

**HEARING OFFICER, CAREER SERVICE BOARD  
CITY AND COUNTY OF DENVER, COLORADO**  
Appeal No. 15-09

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**DEBBIE CLARK,**  
Appellant,

vs.

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

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**I. INTRODUCTION**

The Appellant appeals the termination of her employment. A hearing concerning this appeal was conducted on May 12-14 and July 17, 2009, by Bruce A. Plotkin, Hearing Officer. The Appellant was represented at hearing by Michael O'Malley, Esq. The Agency was represented by Neils Loechell, Assistant City Attorney. Agency exhibits 1-25 were admitted by stipulation. Appellant exhibits A-E, except A-7, F, and G were admitted. A-7 was withdrawn. For reasons stated below, the Agency's termination is AFFIRMED.

**II. ISSUES**

The following issues were presented for appeal:

- A. whether the Appellant violated any of the following Career Service Rules: 16-60 A., B., D., J., K., L., or Z.;
- B. if the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss her conformed to the purposes of discipline under CSR 16-20.

**III. FINDINGS**

The Appellant, Debbie Clark, was one of two employees designated "Case Management Coordinator II" for the Revenue Generation Unit (RGU) of the Financial Services division of the Denver Department of Human Services ("DHS" or "the Agency"). Their immediate supervisor was Gail Ries-Winger. The primary

responsibilities of a Case Management Coordinator II in the RGU are first to obtain supplemental security income (SSI) benefits for children in DHS custody, then to insure the uninterrupted flow of funds continues. The Appellant was assigned to her unit in 2006, and shared her duties with her co-worker, Sheila Genner.

Due to the inherent low-income status of these clients, the failure to procure or continue timely benefits carries grave consequences to the recipient children. [See, e.g. Exhibit 15-10]. Therefore, timely and accurate processing of cases is a critical, core function for the Appellant's section. Moreover, if the Department is out of compliance with the SSA timeline requirements, the SSA could suspend its relationship with the Agency as representative payee for the children in its care. It could take months to reestablish the flow of funds to the family for basic needs of the child. If one Case Management Coordinator fails her duties, the others are hard-pressed to pick up the slack. For all these reasons, Case Management Coordinators are required to log all contacts pertaining to obtaining benefits in a journal called the Record of Contacts, or ROC, for each client in order to insure the initiation and subsequent flow of money for at-risk children continues uninterrupted. [7/17/09 Sorenson testimony 10:45:41].

In October 2007, the Appellant's supervisor, Gail Ries-Winger, placed the Appellant on a Performance Improvement Plan (PIP) to address attendance and performance failures culminating in a performance review rating of "needs improvement." [Exhibit 3-12 et seq.]. Ries-Winger gave the Appellant detailed daily assignments to complete under her PIP. [Exhibit 9; Exhibit 21]. During the PIP period Ries-Winger met daily or even multiple times daily with the Appellant in order to go over the daily assignments, explain what was required to complete her assignment, and to answer any questions the Appellant might have about any part of any assignment. Ries-Winger provided written follow-up to the Appellant about their meetings. [see, e.g. Exhibit 15]. The PIP required a 95% completion rate. The PIP was continued in March 2008 and again in August 2008. The Appellant's performance compliance was 65% in March, 39% in April, 64% in May, 79% in June, 52% in July, 67 % in August, 67% in September, 64% in October, 72% in November, and 86% in December 2008. [Exhibit 24; Exhibit 2-5, 2-6]. For her annual review (PEPR) for 2007-2008 the Appellant received a "needs improvement" rating. The Appellant was on Family Medical Leave on August 28-29, 2008 and again October 7 through October 10, 2008.

The Agency convened a pre-disciplinary meeting on January 29, 2009. The Appellant appeared with her union representative. Both made statements during the meeting, and provided a binder with copies of assignments and emails.

The Agency served its notice of termination to the Appellant on February 20, 2009. The Appellant filed her appeal timely, on February 27, 2009.

## **IV. ANALYSIS**

### **A. Jurisdiction and Review**

Jurisdiction is proper under CSR §19-10 A. 1. a., 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 CSR 16-20. The standard by which the Agency must prove each alleged violation is a preponderance of the evidence.

### **C. Career Service Rule Violations**

#### **1. CSR 16-60 A. Neglect of duty.**

A violation under CSR 16-60 A, is sustained where an employee neglects to perform a job duty which the employee knows he or she is supposed to perform. In re Rogers, CSB 25-08 A. (7/16/09). The Appellant replied there were circumstances beyond her control which prevented the timely completion of her assignments, and would, inferably, negate a finding of neglect. See In re Mestas et al., CSA 64-07, 61-07, 62-07, 67-07, 21 (5/30/08). The instances of neglect cited by the Agency, and the Appellant's responses follow.

1. Timeliness of PIP assignments. The Appellant was required to meet two critical time requirements: to complete her PIP tasks timely at a 95% rate; and to ensure clients received needed benefits accurately 90% of the time. [Exhibits 3-20; 16-10; Ries-Winger testimony]. In addition, she was required to respond to customer requests within 48 hours 90% of the time. [Exhibit 3-14]. The Agency found that, during the PIP period from August to December 2008, the Appellant failed to submit 63 daily tasks timely, based upon its calculation that each task required an average of four days to complete 95% of her daily tasks. [Ries-Winger testimony; Exhibit 3-4; Exhibit 23]. The Agency found the Appellant was compliant with only 67% in August, 42% in September, 64% in October, 72% in November, and 86% in December 2008. [Exhibit 3]. The Agency alleged the Appellant either initiated cases late, too close to the deadline to complete timely, or failed to follow up as required. [Exhibit 3, pp.6-7]. During the same period during which the Agency claimed the Appellant failed to meet her deadlines, the Appellant's co-worker, Genner, met the same deadlines, carrying a similar or greater number of cases.

In response, the Appellant claimed nine reasons that 63 of her PIP assignments between August and December were submitted late or not at all: the required information was unavailable as the Appellant was waiting for information from a case worker or client; her supervisor failed to give credit for some cases she submitted timely; the required information was unavailable as the Appellant was waiting for information from a case worker; SSA offices were unavailable to provide information during their move; some PIP due dates occurred during her FMLA leave; Ries-Winger told her to work on a “held-check” project, so that her normal assignments were left unattended; the Agency failed to grant the Appellant needed long-distance phone access to complete some tasks timely; the Agency failed to train her adequately; the time to submit required assignments was unrealistically short; and the Agency failed to provide computer access necessary to complete some tasks [Appellant’s pre-hearing statement p.2].

a. Unavailability of information. The Agency conceded sometimes a case worker would not provide necessary information in a timely-enough manner for a the Appellant to complete her tasks timely. However, the matter does not end there. On Jun 4, 2008, Ries-Winger specifically instructed the Appellant to document the lack of response and, after five days, to email the case worker’s supervisor and her (Ries-Winger). [Exhibits 15-7, 16-1]. Thus, the Appellant’s claim, that her tardy submission was caused by a case worker failing to respond are not excused by that claim after June 4, 2008 without documentation which substantiates an escalation of the case.<sup>1</sup> As for the failure of clients to respond, the Appellant failed to inform her supervisor, or to continue to acquire the necessary information after only one or two attempts. For these reasons, the Appellant’s claim fails.

b. Failure to credit Appellant’s tasks. The Appellant claimed even when she completed tasks on time, Ries-Winger did not always give her credit for an on-time completion under her PIP. The Agency successfully rebutted this contention. At latest, in May 2008, Ries-Winger notified the Appellant that completion would be counted only when the Appellant placed daily assignments in her (Ries-Winger’s) inbox. [Exhibit 15-6; 15-8]. The Appellant continued to submit many assignments late after that notification. *Id.*

c. FMLA and other leave. The Appellant was absent on Family Medical Leave Act leave (FMLA leave) August 28 and 29<sup>th</sup> and again from October 7 through October 10. She claimed she was absent on approved FMLA leave, or other leave, when 20 of her tasks were due.<sup>2</sup> The Appellant failed, however, to

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<sup>1</sup> **Waiting for Social Worker :** SD assigned 8/11/08, due 8/23/08, submitted 9/11/08; GK assigned 8/18/08, due 8/29/08, submitted 9/25/08; VG assigned 11/12/08, due 11/17/08, submitted 11/18/08; MJ assigned 8/22/08, due 8/29/08, submitted 10/16/08; EC assigned 8/22/08, due 9/12/08, submitted 10/1/08; GH assigned 8/22/08, due 9/12/08, submitted 9/30/08; KB assigned 11/10/08, due 11/18/08, submitted 9/23/08; IC assigned 11/10/08, due 11/20/08, submitted 12/2/08; AH assigned 12/1/08, due 12/16/08, submitted 12/17/08; AG assigned 11/10/08, due 11/18/08, submitted 11/19/08; JC assigned 11/10/08, due 11/18/08, never submitted; KG assigned 11/14/08, due 11/24/08, submitted 11/25/08; TC assigned 11/19/08, due 12/4/08, never submitted.

<sup>2</sup> **FMLA or other leave (see “Appellant’s Submission, dated July 15, 2009):** NH assigned 8/18/08, due 8/28/08,

rebut Ries-Winger's response that the Appellant had time, either before or after her leave, to complete her tasks timely but failed to do so.<sup>3</sup> [Exhibit 3-6; Ries-Winger testimony]; nor did the Appellant complain to Ries-Winger that she had inadequate time to complete assignments after her return from FMLA. For these reasons, this Appellant claim also fails.

d. Held-check list project. [Exhibit 11].

Ries-Winger instructed the Appellant and her co-worker to give priority to catch up on a project known as the held-check list, [Exhibit F], from August 19 through September 5, 2008. [5/13/09 Ries-Winger 9:16:14]. She did not tell the Appellant to cease working on her other duties, [5/13/09 Ries-Winger testimony 9:16:14; 5/14/09 Ries-Winger testimony 12:07:29], yet the Appellant claimed she failed to complete eight of the 63 late cases on time<sup>4</sup> due to Ries-Winger's instruction to ignore daily duties in favor of catching up on the held-check list. Ries-Winger adamantly rejected having given such an instruction. In light of Ries-Winger's keen interest in having the Appellant catch up and stay current with all her duties, and her keen awareness of the dire consequences for untimely assignment completion, it is unlikely Ries-Winger would permit the Appellant to ignore her other duties. Finally, the Appellant admitted this claim could not justify her delay in submitting cases after September 5. This claim also fails.

e. The SSA move. Here, the Appellant stated the Social Security Administration Offices closed on September 8, 2008 to move their offices and phone communication was poor or non-existent for about two to three weeks. [5/12/09 Appellant testimony 11:36:30]. As a result, the Appellant claimed she was not at fault for submitting twelve assignments late between August and December 2008.<sup>5</sup> Genner also found it difficult to reach the SSA by phone for a couple weeks

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submitted 9/19/08; AE assigned 8/18/08, due 8/28/08, submitted 9/17/08; SD assigned 8/11/08, due 8/28 submitted 9/11; DG assigned 8/11/08, due 8/28/08, submitted 9/16/08; LB assigned 8/21/08, due 8/29/08, submitted 9/12; CD assigned 8/21/08, due 8/29/08, submitted 9/11; SG assigned 8/21/08, due 9/8/08, submitted 9/19/08; JA assigned 10/1/08, due 10/8/08, submitted 10/15/08; AB assigned 10/2/08, due 10/13/08, submitted 2/11/09; MA assigned 10/1/08, due 10/6/08, submitted 10/15/08; KJ assigned 10/1/08, due 10/10/08, submitted 10/21/08; JA assigned 10/1/08, due 10/8/08, submitted 10/15/08; JH assigned 10/2/08, due 10/13/08, submitted 10/23/08; JG assigned 10/2/08, due 10/13/08, submitted 10/20/08; IC assigned 11/10/08, due 11/20/08, submitted 12/02/08; KB assigned 11/10/08, due 11/18/08, submitted 11/19/08; RG assigned 11/10/08, due 11/17/08, submitted 11/18/08; AG assigned 11/10/08, due 11/18/08, submitted 11/19/08; VG assigned 11/12/08, due 11/17/08, submitted 11/18/08; CL assigned 11/12/08, due 11/19/08, submitted 11/20/08.

<sup>3</sup> The Appellant was on FMLA leave August 28 and 29, 2008, and again from October 7 through October 10, 2008.

During that time, the NH case was assigned 8/18/08, due 8/28/08, but not submitted until 9/21/08; AE was assigned 8/18/08, due 8/28/08, and submitted 9/17/08; JB was assigned 8/11/08, due 8/28/08, and submitted 9/19/08; WH was assigned 8/11/08, due, 8/28/08 and submitted 9/17/08; AL was assigned 8/18/08, due 8/29/08 and submitted 9/19/08; KJ was assigned 10/1/08, due 10/10/08 and submitted 10/21/08; JA was assigned 10/1/08, due 10/8/08 and submitted 10/15/08; JG was assigned 10/2/08, due 10/13/08 and submitted 10/20/08.

<sup>4</sup> **Held Check List:** NH assigned 8/18/08, due 8/28/08, submitted 9/19/08; AE assigned 8/18/08, due 8/28/08, submitted 9/17/08; SD assigned 8/11/08, due 8/28 submitted 9/11; LB assigned 8/21/08, due 8/29/08, submitted 9/12; CD assigned 8/21/08, due 8/29/08, submitted 9/11; SG assigned 8/21/08, due 9/8/08, submitted 9/19/08; ML assigned 9/4/08, due 9/11/08, submitted 9/15/08; AC assigned 9/4/08, due 9/9/08, submitted 9/12/08.

<sup>5</sup> JB assigned 8/11/08, due 8/28/08, submitted 9/19/08; DB assigned 8/18/08, due 9/15/08, submitted 9/25/08; AL assigned 8/18/08, due 8/29/08, submitted 9/19/08; IK assigned 8/18/08, due 9/15/08, submitted 9/16/08; DG assigned 8/21/08, due 9/8/08, submitted 9/22/08; SG assigned 8/21/08, due 9/8/08, submitted 9/19/08; KB assigned 8/22/08, due

after their move [7/17/09 Ries-Winger cross-exam 8:50:58]; however her daily assignments were not delayed for that reason as she simply walked upstairs in the same building to the SSA offices in order to obtain needed information, and achieved the required 95% completion rate for the same period as the Appellant following the SSA move. [5/14/09 Ries-Winger testimony 11:54:07]. In at least one instance, the Appellant withdrew her claim that the SSA move was the reason for her delayed submission. [*Id* at 11:41:30]. In another instance, when pressed whether she actually tried to contact the SSA during the period in question, the Appellant was unsure, and acknowledged she probably would have marked her attempted contact with SSA. There was no such entry. [*Id* at 1:04:15]. This Appellant claim also fails.

f. No long distance access.

The Appellant claimed she submitted some cases late because she was denied or otherwise did not have access to make necessary long-distance telephone calls. [see e.g. 5/13/09 Appellant cross-exam 9:43:40; 3:24:30]. In the only specific case referred to by the Appellant, the Agency established the case was assigned 8/21, but the first activity reported by the Appellant was 9/22/08. [Exhibit 21-358]. In addition, Ries-Winger responded with equal credibility that the Appellant could have long distance access simply by requesting it, and never denied the Appellant long-distance access. [5/14/09 Ries-Winger testimony 1:58:33]. This Appellant claim also fails.

g. Lack of training. The Appellant claimed Genner and others were provided more extensive training. Her argument seems to derive from her absence from a one-day training attended by Genner and Ries-Winger. [7/17/09 Ries-Winger cross-exam 8:43:59]; Ries-Winger acknowledged the training was helpful. In response Ries-Winger testified the Appellant was not denied training, she was absent from work on the day the one-day seminar took place and the course was not subsequently offered. In addition Ries-Winger provided daily training for two weeks to the Appellant for the information she missed in the one-day seminar, provided daily during her PIP and was otherwise available to train and answer questions. [5/14/09 Ries-Winger testimony 11:35:36; 7/17/09 Ries-Winger testimony 8:46:31]. The Appellant failed to prove, by a preponderance of the evidence that her deficiencies were caused by the Agency's failure to provide sufficient training.

In addition to the above, the Appellant admitted neglect. On November 13, 2008, during her PIP, the Appellant took cases from Ries-Winger's office without discussing the cases with her. [Exhibit 2-6]. The Appellant acknowledged she had the cases but explained (1) she simply did not have a chance to discuss the cases with Ries-Winger. Since the Appellant had daily meetings with Ries-Winger, this

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9/12/08, submitted 9/23/08; JK assigned 9/2/08, due 9/17/08, submitted 10/1/08; ML assigned 9/4/08, due 9/11/08, submitted 9/15/08; AC assigned 9/4/08, due 9/9/08, submitted 9/12/08; JG assigned 9/2/08, due 9/8/08, submitted 9/11/08; KG assigned 9/2/08, due 9/8/08, submitted 9/11/08.

explanation is without merit. (2) The Appellant also replied the children in those cases had left DHS care and therefore she was “waiting to see what happened with them” [Notice of Dismissal p.6].

The appellant also admitted she neglected the VG case, after she failed to submit it during the first assignment then again when it was reassigned 11/12, due 11/17, and submitted 11/18. [Exhibit 21-309; 5/12/09 Appellant cross-exam 4:39:31]. The Appellant also acknowledged she was aware of Ries-Winger’s directives regarding the process to escalate a case where she was not receiving information required to complete her tasks. Despite the directive, the Appellant admitted she did not always follow up with a supervisor after five days, as required. [5/13/09 Appellant cross-exam 9:02:36]. In light of this admission, her claim that she did not want to create friction with the case workers, *id*, is without merit.

h. Unrealistic time to complete assignments. The Appellant complained her PIP duty to complete tasks within an average of four days 95% of the time was unrealistic. [Appellant testimony]. Her comparator, Genner completed the same, or greater number of similar tasks, facing the same difficulties as the Appellant, at a 97% success rate during a comparable rating period. [5/14/09 Ries-Winger testimony 12:05:45]. In addition, her excessive use of City’s email system, *infra*, was further evidence the Appellant had sufficient time to complete her duties. [See *also* Exhibits 2-6, 2-7, 2-9, 2-10]. For these reasons, this Appellant claim also fails.

i. Lack of computer access. The Appellant claimed she was not given access to specialized agency programs that were necessary to perform her duties, in particular the CBMS system. [Appellant testimony]. The Agency conceded it is difficult, if not impossible to conduct the duties of a Case Management Coordinator II without such access. [Ries-Winger testimony; Allen testimony]. Ries-Winger, however, investigated the Appellant’s claim and found that her access was automatically discontinued for lack of use. Moreover, access would have been granted upon the Appellant’s request, and the Appellant failed to do so. [7/17/09 Vasquez testimony 9:48:31]. June Allen, the ultimate decision maker in dismissing the Appellant, denied it was likely the Appellant’s computer access lapsed from some other reason than non-use. [7/17/09 Allen cross-exam 1:35:29]. This Appellant claim also fails.

The Appellant failed to establish, by a preponderance of the evidence, any of the nine reasons she submitted 63 cases late or not at all during the Agency’s review of her PIP compliance. Therefore, the Agency established the Appellant violated CSR 16-60 A by a preponderance of the evidence.

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

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, under 16-60 B, it is the Appellant’s acts (performance), rather

than his omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation of this rule occurs for performing poorly, rather than neglecting to perform, an important duty. Assignments submitted late by the Appellant, rather than not at all, constituted careless fulfillment of her duties.

**3. CSR 16-60 D. Unauthorized...use of machines, or equipment of the City...including but not limited to the unauthorized use of the internet, email or telephones.**

The Agency conducted an investigation into the Appellant's use of email for September through December 2008. The Agency found the Appellant's use was excessive for that period and inappropriate as the subject of the emails involved "your relationship with your husband, another man and a woman with whom your husband was living with [sic]." [Exhibit 2-6]. The obvious issue created by the excessive use of the City's email during working hours is the Appellant's expressed inability to complete her work due to, as she claimed, an unrealistic time to complete her tasks. [Appellant testimony]. In addition, the Appellant appeared to acknowledge the aforementioned personal use of the City's email. [Exhibit 22]. While occasional personal use of the City's email and internet systems is contemplated, CSR 15-83, excessive use that interferes with performance is prohibited. *Id.*

The Appellant countered that the above personal use of email was not excessive and did not interfere with her duties. The Agency failed to provide information concerning the Appellant's personal use of the City's email of sufficient specificity to overcome the Appellant's rebuttal. This violation is therefore 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 PIP that sets forth reasonable requirements by an authorized supervisor constitutes a lawful order. For reasons stated above, the Appellant failed to rebut the reasonableness of the daily PIP assignments. She did not dispute that Ries-Winger was a supervisor authorized to require her to submit to a PIP. Where, as here, an employee fails to meet her PIP requirements, she violates CSR 16-60 J.

**5. CSR 16-60 K. Failing to meet established 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.** The Agency alleged the Appellant failed to meet the following specific standards contained in her 2008-2009 PEPR.<sup>6</sup>

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<sup>6</sup> The Agency specified the Appellant's September 2008-2009 PEPR; however it is apparent the 2007-2008 PEPR was intended since the Appellant was terminated before a September 2009 PEPR would issue, and the Agency attached the

- a. Follow through on commitments in a timely manner. If unable to provide a resolution, still acknowledge the contact within 48 hours.

Social Workers complained the Appellant failed to respond to their inquiries. [Exhibit 2-9]. Alfred Afriyie is a Senior Case Worker at the Agency. He sent three unanswered emails to the Appellant asking her for the status of benefits in an urgent case to which she was assigned.<sup>7</sup> [7/17/09 Afriyie testimony 11:56:12; Exhibit 3-61, 3-62]. The Appellant stated she gave verbal updates to Afriyie when they would happen to meet in the hallway, but Afriyie was adamant the Appellant did not respond in a meaningful fashion to his repeated requests. [7/17/09 Afriyie testimony 11:56:12]. The Appellant's failure to respond to Afriyie prompted him to contact his supervisor, Donald Etzel, for assistance. Etzel then sent an email to the Appellant's supervisor, Sorensen, to express his frustration over the Appellant's failure to respond. Etzel also testified other case workers had complained about the Appellant's lack of response. [7/17/09 Etzel testimony 11:47:19]. Etzel's testimony was not rebutted. This evidence proves the Appellant violated CSR 16-60 K. by a preponderance of the evidence.

- b. Take responsibility for creating and maintaining an environment in which all customers feel heard, valued and respected.

Ries-Winger commented the Appellant's customers complained she failed to respond timely to their requests for service. This allegation is addressed by the more specific standard defined immediately above.

- c. Represent the Department in a positive and professional manner.

General standards such as this will not be analyzed where more specific violations are also alleged. Ries-Winger's oblique reference to this and other violations in the Appellant's PEPR were not directed toward this standard specifically enough to determine if this standard was violated. [Exhibit 3-14,3-15]. Consequently, no violation is found.

- d. Contributes to the development, cohesion and productivity of the team. Standards: Consistently makes contributions to improve team performance; is counted on by other team members to get the job done.

Ries-Winger stated "Feedback from Debra's 360 survey reflects...[s]he does not demonstrate teamwork and cooperation within her unit. She is also perceived as not pulling her own weight in the work unit." [Exhibit 3-16]. The Appellant did not rebut this evidence, and therefore a violation is proven by the Agency.

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Appellant's 2007-2008 PEPR to its exhibit in support of its contentions.

<sup>7</sup> The client had epilepsy. A severe episode required hospitalization, so securing benefits was urgent [Exhibit 3-62].

- e. Follows the performance and conduct standards for the section, and ensures that the essential duties and responsibilities of your job are fulfill in an acceptable manner. This allegation was addressed more specifically in the analysis of the Appellant's PIP compliance.
- f. Observes all reporting, leave and punctuality standards.

The Agency alleged "your attendance has also not improved. You exhausted your sick leave bank in November and were charge[d] with 4.5 hours of Unauthorized Leave without Pay on November 25<sup>th</sup>. In the month of December you arrived late on December 9<sup>th</sup>, 11<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup>." [Exhibit 2-7]. The Appellant replied she was on authorized leave, however, as stated above, the dates of her FMLA leave did not rebut the Agency's contention that she was absent without authorized leave on the dates identified by the Agency that were not during the Appellant's FMLA leave. The Appellant violated this standard.

g.-k. The following standards were addressed by more specific rule violations elsewhere: "Takes personal responsibility for performance, attitude, motivation and work products and outcomes; Initiates corrective action to improve ability to satisfy performance or conduct standards; If a problem arises, communicates it immediately to immediate supervisor; Follows through on commitments to coworkers, supervisors, customers; While being paid on company time works productively and effectively. [Exhibit 3-2].

I-aa. As for the remaining duties and standards cited by the Agency at Exhibit 3-2 and 3-3, the Agency did not specify what evidence tended to prove the Appellant violated such duties or standards, and it was not evident from the evidence what evidence might tend to prove such violations. Insofar as the Agency alleged the Appellant violated the remaining standards specified in Exhibit 3-2 and 3-3, those violations are not established.

#### **7. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.**

To prove a violation of this rule, the agency need only prove that there was a written policy, the employee was aware of the policy, and the employee failed to follow the policy. In re Mounjim, CSB 87-07 A., 6 (1/8/09). The Agency claimed the Appellant violated the following Departmental Rules and Regulations

a. DHS Employee Handbook p. 41. This policy imitates the proscription against improper and excessive use of City equipment for personal email use. For reasons stated above, the Agency failed to prove the Appellant violated this provision by a preponderance of the evidence.

b. DHS Privacy and Security manual p. 40. The language in this policy repeats the language, cited immediately above, concerning use of email at work. For reasons as stated above, the Agency failed to prove this violation by a preponderance of the evidence.

**4. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.**

To sustain this violation, the agency must prove the Appellant's conduct hindered the agency mission, or negatively affected the structure or means by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06). While the potential for harm from the Appellant's negligent performance was substantial, the Agency provided no evidence of actual harm to the Agency or to the City, as required by the second portion of this rule. The Agency also failed to prove the Appellant's actions or negligence prejudiced the structure or means by which the Agency accomplished its mission. In re Strasser, CSA 44-07, 4 (10/16/07), *aff'd* In re Strasser, CSB 44-07 (2/29/08).

**VI. APPELLANT CLAIMS**

While the Appellant did not allege discrimination based upon a protected class, she claimed she was treated less favorably than others. [Appeal, Appellant opening statement]. The only other similarly situated employee, Genner, dispelled that allegation as Genner received the same type and number (or more) of assignments than the Appellant, and met the same performance standards which the Appellant failed to meet. In addition to her own case load, she inherited a portion of the Appellants cases after the Appellant's termination, yet she continued to meet the same performance standards that were not met by the Appellant. [Ries-Winger testimony; Genner testimony].

Next, the Appellant claimed bias by Ries-Winger. The evidence shows quite the contrary. Allen testified she disapproved of Ries-Winger's extraordinary attempts to mentor, coach and retain the Appellant well-after it became apparent to Allen, that the Appellant's performance required termination. Indeed, Ries-Winger went to great lengths to give the Appellant repeated opportunity to learn and improve her performance. Ries-Winger's daily meetings, detailed daily assignments and detailed follow-up emails provided more feedback and opportunity than any reasonable supervisor would be expected to provide. Ries-Winger's unflappability and patient explanation of her continued efforts with the Appellant, even faced with withering cross-examination, underscored her patience with the Appellant. There was no evidence of the slightest degree of bias or any other impropriety in Ries-Winger's relationship with the Appellant.

## **VII. DEGREE OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior if possible. 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. CSR § 16-20.

### **A. Severity of the violations**

The Appellant's duty to submit timely assignments was not just an academic exercise. There were tangible consequences to the most vulnerable population serviced by the City: children with severe medical and financial needs. Therefore the Appellant's failure to submit 63 assignments on time, or not at all, had the potential to result in great harm. In addition, her failure to submit her assignments required others to take up the slack.

### **B. Past Discipline**

The Appellant received the following prior discipline.

August 15, 2008	Temporary reduction in pay	Performance problems and Inappropriate use of email [Exhibit 3-23];
May 27, 2008	Written Reprimand	Performance issues [Exhibit 3-31]
March 7, 2008	Written Reprimand	Performance and attendance problems [Exhibit 3-38]
October 19, 2007	Written Reprimand	Performance and attendance problems [Exhibit 3-43]
July 3, 2007	1 Day Suspension	Excessive internet use [Exhibit 3-47]
February 28, 2007	Verbal Reprimand	Sick leave abuse [Exhibit 3-51]
May 13, 2005	Verbal Reprimand	Failure to attend scheduled orientation [Exhibit 3-57]
February 10, 2005	Written reprimand	Failure to review compliance cases [Exhibit 3-54]

In considering the degree of discipline, Allen took into account the Appellant's extensive disciplinary history. She also considered, correctly, that similar attendance, performance and disciplinary issues had not improved. [7/17/09 Allen testimony 1:33:27].

C. Likelihood of achieving compliance.

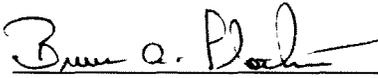
Ries-Winger went to extraordinary lengths to give the Appellant every opportunity to succeed, well-beyond what a reasonable supervisor would normally be expected to invest in an employee: she met daily, or even more than once per day, with the Appellant for a year, [see Exhibit 15, 16, 18,19,20], broke down the Appellant's assignments into discrete tasks that were to be completed, gave specific deadlines for completion and reviewed the daily progress of assignments to give the Appellant every opportunity to seek assistance with tasks she did not understand, or to acquire assistance with any external cause that may have prevented timely completion of tasks. Allen considered Ries-Winger's efforts and the Appellant's failure, even with a great deal of assistance to be able to comply with her duties.

Under the circumstances cited above, Allen's decision was within the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re Garcia, CSA 175-04, 8 (7/12/05), *citing In re Armbruster*, CSA 377-01 (3/22/02). Allen's determination was not clearly excessive or based substantially upon considerations not supported by a preponderance of the evidence. *Id.*

**VII. ORDER**

The Agency's determination to terminate the Appellant's employment on February 20, 2009, is AFFIRMED.

DONE August 27, 2009.

  
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Bruce A. Plotkin  
Career Service Hearing Officer