

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 52-07

DECISION

IN THE MATTER OF THE APPEAL OF:

LINDA PROCTOR
Appellant,

vs.

DENVER DEPARTMENT OF HUMAN SERVICES,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Linda Proctor, appeals her annual work review rating of “needs improvement, assessed August 1, 2007. A two-day hearing concerning this appeal was conducted by Bruce A. Plotkin, Hearing Officer, on November 13 and 29, 2007. The Agency was represented by Assistant City Attorneys Linda Davison and Diane Briscoe. The Appellant was represented by Whitney Traylor, Esq. Agency Exhibits 1-10, 11-13, 16-17, and E-27 through E-30 were admitted. The following Appellant’s exhibits were admitted: A-15 through A-18, B-1, B-2, E-36, G-1 through G-8, H-3, H-5, H-6, I-1, I-2, and I-10, I-12, and I-13. The Appellant testified on her own behalf during her case-in-chief, and presented the following witnesses: Myrna Crawford, Amanda McClure, Jan Ware, Maria Obee, Darnell Mascarenas, Sundanz Washington, and Matthew Paris. The following witnesses testified for the Agency: Sharon Ponder Smith, [REDACTED], Kevin Patterson, and Juanita Sanchez.

Jurisdiction is proper under Career Service Rule 19-10 A. 2. c. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975). Unlike disciplinary matters where the Agency bears the burden of persuasion, in the appeal of a “needs improvement” work rating, the appellant retains the burden of persuasion, throughout the case, to prove the Agency’s rating was arbitrary, capricious, and without rational basis or foundation. CSR 19-10 A. 2. c. The standard by which the Appellant must prove her claim is by a preponderance of the evidence.

Before her most recent work review, the Appellant's work rating was always "meets expectations" or better; however in her most recent review, from August 1, 2006 to August 1, 2007, Sanchez rated the Appellant's overall job performance as "needs improvement" pursuant to the Career Service Rules ranking system. CSR 13-30 C. The Appellant filed a grievance of her "needs improvement" rating on August 2, 2007. The Agency denied her grievance five days later. The Appellant then perfected her appeal on August 23, 2007.

II. ISSUES

The Appellant disputed only the propriety of her "needs improvement" performance rating. Formalities, including notice and the opportunity to be heard, CSR 13-40, were not disputed. Thus, the only issue presented for appeal was whether the Agency's "needs improvement" rating of the Appellant's 2006-2007 work review was arbitrary, capricious, and without rational basis or foundation.

III. FINDINGS

The Agency is Denver's welfare department. The Appellant has been employed by the Agency for 33 years. She has carried her current title, Operations Administrator, for the past eight years. Her immediate supervisor, at all times pertinent to this appeal, was Juanita Sanchez.

On October 16, 2006, two new and inexperienced employees under the Appellant's immediate command, Sharon Ponder Smith and [REDACTED] began employment as branch managers at the Eastside and Montbello branches of the Agency. The Appellant dropped them off at their respective job sites with perfunctory introductions, provided no guidance, no training, and no planning for required training. She provided little or no materials necessary for the managers to perform their duties. She told them on their first day "you are on your own."

When she entered her office for the first time, [REDACTED] found a desk with a bible on it, but no chair, no computer, no documents, and no information regarding her duties, or who to contact for needed items. [Exhibit 12-4, [REDACTED] testimony]. The new managers' questions to the Appellant were met with belittling, abrasive, chastising, abrupt, and otherwise unhelpful responses. [Ponder Smith, [REDACTED] testimony, Exhibit 8-14 through 8-17]. Neither Ponder Smith nor [REDACTED] subsequently asked the Appellant for assistance, nor did either share her concerns about the Appellant's management style with her.

On [REDACTED]'s fourth working day, the Appellant ordered her to issue a verbal reprimand to a subordinate, for reasons unrelated to [REDACTED], without providing an explanation of the disciplinary process, and without providing a template for the form of the reprimand. Three weeks after Ponder Smith began, the Appellant sent her a brief job description. [Exhibit A-17]. The Appellant failed to meet with

either manager alone for one-on-one supervisions required by her Performance Improvement Plan. [Exhibit 3-2, Exhibit 8-16, Ponder Smith, ████████ testimony]. She passed both managers from their probationary periods without first consulting her supervisor.

On August 1, 2007, the Agency issued a "needs improvement" PEPR to the Appellant. The Appellant filed a grievance the following day. The Agency declined the Appellant's grievance on August 7. The Appellant then filed this appeal on August 23, 2007.

IV. ANALYSIS

A. Background: the PEPR work rating system.

Most employees of the city of Denver, including the Appellant, are Career Service employees governed by the Career Service Rules (CSR). Once Career Service employees pass probation, the CSRs require their performance to be formally evaluated and rated once per year, CSR 13-30 A. 1 in a Performance Enhancement Program Report, or PEPR. CSR 13-30 A. 2. The possible ratings, "exceptional," "successful," or "needs improvement," are based on a comparison of the employee's perceived performance compared with the expected accomplishments set forth in that year's Performance Evaluation Program (PEP), which details the duties to be performed by each employee holding a classified position within each Agency. A PEPR must be based on objective standards in the PEP, or in that employee's job description, in order to give the employee notice of the criteria by which her performance will be judged in her annual PEPR. In re Macieyovski, CSA 62-06, 3 (12/14/06).

The Career Service Rules regarding PEPs were amended January 1, 2007, to reflect the Mayor's initiative that all city employees should endeavor to meet city-wide goals of service, teamwork, accountability, respect, and, where appropriate, safety. Together, these five goals are known by the acronym STARS. PEPRs were amended pursuant to the Mayor's initiative, so now there are four sections to PEPRs: (1) link of the Mayor's goals to department or work unit objectives; (2) citywide duties of STARS; (3) job duties; and (4) development plan.

In the appeal of an overall PEPR rating of "needs improvement" the rating may not be overturned unless the rating is expressly found to be arbitrary, capricious, and without rational basis or foundation. CSR 19-10 A.2.c. An act is arbitrary and capricious if "a reasonable person, considering all the evidence in the record, 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).

B. Appellant's "needs improvement" rating.

The Agency rated the Appellant as "needs improvement" in the areas of Service, Teamwork, Accountability and Respect.

1. Service.

The standards by which the Appellant's duty of service is measured include:

(1) Responding to customer inquiries within 24 hours 90% of the time. The Agency's evidence did not address, and did not prove, the Appellant failed to meet this standard by a preponderance of the evidence;

(2) Meeting customer expectations 80-100% of the time. The Agency's evidence did not address and did not prove the Appellant failed to meet this standard by a preponderance of the evidence. While it was apparent the Appellant did not meet Ponder Smith's and ██████'s needs, the evidence was insufficient to prove what percent of total customer expectations was represented by the branch managers' needs;

(3) 90% of customers agree service was excellent. The same comment immediately above applies here as well;

(4) 90% of customers rate the person as being courteous, helpful and friendly. The same comment immediately above applies here as well.

The Agency did not prove the Appellant failed to meet any of the applicable standards to this element. Therefore, without a basis upon which it rated the Appellant's performance of those standards as "needs improvement" the rating for service was arbitrary, capricious and without a rational basis or foundation.

2. Teamwork.

This duty involves the obligation to work cooperatively with others in the chain of command. The specific issues here were the Appellant's failure to support her direct reports and her abrupt and rude manner. [Exhibit 1-5 Supervisor Comments]. PEP standard #1 states "[d]isplay a professional demeanor and a positive outlook," #4 states "[p]romote and facilitate the implementation of change," while #5 reads "[s]hare best practices and program knowledge." The abrupt manner in which the Appellant dropped off Ponder Smith and ██████ at their respective new job sites with perfunctory introductions, failure to provide guidance, training, and little or no materials with which to perform their work, has already been noted above. [See also Exhibit 1-6].

The Appellant replied, somewhat vaguely, that she reviews job expectations

with staff [Exhibit 2-1]. She emailed a very brief punch-list of duties to Ponder Smith three weeks after she started. The Appellant also stated "the department provides orientation (book) for new employees that explain when and how time is used." *Id.* These responses are consistent with the Agency's claim that the Appellant left her two new managers on their own to determine their duties and responsibilities.

At hearing the Appellant explained she was unable to train the new managers because neither was available during the first few months of their employment. Ponder Smith was on medical leave for four to six weeks after only two weeks on the job, however the Appellant provided no training information even after Ponder Smith's return, and met with her only once in a one-on-one meeting to chastise her. [Ponder Smith testimony]. The Appellant's response, that Ponder Smith did not ask for help [Ponder Smith cross-exam], is not persuasive. It is the Appellant's duty to insure her subordinates are equipped for their tasks. [Exhibit 1-5. ("Take the lead in promoting a positive... productive... work environment")].

The Appellant stated [REDACTED] was unavailable for one-on-one training because [REDACTED] was enrolled in daily training for four months. However, the Appellant did not rebut [REDACTED]'s testimony that 1) her mandatory training was sometimes half day only, and she was in her office before training, after training, or both; and 2) that she discovered what training was mandatory only after perusing the "Insight" online magazine one month after she began [REDACTED] testimony]. For the reasons stated in this section, the Agency's rating the Appellant as "needs improvement" in the area of teamwork/promoting a positive work environment was not arbitrary, capricious, or without rational basis or foundation.

3. Accountability and Ethics.

The Agency's "needs improvement," rating for this standard was based upon the Appellant's failure adequately to "continue to monitor the performance of the East office and make staffing changes to address performance and behavioral issues..." [Exhibit 1-6, supervisor comments]. The specific issue was the Appellant's failure to provide support to the new branch managers. *Id.* In addition, the Appellant's PEPRs for the new branch managers failed to address the required factor of "accountability" entirely, which was a failure of her duty to be accountable to insure the managers' understanding of their own performance expectations. [Sanchez testimony]. The Appellant did not rebut this claim. The Appellant also did not rebut the Agency's claim that she passed both new branch managers before they completed mandatory training. These two facts alone are sufficient to support the Agency's rating of "needs improvement in the area of accountability.

4. Respect for self and others.

The Agency downgraded this element of the Appellant's PEPR for her "tactless and abrasive" manner in violation of the standard to "display sensitivity and tact when relating to others." [Exhibit 1-7]. Many branch employees had high praise for the Appellant's direct, but kind and helpful approach to them. [Exhibit 8]. However, the Appellant was clearly not supportive of either Ponder Smith or ██████████ and exhibited demeaning or unhelpful responses to their needs and requests for assistance.

The Appellant replied that Ponder Smith and ██████████ failed to ask for help, so that she was unaware of their needs. Even if true, this response does not relieve the Appellant, in her capacity as an operations manager, of her obligation to her new direct reports to provide support and materials that would permit them to conduct and succeed in their duties, [Exhibit 1-7, 1-10, 1-11], particularly since both were inexperienced. In addition, the Appellant failed to address a crisis in staff issues. [See Exhibit 8-16, 17].

The Appellant also claimed the Agency failed to notify her of its concern about her behavior toward others, but many of her recent PEPRs, and others before, expressed concern about the abrupt and harsh manner in which the Appellant interacted with some employees, for example 1999-2000, 2002, 2004, 2005. [Appellant cross exam]. The Agency was sufficiently concerned about the Appellant's interactions with others in 2005 to hire a coach for the Appellant for three months, to observe and counsel her. [Exhibit 17, Appellant cross-exam]. While evidence outside the rating period may not directly support a below expectations rating, In re Leal-McIntyre, CSA 77-03, 7 (1/27/05), prior evidence may support an inference of notice to an appellant, or inferences relating to credibility.

Ponder Smith and ██████████'s claims that the Appellant treated them poorly and failed to support them are more credible than the Appellant's denials for the following reasons:

(a) Ponder Smith and ██████████'s testimony is consistent with the Appellant's long history of treating some employees demeaningly [Exhibits 3; 6-1; 9-3; 9-6; 9-7; 9-10; 10-4; 12; 13-8; 17].

(b) Most of the Appellant's witnesses were unaware of the Appellant's interactions with Ponder Smith or ██████████ and therefore were not helpful in determining the relative credibility of the Appellant, Ponder Smith and ██████████ [Crawford, McClure, Mascarenas testimony].

(c) Washington was one of three Appellant witnesses who observed the working relationship between the new branch managers and the Appellant. Washington had also applied for the Montbello branch manager position. Her testimony was filled with hurt and anger over ██████████'s selection. When the

Appellant instructed Washington to assist ██████ in learning how to run the branch, Washington told ██████ "I will not train you." [Washington cross-exam]. Thus, Washington's testimony, that the Appellant was supportive of the new branch managers, does not rebut other, more dispassionate testimony to the contrary.

(d) Paris observed the Appellant's interactions with Ponder Smith. When asked if he observed the Appellant induce fear and intimidation in others, Paris replied he had learned how to respond to the Appellant, but left a strong impression that she may well come across that way to others. [Paris cross-exam].

(e) Obee testified she worked under both Proctor and Ponder Smith. Proctor terminated Obee from probation. [Obee testimony]. She stated she never observed Proctor demean anyone. Obee's observations, even if true, do not prove the Appellant was not demeaning to Ponder Smith. The most likely time Obee would have observed the Appellant's interactions with Ponder Smith would have been during group meetings called by the Appellant. Ponder Smith did not deny the Appellant was not demeaning during those meetings, thus Obee's observations are consistent with, and not contrary to, those of Ponder Smith.

Thus, despite many positive comments from subordinates, which indicate the Appellant is capable of, and frequently does, act respectfully to subordinates, the Agency's "needs improvement" rating for this STARS element was not arbitrary, capricious, or without rational basis or foundation.

5. Safety. The Agency rated the Appellant "successful" for this STARS element.

6. Other duties

The Agency rated the Appellant "needs improvement" for her management deficiencies of the Montbello and East branch offices. [Exhibit 1-10,11]. In addition to the evidence, above, finding the Appellant deficient in this area, the Agency also downgraded the Appellant for passing both new branch managers from probation without consulting her supervisor where their inexperience required an additional probationary period. [Exhibit 1-11, Sanchez testimony]. The Appellant admitted she did not consult Sanchez before passing both employees.

The Appellant also stated, contrary to the claims of both Ponder Smith and ██████ that she met with them. [Exhibit E-32]. However, the Appellant did not dispute these were team meetings, and therefore did not provide the sort of mentoring for new managers required by her prior development plan. [Exhibit 9-10]¹, nor did she provide the opportunity to discuss private matters, for example

¹ This development plan, part of the Appellant's 2005-2006 PEPR, is further evidence that she had been on notice what needed to

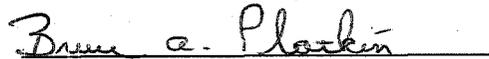
regarding an urgent workplace incident. [Exhibit 8-16].

For reasons stated above, the Agency's rating the Appellant as "needs improvement" in this element of her PEPR was not arbitrary, capricious, or without rational basis or foundation.

V. CONCLUSIONS AND ORDER

The overall rating for an employee's PEPR is not an exact calculation based upon the sum of equally weighted components; rather, the overall rating is tied more closely to the expected accomplishments that have "considerable influence or effect." In re Leal-MCIntyre, CSA 77-03, 134-03, 167-03, 6 (1/27/05). In many respects the Appellant is a highly accomplished manager. The Agency acknowledged as much in its PEPR comments. The shortcomings indicated by her supervisor's comments, however, are critically important to the Appellant's supervisory status. Because the Appellant failed to meet a significant portion of her expected accomplishments for her review period 2006-2007, her challenge to the Agency's "needs improvement" rating did not prove, by a preponderance of the evidence, that the Agency's rating was arbitrary, capricious, or without rational basis or foundation. For this reason, the Agency's rating of "needs improvement" for the Appellant's PEPR dated August 1, 2007, is AFFIRMED.

DONE January 3, 2008.



Bruce A. Plotkin
Hearing Officer
Career Service Board

S:\Share\hearings\Proctor, Linda\52-07\Decision.doc

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

improve, contrary to her assertion that the agency failed to notify her.