in accordance with Rule 19 APPEALS, insofar as it relates to Performance Enhancement Program Reports, but may not grieve or appeal the Performance Enhancement Program, as such.

§13-60 Procedure When Anticipated Rating Will Be Lower Than "Meets Expectations"

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 to review the Performance Enhancement Program Report in accordance with Section 17-20 Representation.

§13-70 Effect of Late Fillings of Performance Enhancement Program Reports

Failure to file Performance Enhancement Program Reports within sixty (60) days of the due date results in a freeze on personnel requisitions as provided for in Subsection 4-22 Effect of Late Performance Enhancement Program Report.

CSR Rule 18 covers the procedures for grievances. It provides, in relevant part:

§18-12 Grievance Procedure

If a work related dispute was not resolved through alternative dispute resolution or if alternative dispute resolution was not previously attempted and a career service employee has a grievance as defined in Section 18-10(a) of this rule, the employee may file a grievance according to the following procedures:

1. Form: The grievance shall be presented in writing and shall be dated. It shall include the name and address of the grievant, the action which is the subject of the grievance, the date of the action, and a statement of the remedy sought. The grievance form shall have a certificate of mailing or a certificate of hand delivery which
indicates the date the grievance was placed in the mail or was hand delivered to the immediate supervisor.

2. Filing with Supervisor: The employer shall present a grievance to the immediate supervisor within ten (10) calendar days after notification of the action which gives rise to the grievance. The supervisor shall consider the grievance and within ten (10) calendar days give the employee a dated, written notice of decision. The immediate supervisor's written decision shall contain a certificate of mailing or a certificate of hand delivery which indicated the date the supervisor's decision was mailed or hand delivered to the employee. The period of time shall be computed in accordance with subparagraph 19-22 a) 2).

3. Filing with Agency Head: If the response of the immediate supervisor does not resolve the grievance and the employee wishes to pursue the grievance further, employee shall present the grievance to the head of the agency, or designee, in writing within ten (10) days) after receiving the decision of the immediate supervisor. The grievance form filed with the head of the agency or designee must contain a certificate of mailing or certificate of hand delivery.

If the immediate supervisor has not responded to the grievance within ten (10) calendar days and the employee desires to pursue the grievance further, the employee must present the grievance in writing to the head of the agency or designee no later than ten (10) calendar days after the supervisor's response was due. The grievance form filed with the head of the agency or designee must contain a certificate of mailing or certificate of hand delivery.

The head of the agency or designees shall consider the grievance and shall give the employee dated, written notice of a decision within ten (10) calendar days from the date contained on the certificate of mailing or certificate of hand delivery. The period of time shall be computed in accordance with subparagraph 19-22 a) 2).

4. Filing with Career Service Authority: If the employee still feels aggrieved after receipt of this decision, or the agency head has not responded within ten (10) calendar days, and the grievance concerns an alleged violation of Charter provisions relating to the Career Service, ordinances relating to the Career Service, or the Career Service Rules, and the employee wants to pursue the grievance further, the employee must appeal to the Hearings Officer of the Career Service Board in accordance with the provisions of RULE 19 APPEALS.
A copy of the grievance and the replies from the immediate supervisor and the agency head or designee shall be attached to the appeal to the Hearings Officer.

CSR Rule 19 concerns appeals. It provides, in relevant part:

§19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel:

d) **Grievances resulting in rules violations:** Any grievance which results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules. The grievance must be in conformance with and processed pursuant to the requirements of Section 18-12 Grievance Procedure. The appeal form must state with specificity which career service charter amendment, ordinance or career service rule(s) are alleged to have been violated. An appeal may be dismissed if the appellant fails to cite the alleged rule violation(s).

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.

§19-22 Time Limitation and Form of Appeal

a) Time Limitation

1) Every appeal shall be filed at the office of the Career Service Authority within ten (10) calendar days from the date of notice of the action, which is the subject of the appeal.

2) The computation of the ten (10) calendar days shall be as follows:

   (a) The date of notice of the action shall be the date on the certificate of hand-delivery to the appellant or the date on the certificate of mailing of the notice if sent by U.S. Mail or interoffice mail.
(b) The period of time for filing the appeal starts on the day following the date of notice of action or date of inaction.

(c) Unless otherwise specified, all time periods are calendar days.

(d) If the final date of the appeal period falls on a day the Career Service Authority office is not open for business, the day for appeal shall be construed to be the next working day.

(e) The appeal period ends at 5:00 p.m. (close of business) on the final date for appeal.

b) Form of Appeal

1) Every appeal shall be on the form prescribed by the hearing office and shall include the name and address of the appellant, the action which is the subject of the appeal, the reason for the appeal, and a statement of the remedy sought.

2) The appeal form must identify the Career Service sections of the City Charter, applicable ordinance, or Career Service Personnel Rule, which the action allegedly violates.

Analysis

The City Charter C5.25 (4) requires the Hearing Officer determine the facts in this matter "de novo." This has been determined by the Courts to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. Turner v. Rossmiller, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Appellant has the burden of proof in cases of appealing a below expectations PEPR.

The basis for the Hearing Officer’s jurisdiction for "Below Expectations" PEPRs rests in CSR §19-10 e). The Rule provides that the only basis for reversal is if the rating is "arbitrary, capricious, and without rational basis or foundation." In order to determine if Appellant’s performance rating was arbitrary, capricious and without rational basis or foundation, the Hearing Officer must look at the record developed at the hearing, as well as the procedures established by the CSA for the proper completion of the PEPR.

The first problem with the PEPR is a violation of at least one section of Rule 13. CSR §13-10 states that a PEPR "is intended to cover overall performance during a specific period of time." In this case, the PEP covers November 1, 2000, through October 31, 2001, (Exhibit 6) while the PEPR covers December 1, 2000, through November 30, 2001 (Exhibit M). To further complicate matters, the evaluation narrative mentions attachments well outside the evaluation
period (written reprimands in 1999 and early 2000), as well as Appellants alleged LWOP in December 2001, factors that would have been inappropriate to consider during the evaluation period, which ever it was. Because of this technical violation of CSR §13-10, the PEPR is per se arbitrary and capricious and without rational basis or foundation.

Even without this technical violation, the PEPR is arbitrary, capricious, without rational basis or foundation.

On January 17, 2001, the Career Service Authority published a manual ("Manual") that sets out the guidelines for the proper implementation of the Performance Evaluation System. It provides detailed instructions of how to create the PEP and perform the PEPR. According to the Manual:

PEP’s approach is to rate the factual accomplishments of job tasks. The philosophy behind PEP is to evaluate the work done to accomplish the organization’s goals. PEP’s intent is to set clear standard for performance. These standards are reviewed in relation to the goals and objectives of the department and the department’s work units. PEP plans are developed before the performance evaluation period to help employees understand how they are being rated and to guide their performance. Managers and supervisors provide periodic performance reviews and feedback during the performance evaluation period. PEPR (Performance Enhancement Program Report) is the annual evaluation report, which measures an employee’s performance. An employee’s performance is measured against performance standards, which describe levels of competence. The level of competence an employee demonstrates during a performance period determines if the employee achieves a Below Expectations rating, a Meets Expectations rating, and Exceed Expectations rating or an Outstanding rating....

PEP introduces the following key term:

1. ALIGNMENT. Assures the goals, objectives, standard for performance and results of performance are linked and are relative to the achievement of the goals and objectives of the work unit, the division and the department.

2. BEHAVIOR INDICATORS. Definitions/descriptions of what performers do on the job, written in behavioral language, that clarifies what performance results “look like.”

3. COMPETENCE. The match between the knowledge and skill of employees and the requirements of their roles. If employees’ knowledge and skills match role requirements, they are competent.

4. COMPETENCY. A characteristic of an employee (i.e., motive, trait, skill, self-mage, social role, or a body of knowledge) which results in effective and/or superior performance in a job.

5. COMPETENCY BASED PERFORMANCE. Identified competencies necessary to achieve performance results are the basis of the performance standards established.
6. CRITERION-REFERENCED EVALUATION. A judgment made when a performance measurement is compared with a performance standard.

7. EXPECTED ACCOMPLISHMENTS. Performance goal statements based on the identified competencies that describe the outcomes expected from the performance of job functions. Complete Expected Accomplishment statements (EAs) specify performance measurement criteria.

8. JOB RESPONSIBILITIES. Definitions/description of what jobholders must accomplish so department/work unit goals are achieved.

*(Manual, pp. 2-3)*

After identification and alignment of goals and objectives for a specific job, the Job Responsibilities (JRs) are identified. JRS are:

Definitions/description of performance results derived from the major job duties identified in the current job specification. Five to ten JRs are included in a PEP plan developed for an evaluation period. Inclusion of JRs is based on the relative impact of each JR on accomplishment of the department/work unit goals. Only the JRs determined essential (a joint determination is made between the supervisor and the employee being evaluated) to accomplishing the department/work unit goals are written in a PEP plan. Even though job duties are not likely to change from one evaluation period to the next, the JRs included in PEP plans are likely to change. JRs change as the goals of the department/work unit change.

Job Responsibility statements (JRs) define/describe what performers do on the job. Written in behavioral language, JRs define/describe what results look like.

*(Manual, pp. 8-9)*

An example of a JR is “foster ownership of agency vision, mission, goals, values, policies and procedures when informing staff of performance expectations.” *(Manual, p. 9)*

Next is the prioritizing of the JR’s.

PEP requires that each JR statement be prioritized on one of three levels. Priority 1 are those that are key to accomplishing the goals and objectives of the work unit/department. Priority 2 statements are those JRs that are important to accomplishing the goals and objectives, but are not critical. Priority 3 statements are less important than Priority 2 statements for accomplishing the goals and objectives of the work unit/department. Priority of JRs determines what is most important for the individual performer to contribute to achieving those goals and objectives.

The Job Responsibility statements are a list of what a jobholder should do. The next step is to set performance goals and standards for the level of performance that is required to meet those responsibilities. Standards for performance must be fair (in relation to the employee’s ability and experience) and job related.
(Manual, p. 10)

Expected Accomplishments are set up next.

Expected Accomplishment statements (EAs) are performance goal statements that describe outcomes expected from the performance of job functions, and/or the knowledge, skill, and attitudes thought to be essential to the performance of those functions. Performance goal statements make it easier to assess employee performance because (1) the desired outcomes are described in terms of performance standards that are based on realistic job-related criteria and (2) employee performance is evaluated against the acceptable level of performance for the particular job function (not against the performance of other employees). Successful achievement then is based on employees meeting the acceptable level of performance.

EAs describe the content of the performance – what the performer should be able to do (behavior), how the performer should accomplish the performance (conditions), and the acceptable level of performance – how to know the performance has been accomplished in an excellent manner (criteria).

Complete the performance evaluation process to formally evaluate the performance of direct reports so that frequent and informal performance discussions are initiated and maintained with direct reports to negotiate a PEP plan for the evaluation period, revise the PEP plan as needed, resolve performance issues, and provide constructive feedback that apprises employees of their performance strengths and weaknesses.

* * *

An acceptable EA statement must contain measurable criteria for the behavior expected.

Acceptable EA statements specify the behavior expected, the conditions and criteria well enough so that the behavior, conditions and criteria "point to" the method for measurement. Some methods used for measurement are (this list of suggestions is not all inclusive):

1. Use actual numbers to define a range...

2. Supervisory observations – count the number of times a supervisor sees something during a workday (always inform the employee when these observations are made)...

One observation does not substantiate a performance problem. Arrange and conduct a realistic number of observations.
3. Supervisory Review – supervisor’s review of the work after what the supervisor is looking for in content, accuracy and any other expectations are conveyed to the employees....

4. Use of time frames....

5. Test or Quizzes – used for jobs requiring a state of readiness (ex: responding to emergencies) or where there is a continuous updating of changing laws or standards."

(Manual, pp. 11-13)

The Manual goes on to note that

“You cannot (find out if the accomplishment was achieved) by comparing one [employee] with another. You can only do so by comparing the performance of each [employee] with the performance called for by the objective.

(Manual, p. 16)

While acknowledging that a work unit may have “boilerplate” JRs (Manual, p. 9), the same is not true for EAs.

PEP requires that each Job Responsibility Statement have a corresponding Expected Accomplishment Statement that describes the acceptable level of performance for the employee (Meets Expectations). Behaviors, conditions and criteria specified may be different for individual employees doing the same job. One employee may demonstrate competence at a basic level, another at a more proficient level and yet another at the mastery level. The Expected Accomplishment statement must describe the appropriate performance level for each individual employee.

(Manual, p. 17)

The fifth step is noting “Resource Control.” This is described as:

the point in the process when the supervisor verifies with the employee that he or she has control of sufficient resources to accomplish the Expected Accomplishment Statements. Examples of such resources are knowledge, skill, equipment, peer and supervisory concurrence, authority, money, etc.

(Resource Control is where to ) explain the circumstance when the employee is not to be held accountable for delay or failure to meet the expected accomplishment due to the lack of the essential resource.

(Manual, p. 26)

The next item of the Development Plan, which either describes performance results that exceed the standard set in the corresponding meets expectations EAs or is a problem solving
development plan, is meant to help employees improve their performance in areas where they are not consistently meeting EAs. *(Manual, p. 27)*

The last step is completing the PEPR.

At the end of the evaluation period the supervisor must compare the employee’s actual accomplishments to the measurement criteria written in the Expected Accomplishment statements in the employee’s PEP plan. Supervisors make a judgment based on the results and rate the employee’s performance for the evaluation period using the Performance Enhancement Program Report (PEPR) to record the judgment. PEPR asks the supervisor to determine if the employee achieved one of the following ratings:

- **Below Expectations:** Employee failed to meet performance standards set for any Priority 1 Job Responsibilities.
- **Meets Expectations:** Employee met the performance standards specified in the PEP Plan for the Priority 1 Job Responsibilities.

*(Manual, p. 28)*

The Hearing Officer, after reviewing the record, finds that the Department did not comply with the requirements of the Performance Evaluation System manual in a number of ways. Most important is that Ms. Saari, Appellant’s supervisor, failed to specifically state that Appellant was below expectations for his Priority 1 Job Responsibility. *(See, Manual, p. 28)* While Ms. Saari provided an extensive narrative enumerating performance problems, she does not give individual ratings for any of Appellant’s job responsibilities.

Another problem is Ms. Saari notes deficiencies that occurred, as she testified or noted in the narrative, only once (i.e., the notarization of affidavits and an incident “when I felt he was somewhat rude”). *(Cf., Manual, p. 13)* She also compares Appellant’s work with others (i.e., not identifying work processes that would assist in the achievement of individual goals, something Ms. Saari testified that others in the Unit did). *(Cf., Manual, pp. 11 and 16)*

Ms. Saari cites examples of alleged deficiencies in the narrative that she could not testify were actually below the Expected Accomplishments. For instance, she wrote the vague statement “Phil had numerous cases that have gone untouched for upwards of 7 months.” *(Exhibit M, p. 1)* She does not state whether this was seven months from October 31 (the date she should have used for the evaluation), or one of the dates at least a month later - November 30 or December 12. Further, when asked about this statement during the hearing, she was not able to state whether having “numerous cases untouched for seven months” was unusual for the Unit. All she could say was “it was not recommended.” There is a problem with the evaluation of an EA when not even the evaluator can explain its importance.

Other problems exist with Ms. Saari’s evaluation that lead the Hearing Officer to conclude Ms. Saari was considering inappropriate information when making the evaluation. As previously noted, she references as attachments written reprimands from 1999 and early 2000, well outside the evaluation period. She attaches a document to the PEPR that states that Appellant did not submit his self-evaluation, which she implied during her testimony was
additional evidence of Appellant's performance failures. This document fails to state that Appellant was out on FMLA leave at the time she left it for him. The failure to provide the self-evaluation, or even his mid-December statement she complained of during her testimony that he did not see the purpose since the decision to rate him below expectations was already made, is not relevant.

Ms. Saari also notes that the FMLA leave was “LWOP,” which she also cites as a violation of the September 6, 2001, written reprimand. There is no evidence that Appellant did not have the right to take FMLA leave in December 2001. If the leave was permitted under the FMLA, it doesn’t matter whether it was with or without pay. As previously noted, this leave was after the evaluation period; the matter should not have been included in the evaluation document.

Ms. Saari writes about Appellant’s failures to turn in his logs daily as required by the September 6 written reprimand. This misstatement of the facts bothers the Hearing Officer. Ms. Saari (and Mr. Dever) agreed with Appellant that he could turn these reports in weekly. To use this as an example of Appellant’s performance failures is disingenuous.

Ms. Saari notes that Appellant was working late without asking for overtime in order to get his work done. The fact that Appellant was willing to work on his own time should have been used as proof of his attempts to meet his job responsibilities instead of evidence of his failure to comply with the requirement that he seek pre-approval for overtime he was not even asking for.

While Appellant may have had a history of using his leave as it vested, he had notes from his physician for his absences. While the eventual accommodation for Appellant’s medical condition was not requested until the last month of the correct evaluation period, it must be noted that Appellant testified as to his medical condition and the fact that stress served as a trigger, requiring his frequent absences to stabilize his health.

Even if Ms. Saari’s narrative met the requirements for a PEPR as set out in the Manual, the Department’s decision to issue a below expectations evaluation was arbitrary and capricious and without rational basis or foundation.

Appellant testified that he felt as if he was being set up for failure, both by his prior supervisor Mr. Herrera, and Mr. Dever, who told Appellant that he would have to be a “super tech” for the last few months of the year in order to achieve a meets expectations rating. The Hearing Officer agrees with Appellant.

Appellant, knowing he was not keeping up with his work, asked Mr. Herrera for assistance in April or May 2001. Instead of providing assistance or even suggestions for dealing with the problem, Mr. Herrera basically replied, “We’re all stressed. Deal with it.” This is not an appropriate response from a supervisor to an employee who is having problems dealing with his job responsibilities, particularly when the same supervisor is also telling the employee to reduce the offending backlog.

There was no supervisor for the Unit over the summer of 2001, which, as Ms. Saari admitted, had the Unit “pretty stirred up” when she came in September 2001. Appellant had no
one to help him get control over his workload during that period other than a lead worker, who would have been responsible for her own caseload.

The Hearing Officer is also concerned that, as of September 6, 2001, the date of the written reprimand noting his performance problems, Appellant was given a supervisor who had no experience in Intake and was actually little more than a timekeeper. The Department's failure to provide Appellant with a supervisor who could help him accomplish his job responsibilities is problematic.

Even though Appellant was falling behind in his work, he was required to complete additional daily, and then weekly, reports of his duties. It seems that the time would have been better spent working on the backlog of cases, not on other paper work.

Despite Appellant's failure to keep current with his caseload, he was expected to attend training in new subject areas, areas that must be noted he was never given responsibility for actually handling. It is difficult for the Hearing Officer to understand that, if Appellant's work was so far behind that it was virtually impossible for him to meet expectations, why the Department's management required him to take the training for matters that he was not actually going to be handling. Appellant could have attended the training at a later time, after he caught up, if he needed to know the information to perform his job responsibilities.

The Hearing Officer is also concerned that Appellant was required to take the State certification test twice so that his already passing score could be raised to a level management could boast of when he should have been using that time to catch up on his pending work.

The last problem is that the Resource Control section of the PEP for the relevant period provides that "Obstacles beyond Phillip's control would influence his ability to accomplish these tasks effectively and efficiently...". (Exhibit 6, p. 2) The Hearing Officer finds that three restructurings of the Intake Unit in less than six months, which both Ms. Saari and Ms. Rodriguez confirmed left the Unit in disarray and turmoil as late as January 2002, the absence of a supervisor who could assist Appellant achieve his performance goals, and the requirement that Appellant take training in an area for which he was not going to have immediate job responsibility, are obstacles outside Appellant's control that certainly influenced his ability to accomplish his job responsibilities. Given these factors, to expect Appellant to meet expectations in his job performance was per se arbitrary and capricious and without rational basis or foundation.

Based upon the foregoing, the Hearing Officer concludes that Appellant's below expectation rating was arbitrary, capricious, and without rational basis or foundation, in violation of CSR 19-10 e).
ORDER

Therefore, for the foregoing reasons, the Hearing Officer REVERSES the "Below Expectations" PEPR as it is arbitrary and capricious. The appeal is GRANTED. The Department is ORDERED to change Appellant's December 12, 2001, PEPR to "Meets Expectations."

Dated this 14th day of August 2002.

Robin R. Rossenfeld
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 AND ORDER by depositing the same in the U.S. mail, this 14th day of August 2002, addressed to:

Phillip Cedillo
1200 Federal Blvd.
Denver, CO 80204

Mark A. Schwane
Colorado Federation of Public Employees
1580 Logan Street, Ste. 310
Denver, CO 80203

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 14th day of August 2002, addressed to:

Niels Loechell
Assistant City Attorney
Department of Human Services
1200 Federal Blvd.
Denver, CO 80204

Employment Law Section
Office of the City Attorney

Diana Smith
Human Resources Department
Department of Human Services