

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

Appeal No. 87-07

DECISION

IN THE MATTER OF THE APPEAL OF:

RONALDA MOUNJIM,
Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Ronalda Mounjim, appeals her dismissal from employment with the Department of Parks and Recreation on November 27, 2007, for alleged violations of specified Career Service Rules. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, over five days, February 15, 25, 26, March 4, and March 6, 2008. The Agency was represented by Franklin A. Nachman, Assistant City Attorney. The Appellant was represented by Michael O'Malley, Esq. Agency Exhibits 1-50 were admitted into evidence, and Appellant's Exhibits A-E, G-I, K-Q, and S-T were admitted into evidence. The Agency called the following witnesses: Dolores Moreno, Denise Brummond, David Jerrow, Reggie Mickles, and Sharon Bauer. The Appellant testified on her own behalf and also called the following witnesses to testify: Claudia Gonzales, Michelle Stelpfleg, Gerald Campbell, and Ted Robinson.

At hearing, the Agency asked to add a violation of violence in the workplace. The motion was denied as untimely.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules (CSR): 16-60 A., B., E., J., K., or L.;
- B. if the Appellant violated any of the aforementioned CSRs, whether the Agency's decision to dismiss the Appellant conformed to the purposes of discipline under

III. FINDINGS

The Appellant was employed by the Agency since 1989 as a Recreation Coordinator. She transferred to the Swansea Recreation Center in the same capacity in January 2006. She instructed participants in various fitness, arts and culture activities at the center, such as senior exercise class, ceramics, and leading day field trips to various locations. Her duties also included developing, implementing, and evaluating recreational programs in a process known as pre-planning and post-planning. The Appellant was diligent, and was almost universally well-liked by customers. [See, e.g. Exhibits 2-2; 36-2; H; I; N; O; P; S].

In June 2007 the Agency converted from pre and post planning to a base budgeting system. [2/26/08 App. testimony 4:04:45]. Previously, recreation coordinators were required to draft pre-planning and post-planning documents for each course. With the advent of program-based budgeting, coordinators were required to place data into a budgeting spreadsheet in order to provide cost analysis information. (Moreno, 2/15/08 @ 9:57:42).

Appellant's immediate supervisor, at all times pertinent to this appeal, was Reginald Mickles. Her second-level supervisor was Dolores Moreno, Recreation Director. Communication between Mickles and the Appellant was often poor. [see, e.g., 2/26/08 Mickles testimony 12:05:10].

The Appellant's last PEPR was rated as successful on November 24, 2006; however, based upon individual grades of "needs improvement" within the PEPR, Mickles placed the Appellant on a Performance Improvement Plan (PIP) in April 2007. Denise Brummond, a Senior Human Resources Professional at the Agency, assisted Mickles in drafting the April Performance Improvement Plan (PIP) for the Appellant. [Exhibit 33]. Brummond and Mickles reviewed the PIP with the Appellant for about one hour. They provided minimal direction how to accomplish the goals set forth in bulleted points within the PIP. [Exhibit 33-2]. The Appellant asked no questions during that time.

The PIP set several review dates, the first of which was an informal 14-day review. The Appellant asked to meet Mickles for the 14-day interim review accompanied by her union representative, but Moreno directed Mickles to refuse to meet the Appellant if she were accompanied by her representative.

Shortly afterward, in May 2007, the Appellant left on family medical leave and her PIP was suspended. She returned from leave July 23, 2007. Mickles re-drafted the PIP, and on August 3 Mickles presented the Appellant with the modified version of her April PIP, including bullet points of Mickles' expectations. [Exhibit 25]. The Appellant did not understand the bullet points. [2/26/08 Mickles testimony 9:42:40; 2/25/08 Brummond testimony 8:53:03, 11:33:17; 3/4/08 Appellant testimony 9:28:12]. Mickles and Brummond met the Appellant for her 30-day review on August 31. The Appellant

brought a 3-ring binder packed with materials she assembled, but the work did not meet Mickles expectations. The most specific criticism was that he found her lesson plan not detailed enough. He granted the Appellant a one-week extension to comply with his expectations, but again gave minimal information what was needed for her to comply with his expectations and the Appellant still failed to understand what Mickles required.

The same parties met again on September 7, 2007. The Appellant turned in a 4-page lesson plan, [Exhibit 18], which Mickles found too detailed. Mickles suggested there was a template from which lessons plans may be drafted, [See 2/26/08 Mickles testimony 12:00:05], but Mickles did not provide one and was unaware whether the Appellant received a template from which an acceptable lesson plan might be created. The Appellant approached 11 other coordinators and 4 supervisors, unsuccessfully, to explain the bulleted points to her. [Exhibits 12-17; 3/6/08 Appellant testimony 8:53:47].

Jerrow hand-delivered a contemplation of discipline letter to Appellant at Swansea on October 18, 2007. A short time later, the Appellant and her husband entered Swansea, accompanied by a union steward, Gerald Campbell. They approached Mickles who was with Jerrow. The Appellant's husband was angry and shaking. Jerrow, concerned for Mickles safety, asked Mickles to leave. The Appellant's husband then yelled at Jerrow about his wife's termination. Campbell then left. Jerrow remained and listened to the Appellant and her husband. Both were highly emotional. Jerrow felt threatened by Appellant's husband, and asked both of them to leave even though the Appellant's shift was not finished.

The following day, October 19, 2007, the Appellant was placed on investigatory leave. The Agency revised its contemplation letter, [Exhibit T], and convened a pre-disciplinary meeting on November 13, 2007. The Appellant attended with her union representative, Ed Bagwell. The Agency was represented by Moreno, Mickles, Jerrow and Assistant City Attorney Karla Pierce.

The decision to dismiss the Appellant was made mutually by Mickles, Jerrow, and Moreno. Jerrow sent the Agency's letter of dismissal to the Appellant on November 27, 2007. The Appellant filed this appeal timely on December 6, 2007.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. as a direct appeal of a dismissal. 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).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate the Appellant's employment complied with the purposes of discipline, CSR § 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule violations .

1. CSR 16-60-A: Neglect of duty

A violation of this rule is established if the Agency proves each of the following elements by a preponderance of the evidence: 1) the appellant had an important work duty; 2) the appellant was heedless or unmindful of that duty; 3) no external cause prevented the appellant's performance of that duty; and 4) the appellant's failure to execute her duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (10/3/06); In re Simpleman, CSA 31-06, 5 (10/20/06), *affirmed* In re Simpleman, CSB 31-06 (8/2/07).

Neither the agency's contemplation of discipline letter to the Appellant, nor its notice of dismissal, linked this rule to any particular allegation of wrongdoing by the Appellant. At hearing, when Jerrow was asked how the Appellant violated this rule, he answered as follows.

Well, as outlined in the [notice of discipline] letter, there were several instances of failing to follow processes and procedures and guidance as directed by her supervisor, as written in one of our process or procedures. Failure to update some of the forms or notifications for parents when they would come in to find their kids for field trips and those kind of things.

[2/25/08 Jerrow testimony 1:49:18].

Jerrow did not identify what duty the Agency claims the Appellant violated. In addition, the evidence failed to identify how or if the Appellant's duties were communicated to her. The Agency's closing statement referred to the October 18, 2007 incident (violence by Appellant's husband) in the context of neglect of duty, but the evidence failed to connect the incident to any wrongdoing by the Appellant under CSR 16-60 A. The Agency offered no other evidence directly linking the Appellant's conduct, or her failure to act, to a violation of this rule. The Agency's closing argument summarized the Appellant's violation of this rule by concluding "the failure to meet the plans, requirements and the events of October 18th indicate the neglect of duty the elements of which are..." The agency then recited the elements of the rule without connecting what wrongdoing related to which element of the rule. [3/6/08 Agency closing argument 1:08:00].

An agency may not shift its burden of locating and synthesizing the relevant facts and arguments that establish a specific violation to the Hearing Officer. Castillo v. Koppes-Conway, 148 P.3d 289, 291 (Colo. App. 2006). Even if the Agency's evidence at hearing had established what duties the Appellant neglected, the Agency may not do so for the first time at hearing. An agency must identify at the pre-disciplinary stage what facts it is relying upon to establish a violation of a Career Service Rule so that the employee has an opportunity to prepare for and respond meaningfully to the allegations. CSR 16-40 B.1; CSR 16-40 E. 2. For these reasons the Agency failed to establish a violation of this rule by a preponderance of the evidence.

2. CSR 16-60 B: Carelessness in performance of duties and responsibilities.

In order to establish a violation of this rule, the Agency must prove the Appellant was heedless of an important work duty, resulting in potential or actual significant harm. In re Butler, CSA 78-06, 5 (1/5/07), *citing* In re Gagliano, CSA 76-06, 4 (1/2/07). Neither the Agency's contemplation of discipline nor its notice of dismissal to the Appellant established a nexus between wrongdoing by the Appellant and this rule. When asked directly how the Appellant violated this rule, Jerrow replied as follows.

Well, some of the same things [as for neglect of duty], and I think from my recommendations and the Performance Improvement Plan is pretty large on carelessness in performance of duties, because, I mean, one of the conversations I had with Ms. Brummond who was, as you know, working with Mr. Mickles on establishing Performance Improvement Plan, evaluating it, and guiding that to... through, and so my discussions with her was, "as a non... Ms. Brummond as a non-recreation coordinator professional, did YOU understand the direction given by Mr. Mickles as far as the performance and what was expected? And her response to those questions was 'yes, I did clearly understand the expectations that the supervisor was laying out.'"

"Ms. Brummond, as a non-recreation coordinator professional, do you think that you could have successfully complied with this Performance Improvement Plan? Was it being explained well enough? Was it being... was it out of bounds? Was it too extreme? Do you feel like it was within the scope of the job specifications?" And her answers were always "yes, I think they was clearly annotated, clearly explained. It was not extreme. It was within the job scope, and Ms. Mounjim should be performing on these levels." So the conclusion was that, if she clearly knows how to do the essential functions of a recreation coordinator, then she's not doing them on purpose.

[2/25/08 Jerrow testimony 1:50:00].

Brummond's ability to understand the Appellant's PIP requirements does not establish that the Appellant was careless in the performance of a duty. Also, Jerrow's conclusion relates to intentional wrongdoing and therefore does not fall under this rule.

The Agency's contemplation of discipline letter to the Appellant stated the Appellant failed to meet her PIP requirements because she did not provide a timeline of objectives, did not provide a prioritization of deliverables, her meeting notes did not identify with whom she met or when she met them. Mickles stated the Appellant failed to list dates for completion of tasks and she failed to list monthly and seasonal goals. [Exhibit 25-2; 2/26/08 Mickles testimony 11:46:20]. These allegations fail to establish a substantial negative consequence, as required under this rule, for failing to meet these tasks.

In closing argument, the Agency concluded the evidence which established carelessness in the performance of the Appellant's duties was "similar" to that of neglect of duty. This conclusion fails to direct the Hearing Officer to the particular facts that tend to establish a violation of this rule. For reasons stated here and immediately above, the Agency failed to prove this violation by a preponderance of the evidence.

3. CSR 16-60 E. Any act of dishonesty which may include, but is not limited to:

- 1. Altering or falsifying official records or examinations;**
- 2. Accepting, soliciting or making a bribe;**
- 3. Lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours.**

In order to establish a violation of part 3 of this rule, agency must prove (1) the employee supplied incorrect information (2) to a superior (3) knowing it was false. See In re Dessureau, CSA 59-07, 6 (1/16/08) (add'l citations omitted). The Agency alleged the Appellant attempted to mislead Brummond into prematurely closing the PIP process by misinterpreting Mickles' statements to the Appellant. [Exhibit 1-5; 2/26/08 Mickles testimony 12:05:10], apparently in violation of CSR 16-60 E. 3.¹

Brummond was not the Appellant's supervisor or in her chain of command. Thus, even if the Agency's claim is true - that the Appellant misled Brummond about Mickles acceptance of her PIP compliance - that dishonesty was not a violation of CSR 16-60 E.

The Agency also claimed the Appellant lied to Mickles when she said two Girls' Club classes had met when they had not, apparently in violation of CSR 16-60 E. 3., and that she falsified attendance sheet for those classes, apparently in violation of CSR 16-60 E. 1. [Exhibit 1-5]. The Appellant denied misinforming Mickles, stating she simply held classes a different time than scheduled. Jerrow believed Mickles more

¹ The Agency did not specify which subsection it found the Appellant violated; however, its evidence is consistent with subsection 3.

than the Appellant, but did not contact any of the parents of the children enrolled in the classes at issue to confirm his belief. [2/25/08 Jerrow cross-examination 2:02:49].

Regarding the Agency's claim that the Appellant submitted false attendance information, the Appellant replied she did not falsify that information, but held classes on the dates stated, September 12 and September 19, at times that were merely later in the day than scheduled. [3/4/08 Appellant testimony 9:53:00]. I do not find credibility of either party more convincing than the other, but the Appellant's testimony was supported by one of the parents of the participants, [3/4/08 Stelpfleg testimony 8:30:00] whose credibility was not challenged. Therefore these claims are not proven by a preponderance of the evidence.

4. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

A violation of the first part of this rule is established by proof that (1) a supervisor communicated a reasonable order to a subordinate, (2) proof the subordinate violated the order (3) under circumstances demonstrating willfulness. See In re Dessureau, CSA 59-07, 7 (1/16/08), *citing In re Diaz*, CSA 13-06, 4 (5/31/06); In re Conway, CSA 40-05, 3 (8/17/05). The Agency did not present evidence that tied any of the Appellant's alleged wrongdoing to a violation of this part of CSR 16-60 J.

A violation of the second part of this rule is established by (1) proof of an assigned duty which (2) the employee is capable of performing, but (3) which the employee fails to perform. The only wrongdoing alleged by the Agency that may relate to this violation was the Agency's claim that the Appellant failed to meet her PIP requirements. Since the proof for such wrongdoing duplicates that of the Agency's allegations under CSR 16-60 K., below, then I will not repeat it here.

5. 16-60 K: Failing to meet standards of performance including either qualitative or quantitative standards. When citing this subsection, a department or agency must describe the specific standard(s) the employee has failed to meet.

An employee's failure to meet established standards of performance is proven by evidence of 1) a prior-established standard; 2) clear communication of that standard to the appellant; and 3) appellant's failure to meet that standard. In re Diaz, CSA 45-05, 6 (9/7/05), *citing Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64, 64-65 (Colo. App. 1992); In re Routa, CSA 123-04, 3 (1/28/05). Mickles delivered a PIP to the Appellant on August 4, 2007. Mickles, Jerrow and Moreno each determined the Appellant failed to meet the requirements of her August 2007 PIP when they met for the Appellant's 30-day PIP review. [2/26/08 Mickles testimony 11:46:20; 2/25/08 Jerrow cross-exam 2:56:49; 2/15/08 Moreno testimony 11:30:23].

a. Prior established standard.

The Agency based its decision to dismiss the Appellant, in part, upon her failure to meet the requirements of her August 2007 PIP. [Exhibit 1-6; 2/25/08 Jerrow testimony 1:45:16; 2/25/08 Jerrow cross-exam 2:56:49; 2/15/08 Moreno testimony 11:30:23; 2/26/08 Mickles testimony 11:46: 20]. A PIP may contain standards upon which an agency may base performance-based discipline.

b. Clear communication.

Agencies are obligated to identify and clearly communicate to employees they place on a PIP the deficiency and the standard by which compliance will be measured at two different stages: when the PIP is issued, and when an agency deems compliance was deficient. When a PIP is issued, the agency must identify specific weaknesses the employee is expected to address, must identify specific actions the employee must take in order to meet performance standards stated in the PIP, and must provide a timeline during which the employee is expected to complete the designated actions. In short, the PIP must answer the questions “what” “how” and “when.” The “clear communication” requirement also applies when, as here, the agency deems the employee’s PIP compliance was so deficient that discipline is appropriate. In that case, the agency must clearly notify the employee what specific performance deficiencies the agency believes may justify discipline, so as to provide the employee a meaningful opportunity to respond to the allegations.

The Appellant’s August 2007 PIP required her to “meet with necessary instructors, principals, parents, teachers, etc. to create a project plan for Fall 2007 Swansea Recreation Center outdoor education events and Arts and Crafts classes.” [Exhibit 25-2]. In order to fulfill this requirement, the Agency stated the Appellant could submit either a hand-written or computer-generated submission by August 31, 2007, which was to include the following bulleted elements:

- A timeline of objectives and delivery dates
- Prioritization of deliverables
- What meetings were established with instructors, principles, parents, teachers, etc.
- Meetings for recruitment
- Tasks which came from the meetings
- Dates associated with specific tasks
- Monthly/Seasonal goals.

[Exhibit 1-2; 25-2].

(1) Timeline of objectives and delivery dates.

(a) Communication of PIP requirements. Mickles explained “a timeline would be the time that she started whatever program that she’s doing. It would be the time that

she started, the time that it ended. It's the session of whatever she's doing in her planning. It would be the time that she actually put in it, what she planned on doing, you know, if she's doing girl's club, and what she planned to achieve at girl's club in the timeline. That would be the objective." [2/26/08 Mickles testimony 9:42:17]. It was clear the Appellant did not understand what deficiency was to be addressed by this requirement, or how to go about complying with it. While the Agency's witnesses stated this was an inherently clear requirement, there was insufficient evidence from which I could conclude that a reasonably astute employee, similarly situated to the Appellant, should have understood this requirement. First, the statement itself does not apprise the reader of the standard by which compliance will be measured. Second, Ted Robinson, the Appellant's co-worker who was also placed on a PIP similar to that of the Appellant, was similarly baffled by the meaning of this requirement, and his testimony was not rebutted. Third, nowhere else within the Appellant's PIP, [Exhibit 25], does the Agency explain how to achieve compliance. Agency witnesses discussed, at length, the existence of templates from which the Appellant could comply with this requirement. Proof that a template was provided to the Appellant, at or near the time she was placed on her PIP, certainly could have provided proof that the Appellant was apprised of the standard she was expected to meet, but in the end, no template was produced. Brummond testified there are many templates in the Agency, and she expected the Appellant to have them, [2/25/08 Brummond cross-exam 10:12:02], but the Appellant received only one template from Moreno, after the Agency had already determined she failed her 30-day review. [Exhibit 24-9, 10/12 entry; 3/4/08 Appellant testimony 9:18:18]. The Agency failed to provide clear notice at the time it issued the Appellant's PIP what deficiency this requirement was intended to address, and by what standard compliance would be measured.

(b) Pre-disciplinary notice. The Agency's contemplation of discipline notice to the Appellant failed to state if the Agency deemed the Appellant fulfilled the requirement of presenting a timeline of objectives and delivery dates. Neither the Agency's exhibits nor the testimony of its witnesses shed any light on the question. [See, e.g. 2/26/08 Mickles testimony 9:42:17; 3/6/08 Mickles testimony 11:36:31; Exhibit T; Exhibit 22]. The Agency's broad statements, that the Appellant failed to meet Mickles' expectations of the Appellant's PIP, were inadequate notice to have provided the Appellant an opportunity to respond meaningfully at her pre-disciplinary meeting. [See, e.g. 2/15/08 Moreno testimony 10:45:58-10:54:22, 2/25/08 9:21:33, 11:17:27; 2/26/08 Mickles testimony 11:46:20; 2/25/08 Jerrow testimony 1:50:00; Exhibit 22].

(2) Prioritization of deliverables.

(a) Communication of PIP requirements

There was much discussion over the meaning of this difficult phrase. The Agency emphasized this element of the Appellant's alleged failure to meet her PIP requirements, as three Agency witnesses testified to its meaning. Moreno explained the phrase as follows.

Um, basically what you're, what you're going to do if, um, if you have, um, a timeline of objectives and delivery dates, and so, um for us, and I'll give you an example. For us, we have um, a city-wide brochure that comes out, um, four times a year, and so, um, so I'm going back to the session calendar is, ah, you know, why we have those registration dates when, when content is due, what posting is due etcetera etcetera, and so, so if, um, so if our, um delivery date of the um brochure is...you know um...February second, that, um, and part of the objectives is to get the information out to, um, the kind of our targeted places in our neighborhoods, whether it's schools, whether its churches, businesses, etcetera etcetera, that, um, that part of the prioritization is, one, you know, who's going to be responsible for that. Who, um, um, who's gonna, you know, make the contact at school, um, what is the, the day that, that you're actually gonna make the delivery [unintelligible] presentation, you know, what does that presentation look like, and who's responsible for that, um, you know, what, what kinds of things you needed in order to make that happen, who are you gonna call, the principal. Set up a time, set up a date, etcetera, etcetera, so it's pretty basic.

[2/15/08 Moreno testimony 10:37:12].

Mickles defined "prioritization of deliverables" this way.

That would be putting in order, like if you're doing a girl's club, what do you need first, I mean, what would you do first, how do you organize your class? Like first, you need to make sure you have a space to do it, you know where you're going to do it at. O.K., then secondly, if, you need a time frame, you need to actually target a age group. Do you have what supplies you're going to need. Are you going to need a bus for projects? It's putting all that stuff in an order."

[2/26/08 Mickles testimony 9:46:00].

Brummond described "prioritization of deliverables" with this explanation.

Um, a prioritization of deliverables. Deliverable would be, um, in... in this case, uh, one of her classes would be a deliverable. Um, making sure that the proper documentation was at the front desk would be a deliverable, um, of a recreation coordinator. Um, you know making sure that she was prepared for class. Anything that had action on her part to be able to make sure that the class was successful.

[2/25/08 Brummond testimony 8:55:45].

It was clear the Agency's witnesses struggled to present a coherent definition, and no written example clarified the disparate explanations. The Agency did not present evidence how the phrase was explained, if at all, to the Appellant at the time her PIP was presented to her. Even assuming the phrase was explained in some form of the explanations, above, it is not apparent that a sufficiently clear definition emerged from which a reasonably astute recreation coordinator should have understood how to fulfill this PIP requirement.

Robinson had, as the Appellant, received a "meets expectations" PEPR from Mickles for his work in 2006. As the Appellant, Robinson was subsequently placed on a PIP by Mickles. Mickles told Robinson, as he told the Appellant, that he wanted more detailed planning. Robinson's PIP was similar to that of the Appellant. [3/4/08 Robinson testimony 11:38:10; 2/26/08 Mickles testimony 1:00:45]. Even though Mickles stated he had no problem communicating the terms of Robinson's PIP to him, *id*, Robinson expressed frustration similar to that of the Appellant over Mickles' communication his (Robinson's) PIP requirements.

Question: Were you clear after these PIPs?

Robinson: Nope. I had what I gathered was a general knowledge of it, but it never seemed like what I thought was exactly what, you know, my supervisor [told me].

[3/4/08 Robinson testimony 11:47:50].

I conclude the Agency failed to provide clear notice, at the time it issued the Appellant's PIP, what deficiency this requirement was intended to address, and by what standard compliance would be measured.

(b) Pre-disciplinary notice

The Agency's contemplation letter acknowledged the Appellant failed to understand this phrase at her 30-day review. [Exhibit T-6, bottom]. Mickles stated "the requirement was clearly spelled out as referenced under Section 16-60 K., above." However, it is unclear if the phrase is even mentioned there, leave alone defined, and if it is, the reference was similarly vague. The section to which the Agency referred states "[p]rioritize effectively and adapt as necessary, attend events to lend support and manage projects, including any updates or changes to the plan." [Exhibit T-3, top]. This language is also unavailing. Equally important, the Agency's contemplation letter failed to specify what it found the Appellant failed to do under this requirement, so as to allow her a meaningful opportunity to respond to the allegations.

(3) What meetings were established with instructors, principles, parents, teachers, etc.

(a) Communication of PIP requirements

This PIP standard, combined with the requirement elsewhere in the Appellant's PIP, to produce a written record within 30 days, contains a reasonably clear instruction what the Appellant must do to comply.

(b) Pre-disciplinary notice

The Agency's contemplation letter to the Appellant states:

The Performance Improvement Plan (PIP) which you were placed under in August 2007 contains the following relevant requirements:

Meet with necessary instructors, principles, parents, teachers, etc. to create a project plan for Fall 2007 Swansea Recreation Center outdoor education events and Arts and Crafts classes. The project plan is to be either hand written or on the computer as a requirement of fulfillment of this task.

The Agency's contemplation letter failed to state whether the Appellant met this requirement, other than a generic statement that the Appellant failed to meet her overall PIP requirements. [See Exhibit T-6, bottom and T-7, top].

Mickles testified the Appellant failed to write with whom she met or when such meetings took place "in a form I'm used to." [2/26/08 Mickles testimony 11:36:20]. Mickles testimony suggests there is a template or example of an acceptable format. Where a supervisor requires a subordinate to use a certain format to demonstrate compliance with performance objectives, the Agency must provide such format to the employee. As previously stated, there was no evidence such a template was provided even though most or all the Appellant's duties seem susceptible to following a checklist or template. Robinson affirmed the Appellant's contention that she sought out and conducted meetings concerning class planning. [3/4/08 Robinson testimony 11:50:10]. This testimony was not rebutted by the Agency. Brummond acknowledged the Appellant met with members of the community, but concluded there were an insufficient number of meetings. There was no evidence the Appellant was required to meet a quantitative standard in this regard.

The Appellant presented Exhibit 18-4 as proof of the meetings she had during her 30-day PIP compliance period. Her notes indicated, *inter alia*, a meeting with 50 or more teachers, and meetings with parents and staff. The Appellant testified the 50-page binder she submitted to Mickles on August 31 contained written confirmation of the contacts she made for her fall 2007 plan, including contacts for outdoor education events, [Exhibits B-3; B-4], but Mickles rejected her submission as inadequate after scanning the document quickly. [3/4/08 Appellant testimony 9:15:13]. Thus, the only discrepancy between the Agency's view, that the Appellant failed to comply with the meeting component of her PIP, and the Appellant's view, that she did, is a question of what specifics the Appellant was to provide as proof of those meetings. Here, the Agency failed to prove, by a preponderance of the evidence, that it identified what deficiency it found in the Appellant's proof of compliance, with sufficient clarity to

provide her an opportunity to respond meaningfully to the allegation.

(4). Meetings for recruitment

(a) Communication of PIP requirements

Taken at face value, this PIP requirement means the Appellant should provide proof she met with prospective participants in an effort to recruit, inferably, new clients into her classes or activities. The PIP did not specify more, and the Agency's testimony and exhibits did not provide any further clarification. The plain language of this and the prior meeting requirement indicate the same information may satisfy, at least in part, both PIP requirements. The Appellant testified the binder she presented to Mickles on August 30 contained promotional meeting information, including prospective participants with whom she'd met. [3/4/08 Appellant testimony 9:01:35]. Since Mickles acknowledged he gave only a cursory review to the Appellant's binder,² and he did not state what information contained in the Appellant's binder was unsatisfactory, it is unknown if the recruitment meeting information contained in it would have met this PIP requirement. Consequently the Agency failed to communicate clearly how the Appellant was to comply with this PIP requirement.

(b) Pre-disciplinary notice

The Agency's letter in contemplation of discipline did not advise the Appellant that she was deficient in this PIP requirement. [Exhibit T]. Mickles testified at hearing the Appellant failed to meet this requirement because she did not write with whom she met or when. [2/26/08 Mickles testimony 11:46:20]. The Appellant's testimony rebutted this allegation. No other objective evidence proved the Agency sufficiently identified what deficiency it found in the Appellant's meetings, to provide her an opportunity to respond meaningfully to the allegation.

(5) Tasks which came from the meetings

(a) Communication of PIP requirements

This PIP standard, combined with the requirement elsewhere in the Appellant's PIP, to produce a written record within 30 days, contains a reasonably clear instruction what the Appellant must do to comply.

(b) Pre-disciplinary notice

The Agency's contemplation letter did not state whether the Appellant met this requirement. [*Compare* Exhibit T-2 *with* Exhibit 25-2]. Mickles testified at hearing that the Appellant did not write what tasks derived from her meetings. [2/26/08 Mickles

² Mickles stated "I looked at some of it [the binder]." [3/6/08 Mickles testimony 11:14:44]. The Appellant's PIP, exhibit 25, did not specify qualitative or quantitative standards for this requirement. Mickles testified the Appellant failed to cite with whom she met, but the Appellant rebutted his claim with her testimony, the binder was not in evidence, and neither witness is more credible on this point than the other.

testimony 11:46:20]. The Appellant rebutted this allegation, [3/4/08 Appellant testimony 9:01:35]. There was no other objective evidence whether, or how, the Appellant complied or failed to comply with this PIP requirement. The Agency, therefore, failed to prove, by a preponderance of the evidence, that it informed the Appellant prior to assessing discipline, that it relied upon this standard, and her failure to meet it, in assessing discipline, as required by CSR 16-60 K.

(6) Dates associated with specific tasks

(a) Communication of PIP requirements

The Appellant's PIP provided no clarification what the Appellant was required to do to meet this broadly-stated requirement, and testimony at hearing did not explain any more about it. For each assertion by an Agency witness that the Appellant stated she understood her PIP requirements, there was equally persuasive testimony that she did not.

(b) Pre-disciplinary notice

The Agency's contemplation letter did not state whether the Appellant met this PIP requirement. [*Compare* Exhibit T-2 with Exhibit 25-2]. Mickles testified the Appellant failed to meet this requirement because she did not write any tasks. [2/26/08 Mickles testimony 11:46:20], but it was unclear he communicated this information to her at the pre-disciplinary stage, or if that information would have placed a reasonably astute employee, similarly situated the Appellant, on notice as to what information regarding dates was required in order to comply with the Appellant's PIP. Consequently the Agency failed to meet its requirement to communicate this PIP standard to the Appellant at the pre-disciplinary stage.

(7) Monthly/Seasonal goals

(a) Communication of PIP requirements

It is unclear whether Mickles expected the Appellant to create goals independent of those he assigned in this PIP, and if so, whether the failure to meet such goals would be grounds for discipline. It was not apparent from any of the testimony why the Agency believed the Appellant failed to meet this requirement.

(b) Pre-disciplinary notice

Mickles testified the Appellant failed to meet this PIP requirement because she failed to present any monthly or seasonal goals. [2/26/08 Mickles testimony 11:46:20]. The Agency's statement of "performance shortcomings" failed to state whether the Appellant met this requirement. The Appellant provided a list of fall 2007 recreation trips to Mickles on July 31, 2007. [Exhibit 26]. She also provided a draft of proposed activities for fall 2007 to Mickles. [Exhibit C-5]. The Agency failed to state whether or

why it found these submissions were inadequate to meet this requirement.

I conclude from this discussion that the Agency failed to meet a critical component of CSR 16-60 K., to describe the specific standards the Appellant failed to meet. The Agency's contemplation letter cited "the following relevant requirements" from the Appellant's PIP, but simply repeated every PIP requirement, including the city-wide S.T.A.R.S. goals, without specifying which, if any of those goals the Appellant failed to meet and what facts it relied upon to connect alleged wrongdoing to CSR 16-60 K. Mickles testified at hearing the Appellant did not pass her PIP 30-day review because "she could not perform the functions of a recreation coordinator. [3/6/08 Mickles testimony 12:05:58]. A broad condemnation of performance is inadequate notice under CSR 16-60 K, because it fails to notify the employee what standards apply, what performance deficiencies the Agency identified under those standards, and fails to identify how those deficiencies should be corrected. "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them... a broad unspecified statement... generic notice... is no notice at all." Shaw v. Valdez, 819 F.2d 965 (10th Cir 1987). Moreover, Mickles rated the Appellant's performance as "successful" for the previous work year, thus his subsequent condemnation only months later - "you are still failing to grasp the basic functions of your position" - seems unjustified, absent the Appellant's intentional refusal to perform her essential work functions, or absent a significant change of job functions for which the Appellant demonstrated an inability to perform. Neither was shown to be the case here.

Brummond summarized the Appellant's failure to meet her PIP requirements as follows. "The main duties missing from successful completion of the PIP were effective planning, attention to detail, and clear communication." [Exhibit 22]. Brummond further defined the Appellant's failure of planning as "the schedule coordination with her peer Ted and what needs to be approved and/or discussed with Reggie and what does not need to be cleared with him." *Id.* The Agency did not advise the Appellant before hearing that she had failed to coordinate scheduling with her co-worker, nor did the Agency state what schedule coordination issue was inadequate. [See Exhibit T, Exhibit 1]. Finally, Brummond informed the Appellant what future improvements needed to be made as follows. "Ronalda will provide the PIP deliverables to Reggie by the deadline and he will review." *Id.* The Appellant, did not understand these directions, and Mickles, Brummond, and Moreno, acknowledged her failure to understand them. [3/4/08 Appellant testimony 9:28:12; 2/25/08 Brummond testimony 11:33:17]. The question that follows is whether the directions contained in the Appellant's PIP would be clear to a reasonably competent employee, similarly situated to the Appellant.

The most objective evidence concerning this issue was Ted Robinson's testimony. Robinson was also a recreation coordinator at Swansea Recreation Center under Mickles' supervision. After receiving a "meets expectations" work review, Robinson was placed on a PIP by Mickles in February 2007. Mickles and Brummond explained he, as the Appellant, was required to create a plan for 2007 activities. Robinson's PIP contained directives similar to those in the Appellant's PIP. [2/25/08 Brummond

testimony 11:06:56]. Robinson, as the Appellant, did not understand Mickles' instructions. [3/4/08 Robinson testimony 11:38:10]. When asked "were you clear [about your duties and responsibilities] after these PIPs?" Robinson replied succinctly and emphatically. "Nope." [3/4/08 Robinson testimony 11:47:00]. Robinson, as the Appellant, did not understand the meaning of "deliverables," [3/4/08 Appellant cross-exam 2:46:07], and, also as the Appellant, did not understand the time requirements to meet his PIP responsibilities, [3/4/08 Robinson testimony 11:48:20], or even if he was still subject to its requirements at the time he testified. [*Id* at 11:48:16]. Robinson's credibility was not questioned. Eventually, Robinson's PIP compliance was deemed successful, but only after the Agency extended Robinson's PIP some undefined number of months. In contrast, the Agency failed the Appellant after her 30-day review.

What remained of the "relevant standards" cited by the Agency in its contemplation letter were requirements projected to be met under the Appellant's 60-day PIP review, [*compare* Agency's contemplation letter, Exhibit T-2, 3, *with* Appellant's August PIP, Exhibit 25-2]. The 60-day review never materialized since the Agency failed, then terminated, the Appellant after her 30-day review. There is no way to know whether the Appellant would have met those future tasks even though the Agency cited them, apparently as evidence of standards she failed under CSR 16-60 K.³

Mickles stated he found the format used by the Appellant to demonstrate her compliance with the August PIP was unacceptable, but the evidence was vague what format would have been acceptable to comply with the above-listed PIP requirements. As stated above, the Agency referred repeatedly to templates from which the Appellant could have modeled a complying PIP, but no such template was produced, and the Appellant adamantly disputed receiving such a template except as stated above. There was no proof the Appellant received a template in time to meet her 30-day review. When Mickles was asked if he provided a template to the Appellant he replied as follows.

Question: Did you provide a templates to Ms. Mounjim for a lesson plan?

Mickles: There were, um, discussions, verbal discussions about what a lesson plan should look like, but because it wasn't very clear I don't know if she had contacted Ms. Moreno or not, but Delores Moreno sent some lesson plans – templates - to Swansea Rec Center, and advised me to distribute them. There was one in sports that I gave to Ted Robinson, and then there was another one that captured like arts and crafts and that kind of stuff that I gave to RONALDA.

[2/26/08 Mickles testimony 11:59:30].

³ There are two possible reasons the Agency listed the Appellant's 60-day requirements in its contemplation letter: she failed to meet them; or the 60-day requirements were superfluous. If the first reason is true, the Agency's contention is speculation. If the second possibility is true, then it is even less clear which PIP standards the Agency found the Appellant failed to meet.

The Appellant's denial of receiving such a template was as convincing as Mickles assertion. By the time Moreno provided a template to the Appellant, on October 12, 2007, it was too late for the Appellant to comply with her PIP. [3/4/08 Appellant testimony 9:18:18].

The Appellant's August PIP also required the Appellant to "check in at 14 days with Reggie Mickles." *Id.* The Appellant attempted to comply, but Mickles, directed by Moreno, refused to meet the Appellant as she requested her union representative to accompany her. [2/15/08 Moreno cross-exam 2:04:16, 2:10:36]. The failure to fulfill the 14-day meeting requirement may not be assessed against the Appellant, since the Agency's refusal to allow representation at any meeting with a supervisor violates the Career Service Rules. "The representative of an employee, including officers and business agents of unions or other associations to which an employee belongs, shall be given the same rights to speak on behalf of the employee during any type of meeting with the employee's supervisor or manager as would be given the employee." CSR 15-93.

Several Agency witnesses found the Appellant's mere recitation of expectations contained in her PIP were inadequate fulfillment of the duties contained in them. [see Exhibit 18]. However, the Agency's PIP sets just such an example. It merely restates standards in the Appellant's PEP including the city-wide S.T.A.R.S. goals, even though the Agency did not allege the Appellant failed to meet those standards. Mickles stated the requirement to create lesson plans has not changed. It was puzzling, then, that the record of Appellant's past PEPRs does not reflect that she had difficulty fulfilling that task previously. Even when the Appellant's overall rating was "needs improvement" her ability to provide a new lesson plan was rated as "exceeds expectations." [Exhibit 43-3].

Thus, the preponderance of the objective evidence leads me to conclude the Agency failed to communicate clearly the Appellant's PIP requirements. Without this critical element, the Agency failed to prove the Appellant violated CSR 16-60 K by a preponderance of the evidence.

6. CSR 16-60 L: Failure to observe written departmental or agency regulations, policies or rules. When citing this subsection, a department or agency must cite the specific regulation, policy or rule the employee has violated.

An agency establishes an employee's failure to observe regulation by proving 1) an oral or written departmental regulation, 2) notice to the employee of that regulation, and 3) the employee's failure to comply with the regulation. *In re Mitchell*, CSA 05-05, 6 (6/27/05) (decided under former § 16-51 A.5), *citing In re Casteneda*, CSA 79-03 (1/14/04). Thus, the Agency must produce evidence that what is being enforced is in fact a policy, and that the Appellant had actual notice of that policy. *In re Stone*, CSA 70-07, 10 (2/25/08), *citing In re Gagliano*, CSA 76-06, 7-8 (1/2/07).

The Agency claimed the Appellant overcharged participants for three outdoor trips, September 6, September 20, and October 4, 2007, contrary to the fee schedule contained in its "Denver Parks and Recreation, New Recreation Division Membership and Program Fees." [Exhibit T-7; Exhibit 1-3; Exhibit 47; 2/25/08 Jerrow testimony 1:54:43]. The Appellant replied Mickles instructed her to charge \$10. Her evidence for this claim was Exhibit D., an email she sent to Mickles on July 31, 2007 as part of her PIP compliance. The fee for the aforementioned trips is indicated as "\$10.00 + Happy meal dinner at McDonalds." The Appellant reasoned Mickles failure to correct this fee makes any mistake his fault as much as hers. However, the Appellant did not dispute that fees are set by ordinance and may not be changed by her or Mickles. Most importantly, she acknowledged the fees as established ordinance are contained in Exhibit 47. She also did not dispute that she was aware of Exhibit 47 prior to charging \$10.00 for the July 31st trip. Consequently, the Agency proved the Appellant violated CSR 16-60 L by a preponderance of the evidence.

V. DEGREE OF DISCIPLINE

In determining the degree of discipline, appointing authorities must consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. In re Ortega, CSA 81-06, 16 (4/11/07). The Hearing Officer must not disturb the agency's determination unless it is clearly excessive or based substantially upon considerations unsupported by a preponderance of the evidence. In re Delmonico, CSA 53-06, 8 (10/26/06).

1. Severity of proven offenses

The Agency proved only that the Appellant failed to comply with an established policy concerning the amount to charge for one field trip, a minor violation of CSR 16-60 L. The Agency did not prove the violation was intentional.

The Agency devoted 1 ½ pages of its disciplinary letter, and over an hour of testimony, describing the incident on October 18, 2007, involving the Appellant, her husband, Jerrow and Mickles. Jerrow stated the October 18 incident weighted "pretty heavily" in the Agency's decision to terminate the Appellant, while Moreno and Mickles denied the incident played any part in the Agency's ultimate decision. The Agency's actions supported Jerrow's statement as the Appellant was placed on investigatory leave the day after the October 18 incident, and the Agency amended its contemplation of discipline letter to include the October 18 incident, [Exhibit T], while adding to its list of violations, CSR 16-60 M, Threatening, fighting with, intimidating or abusing employees or officers of the City, or any other member of the public, for any reason. Despite the considerable capital the Agency invested in portraying the October 18 incident as a significant piece of evidence, the Agency's letter of dismissal did not even cite CSR 16-60 M., nor did the Agency connect the incident to a violation of any other order, regulation, or law.⁴ If the Agency's decision to dismiss the Appellant was based substantially upon the

⁴ Out of a 60-minute closing argument, the Agency referred to the incident, to which it had invested considerable resources, for less than 10 seconds, then mentioned neglect of duty, but did not connect the two. Where an agency

October 18 2007 incident, its decision was unjustified under the Career Service Rules it cited. The Agency also failed to prove its most significant claim, that the Appellant failed to comply with her PIP.

2. Past record

It is worth noting that the Agency's written reprimand to the Appellant on August 14, 2006, acknowledged "the improvements you have made over the course of the last months and ... that for the most part you do a good job and meet the requirements of your job. You are adhering to your work schedule, addressed the usage of personal cell phone during business hours, and conducting city business on the city computers instead of on your own computer. I know you enjoy your job and are committed to doing the best you can and have communicated the willingness to correct the issues stated in this written reprimand." The Agency's claim, less than one year later, that the Appellant "fail[ed] to grasp the basic functions of [her] position" should have been explained but was not.

Given the Appellant's past overall satisfactory performance as a recreation coordinator since 1989 [Exhibit O-6; 36; 43; 44; 45] and with only one written reprimand in 2006 for reasons unrelated to the present case, then only one of two truths is possible: in the year since Mickles became the Appellant's supervisor, the Appellant became un-redeemably incompetent; or the Agency's expectations changed substantially without providing adequate notice and training to the Appellant. The preponderance of the evidence favors the latter interpretation.

3. Likelihood of achieving compliance with Career Service Rules

Regarding the only proven violation, over-charging for one field trip, there was no evidence the Appellant had a history of failing to comply with the Agency's policy concerning proper charges for field trips, nor was there any evidence the Appellant would be unlikely to comply in the future, once apprised of the problem.

4. Other factors

Notice must be sufficient for a reasonably astute employee to be able to understand and comply with the directive. The Agency's notice to the Appellant, both in its written reprimand and in the current case, was so generic as to provide insufficient notice what conduct or negligence must improve and by what standard improvement would be judged. The communication of work duties and of the standards by which those duties are judged, are fundamental tenets of the Career Service Rules. Mickles' generic dissatisfaction with the level of the Appellant's PIP compliance was insufficient notice of wrongdoing. That he found the Appellant's PIP compliance not detailed enough then too detailed failed to give her notice by what standards her work was judged.

fails to connect a rule violation to an employee's behavior, and the nexus is not otherwise apparent, the hearing officer must decline to fill that prosecutorial void.

VI. CONCLUSIONS

The Agency's decision to discipline the Appellant was not substantially based upon considerations that were supported by a preponderance of the evidence, as required by the Career Service Rules. The Agency's choice of dismissal was not reasonably related to the seriousness of the offense, nor did it sufficiently take into consideration the Appellant's past discipline.

VII. ORDERS

1. The Agency's dismissal of the Appellant on November 27, 2007, is REVERSED.
2. The Agency shall reinstate the Appellant to the classification she occupied at the time she was dismissed.
3. The Agency shall repay the Appellant's wages, *nunc pro tunc* November 28, 2007.
4. The Agency shall restore the Appellant's benefits lost following its dismissal of the Appellant, *nunc pro tunc* November 28, 2007.
5. The Agency shall remove all references to this discipline from the Appellant's personnel records.

DONE July 10, 2008.



Bruce A. Plotkin
Career Service Hearing Officer