

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

Appeal No. 25-06

DECISION

IN THE MATTER OF THE APPEAL OF:

MARY LOUISE PADILLA, Appellant,

v.

RISK MANAGEMENT, DEPARTMENT OF BUDGET AND MANAGEMENT,
and the City and County of Denver, a municipal corporation,
Agency.

The hearing in these consolidated appeals commenced on July 13, 2006, and concluded on July 27, 2006 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Lauren Cabot Oray, Esq. The Agency was represented by Assistant City Attorney Robert A. Wolf. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered herein:

I. STATEMENT OF THE CASE

Appellant Mary Louise Padilla, a Claims Adjuster in the Workers' Compensation Unit of Risk Management, Department of Budget and Management, appeals her "needs improvement" Performance Enhancement Program Report (PEPR) rating dated February 28, 2006 after filing a grievance of that rating. Appellant alleges the rating was arbitrary, capricious, and without rational basis or foundation, and was the result of harassment and retaliation.

Exhibits 1 - 4, 7 - 9, A - B and H - J were admitted into evidence.

II. ISSUES

The issues presented in this appeal are as follows:

- 1) Did Appellant establish by a preponderance of the evidence that her "needs improvement" PEPR rating was arbitrary, capricious and without rational basis or foundation under Career Service Rule (CSR) § 19-10 B. 3.,
- 2) Did Appellant prove the rating was caused by harassment, and

3) Did Appellant prove that the Agency retaliated against her by means of the "needs improvement" rating?

III. FINDINGS OF FACT

Appellant has been employed by the City and County of Denver as a Claims Adjuster since January 1998. Her work is to investigate worker's compensation claims made against the City, determine liability, and resolve the claims or assist in preparing them for hearing before the Colorado Department of Workers' Compensation (DOWC).

For a period of time before Workers' Compensation Claims Supervisor Alan Hutchins was hired in 2004, the supervisor position was vacant. During that time, the Worker's Compensation Unit suffered some negative audits of its work by the DOWC. After his arrival in August 2004, Mr. Hutchins was given two missions: improve results from the state audits, and develop a plan to enhance the unit's process. Pursuant to those goals, Mr. Hutchins implemented the claims review form to apply comprehensive criteria for judging the quality of the claims files [Exh. 1], and redid the job description for the position of Claims Adjuster. [Exh. 1.] Appellant signed the new Performance Evaluation Program (PEP) on November 24, 2004.

Under the PEP, an adjuster must achieve at least 80% compliance with the expected accomplishments in four of the six job elements in order to obtain a "meets expectations" rating. [Exh. 1.] The PEP sets forth six job responsibilities: 1) investigating claims and determining liability, 2) making settlements, 3) compiling information for subrogation and litigation, 4) conferring with various parties, 5) calculating claim value and authorizing payments, and 6) monitoring claims files. No duty is listed in the PEP as having higher priority than any other. [Exh. 1.]

The first duty, investigating claims, has at least five expected accomplishments: 1) initial investigation, including contact with parties, 2) ongoing documentation of claim status, 3) creation of a claims plan, and 5) compliance with DOWC audit measures. An adjuster earns a "meets" rating for this category with an 80% score for documentation on the claims audit by the Claims Supervisor.

The second duty relates to settlements and other methods of closing a claim. A "meets" rating requires closure of at least ten claims per month.

Third, an adjuster must include information for subrogation and litigation in the STARS system. This requires initial investigation notes, notification of the Risk Analyst, and notifying the City Attorney's Office of the entry of appearance by a claimant's attorney. An 80% score in supervisory reviews is at the "meets" level.

Fourth, four justified complaints about communication with external customers, and an average survey score of 2.8 from internal partners, will net a "meets" rating for the category of timely and thorough communication.

Calculation of financial reserves is the fifth duty. It includes setting reserves, regular review of reserves for adequacy, handling medical bills and reports as required by DOWC, and reviewing reopened claims for a reserve plan. An 80% score in the Claims Supervisor's audit meets this standard.

The final duty in the PEP is the monitoring of claims files and maintaining a calendar of claims going to hearing. The expected accomplishment is thorough diary review every 30 days, including updates, plans of action and notes of city attorney reviews. An 80% audit score meets the standard for this task.

On June 13, 2005, Mr. Hutchins met with Appellant and placed her on a three-month Performance Improvement Plan (PIP) based on Appellant's failure to achieve compliance with the minimum performance standard in three areas. The plan required that Appellant "demonstrate immediate and sustained improvement" in the areas of initial investigation, reserving sufficient funds to cover the estimated cost of the claim, and documenting claim status in the unit's STARS software system. Appellant's progress under the plan was to be reviewed every thirty days based upon Mr. Hutchins' measurements of Appellant's work. Appellant responded that she was working extra hours to catch up, now had her desk under control, and "will be able to complete my task." Appellant acknowledged that she understood what was expected of her and how she could improve, but requested clarification of the phrase "meaningful documentation." [Exh. 7-1 to 7-3.]

On the July review date, Mr. Hutchins noted that Appellant had raised her score in the initial investigation category from 45% to 57%, scored 100% in two tasks related to reserves, and "showed much improvement" in documentation, earning a 75% score. Appellant was reminded to continually review reserves and document all claims activity in STARS. [Exh. 7-4, 7-5.]

The August review shows nearly full compliance with the initial investigation standard, and improvement in setting initial reserves and documentation in STARS. Under-reserving and delays in diary notes were the only deficiencies noted. [Exh. 7-6, 7-7.]

On the last scheduled review date in September, Appellant's initial investigation score dropped to 50%, and documentation dropped from 83% to 62%. The report shows "demonstrated areas of sustained improvement, such as documentation and reserve notes", but "[t]he reserve adequacy issue continues to lack . . . proactive involvement." [Exh. 7-8, 7-9.] The improvement plan was therefore extended for another three months of observation and measurement, during which there was to be one more review meeting in late October or early November. [Exh. 7-8, 7-9.]

On November 29, 2005, Mr. Hutchins filed a report that stated Appellant "has shown sustained improvement in her documentation of STARS regarding claims investigations", and that her "reserve documentation has improved greatly." However,

initial investigation and reserve reviews were noted as areas that still needed improvement. The report concluded the 90-day extension of the improvement plan, but stated that Mr. Hutchins would continue to measure Appellant's execution of her duties for inclusion in her February 2006 PEPR. [Exh. 7-10 to 7-11.] A copy of the November report was not given to Appellant, and the planned additional review meeting in October or November was not held. [Testimony of Alan Hutchins.]

On February 17, 2006, the Agency advised Appellant that it anticipated giving her a "needs improvement" PEPR rating for the period of February 1, 2005 to February 1, 2006.¹ Appellant and her supervisor met on February 28, 2006 to review the expected rating. The PEPR was issued that same date, accompanied by Mr. Hutchins' justification of the rating, and Appellant's written rebuttal. [Exh. 2.] The supporting justification set forth six areas of performance inadequacy:

- 1) Appellant received ten error letters from the Division of Workers' Compensation out of 146 claims, producing an error percentage calculated at 15%, an increase of 2% over the rate in the last PEP period,
- 2) Appellant failed to regularly review and close claims in the first half of the rating period. She reduced her caseload by 27 claims over the entire year, "[an] excellent result", but did so only after "prompting by her supervisor."
- 3) Two returned surveys showed Appellant negatively interacted with co-workers and customers, and Mr. Hutchins received numerous complaints that Appellant did not timely respond to customer needs,
- 4) The audit/review results showed a compliance rate of 78%,
- 5) The files reveal continued problems with reserving despite the work improvement plan, and
- 6) Mr. Hutchins' "cursory review" of the files assigned in December 2005 and January 2006 showed a lack of adequate documentation or follow-up, late reserves, and delayed filings at the Division of Workers' Compensation in five out of the twelve claims. [Exh. 2-1 to 2-4.]

As a result of the PEPR's "needs improvement" rating, Appellant was placed on a PIP dated March 9, 2006, stamped as received by the unit on March 13th, and signed by Appellant on April 10th. The PIP stated that Appellant had received the following ratings for her compliance with standards in four performance areas:

- 1) 78% for initial investigations,

¹ Exhibit 8 erroneously states that the rating period was from February 1, 2004 to February 1, 2005, but neither party raised that error as an issue in the appeal, and the evidence was consistent throughout the hearing that the rating period was from February 2005 to February 2006.

- 2) 76% for reserving,
- 3) 74% for claims handling, and
- 4) 70% for DOWC timeframe issues (timely filing of Division of Workers' Compensation documents).

The PIP also noted Appellant received an inordinate number of customer complaints. The Action Plan listed the same areas of needed improvement given in the 2005 PIP, and added one: improving the timeliness of her interactions with customers. Appellant indicated that she did not understand what is expected of her or how she could improve, and that she needed clarification of what was expected of her. [Exh. 9.] Appellant grieved the 2006 rating because she believed that it was not a fair or accurate reflection of the work she performed. [Exh. 3.] The grievance was denied on March 28, 2006. [Exh. 4.] This appeal followed.

Appellant testified that in August 2005 she was not satisfied with how she was working her claims, but that she had fallen behind because of the vacancy in the supervisor position. Appellant believes the STARS software was not user-friendly, but that her STARS documentation and other work became steadily better during the 2005 improvement plan. When the September PIP review stated she'd made progress in all three areas, and there were no further meetings or reviews regarding her work, Appellant believed Mr. Hutchins was not seeing serious problems with her performance that might justify a negative rating and denial of a merit raise. Appellant never received Mr. Hutchins' November summary. [Exh. 7-10, 7-11.]

Several witnesses testified that the work atmosphere was tense, and that many employees complained to Risk Management Director Raymond Sibley that Mr. Hutchins spoke to employees in a rude and demeaning manner. Adjuster Jacqueline Ridout stated Mr. Hutchins was aggressive and condescending toward her and Appellant. Administrative Support Assistant IV Bea Medina testified that the atmosphere was "fearful", and that Mr. Hutchins dislikes Appellant and discourages her questions at staff meetings. Shirley Dotson found the environment hostile but not discriminatory. Ms. Dotson observed that at least six employees had complained about Mr. Hutchins "talking down to people," and that she had seen Appellant upset "many times" after speaking to Mr. Hutchins.

Appellant testified that Mr. Hutchins was hostile to her, and did not directly answer her questions or tell her how he wanted her duties performed. Appellant stated that she understood what the job required until the February PEPR failed to give her credit for her improvements and used different criteria than the PEP to judge her performance. She then responded in the PEPR meeting that she no longer understood what was expected of her. Mr. Hutchins became angry and threatening. Appellant complained to Mr. Sibley, who ordered Mr. Hutchins to apologize in writing to Appellant. Mr. Sibley testified that he had counseled Mr. Hutchins after receiving complaints from

other employees that he was rude and demeaning and did not listen. Mr. Hutchins did not rebut this testimony.

IV. ANALYSIS

1. Was the PEPR rating arbitrary, capricious and without rational basis or foundation?

A “needs improvement” performance rating may not be reversed unless there is “an express finding that the rating was arbitrary, capricious, and without rational basis or foundation.” CSR § 19-10 B. 3.

A. 2006 PEPR and Performance Deficiencies

The PEPR justifies the rating being appealed on the basis of six performance deficiencies. Their relationship to the job duties listed in the PEP was not always clear from the evidence.

The first performance deficiency noted in the PEPR was an error rate of 15% in DOWC admissions. This is a subcategory included in the PEP’s first element, investigation of claims. In her grievance, Appellant stated that the 10 error letters that created the 15% error rate were caused by her absence on FMLA leave. I find that the actual error rate for 10 error letters out of 146 admissions is 7%, which is an almost 50% reduction in errors from the previous year. In any event, the PEP performance standard for DOWC quality measures was a passing audit score of 95%, not a number of error letters. [Exh. 1-1.]

Mr. Hutchins admitted at hearing that Appellant’s error rate for the period in question was closer to 8%, but that the correction would not change the rating, since the more important measure is the DOWC timeframe category in the claims audit form. As shown below, the evidence showed Appellant’s score for the DOWC timeframe issues should have been 86%, which is in the “meets” category of 80%, the standard applied in the PEPR. [Exhs. 2-3, 9-2.]

The second problem noted in the PEPR was that Appellant only reduced her caseload in the second half of the rating period after Mr. Hutchins’ prompting. Appellant contends that a negative rating for this category fails to give her credit for the acknowledged “excellent result” in reducing her caseload for the year as a whole. [Exh. 2-2.] Appellant also argues that her PEP failed to assign values to each of the six categories of performance, and that her achievement of the other performance goals in her PEP “would have given me a higher percentage and a passing rate.” [Exh. 3-6, 3-7.]

Reduction of caseload is part of the second element listed in the PEP, along with achievement of settlements. The standard to obtain a “meets” is at least 10 closings per month. The PEP declared that the average caseload per adjuster was between 120 to 135 active cases, with 10 to 15 new cases assigned per month. [Exh. 1-1.] Appellant

reduced her caseload from 133 claims to 105 during the rating period, a net reduction of 28 cases, or 20%. When the average of 10 new cases is added to that net reduction, Appellant achieved an average closure rate of 12 claims per month, which is within the "meets expectations" level of performance under the PEP for the second element.

Third, the PEPR determined that Appellant was deficient in the area of customer service. The Claims Supervisor included two of the ten survey results sent to internal customers in the PEPR. Both gave "unsatisfactory" ratings "for all questions regarding service and interaction." [Exh. 2-2.] Appellant stated in her grievance and testimony that the surveys were sent out the same day as her notification that a "needs improvement" rating was anticipated, indicating that Mr. Hutchins had already decided the survey results would be negative. [Exh. 3.] Mr. Hutchins did not include a favorable survey that arrived on the PEPR review date, which gave Appellant a score of 3.6. [Exh. H.] The PEPR does not quantify how many of the seven survey questions were negative in the two including survey results, or state the average total survey score given by the two counted surveys. The absence of this information means that it is impossible to determine whether Appellant failed to meet the 2.8 performance standard set forth in the PEP.

A second PEP standard for communication with external customers is the receipt of no more than four justified complaints from external customers. The PEPR states that Mr. Hutchins received "numerous complaints throughout the past year about Mary's delays in responding . . ." There is no evidence in the record that about whether these complaints were deemed to be more than "four justified complaints" in accordance with the PEP standard of performance for this job responsibility. [Exh. 1-2.]

The fourth area noted as inadequate in the PEPR was a rating of 78% in the claims audit reviews. The evidence shows that the following errors occurred in those reviews:

1) In the Angel Cordova claim, Mr. Hutchins counted a "no" as a "yes" under the reserving section, and miscalculated the total. The two errors, one in Appellant's favor and one counting against her, indicate no change in the score of eleven out of twelve. [Exh. 1-1.]

2) In the Robert Valdez matter, Mr. Hutchins in his testimony changed two no's to yeses under the category of Claims Handling Issues after Appellant pointed to her notes dated April 5 and 15, 2005. The resulting score is fourteen out of eighteen, an increase of two points.² [Exhs. 1-7, 1-8.]

3) The Initial Investigation category of the Christine Ferrer claim should have been scored as four out of four, as indicated by the letter symbols on the blanks of the

² Mr. Hutchins conditioned that admission by stating that Appellant should have marked the notes "shareable" and he would have seen them during his initial review. However, Director Sibley testified that he did not know until the date of the hearing that the software excluded any notes. I find therefore that Appellant deserved credit for making the two case notes in question.

six questions in that category. That changes the total score for that claim to eleven out of thirteen, an increase of one point. [Exh. I-17.]

4) I take judicial notice that February 21, 2005 was President's Day, a city holiday. Under the circumstances, Appellant should have been given a "yes" on the first entry of the Randy Still claim, for a total score of nineteen out of twenty, a one-point increase. [Exh. I-21.]

5) Mr. Hutchins corrected his initial entries in the section on reserving and changed Appellant's score to fifteen out of eighteen, but did not correct the percentage from 78% to 83% in the Ernest Espinoza claim. [Exh. I-36.]

6) In the Deleon claim, Appellant was given a "no" in data issues for using the PRDP code "equipment/tools improper" because Mr. Hutchins believed it did not apply to an injury resulting from descending a ladder. However, Appellant's initial investigation notes indicate the claimant was leaving a truck by crossing and then descending a narrow catwalk and ladder. The injury occurred when his boot was caught on the ladder. Appellant's use of the equipment code appears proper unless the code has a more specialized meaning than the obvious one. If so, that specialized meaning was not included in the evidence for this de novo review of the rating. Appellant should have been scored a twelve out of fourteen in the review of this claim, an additional one point. [Exhs. I-43, I-45.]

7) Mr. Hutchins changed his "no" to a "yes" at hearing in the DOWC Timeframe category of the T. Mondragon claim after noting Appellant had filed a notice of contest on November 17, 2005. Mr. Hutchins also changed a "yes" to a "no" in the Claims Handling Issues category upon consideration of his handwritten note, "Last note 12/31/05." Those two actions result in no net change to the score of eleven out of thirteen for that claim. [Exh. I-51.]

The PEPR concluded that the score of the audit/review results was 78%, based on an averaging of the following categories:

Initial Investigation:	78%
Reserving/payment:	76%
Medical Issues:	87%
Claims Handling Issues:	74%
Data Issues:	86%
DOWC Timeframe Issues:	70%

In fact, hand calculation of the audit results reveals other mathematical errors. The original audit/review score of 161 out a possible total of 196 should have been calculated as an 82% success rate, within the "meets" category. As corrected after addition of the five points indicated above, the score is 85%. The scores in each category after the corrections made based upon the evidence are:

Initial Investigation:	77%
Reserving/payment:	84%
Medical Issues:	95%
Claims Handling Issues:	83%
Data Issues:	90%
DOWC Timeframe Issues:	86%

When asked if an additional five points would have changed the claims audit results, Mr. Hutchins responded that it would not, since he believed the average score of the files would still be under 80%, despite the mathematical nearness of 78% to the percent needed to achieve a “meets” level of performance.

The next basis for the PEPR rating is that “[t]he area of reserving . . . continued to be an area of concern.” [Exh. 2-3.] However, Appellant’s score in the category of reserving on the claims review forms is 27 out of a possible 32, which equals an 84% success rate. [Exh. 1.] This was a significant improvement over the finding in the November progress report showing problems in the handling of reserves in all five of the cases assigned. [Exh. 7-10.]

The final listed basis for the rating is that Mr. Hutchins’ brief review of the twelve files assigned in December 2005 and January 2006 showed problems in documentation, involvement and follow up in five of those twelve files. These files were not included in the audit/review results of the claims included in Exhibit I. However, even if the five inadequate files were scored the same as the lowest score in the audit/review, which was 7 out of 12 [Exh. 1-29], and the seven remaining files were scored at the median level of 11 out of 13, the average claims audit score of the 25 claims reviewed over the course of the year would be 80%. The admitted cursory nature of the review renders this evidence less reliable than the verified results from the claim review forms.

B. 2006 Performance Improvement Plan (PIP)

In the event of a “needs improvement” rating, the Career Service Rules require that the employee “be provided with a PIP no later than ten (10) calendar days after the PEPR Review Date.” CSR § 13-40 C. While this PIP is dated on the ninth day after the Feb. 28th review date, Appellant did not receive it until forty-one days after the PEPR meeting. [Exh. 9-5.]

The 2006 PIP lists four areas needing improvement: 1) initial investigation, 2) reserving/payment, 3) claims handling issues, and 4) DOWC timeframe issues. The first three are the same issues listed in the 2005 PIP. The action plan repeats almost verbatim the same section of the 2005 PIP, without removal of any of the problems already corrected during the last rating period, such as data issues and reserve authority. [Exhs. 2-3; 7-7.] As noted above, an accurate tabulation of the claim review forms should have showed that Appellant earned scores of 83% in claims handling, 90% for data issues, 84% for reserves, and 95% for medical issues. Although the score

for initial investigations was only 77%, that was an improvement from the 45% Appellant earned in the prior year. The 100% score for the handling of the legal issues of subrogation and litigation was not included, but that may have been eliminated as statistically insignificant based upon the existence of only one answer to that question in the claim review forms. [Exh. I-7.]

C. Does Rating Justify Express Finding under CSR § 19-10 B. 3?

The purpose of an annual performance review is to evaluate individual performance, and reward successful performance with merit pay increases under the Career Service Rules. An evaluation must be fairly based on the standards and measures in the PEP plan in order to give an employee notice of the criteria by which her performance will be judged. CSR § 13-10 G. Evaluations must weigh performance against standards of performance that are objective to the extent feasible given the job being measured. See Cohen v. Austin, 861 F.Supp. 340 (E.D.Pa. 1994).

From the evidence presented, it is unclear what relationship exists between the PEPR deficiencies and the performance standards set in the PEP. The six PEP elements may be summarized as 1) investigate claims, 2) close claims, 3) handle legal issues, 4) communicate with customers, 5) handle reserves, and 6) document claim status in STARS. Some tasks may be counted within two or more job elements; e.g., notes on subrogation may be included in nos. 1, 3 and 6. The imperfect relationship between the PEP and the PEPR makes an assessment of Appellant's degree of success difficult. Since all investigative notes should be included in STARS for accessibility purposes, the results for the first element, investigation of claims, and the sixth, documentation in STARS, should match. However, Mr. Hutchins' audit assigns different numbers to those elements: 78% and 86%, respectively. Under these circumstances, I have looked to the underlying data source, the claim review forms, in order to evaluate the evidence. [Exh. 1.] As indicated above, a hand count of the forms show an average of 85% compliance with standards.

It is also unclear what weight was given to each deficiency listed in the PEPR. Mr. Hutchins stated that "[t]he minimum score for 'Fully successful' (formerly known as 'Meets expectations') is 80%." [Exh. 2-3.] If that statement is intended to mean that only his audit/review results from the claim review forms are being assessed in the PEPR, then the true score as corrected by the evidence in this appeal is 85%. If instead the audit/review is intended to set the scores for only those four elements in the PEP that use the 80% standard, the corrected scores for those elements are as follows: 1) investigation - 77%, 3) legal issues - 100%, 5) reserves - 84%, and 6) STARS documentation - 83% or 90%, depending on whether "claims handling issues" or "data issues" is the most appropriate category. All but investigation fall into the "meets" level of performance according to the PEP. The two remaining elements in the PEP are case closure and communications. Appellant met the standard of ten case closures per month by reducing her caseload while closing the same number of new cases assigned each month. As to the communication element, the PEPR does not support a conclusion that Appellant failed to meet expectations, and the PEPR's failure to include

available favorable customer survey results renders its conclusion on this element unreliable.

Finally, if the three tasks reviewed in the three-month PIP are the critical job elements being measured in the PEPR, the audit shows her scores as follows: initial investigation – 77%, reserves – 84%, and documentation – 86%, for an average of 83%, which is also at the “meets” level.

Here, the PEPR relied upon an audit/review with numerous errors to reach a 78% rating, and the PEPR itself contained mathematical errors. The corrected scores in five out of the six audit/review areas was over 80%, and the average score of all areas was 85%.

However, an erroneous PEPR rating does not compel reversal of the rating. An express finding that the rating was arbitrary, capricious and without rational basis or foundation is the only basis for such reversal. An act is arbitrary and capricious if a reasonable person, considering all the evidence, would fairly and honestly be compelled to reach a different conclusion. In re Leal-McIntyre, CSA 77-03, 134-03 and 167-03, 5 (1/27/05); citing Wildwood Child & Adult Care Program, Inc. v. Colo. Dept. of Public Health Care and Environment, 985 P.2d 654, 658 (Colo.App. 1999.)

While a “needs improvement” rating may be supported by a deficiency in fewer than all critical elements of a job [In re Leal McIntyre, CSA 77-03, 134-03, 167-03, 6 (1/27/05)], this PEPR claims to be based on Appellant’s overall audit rating of 78% in six areas. That erroneous conclusion, together with the PEPR’s failure to consistently apply the standards contained in the PEP, raise questions about whether the evaluation was arbitrary, capricious and without rational basis or foundation.

Mr. Hutchins faced a daunting task of improving a struggling work unit after the long absence of a supervisor and a string of negative audits from the state. However, convincing evidence from Appellant’s co-workers indicated that Mr. Hutchins displayed an active dislike of Appellant. Jacqueline Ridout testified that Mr. Hutchins was aggressive and condescending toward Appellant. Bea Medina stated that Mr. Hutchins discouraged Appellant’s questions at staff meetings by ignoring them, and showed no tolerance for Appellant. Shirley Dotson testified that she has seen Appellant upset many times after conversations with Mr. Hutchins. Mr. Hutchins was ordered to apologize to Appellant in writing for losing his temper during Appellant’s PEPR review date. When Appellant asked Mr. Hutchins to look at her phone directory to prove she had returned a call, Mr. Hutchins did not dispute that he refused to look at the directory so that she might disprove a customer complaint. [Exh. 3-5.] Mr. Hutchins did not respond to Appellant’s testimony that the customer service surveys were not mailed out until the day of the letter required by CSR § 13-40 A.

In addition, the procedural carelessness with which this PEPR was handled contributes to a strong impression that Appellant was arbitrarily deprived of a fair evaluation of her performance. The September review points to Appellant’s

“demonstrated areas of sustained improvement”, including documentation and reserve notes. Mr. Hutchins highlighted two areas in which Appellant still needed to work: contacting parties within one day of assignment, and regular reserve reviews. The review promised another meeting in October or November and extension of the plan for three months to follow up in these areas. [Exh. 7-9.] That meeting was never scheduled. The only action taken during the extension was Mr. Hutchins’ two-page evaluation of Appellant’s progress, which was never shared with her. Under these circumstances, Appellant’s belief that her performance was improving was reasonable. Mr. Hutchins did not send out the customer survey forms until the same day he sent Appellant a notice that he anticipated giving her a “needs improvement” rating, and Mr. Hutchins did not count a favorable survey result into her score. Appellant’s new PIP was untimely, and its action plan was based largely upon old issues from her 2005 PIP. Mr. Hutchins denied at hearing that the errors revealed in the PEPR and his claims audits could have affected the results, and substituted a different category, DOWC timeframe issues, as more important when faced with one such error. However, the substituted category was also miscalculated. This evidence indicates that the PEPR was the product of Mr. Hutchins’ negative feelings about Appellant, rather than an objective, good faith evaluation of Appellant’s performance.

When the PEPR errors and procedural problems are combined with the rest of the evidence, including the demeanor of the witnesses and a thorough examination of the exhibits and testimony, I am compelled to reach the conclusion that the rating was not only in error, but was arbitrary, capricious, and without rational basis or foundation within the meaning of CSR § 19-10 B. 3.

2. Did Appellant prove the rating was caused by harassment?

Appellant failed to present any evidence that the PEPR was caused by her membership in any class protected from discrimination or harassment under CSR § 15-100 et. seq. Therefore, it is determined that this claim has not been established.

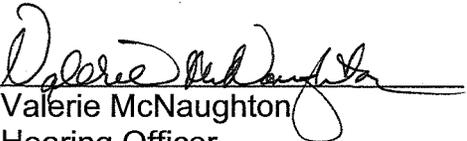
3. Did Appellant prove that the Agency retaliated against her by means of the rating?

Appellant has the burden to prove the adverse action was taken as a result of her actions before the Denver Board of Ethics, or for reporting discrimination or assisting the city in an investigation of a discrimination complaint. Appellant provided no evidence in support of this claim, and it is therefore determined that the claim must fail.

ORDER

The Agency action is REVERSED. The Agency is ordered to remove the "needs improvement" rating and substitute a "successful" rating for the rating period February 1, 2005 to February 1, 2006.

Dated this 13th day of September, 2006.


Valerie McNaughton
Hearing Officer
Career Service Board

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NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

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