

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

Appeal No. 160-02

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**LEROY ALCON, Appellant,**

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

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Hearing in this matter was held before Michael S. Gallegos, Hearing Officer, on March 12, 2003, in the Career Service Hearings Office, 201 West Colfax, 1<sup>st</sup> Floor, Denver, Colorado 80202. Appellant, Leroy Alcon, appeared in person and was represented by Cheryl Hutchison, AFSCME. The Agency was represented by Assistant City Attorney, Niels Loechell. Ms. LeTunya Savage was the Agency's advisory witness at hearing.

Within these Findings and Order, the Hearing Officer refers to Leroy Alcon as "Appellant"; the Denver Department of Human Services as the "Agency"; Family Medical Leave Act as "FMLA" and the Career Service Rules as "Career Service Rules" or "CSR". The Career Service Rules are cited by section number and are those currently in effect unless otherwise indicated.

For the reasons set for the below, the disciplinary action taken by the Agency against Appellant is **MODIFIED**.

**ISSUES FOR HEARING**

Whether there is cause for disciplinary action against Appellant and, if so, whether the degree of discipline imposed is reasonably related to the severity of the offense.

**BURDEN OF PROOF**

The burden of proof is upon the Agency to show, by a preponderance of the evidence, that there is cause for disciplinary action against Appellant and that the degree of discipline imposed is reasonably related to the severity of the offense.

## PRELIMINARY MATTERS

Appellant's Exhibits A and C were accepted over the Agency's objection as to relevancy because they are relevant to Appellant's disciplinary history. Appellant's Exhibits B and D were accepted into evidence without objection. The Agency's Exhibits 1 through 10 were accepted into evidence without objection.

## FINDINGS OF FACT

Based on the evidence presented at hearing, the Hearing Officer finds the following to be fact:

1. Appellant was an employee in career status. He was dismissed from his position as an Administrative Support Assistant (ASA) III with the Agency effective August 27, 2002. At that time, he had worked for the Agency approximately 9 ½ years. From 1995 until his termination, Appellant worked in the Family and Children (F&C) section of the Agency. Throughout his last 3 years with the Agency, Appellant had health problems related to diabetes and high blood pressure. During the last 12 months of his employment Appellant was off work, due to medical problems, for a total of 5 months.

2. In December 1999, Donna Prince (Prince) transferred to the F&C business office and became Appellant's supervisor. At that time, Prince completed a paper review of Appellant's duties. However, she did not attempt to perform the duties herself or to "shadow" Appellant as he performed his duties in order to better understand how long it took to perform his job duties or whether training might be required when she periodically changed or increased Appellant's duties.

3. In December 1999, Appellant's duties included going to the courthouse to copy court reports, as requested by each case worker, then mailing or delivering copies to all parties to the case. If a "minute order" from the court was requested, Appellant had to access the appropriate computer program, print out the minute order and distribute copies to the parties. Minute orders could be 1 to 60 pages long. If a case was transferred from the F&C section to "Adoptions", Appellant had to copy all minute orders issued in the case and distribute copies to all parties. Appellant also did adoption case "break downs" which required him to take oversized adoption files and break them down, in a prescribed order, into two smaller files. These functions were known as "clerical case management". Appellant's regular hours were 8:00 a.m. to 4:30 p.m. with a ½ hour lunch break.

4. Between December 1999 and May 2000, Prince spoke with Appellant on at least 7 occasions regarding the manner and timeliness of completion of his job duties.

5. In October 2000, Appellant received a written reprimand for Excessive absenteeism/tardiness: During the month of March: 4 days tardy and 1 absence; April: 6 days tardy; May: 10 days tardy and 6 absences; June: 11 days tardy; July: 16 days tardy and 2 absences; August: 15 days tardy and 1 absence and September: 12 days tardy and 4 absences. The written reprimand also listed frequent extended lunches, refusal to call his immediate supervisor regarding absences, no doctor's statement for 3 consecutive days absent and job duties not completed in a timely manner.

6. Appellant and Prince had a personality conflict. Prior to the time Prince became his supervisor, Appellant had no continuing difficulties with any of his supervisors. In January 2001, Appellant called Prince to say that he would be in late and left a message saying that he hoped that was okay because he was "sick of your crap".

7. In April 2001, citing "excessive absenteeism" and "medical leave due to health problems" resulting in "complaints from the caseworker staff", Prince reassigned Appellant's duties. Appellant had been on FMLA Leave for 6 weeks.

8. In April 2001, the Agency switched from a data bank (computer tracking) system known as Cwest (pronounced "quest") to one known as Colorado "Trails". At that time, Appellant was taken off clerical case management and assigned to data entry, provider payroll deadlines and twice-per-day mail duties. Along with the rest of the F&C staff, Appellant was required to learn the new Trails computer program. The change from Cwest to Trails caused frustration and morale problems among the staff, as they struggled to learn the new system, and it resulted in timeliness concerns regarding completion of job duties for all staff members.

9. At the same time, Appellant was taking on new mail duties. Appellant's mail duties included incoming and outgoing mail and "all-staff mailings" for approximately 475 people in 63 separate units. Twice each workday, first at about 9:30 a.m. and then at approximately 3:00 p.m., Appellant sorted and delivered incoming mail, by unit, and sorted and bundled outgoing mail. Each day there were 30 to 50 pieces of mail that required "research" to identify the employee to whom that piece of mail should be directed. Appellant also had to gather incoming faxes from approximately 6 fax machines throughout the building, then sort, staple and deliver the faxes to each unit. All-staff mailings included memos, flyers and newsletters and had to be picked up from the first-floor print shop in bulk, then sorted and distributed with the regular mail. Sorting the mail took from 1 to 1½ hours twice a day. Then the sorted mail, faxes and all-staff mailings had to be delivered to each unit. Mail duties required walking throughout the building an average of 3 times per workday.

10. Researching mail includes using a computer to find the appropriate recipient/employee's name and "linedex number" by accessing the Colorado Trails or Cwest programs or CIAO, the Master Case File or other resources. Researching the mail often took over an hour to complete no matter who did the research.

11. The continuing and timely exchange of printed information in the form of daily mail, faxes, all-staff mailings and tech-screen printouts was necessary for the timely completion of duties for the entire F&C staff.

12. In August 2001, Prince added "supplies" to Appellant's duties. Appellant was required to order, stock and deliver supplies and forms. Appellant had to seek out instruction and taught himself, by trial-and-error, how to use the internet to order supplies. He monitored use of forms and submitted form requests to the print shop before the forms ran out. Appellant had to learn, by seeking direction from case workers, which forms were outdated and needed to be removed. He stocked supplies and forms at various "stations" throughout the F&C section. Ordering supplies included weekly orders and being available twice each day for F&C staff to make or pick-up special supply requests. Appellant received special supply requests twice a day by E-mail, telephone messages or in-person. The F&C section has the largest amount of supply orders in the Agency's main building.

13. The F&C section has the largest amount of mail in the Agency's main building. Prior to August 2001, one staff person handled F&C mail duties full-time and another staff person was in charge of supplies and forms. Due to the high volume of mail to the F&C section, there were often complaints about undelivered mail or unfinished mail duties before Appellant took over mail duties. The staff person who handled mail duties prior to Appellant was transferred due to health reasons. More specifically, mail duties required too much walking for that staff person.

14. When Prince added "supplies" to Appellant's existing mail duties, she did not attempt to perform the duties herself or to "shadow" Appellant as he performed his duties in order to better understand how long it took to perform the job duties or whether training might be required when she periodically changed or increased Appellant's duties.

15. Appellant was on FMLA Leave from August 2001 to November 11, 2001 due to a diabetes-related ulcer on his foot. Appellant's treating physician restricted Appellant to no walking or standing for 3 months. More specifically, Appellant could not walk or stand to perform his mail, fax and all-staff mailing duties. When Appellant returned to work in November 2001, he had no medical restrictions from walking or standing.

16. In January 2002, Appellant received a written reprimand based on the following circumstances: Appellant was scheduled for a supervision meeting with Prince on December 28, 2001. He failed to appear for that meeting and never explained to Prince why he missed the meeting. On January 4 and 7, 2002, Prince observed that there was no mail delivery from the previous workday afternoon. On January 7, 2002, Prince assumed mail sorting and delivery duties for Appellant because he had not completed mail duties from the prior workday. With the help of one other staff person, Prince spent 45 minutes completing one of the twice daily "mail runs". The total staff time spent in sorting and delivering mail for one mail run on January 7, 2002 was between 1 and 1½ hours.

17. Beginning in January 2002, Prince scheduled weekly supervision meetings with Appellant. Appellant regularly complained that he was overwhelmed. Prince sorted mail for Appellant "on a number of occasions" and gave Appellant a brochure on Time-management Training. However, she did not investigate why Appellant was not able to complete mail sorting or delivery "on a number of occasions".

18. On February 11, 2002, Prince issued a Memorandum to Appellant listing "Job Expectations", duties and a target date for completion. The memo indicated that all assignments or duties had been "discussed with you previously" and functioned as Appellant's de facto Performance Evaluation Program (PEP) Plan. The memo included Appellant's mail and supply duties and added "tech screen" printouts to Appellant's twice daily mail and fax distributions, re-locating forms from the mail room to the supply room, re-organizing and cleaning out the supply room including ordering, set-up and labeling of forms-shelves, cleaning out Christmas decorations, moving and cleaning out a metal supply cabinet, moving a TV/VCR and scheduling a meeting with Doris Puga (Puga) regarding what to do with 10 boxes of files.

19. Appellant set up a meeting with Puga but did not attend the meeting because Puga's secretary asked to have the file boxes brought to her office. Appellant took the file boxes to Puga's office, ordered shelving for the forms and began the process of re-locating forms from the mail room to the supply room and re-organizing and cleaning out the supply room.

20. On February 15, 2002, Prince completed a Performance Enhancement Program Report (PEPR) evaluating Appellant's job performance over the calendar year 2001 and January and February 2002. (See attachments to PEPR, Exhibit 8.) The PEPR was supposed to have been completed in January, covering Appellant's performance over the calendar year 2001. However, Prince issued the PEPR late and Appellant was not given a copy until March 1, 2002. At that time Appellant was also given a copy of his Performance Evaluation Program (PEP) Plan.

21. On the PEPR, Prince gave Appellant an overall rating of "Below Expectations" stating that, "due to absenteeism, [Appellant's] responsibilities were covered by other staff for a major portion of this time period". Prince further stated that Appellant "has difficulty with time management skills. [He] appears, at times, to lack strong self-discipline skills and likes to socialize." Prince recommended that Appellant "seek out Agency training and Time Management classes in order to acquire additional skills in business organization."

22. "Below Expectations" is defined as "Employee failed to meet a significant portion of the employee's expected accomplishments." CSR 13-23.

23. Appellant had many friends throughout the Agency's main building and in the F&C section. He often "socialized" or chatted briefly with other Agency employees as he completed his mail runs, accepted supply orders or stocked forms and supplies.

24. On March 27, 2002 Appellant called Prince and left a message indicating that he couldn't "take it anymore", he couldn't work for Prince, that he would be in to work whenever he got there, he was going to see the Agency's Director and that he was going to hire an attorney. Nonetheless, Appellant came in to work and was at his desk by 8:00 a.m. Prince believed that Appellant's message was threatening and Appellant received a verbal reprimand for leaving a threatening message. Appellant requested a transfer to a new supervisor.

25. Due to his continuing mail, fax, forms and supply duties, Appellant had not completed re-organizing and cleaning out the supply room. Therefore, he decided to come in, without pay, on his day off - a city holiday, March 25<sup>th</sup>. When he advised Prince that he cleaned and reorganized the supply room on a holiday, Prince was upset with Appellant because she had not authorized overtime pay for the project.

26. Appellant was on investigatory leave for approximately one month from March 27<sup>th</sup> to the beginning of May 2002. He was placed on investigatory leave pending a "psychological evaluation" for "attempting to bargain with the Child Support Caseworker and her supervisor on behalf of his son's current Child Support case." Although he passed his psychological evaluation, in May 2002 Appellant was given a written reprimand for "attempting to bargain with the Child Support Caseworker and her supervisor on behalf of his son's current Child Support case."

27. While he was on investigatory leave during the month of April, Prince gave Appellant a second "Below Expectations" PEPR rating dated April 9, 2002, received by Appellant on April 15, 2002. Although the PEPR was to be given 3 months after the first "Below Expectations" rating, the second "Below Expectations" PEPR was issued approximately 5 weeks after the first. Appellant was at work for approximately 1 month (March) during the actual evaluation

period of March 1 through April 9, 2002. Appellant did not "grieve" the first or second "Below Expectations" ratings because he "felt it would be a waste of valuable time".

28. Prince justified the April 9<sup>th</sup> PEPR by stating that it was for the evaluation period January through March 2002.

29. When Appellant returned to work his supervision was transferred to LeTunya Savage (Savage). At that time, Savage did not review or meet with Appellant regarding a PEP Plan. She completed a paper review of Appellant's duties. However, she did not attempt to perform the duties herself or to "shadow" Appellant as he performed his duties in order to better understand how long it took to perform his job duties or whether training might be required. Savage met with Appellant 2 to 3 times per week regarding his duties and gave him "directives" to help improve his performance.

30. Savage helped Appellant organize his desk. She set up a tracking system, comprised of 3 large three-ring binders for tracking supply orders. At hearing, Savage credibly testified that Appellant was proficient at ordering supplies over the internet. She directed Appellant to have a supply order to her, for approval, every Wednesday by 1:30 p.m.

31. It is Savage's opinion that mail duties, without research, can be completed in 1½ hours in the morning and 1½ hours in the afternoon, for a total of 3 hours per day. Savage directed Appellant to keep a log of the times he delivered mail.

32. On one occasion Savage wrote and sent an E-mail about Appellant that stated, in part: "Sweet Ole' Leroy wasn't too pleased with his new supervisor this afternoon. Can you believe that!" Savage apologized, by E-mail, to Appellant for the E-mail. Appellant credibly testified that he E-mailed Savage back, saying "everything's cool" because he did not want to go to her office. Appellant always felt intimidated or upset after meeting with Savage in her office.

33. In May and June 2002, Savage received 4 or 5 complaints that forms were not stocked at some stations. She returned the overage of shelving ordered by Appellant and had another staff person put together the forms-shelves in the supply room.

34. Savage's supervisor, Dee Grayson (Grayson) asked Savage to evaluate Appellant's job performance and to complete a work plan for Appellant. Savage did not complete a work plan or PEP Plan for Appellant. Rather she relied on her weekly meetings with Appellant and her "directives" to Appellant.

35. Savage gave Appellant the following directives in addition to his regular duties: "clean off the counter tops of the various stations, establish a

supply area at each of the stations, clear out any drawers or cabinets that contained broken office equipment, or anything that has been stored by staff, develop adequate signs to inform staff of the station number, what services are provided at each station, and what supplies are in that area...establish an area on the west side of the building to be the same as the "Touchdown" station on the East side of the building, determine if each of the stations contained any duplication of forms and consolidate the forms if necessary...determine and notify me of any forms that needed to be updated."

36. Savage estimates that Appellant regularly completed only 25% of the directives she gave him and, at hearing, stated that she had "no idea" why he could not complete a higher percentage. Savage believes that Appellant is capable of accomplishing all his duties in a 40 hour week but noted that he regularly did not complete mail distribution or research.

37. On July 1, 2002, Savage added duties described as "faxing for Don Etsel" to Appellant's existing duties. It was estimated that such faxing would take approximately 1 hour per workday.

38. Savage believes that Appellant did not improve in the performance of his job duties, while under her supervision, sufficient to be taken off "Below Expectations". Therefore on July 11, 2002, based on approximately 2 months job performance by Appellant, Savage gave Appellant a "Below Expectations" PEPR rating.

39. Appellant believes that he improved both under Prince (after the first "Below Expectations" rating) and under Savage (after the second "Below Expectations" rating). At hearing, he credibly stated that he timely completed the majority of his duties, including learning how to use the new "Trails" computer data system and how to order supplies and forms, but frequently the mail, fax, all-staff mailings and tech-screen printout duties were overwhelming, had to be completed in a small space and often delivery or research had to be left for the next day. Nonetheless, he took on duties as they were assigned to him.

40. Appellant does not dispute that mail sorting, delivery or research regularly had to be left to the next workday because "there weren't enough hours" to complete the mail, fax, all-staff mailings and tech-screen printout distributions. Additionally, Appellant had no control over when the mail might be delivered to his mail room on the 3<sup>rd</sup> floor. If the mail came later than 2:30 p.m. he could not regularly complete "researching the mail" in the same workday.

41. Appellant represented himself at the pre-disciplinary meeting. The Agency's Acting Program Administrator, Grayson, conducted the meeting and Savage attended. The meeting was facilitated by a staff member from the Agency's Human Resources section.



42. Because Appellant received a 3<sup>rd</sup> "Below Expectations" PEPR rating, Grayson determined that discipline was appropriate. (See also CSR 16-50 A 19.) Grayson herself had received approximately 6 complaints from staff regarding supply issues.

43. Grayson considered Appellant's prior discipline in recommending termination in this case. Appellant's disciplinary history included: a Verbal Reprimand in May 2000 (for failure to meet performance standards) and 4 Written Reprimands: October 2000 (See above paragraph 5.), two in January 2002 (for absenteeism, negligence and refusal to comply with his supervisor's order. See above paragraph 16.) and one in May 2002 (See above paragraph 26.).

44. In considering whether discipline should be imposed against Appellant, Grayson did not consider disciplinary action taken against Appellant in 1998-99. However, at hearing, Appellant raised the 1998-99 discipline for excessive tardiness as an example of successful use of progressive discipline and his ability to correct his performance in concert with his then supervisor.

45. Grayson did not consider demotion and transfer of Appellant because it is her opinion that performance problems should be dealt with by the existing supervisor and not simply transferred to a different supervisor.

46. Donna Good (Good) is the Agency's Manager and Appointing Authority. At hearing, Good credibly testified that her decision to terminate Appellant was based largely on his performance. The May 2002 incident, in which Appellant was accused of attempting to bargain with the Child Support Caseworker on behalf of his son's Child Support case, was given little consideration compared to the overall failure of Appellant to improve in the timely completion of his duties.

47. Appellant was dismissed for failure to meet established standards of performance in three successive rating periods and failure to meet established standards of performance including either qualitative or quantitative standards. Dismissal is the highest level of discipline that can be imposed on a career service employee.

48. In considering Appellant's performance during his last two rating periods, Good considered the fact that Appellant's PEP plan was given to him a month late. (See paragraph 20, above.) and that his last rating period covered 2 months of performance rather than the usual 3 month rating period. (See paragraph 38, above.)

49. PEPR ratings for periods when an employee is on FMLA should be no lower than "Meets Expectations". At hearing, Good credibly testified that she considered the fact that Appellant was on FMLA for approximately 5 months of

his last 12 months with the Agency and she factored that into consideration of his "Below Expectations" ratings.

50. Changes instituted by Prince and Savage, such as moving the location of forms and shelving, cleaning and reorganizing the supply room and Appellant's desk and instituting the 3 ring binder supply-request tracking system were designed to make Appellant's job easier. However, such changes did not shorten the time necessary to complete Appellant's mail and faxing duties.

## DISCUSSION

**1. Authority of the Hearing Officer:** The City Charter and Career Service Rules require the Hearing Officer to determine the facts, by *de novo* hearing, in "[a]ny action of an appointing authority resulting in dismissal, suspension, involuntary demotion...which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules." (City Charter C5.25 (4) and CSR 19-10 b.) A *de novo* hearing is one in which the Hearing Officer makes independent findings of fact, credibility assessments and resolves factual disputes. (See *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. App.1975).)

**2. Cause for discipline:** Career Service Rules provide, in pertinent part: "The purpose of discipline is to correct inappropriate behavior or performance." (See CSR 16-10.) In this case, during the first 6 months that Prince was Appellant's supervisor, she attempted to correct Appellant's performance by speaking to him - on average, once a month - regarding her concerns related to the timely completion of Appellant's job duties, tardiness and absenteeism. However, talking with Appellant did not correct Appellant's tardiness and absenteeism. Therefore, Prince gave Appellant a written reprimand in October 2000. (See Findings of Fact, paragraphs 4 and 5.)

Appellant's health problems contributed to his tardiness and absenteeism and, in early 2001, Appellant required 6 weeks FMLA Leave. Citing "excessive absenteeism" and "medical leave due to health problems" resulting in "complaints from the caseworker staff", Prince reassigned Appellant's duties. Appellant learned the new computer program "Trails" which was necessary for his clerical case management duties and he assumed the mail duties. Eventually he developed a schedule for mail runs, faxes, all-staff mailings and tech-screen printout distribution. Mail sorting and delivery took an average of 3 hours per day and researching the mail took another hour per day. On some days mail took less than 4 hours, but many days it took longer than 4 hours. In fact, mail had been a full-time job for one staff person, prior to Appellant's reassignment. When Prince added supplies (another 1 to 1 ½ hours per day), she did not investigate how long it might take Appellant to complete his duties or whether he might require training. Nonetheless, Appellant learned how to order supplies.

However, Appellant required FMLA Leave, from August 2001 to November 11, 2001 because he was medically restricted from walking which was necessary in order to complete mail duties. (See Exhibit 8 and Findings of Fact, paragraphs 7 through 10, 12, 13, 15 and 18 through 22.)

When Appellant returned to work, he was again reprimanded for failure to complete his mail runs and Prince added more duties without investigating how long it might take Appellant to complete his duties. At that time, Appellant was attempting to perform duties that had been split between 2 staff persons prior to his reassignment. Prince's next attempt to improve Appellant's performance was a "Below Expectations" rating which he received on March 1, 2002. Then, 5½ weeks later, and after evaluating Appellant's performance over 1 month, Prince gave Appellant a second "Below Expectations". (See Findings of Fact, paragraphs 13 and 27.) It is clear, from the evidence presented at hearing, Prince was escalating the level of discipline in an attempt to address Appellant's continuing inability to complete the mail, fax, all-staff mailings and tech-screen printout duties collectively referred to as "mail duties". It is also clear, from Appellant's own testimony that, on a regular basis, he did not or could not complete the mail duties and, for failure to complete his duties on a regular basis, Appellant received 3 consecutive "Below Expectations" PEPR ratings. Therefore, the Hearing Officer concludes the Agency has met its burden to show there is cause for discipline and turns to the question of degree or level of discipline.

**3. Degree of discipline:** Career Service Rules provide, in pertinent part: "The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record." (See CSR 16-10.) Having concluded that there is cause for discipline in this case, the issue at hand is: Whether dismissal is reasonably related to the seriousness of the offense, considering Appellant's work history, PEPRs and his disciplinary history. In this case, Appellant admits that he regularly did not or could not complete mail duties. Additionally, the continuing and timely exchange of printed information in the form of daily mail, faxes, all-staff mailings and tech-screen printouts was necessary for the timely completion of duties for the entire F&C staff. Therefore, the Hearing Officer concludes that Appellant's failure or inability to complete mail duties on a regular basis was a serious matter.

Nonetheless, based on a unique combination of late or mistimed PEPRs, the lack of adequate PEP Plans and a fundamental failure-to-communicate between Appellant and his supervisors, the undersigned Hearing Officer concludes that responsibility for Appellant's continuing failure or inability to complete mail duties does not fall solely on Appellant's shoulders. That is, Appellant was not given clear performance standards, sufficient time or the information necessary to be able to improve his performance to "Meets

Expectations". Therefore, imposition of the highest level of discipline (dismissal) is not reasonable in this case.

In order to get a "Meets Expectations" rating (or be "taken off 'Below Expectations'") an employee's performance must improve. Ordinarily, with a clear PEP Plan, first and second "Below Expectations" ratings would be fair warning that one needs to improve or be subject to escalating discipline including dismissal. However, in this case, the performance standards and expectations for improvement were not clear. Prince did not write a new PEP Plan every time she added new duties and Savage didn't write a PEP Plan at all. Neither Prince nor Savage knew how long it would take each day to complete all of Appellant's duties or specific duties (such as researching the mail) or assignments (such as cleaning out the supply room or assembling shelves). Rather, they estimated how long it should take to complete duties and assignments. Because Appellant's duties were not particularly difficult, Prince and Savage assumed that they were not necessarily time consuming. They kept adding duties based on estimates of how long mail duties might take on an *average* day without acknowledging that Appellant had no control over mail delivery times or the amount of mail that might need researching on a given day. Sometimes there just "weren't enough hours" in the day. However, when Appellant attempted to catch up on his work outside regular work hours, he was not allowed to do so. (See Findings of Fact, paragraph 25.)

The fact that Appellant's PEP Plans did not adequately reflect his job duties might have been cured by other means, such as clear verbal communications and sufficient time to improve on a burdensome daily schedule. However, personality conflicts and demeaning attitudes prevented both Appellant and his supervisors from communicating with each other. Additionally, Appellant's last 3 PEPRs were given late or so closely together that out of a 6 month period, Appellant was evaluated on a little more than 3 months of actual work. Appellant's last "Below Expectations" was based on 2 months work without a PEP Plan. (See *also* paragraph 4. b, below.) Lastly, Appellant was given no training for a position that was key to the smooth operation of the F&C section, even though duties were changed or added on a regular basis.

The Agency dismissed Appellant for "failure to meet established standards of performance in three successive rating periods and failure to meet established standards of performance including either qualitative or quantitative standards". However, there were no established standards of performance and no PEP Plan for Appellant's position where duties were changed or added regularly up to a few days before Appellant's last PEPR rating. (See Findings of Fact, paragraph 37.) Therefore, the Hearing Officer concludes that dismissal is not reasonable, in this case, because Appellant was not allowed the time, plan or ability to improve his performance.

**4. Appellant's allegation of violations of Career Service Rules:** Appellant alleges that the following Career Service Rules were violated: CSR 19 regarding Appeals, CSR 16-10 regarding the purpose of discipline (addressed above in Discussion paragraphs 2 and 3.), CSR 16-20 regarding progressive discipline, and CSR 13-41 regarding quarterly reports following a "Below Expectations" rating.

No competent evidence of violation(s) of Career Service Rule 19, regarding the Appeals process, was presented at hearing. Therefore, Appellant's allegation of violation(s) of CSR 19 is dismissed.

**a. Progressive discipline:** Career Service Rules regarding progressive discipline provide, in pertinent part: "Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed." CSR 16-20 2). Appellant had been disciplined during 1998 – 1999 for excessive tardiness and with the use of progressive discipline, Appellant and his then supervisor were able to correct Appellant's behavior. Appellant argues that the Agency improperly applied progressive discipline in this case and, presumably, that if properly applied would have had the effect of correcting Appellant's regular inability to complete the mail duties. The Hearing Officer dismisses Appellant's allegation of violation(s) of CSR 16-20 as moot. That is, the Agency's discipline is herein modified to a suspension which follows next in order of increasing severity of discipline as listed in CSR 16-20 1) a) through e).

**b. Quarterly reports following a "Below Expectations" rating:** Career Service rules provide, in pertinent part: "Whenever the over all evaluation of a Performance Enhancement Program report is 'Below Expectations,' an additional report shall be required *at the end* of three (3) month's time and each (3) three thereafter until the employee has achieved a rating of 'Meets Expectations' or above." (CSR 13-41, Emphasis added.) While it is a practical reality that not all PEPRs are timely issued, each rating period should be specific. Such was not the case here which resulted in two actual rating periods of March 1 to March 27, 2003 and May 1 to July 1, 2003. (See Findings of Fact, paragraphs 20, 26, 27 and 38.)

The requirement that an additional PEPR be completed "at the end of three (3) month's time and each three (3) months thereafter..." is designed to provide a specific rating period. The employee does not have to be at work for the entire 3 months. For example, the employee could be on FMLA Leave or, as in this case, on investigatory leave for any portion of the 3 months. In this case, the specific rating periods should have been January through March and April through June. However, in spite of claims that the two rating periods covered January through June 2003, a clear examination of the documents attached to Appellant's first "Below Expectations" rating shows that the initial evaluation

period ran to March 1, 2003. (See Exhibit 8.) The next rating was issued 5 weeks later. It is the conclusion of this Hearing Officer that an employee who receives a "Below Expectations" rating should be given the duties in which he is to improve (a PEP Plan) and the time (a 3 month rating period) in which to complete or improve in those duties.

Career Service Rules provide for the issuance of PEPRs up to 60 days after the rating period. (See CSR 13-70.) Therefore, the issuance of an annual PEPR may overlap into the next rating period. However, in this case, the actual rating period was compressed. Appellant was given neither a PEP Plan nor the 3 month rating periods in which to improve. Therefore, the Hearing Officer concludes that the Agency was in violation of Career Service Rule 13-41.

**5. Family Medical Leave:** Based on the totality of the evidence presented at hearing, the Hearing Officer concludes that there was often confusion as to which tardy arrivals or absences were related to Appellant's health problems or FMLA and that no differentiation was made for purposes of discipline. During Appellant's last year of employment with the Agency, he was off work – due to medical problems – for a total of 5 months, plus approximately 1 month on investigatory leave. If, as Good testified, Appellant was given a "Meets Expectations" rating for all the periods he was on FMLA, it would seem nearly impossible to get an overall "Below Expectations" based on 6 months out of a 12 month period. (See Findings of Fact, paragraphs 1, 7, 15, 21, 26, 27 and 49.) Therefore, based on the Agency's failure to set standard rating periods, failure to issue a PEP Plan during the last rating period and the uncertain effect of Appellant's FMLA on his "Below Expectations" ratings, the Hearing Officer concludes that the Agency has not met its burden to show that the level of discipline is reasonably related to the seriousness of the offense.

### CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction to make and issue Findings and Order in this matter.


2. The Agency met its burden to show there is cause for discipline.

3. The Agency did not meet its burden to show that the level of discipline imposed is reasonably related to the severity of the offense.

**ORDER**

Therefore, for the reasons stated above, the Agency's decision to dismiss Appellant is MODIFIED to 5 months suspension. Appellant is ordered reinstated to his former position with back pay and benefits from January 27, 2003 to the date of reinstatement.

Dated this 16th day of June 2003

  
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Michael S. Gallegos  
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 same in the United States Mail, postage prepaid, on the 17<sup>th</sup> day of June 2003, addressed to:

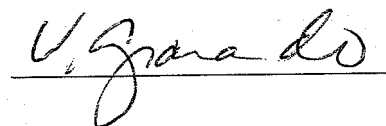
Leroy Alcon  
2047 E. Platte Blvd. #38  
Pueblo, CO 81008

Cheryl Hutchison, AFSME  
3401 Quebec St., #7500  
Denver, CO 80207

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in interoffice mail, on the 17<sup>th</sup> day of June 2003, addressed to:

Niels Loechell, Esq.  
Assistance City Attorney

Diana Smith  
Denver Department of Human Services

  
\_\_\_\_\_  
V. Granada