IN THE MATTER OF THE CONSOLIDATED APPEALS OF:

AUDRA MESTAS, PATRICIA SALAZAR, LAURA FUENTES, KAREN SIERRA,
Appellants,

vs.

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

I. INTRODUCTION

The Appellants, Audra Mestas, Patricia Salazar, Laura Fuentes, and Karen Sierra, challenge the discipline imposed on them by the Agency, the Department of Parks and Recreation, for alleged violations of specified Career Service Rules and Agency regulations. The Appeals were consolidated for hearing. Bruce A. Plotkin, Hearing Officer, conducted the hearing in these appeals over five days: December 17, 18, 19, 2007, January 4 and February 1, 2008. The Agency was represented by Franklin Nachman, Assistant City Attorney, while the Appellants were represented by Hugh S. Pixler, Esq. The following Agency Exhibits were admitted into evidence: 1-34, 38, 41-47, 49-58, 60-62, and 65-74. The following Appellant's Exhibits were admitted into evidence: A-C, E, G-Z and A A-V V. The Following witnesses testified for the Agency: Susan Judah, Phillip Cummings, Raymond Taylor, Yuriko Thiem, Kelly Martin, Tracy Marin, Ann King, David Jerrow, and Linda Mesegadis. All four Appellants testified on their own behalves, and presented additional witnesses Vern Howard, Shelly Pawlowski, and Denise Brummond. Jurisdiction was not at issue.

Due to lengthy testimony over five days, and because some witnesses testified on more than one day, citations to witness testimony include a date and time for easier access to the source. I have repeated the rule violations and the agency's evidence for each Appellant, even though doing so creates a lengthier document. I chose this method to avoid having the reader engage in the cumbersome task of jumping back and forth within the Decision to find pertinent information. The “Findings” section explains the general nature of the claims against the Appellants and my conclusions, while the subsequent “Analysis” section explains the reasoning behind my findings.
II. ISSUES

The following issues were presented for appeal:

A. Whether each Appellant violated any of the following Career Service Rules: 16-60 A., B., J., K., or Z.;

B. If each Appellant violated any of the aforementioned Career Service Rules, whether the Agency's dismissal of Appellants Mestas, Fuentes, or Salazar, or the Agency's five-day suspension of Appellant Sierra, conformed to the purposes of discipline under CSR 16-20;

C. Whether the Agency's discipline was based upon unlawful discrimination.

D. If Appellants substantially prevail in their claim, or if the Agency substantially fails in its claims, whether the Appellants are entitled to monetary relief, fees and costs.

III. FINDINGS

A. Generally

The Appellants were co-workers in the same office. They were hired by the Agency as Administrative Support Technicians IV (ASA IV) to process payroll for all Agency employees. Shortly before they were disciplined, the Appellants had been reclassified to Human Resources Support Technicians, with Fuentes appointed as the immediate supervisor to Mestas, Salazar, and Sierra. Fuentes reported at first to David Jerrow, then later to Ann King. King made the final determination in the Appellants' discipline, with approval from Manager Kim Bailey.

Jerrow had been working exclusively in human resource functions when the Director of Human Resources assigned payroll oversight to him toward the end of 2003. He candidly admitted he knew little about payroll, ("at that point, I'll admit, the only thing I knew about payroll was that I got paid twice a month"), and relied on payroll technicians to evaluate process and procedures since he did not have time to devote his full attention to payroll. He stated he was "a voice" in the reorganization of payroll/HR functions, [12/18/07 Jerrow testimony @ 8:37:48], but the principal responsibility of training technicians in their newly-assigned duties fell to the technicians themselves. [Id @ 8:41:08]. Under Jerrow's direction, the payroll technicians processed separation audit source documents by assembling separation documents, then bringing them to Jerrow to review. Jerrow then calculated the final payout. [12/18/07 Jerrow testimony @ 9:01:47]. After the Appellants' office was reorganized, the Appellants became responsible for performing critical calculations for review by Fuentes, a process that failed.
The Department of Parks and Recreation faces greater payroll and human resource demands than other city agencies because, unique to this agency each spring, agency staffing needs require more than doubling employment, from 700 to 1500 employees, in anticipation of summer swimming pool, recreation center, golf, and parks staffing requirements. The process of hiring each seasonal employee generates an array of paperwork for candidate testing, criminal background check, citizenship status, hiring, payroll, and end-of-season separation documentation, for each of the 700 to 800 part-time employees.

Based upon a city-wide audit of the ASA IV position, the Career Service Authority (CSA) announced a reclassification of the Appellants' positions from ASA IV to HR Support technicians in August 2006. That fall, Director of Human Resources Ann King, who had been hired from the private sector only about one month before the Appellants' reclassification, began to restructure the payroll department to comply with the reclassification, although she knew little about payroll. [12/17/07 King testimony 2:36:19]. Each of the Appellants continued processing payroll, but now had the added responsibility for processing personnel actions. [Exhibit 50-2]. To assist her in the transition, King asked Fuentes in September 2006 to take on the role of acting supervisor over the other Appellants. Fuentes had little or no previous supervisory experience.

Reorganization was formalized in January 2007, along with a new reporting structure. [Exhibit 26]. The Appellants' added administrative functions were intended to provide a kind of employment cradle-to-grave service for all Agency employees' pay-related needs, from hiring to separation. In addition, each Appellant was required to rotate once per week to a help desk. Despite the reorganization, there were no definitive procedures for processing payroll and leave as late as July 2007. [Exhibit 47-2 @ #9; Exhibit 47-3 @ #18].

King informed the Appellants she expected the reorganization to be completed by August 2007. [Exhibit B]. She told the Appellants she expected they would make mistakes in their new duties. "I think I have set a realistic expectation with everyone that we will have mistakes, errors, and discovery for where we need to improve throughout the summer." [Exhibit C; 12/18/07 King cross-exam 2:51:22]. King was delighted with Fuentes' post-reorganization performance and promoted her from acting supervisor to full Administrative Support Supervisor I in April or May, 2007. [12/17/07 King testimony 3:52:28]. Personal issues began to erupt between King and Fuentes around April, 2007, [Exhibit BB]; however, as late as June 5, 2007, King continued to find Fuentes' performance merited an "exceptional" rating. [Exhibit G-1 @ supervisor's signature]. King remained unfamiliar with the processes followed by the Appellants after the January 2007 reorganization, so that during a May 2007 staff meeting, King directed Fuentes to write a procedure manual for all functions performed by the technicians. At the end of May, Fuentes presented a draft to King, Jerrow and Kelly Marlin. King said she would take over from there, but there was no evidence that anything further was
done with the draft and Fuentes did no more work on the procedure manual after King took over. [1-4-08 Fuentes testimony 10:06:37]. Despite telling the Appellants in January 2007 that she expected mistakes to be made during the first year of reorganization, less than one month after she discovered the Appellants were making significant errors, she began discussions about discipline with Jerrow, the end result of which was the notices of discipline leading to this appeal. [Exhibit II].

In July 2007, the Appellants' department was reorganized for a second time. [Exhibit 47-1 @ 1]. This second reorganization was driven by Sierra's leaving on family medical leave, resulting in inadequate manpower for the office to accomplish its tasks. Fuentes made organizational changes, and King approved them. Each Appellant had previously been responsible for processing payroll and personnel actions for specific departments within the Agency. Fuentes directed that all work for the technicians would henceforth be placed into one bin on her desk alone. She then assigned work to each technician, rather than having each work group remaining responsible for certain departments. [12/19/07 Sierra testimony 9:31:08]. When one employee finished her assignment, Fuentes would parcel out more assignments. [Exhibit 47-1]. This reorganization was unsuccessful as it resulted in more errors than before. The reason for the failure of this reorganization was the Appellants unfamiliarity with new customers, making it less likely the appropriate questions would be asked, [1-4-08 Jerrow cross-exam 4:57:43].

At the same time that Fuentes was reorganizing the work flow for her staff in July 2007, King was becoming aware of significant problems in her department for the first time since she was hired one year previously. Those problems, described next, formed the basis of the Agency's decision to discipline the Appellants. King first notified the Appellants there was a problem with their work performance when she issued their contemplation of discipline letters. The Agency alleged the Appellants engaged in misconduct regarding some or all of the following duties.

B. Separation Audit Source Documents Within 30 Days

The Agency alleged all four Appellants failed to deliver source documents for separation audits to the Auditor's Office within 30 days after Agency employees' separation from employment. Separation audits are one of the functions performed by the City Auditor's Office. These audits determine the accuracy of the final paycheck issued to employees who have separated from service with the City. The accuracy of final paycheck depends upon verification of banked vacation and sick time, compensatory time, Family Medical Leave, and other accumulated benefits as well as accumulated deductions. Before the City centralized payroll operations, each agency supplied separation documents to the Auditor's Office for each of its employees who separated from service. Separation documents include the final separation personnel action, leave slips for the preceding 12 months, leave history records from PeopleSoft, attendance sheets for the preceding 30 days, and other records related to pay and benefits. The agency's payroll/HR staff would also make initial calculations for final
payout. After reviewing the calculations and supporting documents submitted by the Agency's HR/payroll staff, if the Auditor's staff found errors in the agency's submission, the staff auditor would make positive or negative adjustments to the calculations submitted by the Agency, resulting in the issuance of a check in cases of underpayment, or collection procedures for cases of overpayment. For this reason, the impact of errors made by an agency's payroll/HR staff was significant.

Following the Agency's reorganization of its payroll functions in January 2007, the Agency added to the Appellants' regular payroll functions the responsibility for gathering the above-mentioned separation audit source documents, for calculating final payment, and for forwarding those source documents to the Auditor's office. The Appellants were also assigned the responsibility for issuing personnel actions. The Appellants' training for these tasks was minimal. By comparison, the Auditor's Office requires its audit staff to have at least an undergraduate degree in accounting, finance, or similar education. None of the Appellants possesses a college degree.

On July 19, 2007, Phillip Cummings, Audit Supervisor for the city Auditor's Office sent an email to King, [Exhibit 60], in which he complained that King's department had not forwarded separation documents for one employee 10 months after the employee separated from employment. King assumed Fuentes took care of the issue until August 13 when Cummings emailed King a second time to tell her his office had still not received the aforementioned separation papers. In the same email, Cummings said his department found 17 other Agency employee separations in 2006 and 2007 for which King's department had not forwarded separation documents. [Exhibit 12]. King felt embarrassed and humiliated by these communications from Cummings. [12/17/07 King testimony @ 3:32:13] The Agency's contention, that the Appellants had been aware that separation documents were required to be submitted to the Auditor's Office within 30 days after the employee's separation, was not supported by the evidence.

C. Separation Audit Source Document Errors

In addition to its claim that the Appellants failed to submit timely separation source documents to the Auditor, the Agency also claimed Mestas, Salazar and Sierra made errors in the calculation of final pay based upon those source documents. The Agency also claimed Fuentes failed to check her subordinates' work before forwarding the faulty calculations to the Auditor's Office. The significance of the problem is evident in the Auditor's 2006 letter to the Mayor in which he explains that pay adjustments, either up or down, totaled $295,000. Overpayments that cannot be collected as an offset from final payout are referred to the collections process for attempted recovery with a success rate of only 40%. Notably, the error rate for separation pay for the
Department of Parks and Recreation in 2006 was not worse than most other agencies.¹

D. Failure to check CSA certification list (Rude Lifeguards)

About the same time that King became aware of separation audit problems, she became aware of another problem that formed one of the bases for discipline in this case. Darlene Robles, Coordinator for the Robles Recreation Center, hired five lifeguards without resorting to the CSA hiring process, between April 10, 2007 and April 23, 2007. None of the lifeguards had applied through the CSA, and none was chosen from a CSA certification list. Robles issued congratulations letters to these five new employees who took the letters to the Agency’s HR/payroll help desk on various days when Salazar, Sierra, and non-party Tracy Marin, manned the help desk. Salazar, Sierra, and Marin issued Report for Duty (RFD) forms, [Exhibits 41, 42, 43, 45, 46], to the five new lifeguards and Fuentes approved them as supervisor. King implicitly approved the issuance of at least one of the Report for Duty forms, as she co-signed the personnel action that followed. [Exhibit 42-2]. When the wrongful hiring was discovered, the Agency suspended Robles for three days, [Exhibit 68], but later reduced the suspension to two days. [Exhibit 67]. The Agency claimed Salazar, Sierra and Fuentes failed, pursuant to a specific standard operating procedure, to check new hire names against a certification list issued by the CSA before issuing Report for Duty forms; however, the standard operating procedures relied on by the Agency do not refer to a process for issuing Report for Duty forms. The Appellants did not become aware of a duty to check new hires against a certification list until after the Rude lifeguard incident, nor did they have ready access to certification lists until after this incident.

E. Leave Slips.

A leave slip, also known as a premium pay slip, is issued for extraordinary pay events such as sick leave, vacation, or overtime. A leave slip serves as a printed copy of leave approved by the employee’s supervisor and thus helps ensure the proper calculation of pay. Leave slips also constitute part of the documentation required for separation audits. The Agency claimed that between January and June 2007 Mestas failed to attach one or more leave slips to 95 timesheets, instead attaching a colored sticky-note describing what information was missing. The Agency failed to establish that it communicated to Mestas a duty to attach leave slips to timesheets before issuing her contemplation of discipline letter.

¹ For the Department of Parks and Recreation the error rate for separation documentation was 43% in 2006; for other agencies the error rates in 2006 were as follows: Career Service Authority – 64%; City Attorney’s Office – 79%; Department of Public Works – 65%; Denver County Court – 86%; Office of Economic Development – 38%; Library – 26%; Department of Aviation – 59%, Denver Health – 42%; Community Planning and Development – 55%; Technology Services – 60%; Sheriff’s Dept – 33%; Treasury – 38%; Dept. of Human Services – 39%; and most surprisingly, the Auditor’s Office – 71%. Clearly the problem has been systemic.
F. Personnel Actions

A personnel action (PA) is a document created whenever a change to an employee's record is required, such as when an employee is hired, promoted, disciplined, or separated. [12/17/07 Taylor testimony 10:48:12]. The Agency claimed Mestas failed to create PAs for three suspended employees between April and June 2007.

G. Failure to Assist Customer

The Agency claimed Mestas failed to process an Agency employee’s request to receive his recently-awarded pay increase. Mestas did not dispute the customer’s request, but failed to process the request even a month later when the employee’s supervisor called to find out why the request had not been processed. Mestas’ response did not rebut the Agency’s claim.

Separate pre-disciplinary meetings for the Appellants were held on August 15, 2007. The Appellants attended with their attorney. They presented nearly identical written statements. Following the Agency’s dismissal of Mestas, Fuentes, and Salazar, and the Agency’s suspension of Sierra, all four Appellants filed timely appeals.

H. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A. 1. 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).

I. Burden and Standard of Proof

This case contains a mixed burden of proof. The Agency retains the burden of persuasion, throughout the case, to prove each Appellant violated one or more cited sections of the Career Service Rules, and to prove its disciplinary decisions complied with the purposes of discipline under the Career Service Rules. CSR 16-20. The Appellants retain the burden of persuasion, throughout the case, to prove the Agency engaged in unlawful discrimination. The standard by which the moving party must prove each claim is by a preponderance of the evidence.
IV. ANALYSIS

A. MESTAS.

1. Introduction

Audra Mestas (Mestas) began working for the city of Denver in 1989 and transferred to the Agency in 2001 where she worked until her dismissal on September 7, 2007. She was well-experienced in payroll data entry and, by all accounts, she performed that aspect of her job well. [12/18/07 King testimony 1:32:05, Exhibit H]. Before the CSA reclassified her from ASA IV to HR Support Technician, Mestas handled payroll processing for most of the recreation side of the Agency by herself. After the Agency reorganized its payroll office, Mestas continued to service payroll for all 29 recreation centers, facility Services and recreation administration, [Exhibit 4-2], a total of 400 employees, but was given additional responsibilities in human resource functions related to payroll. [12/18/07 Jerrow testimony 8:20:04; Exhibit 50-2]. Payroll technicians in other agencies were responsible for 200-250 employees’ pay. [Exhibit 4-2]. The new duties added responsibilities related to benefits. The Appellants were also required to rotate manning the front desk one day per week. The method for accomplishing the additional tasks was poorly defined. It was not possible for Mestas to keep up with such tasks as attaching leave slips to pay sheets until Tracy Marin was hired on April 2, 2007. After Marin was hired, Mestas had few problems attaching leave slips to pay sheets. [Exhibit 4-2]. Mestas was dismissed by the Agency on September 7, 2007. Her previous disciplinary history consisted of a written reprimand in 2003 and a verbal June, 2007.

The Agency alleged Mestas engaged in the following misconduct: (1) she failed to prepare personnel actions for three employees who had been suspended; (2) she failed to submit separation documents to the Auditor’s office within 30 days after the separations of eleven Agency employees; (3) she made errors in calculating separation pay for nine of the separated employees; (4) she failed to reply to the request of an Agency employee concerning his pay increase; and (5) she failed to attach leave slips to 95 pay sheets. [Exhibit 1-3 to 1-5]. The Agency did not link Mestas’ alleged misconduct to any particular Career Service Rule, so that any connection of the Agency’s evidence to a particular rule violation is by inference.

2. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the agency must establish each of the following 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; 4) the Appellant’s failure to execute her duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (Order 10/3/06); see also In re Simpleman, CSA 31-06 (Order 10/20/06).
As also required to establish a violation of CSR 16-60 K, failure to meet established standards, the agency must have communicated the important duty in such manner that a reasonably astute employee would be aware of it and, if also required by the agency, the manner in which the agency expects the duty to be performed. See In re Encinias, CSB 02-07, 2 (10/19/07) (“the agency...bears the burden of showing that it made the employee aware of his job responsibilities”).

The Agency alleged Mestas (1) failed to create personnel actions following the suspension of three Agency employees on April 16, June 20, and June 28, 2007; (2) failed to complete and forward separation audit documentation, between February and June 2007 for 11 employees within 30 days after their separation from employment; (3) made errors in calculating final pay for nine of the eleven separated employees; (4) failed to respond to an employee’s request for payment of his raise differential; and (5) failed to attach premium pay/leave slips to attendance sheets for 95 individual attendance sheets before entering pay data into PeopleSoft. [Exhibit 1; Jerrow testimony 12/18/07]. I examine next whether the Agency established a violation of CSR 16-60 A. for each of its claims against Mestas.

a. Personnel actions

A personnel action (PA) is a document created whenever a change to an employee’s record is required, such as when an employee is hired, promoted, disciplined, or separated. [12/17/07 Taylor testimony]. The Agency claimed Mestas failed to create PAs for three suspended employees between April and June 2007. The Agency acknowledged no harm was done, as “you discharged your duty to ensure that no salary went out for these employee suspensions,” but claimed she failed her duty to create and send the PAs to the Career Service Authority pursuant to the guidelines contained in How to Prepare a Personnel Action, in which, according to the Agency, Mestas had been trained. [Exhibit 1-3; Exhibit 74].

Yuriko Thiem, an Analyst II in the Auditor’s Office since April 2006, conducted the above-described training for the Appellants in March 2007. Her training covered some, but not the entire, several-hundred page tome named HR Processing Guide. Within the Guide is a 100 page section, Part II: How to Prepare a Personnel Action, but Thiem was vague as to whether she covered that section with the Appellants and, if so, to what degree. [12/17/07 Thiem testimony @ 11:17:00]. Because the Guide was a work-in-progress at the time, Thiem told the Appellants they could not have a copy of it until revisions were completed, June 1, 2007. [12/17/07 Thiem cross-exam@ 11:31:45]. Thiem’s credibility was not challenged.

Mestas stated Thiem’s training focused on new hire, rehire and transfer processing, and did not cover processing of PAs for disciplinary actions. She also stated, consistent with Thiem’s testimony, that she received the HR Processing Guide only in June 2007. This testimony was not disputed.
The Agency based its claim against Mestas upon her knowledge, ability, and access to the information to create personnel actions for suspensions, however, it was unclear whether training covered personnel actions for suspensions. The HR Processing Guide, [Exhibit 74], cited by the Agency as the source upon which Mestas was supposed to rely, was unavailable to her until June, while the first of the three suspensions named by the agency occurred in April. [Exhibit 1-3]. The Guide was available June 1, 2007, before the next two suspensions cited by the Agency - June 20 and June 28 - however the Agency failed to prove that it made Mestas aware of it at that time or that she was trained to use the Guide less than one month after it became available. In addition, King's testimony supported the Appellant's contention that their first priority was payroll, so that other functions such as the prompt processing of personnel actions could be left wanting, particularly during spring and summer. [Exhibit 59-1; 12/19/07 King cross-exam 8:40:10].

Linda Misegadis is the payroll manager at the Controller's Office. She is a certified payroll professional. Her credibility was not challenged, and her testimony appeared to be knowledgeable and neutral. When a decision was made to explore shifting payroll to a centralized system, she was charged with meeting all the agencies' payroll personnel to look at their payroll processes and issues. She met with each Appellant on 7/16/07 for about five minutes. [12/18/07 Misegadis cross-exam 11:52:53]. After she met with the Appellants and with King, Misegadis concluded

[It was clear that a training program needs to be created for both the supervisors and the employees. There is not a clear understanding of what their responsibilities are or of the rules. The payroll technicians felt that they understood what their roles and responsibilities were, but the field [their customers] did not have a clear understanding of what their roles were. [Exhibit 47-3].

The Agency's evidence failed to prove Mestas was trained in, and capable of, creating timely personnel actions for three suspended employees in April and June 2007. The Agency also failed to prove that it communicated this important duty in such manner that a reasonably astute employee would be aware of it. Consequently, the Agency failed to prove Mestas' failure to create personnel actions for three suspended employees, between April and June 2007, was a violation of CSR 16-60 A.
b. Separation audits: 30-day rule.\(^2\)

Since the Agency claims Mestas submitted separation audit documents late, rather than not at all, the claim is one of poor performance of a duty, addressed by CSR 16-60 B., carelessness, below, rather than by neglect of duty.

c. Separation audit errors.

The Agency’s evidence was that Mestas performed poorly her duty to calculate final pay, rather than failing entirely to calculate it. Thus, this claim is addressed by carelessness in the performance of duties, below, rather than by neglect of duty.

d. Customer request for payment of raise differential.

The Agency claimed an employee emailed the HR help desk on June 26, 2007 to inquire when he would be paid the increase that had been awarded to him. Mestas was on duty at the help desk at that time and therefore was responsible for replying. On July 12 the employee’s supervisor emailed the HR help desk inquiring when an answer would be provided. Another HR Technician answered the same day, and sent a copy to Mestas, stating the employee was owed $123.20 and would receive the adjustment on July 27. The employee’s supervisor sent a follow-up email on July 31 inquiring why the employee had not been paid. Mestas did not deny it was her responsibility to process the request. Her only response was “with the volume of work, training, cross-training and meetings, it was simply missed.” Without more specificity as to how her other obligations caused a failure of duty that was beyond her control, Mestas’ response does not rebut the Agency’s assertion that it was her responsibility to ensure payment to the employee. While it is noteworthy that the Agency did not specify a limit to the time Mestas should have responded to the employee’s request, a delay of over one month to reply to a customer’s request is too long by any reasonable measure.

In terms of the elements of neglect of duty, Mestas did not deny her obligation to respond to the employee’s pay inquiry was an important duty; she was unmindful of her obligation to respond promptly to process the pay request; she did not establish that it was beyond her control to process the employee’s request promptly; and

\(^2\) The method used by the Agency to determine the Appellants’ failure to submit timely separation documents is incorrect. The Agency claimed the Appellants were tardy when they submitted separation source documents to the Auditor’s Office more than 30 days after an employee’s separation from employment. The Agency calculated tardiness from the employee’s separation date, but if the Agency permits 30 days after separation to submit separation documents, then the first tardy day occurs on the 31st day following separation. Consequently, the Agency’s calculation of “Days Late” overshoots each claim by 30 days. Thus, for example, in Exhibit 1-3, Employee #103052 separated on 10/1/06. Separation documents were received at the Auditor’s Office 2/15/07, 137 days later. Since, according to the Agency, separation documents are due within 30 days after separation, the first late day would be 11/1/07, not 10/1/07. Therefore, for employee #103052, the proper “Days Late” calculation according to the Agency’s standards should be 107 days late, not 137 days late. Accordingly, each “Days Late” calculation in each of the Agency’s notices of discipline should be reduced by 30 days.
consequently, the employee was substantially delayed in receiving all the pay due to him. Together, these elements constitute a violation of CSR 16-60 A. by a preponderance of the evidence.

e. Leave slips.

A leave slip, also known as a premium pay slip, is issued for extraordinary pay events such as sick leave, vacation, or overtime. A leave slip serves as a printed copy of time off approved by an employee’s supervisor and therefore helps ensure the proper calculation of pay. It also constitutes part of the documentation for separation audits.

The Agency claimed that between January 1, 2007 and June 30 2007, Mestas was responsible for, but failed to attach, 95 missing leave slips to various employees’ attendance sheets before entering pay data into payroll software. The Agency also alleged Mestas failed to advise the appropriate field supervisor about the missing leave slips. [Exhibit 1-5].

In 2003 Mestas received a written reprimand for failing to process, and processing incorrectly, several leave slips before taking maternity leave, resulting in a six-month delay in correcting the problems. [Exhibit 7]. In its reprimand, the Agency notified Mestas she was responsible for notifying the employee or her supervisor about inconsistencies in the leave slips, but failed to do so. [Exhibit 7-2]. Mestas acknowledged her performance failure. Id. Later, Jerrow counseled Mestas in improving performance regarding leave slips in her 2005-2006 PEPR. “Prepares bi-weekly list of missing slips and inaccurate attendance sheets to supervisors. Conduct follow-up to ensure compliance.” [Exhibit H-8]. Thus Mestas was on notice since 2003, and reminded in 2005, to pay more attention to processing leave correctly.

Mestas replied that before the first 2007 reorganization, supervisors emailed timesheets without any attachments such as leave slips which they would send separately or bring in later. Many times supervisors would not check to see if leave slips were required or failed to submit them subsequently. She checked pay sheets weekly and placed a sticky-note on those timesheets which needed additional information. After entering the available information into the Agency payroll software, she typed, for each recreation center, a list of employees whose pay sheets required additional attention and what information was still required. She emailed the appropriate recreation center. She also sent the list to Jerrow, and Jerrow forwarded the list of missing documents, such as leave slips, to the Agency Managers. As documentation arrived, Mestas crossed off those employee’s names from the list and removed the corresponding sticky-note from their pay sheets. In January or February, after the first reorganization, Mestas required field supervisors to attach leave slips to pay sheets, drastically cutting down on outstanding leave slips. [12/19/07 Mestas testimony 4:04:03]. When additional responsibilities were added after the January
reorganization, Mestas could no longer keep up with that task. [12/19/07 Mestas cross-exam 3:08:59]. Finally, Mestas said, and King did not deny, that she (Mestas) made King aware of the leave slip issue shortly after King became her supervisor, and told King she needed help with it. [Exhibit 4-2, Mestas testimony].

Mestas' response does not rebut the fact that she was made aware of her obligation to inform appropriate supervisors of missing leave slips since her 2003 reprimand. While the Agency did not rebut Mestas' response - that she failed to follow up on missing leave slips because she became overwhelmed with other work - the fact that she had been disciplined for the same problem should have alerted her at least to ask for help rather than face additional discipline. Thus, Mestas had an important duty, to follow up or request help regarding missing leave slips; she was aware of that duty from prior discipline for the same violation; she was unmindful of her obligation to comply; she did not establish, by a preponderance of the evidence, that it was beyond her control to seek assistance for these 95 missing leave slips; and consequently, there was a substantial risk of over or underpayment of pay, as indicated from her 2003 reprimand. Together, these elements constitute a violation of CSR 16-60 A. by a preponderance of the evidence.

3. 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, to prove carelessness, it is the Appellant's acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly, rather than neglecting to perform, an important duty.

a. Personnel actions

Since the Agency's evidence indicates Mestas neglected to submit three personnel actions, her omissions, even if proven, are addressed by neglect, above, and not by this rule. Before a violation may be found, the Agency must have provided notice what duty was performed carelessly, and by what standard carelessness was judged.

b. Separation audits: 30-day rule

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, to prove carelessness, it is the Appellant's acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, an employee violates this rule for performing poorly, rather than neglecting to perform, an important duty.
The Agency claimed Mestas submitted separation audit documentation to the Auditor’s office more than 30 days after Agency employees’ separations from service, in violation of the Auditor’s Office guidelines. Mestas disputed the existence of such a requirement within the Agency.

In 2002, the Auditor’s Office created Separation Audit Guidelines for CSA Employees (Guidelines) as a guide for its auditors to process separation audits. This document was circulated to agency managers, but it was unclear whether Mestas, unlike Fuentes, [see discussion, below], became aware of the Guidelines before she was disciplined for failing to follow them.

On June 12, 2007, Mestas received a verbal reprimand for failing to submit separation audit source documents for two Agency employees to the Auditor’s Office within 30 days after their separation as required by the Guidelines. The Agency advised Mestas “[t]he Auditor’s separation guidelines state that within 30 calendar days of separation Internal Audit will receive from the Agency [the following separation documents]....” [Exhibit 6-1]. Notwithstanding the Agency’s claim, the Guidelines do not contain a 30-day timetable or any other timetable for the submission of separation audit source documents to the Auditor. Moreover, it is unlikely the Guidelines would contain a deadline for submission of documents from outside the Auditor’s Office, as they were created for internal use by the Auditor’s Office. Since the Agency’s evidence did not prove Mestas was otherwise advised about the 30-day deadline, then the Agency’s June 12, 2007 verbal reprimand to Mestas was her first notice that the Agency required her to submit separation source documents to the Auditor within 30 days after an employee’s separation from employment.

After erring about the source of the 30-day deadline in its June reprimand, the Agency remained undeterred. In its notice of dismissal, the Agency claimed Mestas was aware of a 30-day timetable. In its amended notice of dismissal to Mestas on September 7, 2007, the Agency made a noteworthy change from its June 12 verbal reprimand when it addressed Mestas’ failure to follow the Guidelines. “Though this document [the Guidelines] does not specify a timetable it has been a long standing recognition by you and this office that separation audits are due to the Auditor’s Office 30 days after employee separation.” [Exhibit 1-3]. This acknowledgment, that the Guidelines do not contain a 30-day timetable, makes it clear the June 12, 2007 written reprimand was not justified by the facts. The Agency claimed Mestas was aware of its 30-day rule by other means, based upon the following evidence.

Jerrow testified “it’s always been my understanding that the Auditor’s Department has required that separation audits be submitted to them within thirty days of the date of separation.” He also stated “[i]n two or three PEPR years it was even one of the annotations in the PEPR.” [12/18/07 Jerrow testimony 9:04:19]. None of the Appellants’ PEPRs in evidence contained such a requirement. [Exhibits G, H, I, U, V]. The Appellants had been trained by Jerrow to process separation audit source
documents according to a checklist he created when he was their supervisor. [Exhibit 70-2, 70-3]. That checklist is silent regarding a timeline in which the separation audit process is due at the Auditor's Office. Under Jerrow, the Appellants merely collected separation source documents and submitted them to Jerrow, who performed calculations later assigned to the Appellants after the January 2007 reorganization of the Appellants' duties. Training in the new separation audit process took place between the Appellants, but not from an outside source such as the Controller's Office or Auditor's Office, and it remains unknown if a 30-day timetable was conveyed to the Appellants during their training.

King testified the Separation Audit Guidelines were available to the Appellants in 2007. [12/17/07 King testimony @ 2:54:00]. As previously stated, the Guidelines were created for the Auditor's Office and therefore do not refer to a 30-day deadline for submitting separation source documentation.

King also testified "it [30-day deadline] seemed to be common knowledge among people who did payroll." [12/17/07 King testimony @ 3:27:18] King, as Jerrow, also determined Mestas' was aware of this duty because "it had been in place for a very long time." [Exhibit U, p.8]. King conceded there are times when the 30-day goal cannot be met, for example, because processing regular payroll takes priority. [12/19/07 King cross-exam 8:38:19; Exhibit 59-1]. This was precisely the reason cited by Mestas for her inability to process separation audits promptly.

In response to the Agency's evidence, Mestas stated there was no written Agency procedure that specified a timeline for completion of separation audit documentation. [Exhibit 4-2]. Even though Mestas' statement is true, King found this response to be "belligerent" and proof that Mestas failed to take responsibility for her work, because "she'd been doing this for three years successfully." [12/18/07 King testimony 1:41:00].

The Agency's 30-day timetable claim was rebutted by the following evidence. Cummings, the author of the aforementioned Guidelines, acknowledged delays in the submission of separation audit source documents is a city-wide problem, and may be caused by the failure of field supervisors to submit correct or timely source documentation to HR support technicians. It was in that context that Cummings testified "[t]he whole agency is charged with responsibility of due [diligence] for separation audits." He agreed with the Appellants that 30 days is a general guideline and not a deadline for collecting and forwarding audit source documents to the Auditor's Office. [12/17/07 Cummings cross-exam @ 10:41:48].

Cummings had rated the entire Agency as "needs improvement" in separation audits for the past three or four years. He notified Jerrow and King about it, so King, and Jerrow before her, had been advised about the issue. [12/17/07 Cummings testimony @10:25:59].
The Appellants’ failure to improve performance in this area strongly suggests that
errors and lack of timely submissions for separation audit source documents did not
begin and end with the Appellants, since these problems pre-dated them and even
deteriorated further after their departure. [12/19/07 Howard testimony 10:52:56;
12/19/08 Pawlowski testimony 11:07:58; 12/19/07 Brummond testimony 11:44:33].
Vern Howard is an operations supervisor in the Agency. His undisputed testimony was
that, in the past two months (up to the date of hearing, but after the termination of three
Appellants) he “has never seen such disorganization.” He stated he could always
approach one of the Appellants with any payroll issue and it would be answered
promptly while now there is a problem every pay period and it is difficult to receive
answers to his questions. [12/19/07 Howard testimony 10:52:56]. The Agency did not
dispute that the same problems regarding timely submission of separation documents
remained after the dismissal of three Appellants.

Mestas claimed she was unable to process separation documents for the 11
employees listed in the Agency’s notice of dismissal, [Exhibit 1-3], for two reasons:
field supervisors failed to submit necessary documents and she was overwhelmed
with payroll duty which took priority. Mestas agreed not all the delay could be
attributed to delay caused by field supervisors. [12/19/07 Mestas’ cross-exam
3:06:23]. Nonetheless, without proof that Mestas knew or should have known about
the Agency’s 30-day standard, she cannot be held accountable to it for employees
who separated before Jun 12, 2007, when the Agency’s verbal reprimand first advised
her of the 30-day standard. None of the 11 employees cited in the Agency’s notice of
dismissal separated after June 12, so the Agency failed to prove Mestas violated a
standard known to her before that date. It is also noteworthy that, on the date of her
reprimand, Mestas had not submitted separation documents to the Auditor for five of
the twelve employees listed in the notice of dismissal, but within two weeks she
delivered four of them to the Auditor, and within three weeks, the last one. [Exhibit 1-3,
1-4]. This evidence shows that Mestas was capable of submitting timely separation
audit documents if she had known about the deadline beforehand. Since her credibility
was not diminished by the Agency’s evidence, this evidence supports Mestas’ claim
that she failed to submit the separation documents because she was unaware of a
deadline and she was overwhelmed by higher-priority duties.

Having disposed of the Agency’s claim that Mestas knew or should have known
about the Agency’s 30-day deadline before her June 12, 2007 reprimand, what
remains is the Agency’s assertion that the 30-day deadline was “well-known” within
the Agency. As I have stated elsewhere, such “well-known” or “self-evident” standards
represent dangerously subjective measures of performance, and when challenged,
are difficult to prove. In re Encinias, CSB 02-07, 2 (10/19/07) (“the agency...bears the
burden of showing that it made the employee aware of his job responsibilities”); In re
Routa, CSA 123-04 (1/27/05) ("[I]tthree requirements are prerequisite to finding a
violation of this rule...clear communication of that standard to the Appellant..."). The
Agency's evidence, that the standard was "well-known" is not more compelling than Mestas' denial. Since the Agency failed to establish both bases for its assertion that Mestas knew or should have known she was required to submit separation documents to the Auditor within 30 days, the Agency failed to prove that Mestas’ failure to meet that standard was a violation of CSR 16-60 A.

c. Separation audit errors.

For many years, the city Auditor has found startlingly high rates of errors in processing separation audit source documents by all city agencies. The Auditor was sufficiently alarmed that he wrote to the Mayor of Denver for three consecutive years, 2006-2008 to express his concern about the problem. [Exhibit VV]. The Appellants’ rates of errors were similar to, or less than, those of other agencies. ³

The Agency listed nine errors committed by Mestas in the calculations involving separation audit source documents. [Exhibit 1-4]. The Agency claimed Mestas failed to meet standards contained in Separation Audit Guidelines for CSA Employees, [Exhibit 1-9].

Phillip Cummings has been an audit supervisor for nine years with the city’s Auditor’s Office. His duties include overseeing separation audits. Cummings testified that, in order to ensure proper payout upon an employee’s separation, payroll/HR personnel should assemble the documents listed in Exhibit 3, Separation Audit Guidelines for CSA Employees. That guide was in effect from 2002 to August 2007. [12/17/07 Cummings testimony @ 10:17:00]. Cummings stated the Guidelines were distributed to HR and payroll supervisors but were drafted for use by the Auditor’s Office staff. He was unaware if the Agency distributed or supplied training to the Appellants regarding how to process separation audit source documents, and the Agency failed to prove the Appellants were aware of or trained in the use of the Guidelines. The Agency also failed to prove that, had the Appellants used the Guidelines properly, the errors attributed to them would have been avoided. The Agency’s evidence regarding training for separation audit source documents was as follows.

During the January 2007 reorganization of the payroll office, Jerrow understood CSA and the Controller’s Office would provide necessary training for the Appellants’ new duties. That understanding was not supported by the evidence. Cummings testified it would constitute a conflict of interest for the Controller’s Office to train the HR technicians. [12/17/07 Cummings testimony 10:34:58]. The training that was ultimately provided by Thiem, as stated above, was perfunctory, and did not address

³ A sample of the rates of error across city agencies in 2006 include: Parks and Recreation -50%; City Attorney’s Office -79%; Career Service Authority - 64%; County Court - 86%; Denver Health - 42%; Sheriff’s Department - 33%; Department of Aviation - 59%; and most startling of all - Auditor’s Office 71%. [Exhibit VV]. Error rates for later years were not in evidence, but several witnesses, as cited elsewhere in this Decision, testified error rates remained high after the dismissal of Mestas, Fuentes and Salazar.
the Appellants' training needs in the area of separation audits.

Tracy Marin was a co-worker of Salazar, Mestas and Sierra. Fuentes was her immediate supervisor until Fuentes' termination. Marin, who testified for the Agency, stated there was no formal training in the preparation of separation audits, and no training manuals or documents in how to prepare them. [12/17/07 Marin testimony 1:31:27]. Marin’s credibility was not challenged.

While Mestas did not dispute that she made errors in calculating pay for nine separation audits, the Agency failed to link these errors with wrongdoing by Mestas, so that Mestas’ claims - that the errors were attributable to circumstances beyond Mestas’ control such as inadequate or incorrect information from the field, unavailable or inadequate training, inadequate or absent guidelines, and inadequate oversight - were just as plausible as the Agency’s belief that Mestas was aware of the Guidelines and adequately trained to use them. Without proving Mestas was provided with or was aware of the Guidelines, the Agency failed to prove she was careless in failing to follow them.

d. Customer request for payment of raise differential

Mestas’ failure to reply to an employee’s request for payment of his raise differential is addressed by neglect of duty, above, rather than by carelessness in the performance of a duty.

e. Leave slips

This claim was addressed, above, under “Neglect of Duty.” The same claim does not apply here, as the claim involved Mestas’ failure to act altogether, rather than poor performance.

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. 

The Agency did not present evidence that Mestas failed to comply with the lawful order of a supervisor.

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 cite the specific regulation, policy or rule the employee has violated.

This rule differs from neglect of duty or carelessness in the performance of duties in that this rule focuses on objective measures of performance rather than on the
employee’s performance or failure to perform. In a departure from the earlier forms of CSR 16-60 K., this version requires the Agency to cite a specific standard the employee failed to meet, without which a violation of CSR 16-60 K may not be sustained. Thus, the mere recitation of wrongdoing will no longer suffice to prove a violation. The Agency listed four instances of wrongdoing by Mestas under this rule, but cited only one standard, the 30-day [Auditor’s] timetable. Consequently, the Agency failed to prove, by a preponderance of the evidence, that Mestas’ failure to process personnel actions, failure to process fees, and failure to request missing required payroll documentation, violated this rule. What remains is the Agency’s 30-day rule.

a. Separation audits: 30-day rule

For reasons stated above, the Agency failed to prove it timely communicated the Auditor’s 30-day standard to Mestas. Consequently this claim fails. Because the Agency’s notice of discipline, and the evidence at hearing, linked Mestas’ separation audit errors to her failure to process them timely, I will discuss that claim separately, in order to make clear why no violation was proven for that claim under this rule.

b. Separation audit errors

In the portion of the Agency’s notice of discipline which contains a recitation of facts to support its claims, the Agency described nine errors made by Mestas in separation source documents which she submitted to the Auditor. [Exhibit 1-4]. In the Agency’s recitation of standards Mestas violated under CSR 16-60 K., it cited the 30-day timetable, [Exhibit 1-1], but the Agency did not cite a standard for audit errors. Because the proof which establishes separation audit errors is different from the proof which establishes a timetable violation, each proof requires a reference to what standard was violated. To do otherwise would fail to give notice to an employee what conduct is proscribed. Consequently, the Agency’s mere recitation of Mestas’ separation audit calculation errors fails to state a standard of performance as required by this rule.

6. 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 Strasser, CSA 44-07, 4 (10/16/07), affirmed In re Strasser CSB 2/29/08.

The Agency proved two of its five claims against Mestas: that she failed to respond to a customer’s request in a timely fashion and that she failed to correctly process leave slips. Where the Agency proved only these failures, and the
consequences of these failures were minimal, the Agency failed to establish that an Agency mission was negatively affected, or that the city's integrity was compromised in violation of CSR 16-60 Z.

B. FUENTES

1. Introduction

Laura Fuentes (Fuentes) was employed by the city of Denver for five years and was with the Agency for three years. She began with the Agency as an ASA IV, serving under David Jerrow, processing payroll for the city golf course employees and city community centers. King took over supervision of the Fuentes and the other Appellants in September 2006. [See Exhibit 26 reporting structure].

King appointed Fuentes as acting supervisor over the other Appellants on November 11, 2006, in order to assist her (King) with reorganizing the office to comply with CSA's reclassification of the Appellants' positions. Fuentes' new duties included supervision of the following: new hire paperwork such as I-9 and other regulatory documentation; issuance of Report to Duty forms; preparation of personnel actions; managing documentation for medical records and FMLA leave; staffing the HR front desk on a rotating basis; answering questions from field staff and their supervisors; and generally processing all documentation from new hiring to separation. These new supervisory responsibilities were added to Fuentes' continuing responsibility to process payroll. This reorganization doubled the Appellants' workload.

When King appointed Fuentes as acting supervisor, Fuentes advised King she had only payroll experience and none in processing personnel actions. Fuentes advised King that Mestas and Sierra were familiar only with payroll functions, while Salazar knew something about processing personnel actions. Fuentes' training in her new duties consisted of spending 10-15 minutes with Jerrow. [1-4-08 Fuentes testimony 9:19:52].

King and Fuentes agreed that the period from January to August 2007 would be a learning period, particularly with the approaching hiring season, and that inevitable mistakes would diminish as the technicians evaluated and corrected mistakes during the subsequent slower fall and winter 2007 period. King told Fuentes that Kelly Marlin would help train her (Fuentes), but Marlin simply provided a draft copy of the voluminous Part II, Personnel Action Guide and told Fuentes that it was self-explanatory. This testimony was not refuted. [1-4-08 Fuentes testimony 9:31:24; 1/4/08 Marlin testimony 3:33:00].

King was delighted with Fuentes' work in her capacity as acting supervisor, so that she sought out-of-classification pay for the period Fuentes was acting supervisor. [Exhibit E], and promoted Fuentes to Supervisor of Administrative Support Supervisor.
I, on February 11, 2007. King found that Fuentes’ leadership over five payroll technicians’ duties, including hiring, recruiting and training, led to improved productivity by implementing standards for completing work. [Exhibit E; 12/17/07 King testimony 3:52:28 ].

King and Fuentes reorganized the office a second time when Sierra left to take Family Medical Leave in July 2007. Prior to the second reorganization, each technician was assigned to process payroll and personnel actions of specific departments within the Agency, so that the technician became familiar with the quirks of particular departments. For example, Mestas, who had been processing payroll for recreation centers’ staff, had become familiar with shift differential pay, so that after the July reorganization, the other technicians also needed to learn shift differential pay. These quirks were not onerous individually, but when combined, they added time and difficulty in meeting overall payroll/HR requirements.

As late as June 2007, King remained delighted with Fuentes’ work, and awarded her an “exceptional” rating for her work from March 2006 to March 2007. King stated “I can’t say enough about my appreciation for Laura’s hard work.” [Exhibit G-1]. Cummings’ email to King on July 19, 2007, seeking separation documents for an employee who had separated 10 months ago or longer, triggered King’s displeasure with Fuentes’ work. [Se, e.g. 12/18/07 King testimony 2:16:24].

Fuentes was dismissed on August 22, 2007. Her disciplinary history consisted of two separate reprimands assessed in June 2007, one, June 12, 2007, for failure to comply with the Auditor’s 30-day guideline for submitting separation audits for two employees, and another, June 28, 2007, for taking extended lunch breaks with a co-worker. [Exhibits 72, 73]. Both reprimands occurred after King became Fuentes’ supervisor.

The Agency alleged Fuentes engaged in the following misconduct: she failed to train and review her subordinates’ issuance of Report to Duty forms for six Rude lifeguards; she neglected her responsibility to insure her subordinates submitted separation audit source documents to the auditor’s office within 30 days after an employee’s separation; and she failed to prevent calculation errors, made by her subordinates, from reaching the Auditor’s Office. [Exhibit 9-3, 9-4]. The Agency did not link Fuentes’ alleged misconduct to any particular Career Service Rule.

2. CSR 16-60 A. Neglect of duty.

To sustain a violation under CSR 16-60 A, the agency needs to establish each of the following 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; 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); see also In re Simpleman, CSA 31-06 (10/20/06). These elements of the rule presuppose, as with CSR 16-60 K (failure to meet established standards), that before a violation may be found, the agency must have communicated the duty in such manner that a reasonably astute employee, similarly situated, would be aware of such duty, and aware of the standards by which success is measured. In re Encinias, CSB 02-07, 2 (10/19/07) ("the agency...bears the burden of showing that it made the employee aware of his job responsibilities");

a. Separation audits: 30-day rule.

The Agency found Fuentes failed to insure that her subordinates submit separation documents for 21 separated employees to the Auditor's Office within 30 days. [Exhibit 9-3, 9-4]. Fuentes replied there is no 30-day requirement, and that with the crush of new responsibilities as a supervisor, new duties following two reorganizations, and the crush of the summer hiring season, separation audits were a lower priority than the issuance of regular payroll. [Exhibit 9-14].

In Fuentes' December 12, 2006 email to King and Agency manager Kim Bailey, Fuentes explained she had misunderstood the requirement to submit source documents for separation audits to the Auditor's Office within 30 days of an employee's separation. [Exhibit 49-3]. Fuentes' December 12 acknowledgement establishes the date from which she had notice of her duty to insure that separation audit source documents managed by her subordinates were delivered to the Auditor's Office within 30 days after separation. She was reminded of this obligation when the Auditor's Office informed her and Sierra, on February 9, 2007, that they were late submitting source documents for the separation audit of a specified employee. Fuentes' replied the same day stating "[w]e will work on the audit next week." [Exhibit 60-2].

While Fuentes claimed the crush of summer hiring activity interfered with her ability to oversee the timely processing of separation documents, some of the employees had separated well-before the start of the summer hiring season, [Exhibit 9-3, 9-4, 9-7], so Fuentes' claim does not explain the delay in processing separation documents for those employees. Fuentes also failed to explain her failure to insure separation documentation was processed ten months after an employee's separation and five months after being specifically requested to do so by the Auditor's Office on February 9, 2007. On July 19, 2007, Cummings sent an email to King concerning a separated employee for whom separation documentation had not been submitted 10 months after her separation from the Agency. A staff auditor under Cummings had emailed Fuentes on February 9, 2007, seeking separation documentation for one particular employee. A subsequent exchange of emails between Fuentes and the

It is important to note the evidence did not establish whether Fuentes subsequently communicated the 30-day requirement to her staff. With such evidence, the Agency would have established notice of the 30-day rule to the other Appellants, and thus overcome an important impediment to proving violations based upon that allegation.
auditor left the separation audit in limbo, prompting Cummings' July 19 letter to King. [Exhibit 60]. King wrongly assumed the separation audit problems were being taken care of, [12/17/07 King testimony @ 5:02:38], until August 13, 2007, when Cummings sent another email to King, stating his office was awaiting separation documents for the same employee plus 17 others, and all were more than 30 days after their various separation dates. [Exhibit 12]. King told Fuentes to "write up" the entire staff, but Fuentes disagreed as it would reflect badly on management. [1-4-08 Fuentes testimony 9:52:00].

From the evidence above, I conclude the Agency established the following: on December 12, 2006, Fuentes acknowledged she had a duty to supervise the processing and forwarding of separation documents to the Auditor within 30 days after an employee's separation; she failed to do so for 21 employees; her failure to insure the timely processing of documents for 21 separations was heedless of that duty; she was not prevented from executing this duty by external causes; her failure to execute her duty resulted in significant harm to employees whose final pay was significantly delayed. Consequently, Fuentes was neglectful of her duty to oversee timely processing of separation documents in violation of CSR 16-60 A.

b. Separation audit errors.

In addition to its claim that Fuentes failed to train and insure that subordinates submit separation documentation within 30 days, the Agency also stated that, due to Fuentes' poor oversight, errors in separation pay calculations were permitted to reach Auditor's Office. [Exhibit 9-3, 9-4, 9-7]. As previously noted, separation calculation errors were not unique to the Department of Parks and Recreation, but were systemic throughout the city. [Exhibit VV]. The Auditor explained some errors may have been caused by field supervisors' failure to administer time and leave properly. [Exhibit O-1, bottom]. It was not clear what portion of separation documentation errors were due to incorrect calculations by Fuentes' subordinates, what portion, if any, of the errors were due to factors beyond their control, and what process, if any, was in place and known to Fuentes that should have prevented the cited errors by the exercise of due diligence.

The errors cited by the Agency fall into these categories: 5

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overpayments</td>
<td>4</td>
</tr>
<tr>
<td>Leave posting errors</td>
<td>2</td>
</tr>
<tr>
<td>Sick payout miscalculation</td>
<td>2</td>
</tr>
<tr>
<td>Failure to calculate final health &amp; dental payment</td>
<td>2</td>
</tr>
<tr>
<td>Failure to calculate RTD pass payment or reimbursement</td>
<td>1</td>
</tr>
<tr>
<td>Missing leave slips</td>
<td>1</td>
</tr>
<tr>
<td>Underpayment</td>
<td>6</td>
</tr>
</tbody>
</table>

5 The categories derive from the combined notices of discipline of the other Appellants. [Exhibits 1, 14, and 19].
Unauthorized leave processed
Incorrect leave accrual
Leave without pay taken but not deducted
Problems with worker's compensation paperwork

The Agency’s evidence did not tie any of these categories to Fuentes’ duties of oversight. All that remains is an inference that Fuentes’ failure of oversight allowed the errors to reach the Auditor’s Office. I reject this inference because the proof is circular, to wit: Fuentes was neglectful in allowing calculation errors to reach the Auditor’s office simply because the Agency listed them in its dismissal notice. The Agency must establish that it communicated the source of the duty of oversight in such manner that a reasonably astute supervisor would be aware of it. The Agency presented no evidence from which a trier of fact could determine whether a reasonably astute HR technician supervisor would be aware that she had a duty to avoid or correct the listed errors.

c. Failure to train and supervise re issuance of Report for Duty Forms (Rude Lifeguards)

Before a new employee Report for Duty (RFD) form may issue, the following documents are required: an application, the applicant’s name on a certification list, a water safety instruction certificate, a positive physical examination result, an I-9 form indicating legal U.S. resident status, and a background check if over 18 years old. Once these documents are completed, then a personnel action is created in PeopleSoft with the pertinent information collected from those hiring documents. Only then is an RFD issued, indicating approval to receive pay from the city. [12/17/07 King testimony].

There are several important reasons to insure that all these documents are in order. For example, an employee who is hired without going through the CSA hiring process subjects the city to substantial state and federal fines if the I-9 form is not completed and verified to confirm a candidate is a legal resident. Criminal background checks prevent the hiring of inappropriate employees. The process helps to insure the most qualified candidate is hired. [Exhibit 25].

The Agency claimed Fuentes failed to train, control, check, and supervise her subordinates in the wrongful hiring of six lifeguards by the coordinator of Rude Recreation Center. [Exhibit 9-3]. The Agency determined that Fuentes’ failure to prevent her subordinates from issuing Report for Duty forms placed the city at risk for the combined 187 hours the six lifeguards were allowed to work. [Exhibit 9-3].

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6 See elements of neglect at IV. D. 1., above.
7 [12/17/07 Marlin testimony 12:05:37]. Marlin investigated the Rude lifeguard incident for the Agency.
King testified all the Appellants knew about the requirement to check new hires against the CSA certification list before issuing an RFD because the requirement derives from two documents "known to them": a new hire checklist, and the HR Processing Guide. [12/18/07 King testimony 3:32:02].

The new hire checklist to which King referred is titled Hiring and Recruiting, a checklist created by Kelly Marlin, [Exhibit 25]. Despite King's contention, the checklist did not contain any information about the procedure for issuing RFDs, [Id; 1/4/08 Marlin cross-exam 3:44:17], and King no longer remembered if the checklist contained such a requirement when asked about it on cross-examination. [2/1/08 King cross-exam 9:16:31]. King's reference to the same requirement as contained in the HR Processing Guide was also unfounded. The Guide states it is optional, not mandatory, whether to attach a copy of the certification list to new hire documents. [Exhibit 74-7; 1-4-08 Salazar cross-exam 8:44:10].

When Jerrow was questioned about the origin of the RFD requirements, his response was vague as to how or when that requirement was communicated to the Appellants. "It would have been during the reorganization, and again, Ms. Fuentes was supervisor for that section, and I was in employee relations so I wasn't involved with the day-to-day role-out of that reorg [sic] as it applied to payroll." [12/18/07 Jerrow cross-exam 9:55:30]. Jerrow also testified SOPs [Exhibits 24, 25] were drafted “to give the entire Agency a guidepost on proper process to ensure that we hire somebody and not miss any key steps." [12/18/07 Jerrow cross-exam 9:52:44]. As found above, the procedures for issuing RFDs are not contained in the SOP to which Jerrow referred.

In addition, King and Marlin conceded that Marlin kept the certification lists so that the lists were not readily available to the Appellants until after the Rude hiring incident when Marlin placed the lists on a shared hard drive. [Marlin cross-exam 1-4-08 @ 3:24:57]. After the Rude incident, Fuentes changed the Report for Duty Form by adding a place for the reviewing technician to sign that she had confirmed the applicant was on the certification list. [1-4-08 Fuentes testimony 9:52:00].

The Agency failed to prove, at the time six lifeguards were improperly hired at the Rude Recreation Center, that it was the HR technicians’ duty to confirm the lifeguards names appeared on certification lists before issuing Report for Duty forms. Since the Agency failed to establish this was an established duty known to the Appellants, then Fuentes’ failure to train and supervise them was not a neglect of duty in violation of CSR 16-60 A.9

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9 The exhibit was not numbered when entered into evidence. I numbered the first 7 pages of this extensive exhibit for the reader's benefit in finding the cited material.

9 Tracy Marin testified she was aware certification lists were available on the HR technicians' shared drives. This information was critically important to rebut Appellants' claim that they had no access to certification lists at the time of the Rude lifeguard hires. Further inquiry could have revealed answers to such questions as: when did Marin become aware that certification lists were available on the shared drive? was it before or after the Rude incident? why did Marin seek the
e. Failure to apprise King

In her testimony, King referred to being “blindsided” by previously-undiscovered issues. King stated she gave Fuentes high review marks for her work as late as March 2007 only because Fuentes’ failed to apprise her of the mounting problems that led to her dismissal. The evidence, however, supports Fuentes’ response that she kept King regularly appraised of the issues relating to her dismissal even after March. [See Exhibits 52, 53, 55, 57, 61]. On May 23 King told Fuentes and the other Appellants “[t]hank you for continuing to give me the facts and details about productivity, errors and problems.” [Exhibit DD]. Thus, if King’s claim about being “blindsided” was part of the Agency’s decision to dismiss Fuentes, it was not supported by the evidence.

King also claimed the Appellants failed to approach her about mounting problems. However, witnesses whose credibility was not at issue found King was not easy to approach, and found she gave frustratingly unclear instructions. For example, Brummond testified emphatically she had seen King lose her temper, [12/19/07 Brummond testimony 11: 42:59; Brummond cross-exam 12:11:16]. She also found King could be confrontational. All the Appellants had approached her to request training in areas including personnel actions. Brummond also reported that Fuentes asked her to clarify matters about which she met with King because she was more confused after meeting with King than before. Brummond affirmed she too had issues with King giving her unclear directions. [12/19/07 Brummond testimony 12:19:15].

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

a. Rude lifeguards

While CSR 16-60 A) and CSR 16-60 B), share similar elements of proof, they are distinguished in that, to prove carelessness, it is the Appellant’s acts (performance), rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA 31-06, 4-5 (10/20/06). Thus, an employee violates this rule for performing poorly, rather than neglecting to perform, an important duty. Since the Agency’s evidence indicates Fuentes neglected to train her subordinates to check certification lists rather than training them poorly, her omission is not a violation of this rule.

b. Separation audits: 30-day rule

For the same reasons as stated above in my discussion of Neglect of Duty, Fuentes’ failure to train and supervise her subordinates to submit separation source lifeguards’ names on a certification list? was she independently aware of a duty to do so, or was it for the simple reason that someone asked her to check? Without Marin’s answers to these critical questions, the Agency did not successfully rebut the Appellants’ claims that they were unaware of a duty to check certification lists before issuing Report to Duty forms.
documents to the Auditor within 30 days is not a violation of this rule, because the Agency alleges nonfeasance (neglect) rather than misfeasance (carelessness).

c. **Separation audit errors**

The same findings and conclusions reached above regarding separation audit errors as neglect of duty, apply here as well. The Agency failed to prove this violation 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.**

   This is a two-part rule. To prove a violation of the first part, failure to comply, the Agency must prove proper instructions were provided and appellant knew of those instructions, but failed to follow them. *In re Vigil*, CSA 110-05, 5 (3/3/06) (decided under former §16-51 A. 10), citing *In re Trujillo*, CSA 28-04, 10 (5/27/04 ). For reasons stated previously, the Agency failed to prove, by a preponderance of the evidence, that an order was communicated to Fuentes. The Agency’s evidence for the second portion of this rule, failure to do assigned work which the employee is capable of performing, appears to mirror the evidence for neglect of duty or carelessness in the performance of duty, above.

   The Agency proved only one of its claims against Fuentes, failure to insure submission of separation audit source documents to the Auditor within 30 days. After Fuentes had notice of this responsibility, she failed to train and oversee that her subordinates submit separation audit documents to the Auditor’s Office within 30 days after employees’ separations. She was capable of this assignment as shown by her December 12 email in which she acknowledged the duty and described how she would correct the problem. Consequently, her failure to carry out this assigned task was a violation of CSR 16-60 J.

5. **CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards.**

   Agencies are required to cite specifically what standard of performance the employee has violated before a violation of CSR 16-60 K may be found. As noted above, the failure to perform a duty (neglect) or the careless performance of a duty may not be sustained if the Agency did not cite a specific standard. The Agency listed only one standard it alleged Fuentes failed to meet: failure meet a 30-day timetable for submission of separation source documents to the Auditor.

   In her December 12, 2006 email response to the Auditor’s office, Fuentes acknowledged she was obligated to ensure her staff followed the 30-day standard for
submitting separation documents to the Auditor’s Office. [Exhibit 49]. Her subsequent failure to ensure that her staff complied was a violation of this standard.

6. 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 misconduct by Fuentes hindered the agency’s 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); In re Strasser, CSA 44-07, 2 aff’d CSB (2/29/08). Under the circumstances of this case, the impact of the errors emanating from Fuentes’ department cannot be substantially attributed to wrongdoing by Fuentes. Consequently the Agency failed to prove it was Fuentes’ conduct that hindered the agency’s mission, negatively affected the structure or means by which the agency achieves its mission, or compromised the integrity of the City. Moreover, the Agency failed to state what Agency mission was affected by Fuentes’ wrongdoing, and failed to demonstrate how the integrity of the City was compromised.

C. SALAZAR

1. Introduction

Salazar began working for the city of Denver in 1996. She transferred to the Agency in July 2006, as an ASA IV, where her duties consisted of unspecified processing of personnel actions for Parks, Golf and Aquatics, sorting and distributing mail, ordering supplies, making copies, sending faxes, and serving as a DECC coordinator. When the Agency reorganized in 2007, Salazar’s duties changed significantly. [Exhibit B]. Her new payroll processing assignments included processing FMLA leave, Worker’s Compensation, short-term disability, and separation audit document assembly, none of which she had done before, save for processing personnel actions. [12/19/07 Salazar testimony 4:08:49]. In July 2007, the technicians were instructed they would no longer process payroll for assigned work groups.

Salazar’s disciplinary history consists of a two-day suspension on June 12, 2007, for her failure to process personnel actions timely, and for her failure to process payroll timely. [Exhibit 17]. She was subsequently placed on a Performance Improvement Plan (PIP) in July 2007, but was dismissed by the Agency August 29, 2007, prior to completion of the PIP, and prior to her first PIP review.

10 Including: structural problems in the department which allowed Fuentes’ errors to go unnoticed and to multiply until Cummings’ letter to King in July 2007; King’s stated understanding that she expected mistakes would be made during this first season after reorganization; and doubling of the Appellants’ responsibilities which overwhelmed Fuentes.

11 Denver Employees Combined Campaign, a yearly charitable campaign.
The Agency alleged Salazar engaged in the following misconduct: she issued Report to Duty forms for three Rude lifeguards without following a “process known to you and this office,” she failed to submit separation documents to the Auditor’s office within 30 days after three Agency employees left employment; and she made errors in calculating the separation pay of all three employees. [Exhibit 14-03, 14-04]. The Agency did not link Salazar’s alleged misconduct to any particular Career Service Rule.

2. CSR 16-60 A. Neglect of duty.

To sustain a violation of this rule, the agency must establish each of the following 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; 4) the Appellant’s failure to execute her duty resulted in significant potential or actual harm. In re Martinez, CSA 30-06, 4-5 (Order 10/3/06); see also In re Simpleman, CSA 31-06 (Order 10/20/06). The agency must have communicated the duty in such manner that a reasonably astute employee, similarly situated, would be aware of the duty and the standards by which success is measured. See In re Encinias, CSB 02-07, 2 (10/19/07) (“the agency...bears the burden of showing that it made the employee aware of his job responsibilities”); In re Routa, CSA 123-04 (1/27/05) (“[t]hree requirements are prerequisite to finding a violation of this rule...clear communication of that standard to the Appellant...”).

a. Rude Lifeguards

Salazar prepared three “Report to Duty” forms which authorized the commencement of employment for three of the new lifeguards hired by Robles to work at Rude Recreation Center. The Agency claimed Salazar failed to follow

a process known to you and this office [which] includes verification that the individual first present a Congratulations Form verifying that a supervisor has selected the individual for hire and to what classification. Secondly, verify that the individual is on a Career Service Authority Certification list, and thirdly that the Agency [is] in possession of the individual’s application.

[Exhibit 14-3]. The Agency claimed Salazar was aware of her duty to check the lifeguards names against the appropriate CSA certification list before issuing RFDs based upon the following evidence.

Kelly Marlin began as a Management Analyst II for the Agency in July 2007. Previously, she was responsible for hiring and recruiting in the Agency’s HR section from October 2006 to July 2007. She investigated the Rude lifeguard situation. According to Marlin, before a lifeguard Report for Duty form may issue, the following
documents are required: an application, the applicant’s name on a certification list, a Water Safety Instruction certificate, a positive physical examination result, an I-9 form indicating legal U.S. resident status, and a background check if over 18 years old. [12/17/07 Marlin testimony 12:05:37]. She stated, without explanation, that Salazar was experienced in processing new hire paperwork. King also testified, without explanation, that Salazar had been following the correct hiring process even before King started work at the Agency. [12/17/07 King testimony 3:20:20; 12/18/07 King testimony 2:02:30].

King testified, as for her claim against Mestas, above, that Salazar knew about the requirement to check new hires against the CSA certification list before issuing an RFD because the requirement derives from two documents “known to her,” the seasonal Hiring and Recruiting checklist, [Exhibit 25], and the HR Processing Guide, [Exhibit 74]. [12/18/07 King testimony 3:32:02]. For reasons as stated above, [pp. 23-25], this Agency claim against Salazar was not supported by the evidence.

The Agency also claimed at hearing that Salazar should have also attached the Rude lifeguard applicants’ resumes and applications, [1-4-08 Salazar cross-examination 8:44:10], but the Agency had not apprised the Appellant of this new allegation prior to hearing, and I do not consider it now.

b. Separation audits: 30-day rule

The Agency found Salazar failed to meet a “well-known” 30-day deadline for submitting documentation for three employees’ separations. One submission was 118 days overdue, a second 54 days overdue and the third 45 days overdue. [Exhibit 14-4]. King testified that even if 30 days was not a written rule there was no excuse for the extent of delay in processing these three employees’ separation documents. Salazar replied there is no written 30-day rule, and the Auditor’s reference to 30 days is simply a guideline, not a requirement. [Exhibit 16-2].

Unlike the Agency’s claim against Fuentes, who acknowledged her obligation to comply with the 30-day standard, the evidence does not support a finding that Salazar had notice of the 30-day rule. The Agency, as with its claims against Mestas, failed to prove that Salazar was notified otherwise about the rule before serving her with its notice of dismissal on August 29, 2007. In addition, Denise Brummond, whose credibility was not challenged, testified the Agency’s submission of separation source documents continued to be consistently late and replete with errors after the Appellants’ departure. For example, Salazar received her final payout 62 days after her termination. [1/4/08 Salazar cross-exam 8:59:00]. This testimony supports the Appellants’ contention that the tardy submission of separation documents is systemic and managerial, rather than individual. For these reasons, and as concluded above at pp. 13-16, the Agency failed to establish Salazar was under a duty to submit
separation documents within 30 days. She was therefore not careless in the
performance of that duty.

c. Separation Audit errors

The Agency claimed Salazar made errors in calculating separation audit
documents. Consequently, for reasons stated immediately above, the proof for this
claim falls under CSR 16-60 B., carelessness in the performance of duty, rather than
under neglect of duty.

3. 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, to prove carelessness, it is the Appellant’s acts (performance),
rather than her omissions (neglect), which are reviewed. See In re Simpleman, CSA
31-06, 4-5 (10/20/06). Thus, a violation under this rule occurs for performing poorly,
rather than neglecting to perform, an important duty. Before a violation may be found
under this rule, the Agency must prove it communicated the important duty to Salazar,
or that she should have been aware of the duty as a reasonably astute, similarly
situated employee.

a. Rude Lifeguards

This claim, based upon Salazar’s negligence, was discussed above. For reasons
previously stated, the claim does not fall under careless performance.

b. Separation audits: 30-day rule

This Agency claim, that Salazar failed to meet its 30-day rule for the submission
of separation documents to the Auditor, falls under neglect of duty, CSR 16-60 A.,
above.

c. Separation Audit errors

The Agency claimed Salazar made errors in calculating final pay for three
employees as follows.

Employee #123309. The Agency claimed Salazar failed to calculate leave
without pay for this employee resulting in an overpayment in the employee’s last
check. [Exhibit 14-4, Exhibit 70]. Salazar explained the overpayment was due to the
date she was notified of the employee’s last work day. [Exhibit 16-2]. It was not
evident, from either the Agency’s claim or Salazar’s response, whether the error in
Salazar’s calculation was due to her carelessness or due to some circumstance
beyond her control or ability to determine. The Agency’s evidence at hearing failed to
clarify the matter. The Agency briefly raised the specter of proof, but did not pursue it. [1/4/08 Salazar cross-exam 8:56:00]. The Agency failed to show, by a preponderance of the evidence, that it provided information from which Salazar knew, or that she should reasonably have known, how to avoid this particular error.

Employee #104402. The Agency stated a negative pay adjustment was required to this employee's pay due to "Problems with workers' compensation paperwork." [Exhibit 14-4, Exhibit 69]. Following the January 2007 reorganization, the Appellants had asked for training to include worker's compensation, however none was provided, and it was unclear whether Salazar was trained or should otherwise have been aware how to process disability leave. Here too, the Agency briefly raised the error, then dropped the matter without addressing the underlying issue. Salazar refuted the Agency's claim that she had Separation Audit Guidelines, [Exhibit 3-4], available to her at the time she processed this employee's final pay. [1/4/08 Salazar cross-exam 9:04:30]. The Agency failed to demonstrate, by a preponderance of the evidence, that it provided information from which Salazar knew, or that she should reasonably have known, how to avoid this particular error.

Employee #100965. The Agency stated Salazar incorrectly calculated leave accrual, resulting in an underpayment on the employee's last check. [Exhibit 14-4, Exhibit 71]. The Auditor's separation audit for this employee concludes there were separate errors for incorrect leave accruals in May 2007, and for an underpayment on June 1, 2007 because benefits were deducted for June, whereas the employee's last work day was May 18, 2007. After Fuentes trained Salazar how to process separation audits sometime after the January 2007 reorganization, Salazar requested, but did not receive additional training. [1/4/08 Salazar cross-exam 9:00:00]. The Agency failed to prove, by a preponderance of the evidence, that it provided information from which Salazar knew, or that she should reasonably have known, how to avoid these particular errors.

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.

The Agency did not advance any evidence of a direct order which it claimed Salazar failed to obey. The Agency's evidence appears to be directed toward the second part of this rule, that Salazar failed to do assigned work of which she was capable.

a. Rude Lifeguards

The Agency did not communicate to Salazar the duty to check new hires' names against the corresponding CSA certification list; nor did the Agency prove Salazar should have been aware of the duty through common knowledge or training. Without
proving such knowledge, the Agency did not prove Salazar was capable of performing the duty of checking certification lists prior to issuing Report for Duty forms at the time the Rude lifeguards were hired. Consequently, the Agency failed to prove this claim against Salazar by a preponderance of the evidence.

b. Separation audits: 30-day rule

Because the Agency's claim against Salazar was one of failure to perform, rather than poor performance, then for reasons as stated above, this claim falls under the Agency's neglect claim, CSR 16-60 A., above.

c. Separation Audit errors

The evidence, as found under the discussion of the Agency's carelessness claim, above, does not support a finding that Salazar was apprised of, or should have known, how to avoid the errors cited. The Agency failed to prove Salazar was capable of performing, without error, the tasks for which she was disciplined.

5. CSR 16-60 K. Failing to meet standards of performance including either qualitative or quantitative standards.

Agencies are required to cite specifically what standard of performance the employee has violated before a violation of CSR 16-60 K may be found. The Agency listed only one standard it alleged Salazar failed to meet: a 30-day timetable for submission of separation source documents to the Auditor.

a. Separation audit documents: 30-day rule

While Fuentes acknowledged her obligation to submit separation documents within 30 days, there was not such direct evidence concerning notice to Salazar. There is no evidence Fuentes communicated the requirement to Salazar. The Agency's speculation that the 30 day rule “has been a long standing recognition by you” does not rebut Salazar's denial that she was apprised of the deadline before the date she was served with letter in contemplation of discipline. Therefore the Agency failed to prove this violation by a preponderance of the evidence.

b. Separation Audit errors

The Agency cited a 30-day timetable as the standard of performance Salazar failed to meet, but the Agency did not cite a standard for which the listed separation audit errors violated CSR 16-60 K. Because the proof which establishes a timetable violation is different from the proof which would establish calculation errors, the Agency must cite a standard for each violation. “A department or agency must describe the specific standard(s) the employee has failed to meet.” CSR 16-60 K. To
permit otherwise would fail to give notice to an employee what conduct is proscribed. Thus Salazar cannot be deemed to have violated CSR 16-60 K for this claim where the Agency failed to cite the standard she allegedly failed to meet.

6. 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 misconduct by Salazar hindered the agency's 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), In re Strasser, CSA 44-07, 2; CSB 44-07 (2/29/08). Because the Agency failed to prove any wrongdoing by Salazar, it cannot establish a violation of this rule.

D. SIERRA

1. Introduction

Sierra began working for the Agency in 1992. Before CSA reclassified her from ASA IV to HR tech, Sierra's experience lay in payroll processing and data entry for the parks side of the Agency, and for the zoo. In January 2007, when the technicians began to process personnel actions, there was a significant increase in the quantity of work they performed. In addition to rotating one day per week to cover front desk obligations, the technicians were assigned human resource processes in addition to payroll. Sierra had difficulty keeping up with her new responsibilities, particularly due to the summer hiring documentation required for 700-800 part-time employees. Her first notice of deficient performance was the contemplation of discipline letter served on her August 7, 2007. The Agency suspended her for five working days beginning September 26, 2007. She had no prior discipline.

The Agency alleged Sierra engaged in the following misconduct: she issued Report to Duty forms for one of the new Rude lifeguards without following a "process known to you and this office;" she failed to submit separation documents to the Auditor's office within 30 days after three Agency employees left employment; and she made errors in calculating separation pay for one of the separated employees. [Exhibit 14-03, 14-04]. The Agency did not link Sierra's alleged misconduct to any particular Career Service Rule.

2. CSR 16-60 B. Neglect of duty.

To sustain a violation of these rules, the agency must have communicated the duty in such manner that a reasonably astute employee, similarly situated, would be aware of the duty and the standards by which success is measured. See In re Encinias, CSB 02-07, 2 (10/19/07) ("the agency...bears the burden of showing that it
made the employee aware of his job responsibilities\)).

a. Rude lifeguards

The Agency’s evidence infers Sierra’s failure to check the certification list, before issuing a Report for Duty (RFD) form to one of Rude lifeguards on April 29, 2007, was the basis for its claim that she violated CSR 16-60 A or B. To prove a violation of CSR 16-60 A., the Agency must establish, \textit{inter alia}, the appellant knew, or reasonably should have known she was under such a duty.

In the Agency’s notice of discipline, King stated the “process known to you and this office includes verification that the individual first presents a Congratulations Form verifying that a supervisor has selected the individual for hire and to what classification. Secondly, verify that the individual is on a Career Service Authority certification list; and thirdly that we are in possession of the individual’s application.” [Exhibit 19-3]. King testified at hearing that “the only explanation was that process wasn’t followed.” [12/17/07 King Testimony @ 3:09:17]. King did not explain the origin of these requirements, or how they were previously communicated to Sierra. King’s conclusion, that Sierra failed to follow a well-known process, was not supported by the Agency’s documentary evidence, or by testimony at hearing. Jerrow’s testimony concerning how and when this duty was communicated, was similarly vague and conclusory. \textit{Supra}, p. 25.

Marlin provided the only documentary evidence of the Agency’s claim. Marlin stated she drafted the Standard Operating Procedure (SOP), [Exhibit UU], as a complete guide to the hiring process for all staff, including the Appellants, [Id @12:25:32]. However, Marlin acknowledged the Report to Duty (RFD) process is not included in her SOP. Marlin stated “this document is not a training document for HR techs.” [12/17/07 Marlin cross-exam 12:28:41]. It was therefore not clear if Marlin intended for the Appellants to follow the procedures in Exhibit UU. Had they followed the process described in Marlin’s SOP, it is not apparent the Rude lifeguard hiring issue could have been averted, as the SOP did not describe the procedure for issuing RFDs even though Marlin’s description of her Exhibit UU was “the entire process of hiring and recruiting.” [12/17/07 Marlin cross-exam 12:25:32].

Marlin concluded, without explanation, that Sierra “had been adequately cross-trained. She would have known [the process for new hires] also.” [12/17/07 Marlin testimony 12:05:37].

The Agency failed to provide written proof Sierra knew or should have know she was under a duty to check certification lists before issuing RFDs. Marlin’s SOP did not address the RFD process, and the SOP did not assign responsibility for checking a relevant certification list before issuing an RFD. Without written proof, the Agency’s remaining evidence of this claim against Sierra was oral testimony. The conclusory
statements offered by the agency’s witnesses were not more credible than Sierra’s denial. Therefore, the Agency failed to prove, by a preponderance of the evidence, that Sierra’s failure to check the CSA certification list before issuing an RFD on April 29, 2007, was neglectful in violation of CSR 16-60 A.

b. Separation audits: 30-day rule

The Agency’s claim that Sierra submitted an employee’s separation documents to the Auditor’s Office late, rather than not at all, falls under CSR 16-60 B., Carelessness, rather than as a failure act, which would apply here.

c. Separation audit errors

The Agency’s evidence was that Mestas performed poorly her duty to calculate final pay, rather than failing entirely to calculate it. Thus, this claim is addressed by carelessness in the performance of duties, below, rather than by neglect of duty.

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

a. Rude lifeguards

The Agency’s claim that Sierra failed to check a new hire’s name against the appropriate CSA certification list is a claim of negligence, addressed above.

b. Separation audits: 30-day rule

The Agency claimed Sierra failed to submit final payout information to the Auditor’s Office for three employees within 30 days of their separation. The Agency stated Sierra was aware of her duty to meet this 30-day deadline. [Exhibit 19-3].

When Sonia Montano, an auditor at the City’s Auditor’s Office, sent an email to Fuentes on February 9, 2007 regarding overdue separation documents, Sierra was included as an additional addressee. [Exhibit 60-2]. Thus Sierra had notice from her customer, the Auditor’s Office, on February 9, 2007, that separation audit documents for the employee named by the auditor were overdue. When Fuentes replied “[w]e will work on the audit next week,” she emailed a copy of her response to Sierra. Thus, Sierra and Fuentes were equally obligated to follow-up to ensure prompt processing of the request. Cumming’s email to King five months later, [Exhibit 60], proves they failed to do so. While Sierra’s failure to follow-up on Montano’s inquiry appears to be a breach of a duty, the discussion does not end there.

In Fuentes’ email to her supervisors on December 12, 2006, she acknowledged she was aware of her obligation to submit separation audit documents to the Auditor within 30 days. Sierra made no such acknowledgment, and the Agency failed to prove
she was otherwise informed of the same duty. Montano made no reference to the 30-day timeline. The Agency did not prove that Fuentes informed Sierra about it. The Agency presented no other evidence that it communicated the timeline to Sierra or that she was otherwise aware of it.

Thus, while Sierra’s failure to service Montano’s request certainly violates some duty of customer service, the Agency’s citations to the rule violations committed by Sierra were substantiated, both in the notice of discipline and at hearing, by Sierra’s failure to uphold “a long standing recognition by you,” of the 30-day timetable, [Exhibit 19-3. King testimony, Jerrow testimony], rather than a more general duty of customer service. Where an Agency’s proffered evidence fails to prove its claims, the hearing officer may not substitute another claim that better fits the evidence.

The Agency’s failure of proof is further supported by the same conclusions as I made above concerning Mestas and Salazar. [See, discussions supra, re Mestas @ pp 14-16, and Salazar @ pp. 30-31]. For reasons stated in this section and in the above-cited sections, the Agency failed to prove Sierra’s late submission of separation documents for employee’s ##109120, 103046, and 107984 was a violation of CSR 16-60 A.

c. Separation audit errors

The Agency stated Sierra made three errors in calculating the correct final pay for employee #103046, [Exhibit 19-4, top], who was absent on Family Medical Leave at the time of her separation. Jerrow testified, without explaining, that Sierra had a full understanding of how to conduct separation audits. "I can't specifically recall which of her audits had FML and which didn't, but I would rather weigh heavily in the odds being that [the Appellants] had [training]." [12/18/07 Jerrow cross-exam 9:39:19]. Sierra denied she was ever trained how to calculate leave for an employee absent due to Family Medical Leave. The Agency also claimed Sierra was subject to the standards set forth in Separation Audit Guidelines, [Exhibit 14-11; Jerrow testimony; King testimony].

Sierra testified she processed the separation documents as she had been previously instructed, so that her lack of training was the cause of the errors. [Exhibit 20-2, 12/19/07 Sierra testimony]. Sierra refuted that she had received or had been trained in the use of the Guidelines prior to the date the Agency alleged she made the three errors cited above, and the Agency failed to rebut this contention. Therefore, the Agency failed to prove Sierra’s errors in calculating separation pay were careless.
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.

This is a two-part rule. To prove a violation of the first part, failure to comply with the orders of an authorized supervisor, the Agency must prove a lawful instruction was provided and the Appellant was aware of the instruction, but failed to follow it. In re Vigil, CSA 110-05, 5 (3/3/06) (decided under former §16-51 A. 10), citing In re Trujillo, CSA 28-04, 10 (5/27/04). To prove a violation of the second part of the rule, failing to do assigned work which the employee is capable of performing, the Agency must prove it communicated a reasonable assignment, and that the employee was capable of performing the assignment. The assignment may derive from a direct order, or from any proper source such as a PEP, a job description, or a meeting with a supervisor.

Sierra’s PEP assignment included fulfilling reasonable customer requests related to her duties. “Communicate professionally and promptly to all customer inquiries.” [Exhibit I-11]. There was no dispute that the Auditor’s Office was a customer of the HR technicians. After Montano’s email provided notice to Sierra that she was responsible for processing separation documents for employee #107984, Sierra promised to undertake the task the following week, but she failed to do so for five months. As a result, her customer, the Auditor’s Office, became dissatisfied with her service, as evidenced by Cumming’s emails to King. [Exhibit 60]. Consequently, Sierra’s failure to respond promptly to this customer’s request was a violation of 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.

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards, such as those one would find in a performance evaluation. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency is required to cite what specific standard the Appellant failed to meet.

a. Rude lifeguards

The Agency failed to cite, as required by CSR 16-60 K., what standard Sierra failed to meet in its notice of discipline. Consequently the Agency failed to prove this claim.

b. Separation audits: 30-day rule

The standard cited by the Agency was the Auditor’s 30-day goal. The standard violated by Sierra was a PEP standard of customer service. The Agency failed to
prove Sierra violated the standard it cited. The hearing office may not substitute a
standard not cited as required by this rule, even if an alternative standard is otherwise
in evidence.

c. Separation audit errors

The Agency failed to cite, as required by CSR 16-60 K., what standard Sierra failed
to meet that resulted in her errors. Consequently this claim is not proven.

6. 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 Strasser, CSA 44-07, 2, aff'd CSB (2/29/08). The Agency
failed to state what Agency mission was affected by Sierra's wrongdoing, and failed to
demonstrate how the integrity of the City was compromised. Thus the Agency failed
to prove Sierra violated this rule.

E. APPELLANTS’ DISCRIMINATION CLAIMS

The Appellants bear the burden of persuasion to establish unlawful discrimination
by a preponderance of the evidence. In re Lombard-Hunt, CSA 75-07, 7 (3/3/08). A
prima facie case of intentional discrimination is proven by evidence of 1) membership
in a protected class, 2) an adverse employment action, and 3) evidence which
supports an inference of discriminatory intent. Id, citing In re Ortega, CSA 81-06, 14
(4/11/07). The Appellants did not claim discrimination until after their pre-disciplinary
meetings.

The Appellants are Hispanic and consequently meet the first test. The Agency's
dismissal of Mestas, Fuentes, and Salazar and its suspension of the Sierra, meet the
second test, an adverse agency action. With respect to the third requirement,
evidence which supports an inference of discriminatory intent, the Appellant's
evidence is as follows.

1. Mestas

When Mestas was asked at hearing if she believed discipline against her may
have been caused or influenced by discrimination, Mestas replied “I don't know.”
[12/19/07 Mestas cross-exam 4:00:58]. Mestas did not offer any other evidence that
might tend to establish King or any other supervisor acted out of a discriminatory
animus in terminating her, thus Mestas' claim fails.
2. Fuentes

Fuentes stated King treated her “differently” than Kelly Marlin, a Caucasian, based upon the following: (1) King and Marlin socialized together while King never socialized with Fuentes; (2) when Fuentes told King she was leaving early to care for an autistic 18 year-old nephew, King stated “when are you going to give that up... well, I know that’s what you guys do;” prior to hiring interviews which were to be conducted jointly by King, Fuentes and Marlin, King asked Fuentes to dress nicely. When Fuentes arrived King commented the way Fuentes did her hair and applied makeup was for an evening look, but she understood “that’s how you guys put on your makeup;” on Halloween, when Fuentes’ mother and family came in to see her, King said “your family’s always around, but I know that’s how you guys are” or “that’s what you do.” on another occasion when Fuentes brought in food, King said “we really need to get you a new hobby, but I know you guys are nurturing people, so that’s what you do.” When Fuentes was asked if King used any derogatory terms, she answered King stated Sierra always looked like a deer in the headlights. [1/4/08, Fuentes testimony]

King denied making any of these comments, and neither King nor Fuentes is more credible than the other. Even if King had made these statements, they do not rise to the level of discriminatory animus, and there is no indication that King fired Fuentes or treated her less favorably due to the inferred prejudice underlying the statements. Consequently, Fuentes’ claim of discrimination fails.

3. Salazar

Salazar claimed national origin discrimination (Hispanic) based upon her conclusion that Tracy Marlin, a Caucasian, was not disciplined after she failed to perform a background check of an employee who was subject to sex offender registration but was placed in a position where he worked with children. [12/19/07 Salazar testimony 4:38:17]. First, the Agency disputed, and Salazar did not prove, by a preponderance of the evidence, that it was Marlin’s duty to perform that background check. Moreover, Marlin’s alleged negligence in failing to perform a background check is not similar to the Agency’s allegations against Salazar. Disparate discipline must compare only those who bear a high degree of similarity to that of the party claiming discrimination. The compared employees must have reported to the same supervisor, must have been subject to the same performance and discipline standards, and both must have engaged in similar conduct, without other circumstances that would distinguish the misconduct or the appropriate discipline for it. In re Owens, CSA 139-04, 10 (3/31/05). Thus Marlin and Salazar were not similarly situated for purposes of comparing discipline. Finally, after Salazar was dismissed, King filled her position with another Hispanic. [Exhibit T-2]. A replacement within the same protected class cuts strongly against any inference of discrimination. Murray v. Gilmore, 406 F.3d 708 (D.C. 2005). For these reasons, Salazar failed, by a preponderance of the evidence, to prove her dismissal was based on illegal
discrimination.

4. Sierra

Sierra stated the thought of discrimination did not occur to her at the time of her pre-disciplinary meeting. [12/19/07 Sierra testimony 10:46:18]. She did not present any other evidence of discriminatory animus. Sierra failed to establish any connection between the Agency’s discipline and any discriminatory action, therefore her claim fails.

F. APPELLANTS’ CLAIM FOR ATTORNEY FEES AND COSTS.

During hearing, the Appellants requested attorney fees plus costs if they were substantially to prevail. The Appellants submitted a brief in support of their claim. The Agency filed a responsive brief. I considered the arguments of the parties and find no merit in the Appellants’ claim.

V. DEGREE OF DISCIPLINE

A. Generally

The purpose of discipline is to correct inappropriate behavior or performance, if possible. CSR § 16-20. Appointing authorities are directed by CSR 16-20 to 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. Also, “[w]henever practicable, discipline shall be progressive.” CSR 16-50. A. 1. Thus, the aim of discipline should be corrective rather than punitive.

B. Mestas

1. Severity of the proven offenses.

The only claims which the Agency proved against Mestas were her failure to follow up on a customer’s request for promotional difference pay, and her second failure to notify a supervisor about leave slip problems. The harm caused by her failure to reply to the employee’s request for payment amounted to a delay of approximately one month in processing a $123.20 raise. This violation does not merit substantial discipline. A second violation for leave slip violations merits progressive discipline, but not termination.

2. Past record.

Mestas had two prior reprimands. She received a written reprimand in 2003, [Exhibit 7], for her failure to reconcile four leave slips with the appropriate time sheets,
and failing to notify a supervisor about them before taking medical leave, with the result that incorrect pay was issued and correcting the incorrect pay was delayed. On June 12, 2007, Mestas received a verbal reprimand, [Exhibit 6], for failing to forward separation documents to the Auditor within 30 days after the separation of two Agency employees. For reasons stated above, the 2007 reprimand was unfounded.

3. Penalty most likely to achieve compliance with the rules/progressive discipline.

King failed to testify why a lesser punishment would not have achieved Mestas’ compliance with the Career Service Rules. The Agency proved only that Mestas neglected to reply to a customer’s request for a raise differential and neglected to notify a supervisor about leave slip issues. The leave slip issue in the current case was her second violation in five years for the same reason. Mestas had worked for the city for 18 years performing payroll functions successfully. In Jerrow’s last review of Mestas’ work performance for 2005-2006, he rated her work “successful” in all areas. Jerrow stated there were no unresolved payroll issues at that time. [Exhibit H-7]. Further, Jerrow was satisfied with Mestas’ methods and success in processing leave slips. [Exhibit H-8]. Under these circumstances, there is no substantial reason that a lesser degree of discipline would not achieve Mestas’ compliance with the Career Service Rules.

The Agency’s decision to dismiss Mestas was based substantially upon considerations unsupported by a preponderance of the evidence and was therefore excessive. In re Delmonico, CSA 53-06, 8 (10/26/06), citing In re Armbruster, CSA 377-01 (3/22/02), and Adkins v. Div of Youth Services, 720 P.2d 626 (Colo. App. 1986).

C. Fuentes.

1. Severity of the proven offenses.

The Agency proved only one of its claims against Fuentes, her failure to oversee that her subordinates submit separation documents to the Auditor within the Agency’s 30-day timetable. Fuentes’ violation of the Agency’s 30-day timetable constitutes a violation of three Career Service Rules: neglect under CSR 16-60 A., failure to do assigned work under CSR 16-60 J., and failure to meet established performance standards under CSR 16-60 K. A second violation for the same performance failure merits progressive discipline.

2. Past record.

Fuentes’ was assessed two separate reprimands in June 2007. The discipline was a verbal reprimand [Exhibit 72] assessed June 12, 2007, for failure to comply with the Auditor’s 30-day guideline for submitting separation documents for two employees. The Agency’s evidence proved that Fuentes, unlike the other Appellants, had
acknowledged the Agency's 30-day requirement. [Exhibit 49-3] Thus, she was under a duty to uphold that timeline. Fuentes' second discipline was a written reprimand, assessed June 28, 2007, for taking extended lunch breaks with a co-worker. [Exhibit 73]. Both reprimands occurred after King became Fuentes' supervisor.

3. Penalty most likely to achieve compliance with the rules/progressive discipline.

King gave the following justification for dismissing Fuentes.

Q: You testified a little bit ago that, regarding Laura Fuentes, you couldn't see any reason to not dismiss. Do you recall that testimony?

King: Yes.

Q: Was that standard...or applying to her situation?

King: A standard? I don't think there's a standard for this sort of thing. I felt like my job and responsibility was to look over all the facts and the details and to make sure that I was making a fair decision; that I was not treating Laura in some way with favoritism over other employees, and that I was looking at whether or not it looked like it was an adult decision and a choice, or whether or not it was an accident or a misunderstanding, and I came to the conclusion, based on previous performance and current performance, and the incidents at hand, that these were willful decisions to not complete work.

[12/18/07 King cross-exam 4:29:16].

King concluded she considered, but did not assess, a lesser penalty because Fuentes refused to take responsibility for her wrongdoing, so that any discipline less than dismissal would be showing favoritism. [12/18/07 King testimony 1:12:53]. Most of King's conclusions were not supported by the evidence, and her justification for dismissing Fuentes does not comport with the standards imposed by the Career Service Rules. CSR 16-20, 16-50. King considered a lesser degree of discipline in the context of whether it would show favoritism, rather than in the context required by the Career Service Rules: whether a lesser degree of discipline might have achieved compliance.

4. Other considerations.

Fuentes' performance failures are partly mitigated by the Agency's decision to place Fuentes in a position for which she was ill-trained, and overwhelmed by the myriad and complex tasks assigned to her team. Multiple changes in supervisory staff and to the structure of the Agency in the year preceding Fuentes' dismissal created a vacuum in resources for Fuentes. Jerrow's transfer left him unavailable as a consultant. King was untrained in the Appellants' tasks, and it was clear from listening
to and observing the parties that there were personality conflicts between King and the Appellants that remained unresolved, thus creating an atmosphere that was not conducive to establishing avenues of communication or to resolving performance issues.

King sought to discipline the Appellants as soon as she became aware of their errors, without determining whether the errors could be corrected, and despite her earlier statement to them that their new tasks would cause inevitable mistakes. Most of the errors for which the Appellants were disciplined occurred following two reorganizations, and during their busiest season while the Appellants were adjusting to their new and increased tasks. Under these circumstances in which performance errors were all but inevitable, the Agency’s haste to discipline the Appellants was not substantially conceived to correct those errors. CSR § 16-20.

Although other Agency employees engaged in some of the same wrongdoing as the Appellants, they were treated more leniently. Kelly Marlin agreed she shared some responsibility for verifying eligibility of the lifeguards at Rude [1-4-08 Marlin testimony 3:30:32], but she was not disciplined for it. Darlene Robles, the Rude Recreation Center Aquatics Director who was directly responsible for circumventing the hiring process by hiring five uncertified lifeguards, was suspended for two days [Exhibit 67], whereas the same incident was an important factor in the termination of three of the Appellants. Tracy Marin was given a second chance after making the same mistakes for which the Appellants were disciplined.

The Agency’s decision to dismiss Fuentes was based substantially upon considerations unsupported by a preponderance of the evidence and was therefore excessive. In re Delmonico, CSA 53-06, 8 (10/26/06), citing In re Armbruster, CSA 377-01 (3/22/02), and Adkins v. Div of Youth Services, 720 P.2d 626 (Colo. App. 1986).

D. SALAZAR

The Agency failed to prove any of its claims against Salazar by a preponderance of the evidence. Where the agency fails to prove any wrongdoing by an employee, no discipline may be assessed.

E. SIERRA

1. Severity of the proven offenses.

The Agency proved only that Sierra failed to respond to the auditor Montana’s request to process a single employee’s separation documents. When Fuentes was disciplined for her first violation of the same offense, the same supervisors issued a verbal reprimand to Fuentes for the same violation of the same duty, and Fuentes had
a higher degree of responsibility as a supervisor. Consequently the severity of the only proven offense does not merit a substantial penalty.

2. Past record.

Sierra had no prior discipline. Jerrow rated Sierra’s work performance from 9/20/05 to 10/1/06 as “exceptional.” [Exhibit I]. The impression left by Jerrow’s comments was that Sierra pays close attention to detail, [see id @ l4, 5] and excels in meeting deadlines and expectations. [id @ l-10].

3. Penalty most likely to achieve compliance with the rules/progressive discipline.

King failed to testify why a lesser punishment would not have achieved Sierra’s compliance with the Career Service Rules. Given that the Sierra’s only offense was minor, that she had no prior discipline, and that her past performance was satisfactory or better, the Agency’s choice to suspend Sierra for five days failed substantially to comply with the purposes and directives of the Career Service Rules for discipline.

VI. CONCLUSIONS

The timely, accurate issuance of payroll is too important to rely upon vaguely-communicated processes executed by inexperienced personnel. Yet, the Agency’s payroll process and oversight that were in place prior to the two 2007 reorganizations were insufficiently defined and insufficiently communicated to prevent errors in processing payroll. Following two 2007 reorganizations, payroll/HR processes and oversight remained ill-defined. Structural problems, including a lack of clearly-defined payroll processes, lack of training, lack of oversight, and confusion resulting from multiple reorganizations within a short time, made it almost inevitable that mistakes would be made and would not become evident until complaints arose from the affected employees.

Responsibility for errors may not be laid at the feet of those who execute their duties under a system where vague processes, coupled with faulty structure and oversight, invite just such errors. King acknowledged as late as the end of March 2007 that, during their first busy season under reorganization with new duties, the Appellants were expected to make mistakes and would not be punished for them during their learning period. “Let me remind all of you that we are going into a high season with new processes, new people, and people in new positions...I think I have set a realistic expectation with everyone that we will have mistakes, errors, and discovery for where we need to improve throughout the summer.” [Exhibit C]. Nonetheless, within four months, termination of the Appellants was being considered for those same errors.

Another problem with the Agency’s case was the dearth of measurable standards by which it judged the Appellant’s performance. The Agency cited the source of its
30-day rule was the Auditor’s audit guide. When the Appellants pointed out the Agency’s 30-day requirement was not even mentioned in the Auditor’s guide, the Agency switched the basis of its claim to “a long standing recognition.” [Compare Exhibit 72 with Exhibits 1, 9, 14, and 19]. Even if the Agency had established a 30-day rule, how many late submissions may be made before downgrading performance? Regarding errors in the calculation of final separation pay, how many errors are too many? According to the discipline imposed on Sierra, even one appears to be too many, yet no other agency was error-free. So, what if the standard is beyond the abilities of any reasonably competent HR technician? Exhibit V V was vitally important in that regard because it demonstrates the pervasiveness and difficulty of submitting timely and accurate separation audit source documents throughout all city agencies, not just in the Department of Parks and Recreation. When one agency disciplines its employees for a task no other agency performs any better, then the problem lies not with the employees performing the task but in the agency’s decision to attach an unreasonable expectation to the task.

The closest the Agency came to announcing a standard was King’s conclusion that, although there was no written standard, the Appellants made “too many” errors. How many errors are unacceptable for failing to attach leave slips to pay sheets? Clearly the problems created by separation audit mistakes and by failing to attach leave slips are enormous. However, in determining the propriety of a disciplinary action, it is not enough to say bad things happened; it is equally important to provide fair notice to those charged with executing their duties by what standards and measures they will be judged. In the present case, the Agency focused on the widely-rippling effects of the Appellant’s errors, but ignored the endemic cause of those errors, and evident indications that the Appellants were under-trained, and poorly organized. The Agency repeatedly failed to demonstrate by what established, repeatable standards the Appellants were being judged.

In addition to the problems faced by the Agency’s case by its lack of measurable standards, it failed to communicate meaningfully those standards it cited. It seems evident that duties deemed essential by an agency would be communicated in a sufficiently meaningful manner to apprise employees affected by them of the nature and importance of the duty, and means to accomplish it, so that the employee has fair notice and a reasonable opportunity to comply. See In re Encinias, CSB 02-07 (10/18/07). Not every duty must be specified in written detail, but “the agency bears the burden of showing it made the employee aware of his job responsibilities.” Encinias at 2. For example, a PEP standard sets forth the nature of the duty (standard) the agency expects to be met, the relative importance of it, and the measures by which the employee should expect to be rated. While the Appellants’ PEP standards were in evidence, the Agency failed to connect those standards to wrongdoing. Even contemporaneous notes from team meetings, or testimony from those who remembered the verbal communication of duties or standards would constitute evidence of the communication of those duties or standards, but such
evidence was missing from the Agency’s case. Instead, Agency witnesses referred to “well-established” or “well-known” duties or standards, which inherently lack evidentiary weight.

Another damaging aspect of the Agency’s case was its failure to connect the wrongdoing of which it accused the Appellants to any particular Career Service Rule or Agency regulation. The agency’s notices of discipline contained confusing narratives that failed to connect any of the actions or negligence to the rules or listed duties. The Agency also failed to connect wrongdoing to particular Career Service Rules during hearing. If an agency fails to connect an appellant’s actions or inactions to specific Career Service Rules, the Appellant is forced to guess, as is the hearing officer, what conduct the Agency believes was proscribed by the Career Service Rules. The result is a confusing, long, costly appeal process. In some cases, the connections may be so apparent that it is unnecessary to state them, but, with sixteen witnesses and hundreds of pages of exhibits over five days of often-unfocused testimony, that was not the case here. For example, (1) the Agency alleged repeatedly that the Appellants were dishonest in their interviews with Misegadis about the amount of time required to process payroll when they met in July, 2007. [12/17/07 King testimony 4:46:00; 12/18/07 Misegadis testimony; Exhibit U-4; 12/19-07 Mestas cross-exam; 12/19/07 Salazar cross-exam; Agency opening statement; Agency closing statement]. However, the Agency did not allege any of the Appellants violated the Career Service Rule against dishonesty, and it was not otherwise apparent what importance the Agency attached to it. (2) The Agency presented extensive testimony about the hiring of a registered sex offender who was placed into a position of working with children. The Agency presented several witnesses who referred obliquely to Mestas’ responsibility in that matter, but it was unclear if part of the Agency’s decision to terminate her was based upon that allegation. (3) King explained that her initial praise of the Appellants’ work turned to disappointment and discipline in the space of less than two months because she only learned about the Appellants’ errors belatedly. King testified she felt intentionally deceived by the Appellants, inferring strongly that they conspired against her, but the Agency failed to provide objective support for this conclusion. The technicians merely followed the same, unreliable processes they had always followed, and unsurprisingly, failed to execute new tasks accurately when their duties doubled, changed, and changed again in the space of several months, all while absorbing the paperwork of 700-800 new hires for the 2007 summer season.

It is illogical that all four Appellants performed their work satisfactorily for their entire tenure, as evidenced by their prior PEPRs, then suddenly were incapable of, or as the Agency alleged, refused to, perform new duties properly after the January and July reorganizations. The Agency did not present evidence of a motive for the Appellants’ sudden “willful refusal to discharge their duties,” [2/1/08 Agency closing argument], so the remaining evidence, which is the Appellant’s claim that they were ill-trained and overwhelmed is, by default, more convincing.
VII. ORDERS

A. AUDRA MESTAS

The Agency’s September 7, 2007 dismissal is MODIFIED to a one-day suspension. Mestas shall be restored to the classification and pay-grade she occupied at the time of her dismissal, with restoration of pay, benefits, and status in compliance with this order.

B. LAURA FUENTES

The Agency’s August 22, 2007 dismissal is MODIFIED to a five-day suspension. Fuentes shall be restored to the classification and pay-grade she occupied at the time of her dismissal, with restoration of pay, benefits, and status in compliance with this order.

C. PATRICIA SALAZAR

The Agency’s dismissal on August 29, 2007 is REVERSED. Salazar shall be restored to the classification and pay-grade she occupied at the time of her dismissal, with restoration of pay, benefits, and status in compliance with this order.

D. KAREN SIERRA

The Agency’s five-day suspension, assessed August 7, 2007, is MODIFIED to a written reprimand. Sierra’s pay and benefits that had been suspended shall be restored in compliance with this order.

E. The Appellants’ discrimination claims are DENIED.

F. The Appellants’ motion for attorney fees & costs is DENIED.


Bruce A. Plotkin
Career Service Hearing Officer