

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

Appeal No. 62-06

DECISION

IN THE MATTER OF THE APPEAL OF:

VINCENT MACIEYOVSKI,
Appellant,

vs.

FACILITIES MANAGEMENT, DEPARTMENT OF GENERAL SERVICES,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Vincent Macieyovski, seeks a reversal of the Agency's assessment of a "needs improvement" rating of his work performance for July 1, 2005 through June 30, 2006. I affirm the Agency's "needs improvement" rating.

II. ISSUES

The only issues to decide are whether the Agency's "needs improvement" rating of the Appellant's July 2005-June 2006 Performance Enhancement Program Report (PEPR) was arbitrary, capricious and without rational basis or foundation, and whether the Agency's rating was based upon a hostile work environment of its own creation.

III. FINDINGS

The Appellant is employed as a Master Trades Worker at the Agency. For the performance review period at issue in this appeal, the Appellant was re-assigned, in the same classification, to a new position created specifically to assist the needs of the Denver Art Museum (the Museum). The new position was created after the Museum paid an outside contractor over \$100,000 to care for the Heating, Ventilation, and Air Conditioning (HVAC) needs of the museum in 2003.

Due to the high cost of paying for an outside contractor, and because the museum was undergoing a significant expansion with additional anticipated HVAC and other maintenance costs, the Museum, an independent agency, reached an agreement with the City of Denver to place a city employee with the Museum to care for HVAC and maintenance needs for the museum. The Superintendent of Facilities Maintenance and Appellant's immediate supervisor, Candace Lothian, assigned the Appellant to those Museum duties. The resulting relationship between Facilities Maintenance and the Museum was that of service provider/customer. Under this arrangement, the Appellant continued to be supervised by Lothian, but was to report and respond to Terri Cross, the Museum Protective and Facilities Services Manager. [Exhibits 12, 20-2, 25]. The Appellant worked at the Museum from July 2005 to July 2006. He was transferred from the Museum following complaints from the Museum management concerning his work skills and demeaning attitude toward co-workers. [Exhibits 12, 13, 14, 17, 19, 20-2, 21-1, 23-1].

On July 14, 2006, in accordance with CSR 13-40, the Agency sent notice to the Appellant that it anticipated rating his annual review called a Performance Enhancement Program Report (PEPR) as lower than successful. A meeting concerning the notice was held on July 26, 2006, and was attended by the Appellant. On July 26, 2006, the Agency delivered notification to the Appellant that his annual PEPR for the review period July 1, 2005 through June 30, 2006, was rated "needs improvement." The Agency cited the following reasons for the rating. 1. Three instances demonstrating the Appellant's lack of required ability: (a) failure to change museum air filters according to the Museum's schedule [Exhibit 12-3]; (b) incorrect installation of the frame for a backflow prevention device; *Id.* (c) failure to supervise or remain in contact with supervisors during a repair incident. *Id.* 2. Appellant's failure to provide required service/repair/preventative maintenance documentation to the Museum. [Exhibit 12-2]. 3. Ineffective personal relations. [Exhibit 12-4].

The Appellant filed a grievance with the Agency concerning his PEPR on August 2, 2006. [Exhibit 3]. The Agency denied his grievance two days later. The Appellant filed a timely appeal on August 18, 2006.

A hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on October 31, 2006. The Appellant attended *pro se*, while the Agency was represented by Assistant City Attorney Chris M. A. Lujan, with Candace Lothian, Manager of the Agency, serving as the Agency's advisory witness. Agency exhibits 1-25 were admitted without objection. The Appellant offered his Exhibit C. The Agency objected and no further action was requested concerning the exhibit. The Appellant testified on his own behalf. The following witnesses testified for the Agency: Ms. Terri Cross, Ms. Candace Lothian, and Mr. James Williamson.

V. ANALYSIS

The standard of review that guides my decision whether to reverse a “needs improvement” PEPR is whether the Appellant sustains his burden of persuasion to show the Agency’s determination was arbitrary, capricious, and without rational basis or foundation. CSR 19-10 B. 3. It is insufficient for the Appellant to show the “needs improvement” rating was merely miscalculated or erroneous. In re Padilla, CSA 25-06 (Order 9/13/06).

An evaluation must be based on objective standards in the Performance Evaluation Plan (PEP) and Job Description, in order to give an employee notice of the criteria by which his performance will be judged in his annual PEPR. CSR § 13-10 G. In light of the foregoing criteria, I address each of the Appellant’s PEP “priority one” duties which the Agency rated “needs improvement.”

1. Operations/Maintenance/Repairs – Employee responds to service calls, trouble-shoot and repair building equipment and systems.

The Agency rated the Appellant “needs improvement” in this area for three instances where it deemed the Appellant failed to demonstrate a master trade level knowledge in the operation of the Museum: failure to meet required schedules to change air filters; improper placement of a frame for a back-flow prevention installation; failure to supervise or remain in communication with supervisors during an important repair incident.

Filter change. Cross testified that, when properly maintained, the Museum air filters trap particulates down to .03 microns. Maintaining constant low levels of air particulates, as well as constant levels for temperature and humidity, is critical to the integrity of the Museum’s billion dollar art collection. [Cross testimony]. Monitoring these levels is also contractually required by the terms of collections loaned from other museums. [Cross testimony, Exhibit 20-2]. Cross stated she asked the Appellant many times to monitor and change the air filters, [Cross testimony, Exhibit 19-1], after alarms began to sound for overdue filter changes in the fall of 2005. Despite numerous exchanges of emails in which Museum staff expressed concern over the failure to change the filters, [Exhibit 19, dated 12/9/05], [Exhibit 21, dated 4/6/06], [Exhibit 18, dated 5/9/06], [Exhibit 15, dated 6/19/06], the Appellant insisted no change was required.

The Appellant stated it was not necessary to monitor the filters as required by Cross, since alarms would sound when it is time to change them. [Exhibit 19-1]. Second, he stated the alarms were improperly set by the company selected to program the settings. [Appellant testimony]. Third, he stated he sent the filters to an outside laboratory which confirmed the filters did not need to be changed. [Appellant testimony, Exhibit 15-1, 2]. No record was produced concerning what results were obtained. On the other hand, the Agency brought in a

representative from the filter manufacturer who confirmed the filters were well past their useful life. [Cross testimony].

The Appellant's preference was to program systems for optimum financial savings, while the museum was obligated to maintain level readings for particulates, humidity and temperature, in order to preserve its artwork. In response to this ongoing dispute, the museum removed environmental programming access from the Appellant late in 2005. [Exhibit 20-2]. In May 2006 a Museum employee, not the Appellant, changed the filters five months after alarms began to go off. [Exhibit 15-1]. Cross said she inspected the filters and, even without any special knowledge and contrary to the Appellant's statements, she could see the filters were very dirty. *Id.*

The objective evidence concerning the Museum air filters indicates the filters needed to be replaced at latest in December 2005. The Appellant refused to perform this function while, as indicated below, demeaning others who disagreed with him. Because the need to change filters was based upon objective evidence, and the Appellant refused to comply with the change schedule, the Agency's rating the Appellant as "needs improvement," for failing to respond to multiple service calls to change air filters, was not arbitrary, capricious, or without rational basis or foundation.

Placement of frame for a back-flow prevention installation. Here, the Agency claimed the Appellant failed to move, or ask for assistance in correcting the placement of a frame for a back flow prevention system in the Museum. [Exhibit 12-3]. Cross explained the Museum lacked a back flow prevention system, so a design was executed for installation. The Appellant told installers to ignore the design, and instead, directed the frame for the system to be installed against a wall, in violation of building codes.

The Appellant stated he did not know what the problem was, adding the installation was the same as others at locations where he has worked. [Appellant testimony]. In response to the Appellant asking Cross how she knew the installation was incorrect, Cross replied she asked the electrician on the job, who told her code required a 36 inch set-back and the installation was right against the wall in violation of that requirement. [Cross Cross-exam].

I find the electrician's statement, albeit hearsay, more persuasive than the Appellant's statement that the installation was similar to those in other locations where he has worked. Presumably the other installations would have given the Appellant the expertise to understand the 36 inch set back requirement. He did not dispute the frame was set against the wall, and did not dispute the code requirement. For these reasons, I find the Agency determination that the Appellant did not adequately repair a building system, namely the back flow system, was not arbitrary, capricious, or without rational basis or foundation.

Failure to supervise. The Agency stated an inadvertent shut off of steam resulted in a drop in humidity levels throughout the Museum. The Appellant notified Cross of the problem, then left without further communication. Cross paged the Appellant on his work pager, but he did not respond. Lothian testified she had to step in to make calls to resolve the problem after trying and failing to locate the Appellant. [Lothian testimony]. The Agency claims it was the Appellant's responsibility to oversee or correct the problem himself. [Exhibit 12-3].

The Appellant responded there was no humidity problem before he left, stating alarms would have gone off had there been a problem. [Appellant testimony]. He added no one notified him there was a humidity problem. He complained Cross did not try to contact him on one of the cell phone numbers, but did not respond why he failed to answer Cross' page.

Other Museum staff complained about a similar lack of response and availability by the Appellant. [Exhibit 14-1, 17, 23-1]. The Appellant's failure to oversee work also violates two essential duties of his position: "monitors the work of the crew assigned to assist in the project;" and "assigns specific field assignments to crew members and monitors work to ensure permit requirements are met and duties are properly performed." [Exhibit 24-1]. For these reasons, the Agency's finding that the Appellant failed to be responsive to needed repairs was not arbitrary, capricious, or without rational basis or foundation.

2. Work Orders and Daily Time Sheet - Maintains records, completes work order information and other related documentation.

The Agency claimed the Appellant merited a "needs improvement" in this area due to complaints from the Museum about the Appellant's ongoing failure to keep required maintenance records. Even after his supervisor requested specific records for 2005 expenses, the Appellant was vague in his response. [Exhibit 16]. The Appellant's job description requires him to prepare work records and reports. [Exhibit 24-2, Cross testimony]. The Appellant replied most of his purchases were done with a city-authorized credit card, and therefore expenses could be tracked through statements for the card. Cross' concerns about the Appellant's failure to keep detailed maintenance records were sufficient justification for the Agency to have downgraded the Appellant's PEPR in this area.

3. Ineffective personal relations.

The Appellant's failure to communicate effectively, and his demeaning interactions with co-workers and Museum staff, is well-documented by the Agency. [Exhibit 13, 14-1, 21, 23-1]. During hearing, the Appellant displayed a supercilious attitude toward Cross, responding sarcastically to her statements during his cross-examination. [Cross Cross-exam]. The Appellant claimed others

were incompetent or prevented him from performing his tasks, but the Appellant's responses served more to demonstrate his misunderstanding of his duties than to identify mischief by others. For example, the Appellant claimed the function of programming the Museum's environmental controls was "highjacked by Westover, the most favor[ed] outside contractor...energy savings is the quintessential function of any facility operation..." whereas the Museum's first priority is the protection and preservation of its one billion dollar art collection. [Cross testimony], see also Exhibit 8 regarding the Appellant's misunderstandings. The Agency's decision to downgrade the Appellant's PEPR for ineffective personal relations was supported by competent evidence and was not arbitrary, capricious or without rational basis or foundation.

VI. APPELLANT CLAIMS

The Appellant argued his PEPR was based upon the last half of his review period, and ignores his work at facilities other than the museum. Even if true, the Agency presented a proper basis for downgrading the Appellant's PEPR based upon his performance at the Museum during his 2005-2006 review period.

The Appellant also claimed that failures attributed to him are, in reality, the result of others not heeding his advice. The evidence establishes, by a preponderance of the evidence that the Appellant was unresponsive and demeaning. There was no basis for the Appellant's claim.

The Appellant also argues the Agency failed to use measurable standards in rating his work, that no supervisor directly observed his work, and that the downgrade in his performance was based only upon complaints by those outside the Agency. I find the standards the Agency employed in reviewing the Appellant's 2005-2006 work were objective, and well-established in his job descriptions, Exhibits 24, 25. His supervisor was not only entitled, but obligated, to receive and act upon complaints received by the Agency's customer, the Museum.

Finally, the Appellant claimed he submitted 2 emails outlining the hostile work environment toward him and the management failed to address his claim. The Appellant's claim was vague to the point where he failed to state a claim for hostile work environment, which requires, at a minimum, identification of what protected status the Appellant claims, and what extreme incident or pattern of behavior constitutes an alteration of workplace conditions. In re Chappell, CSA 02-02, 34 (3/22/02). Neither was stated, nor established. In addition, the Appellant did not file a complaint of harassment with the Agency as required to establish a claim under CSR 19-10 B. 1.

VII. CONCLUSION

It is important to recall that the relationship between the Agency and the Museum was that of service provider/customer. [Exhibit 25, 20-02]. The importance of that relationship is that, as a matter of common business practice, any disagreement between the parties should normally be resolved in deference to the customer's wishes, and that disagreements should be resolved by the service provider taking complaints up his own chain of command instead of confronting the customer. In short, the adage "the customer is always right" should prevail. Despite evidence to the contrary, the Appellant decided he was correct and the Museum was wrong in several areas, he openly defied Museum demands, and he was demeaning to Museum management. If the Appellant took issue with the Museum's requests, he should have taken his concerns up his chain of command, rather than simply to ignore the Museum, and thereby create tension between the Agency and its customer, the Museum. Museum personnel became sufficiently frustrated with the Appellant's lack of responsiveness that they requested his removal. [Exhibit 13]. These facts establish a basis for the Agency's rating of the Appellant's PEPR as "needs improvement." The Appellant failed to establish, by a preponderance of the evidence, that the Agency's rating of his PEPR as "needs improvement" was arbitrary, capricious, or without rational basis or foundation.

VIII. ORDER

The Agency's assessment of a "needs improvement" rating for the Appellant's July 1, 2005 - June 30, 2006 PEPR is AFFIRMED.

DONE this 14th day of December, 2006.



Bruce A. Plotkin
Hearing Officer
Career Service Board