

**DECISION AND ORDER**

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**TERESA MCKISSON**, Appellant,

v.

**DENVER DISTRICT ATTORNEY'S OFFICE**,  
and the City and County of Denver, a municipal corporation, Agency.

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The hearing in this appeal was held on Jan. 9, 2017 before Hearing Officer Valerie McNaughton. Appellant was represented by Mark Bove, Esq. Assistant City Attorney John Sauer appeared for the Agency, and Gena Netwal served as the Agency's advisory witness. Gena Netwal testified for the Agency. Appellant testified on her own behalf, and presented the testimony of Daniel Kimmett.

**I. STATEMENT OF THE APPEAL**

Appellant Teresa McKisson challenges her 11.35% reduction in pay for six pay periods imposed on Oct. 28, 2016. The parties stipulated to the admission of Agency Exhs. 1, 2-1 to 2-14, 2-20 to 2-22, 5, and Appellant Exhs. A, B and F. Appellant stipulated that Exh. 3 is admissible on the basis of authenticity. Exh. C was admitted at hearing, and Appellant withdrew Exh. E.

**II. FINDINGS OF FACT**

Appellant has been a Legal Secretary for the Denver District Attorney's Office (Agency) for the past 16 years. Appellant transferred from the District Court Division to the County Court Division in February, 2016, under Operations Supervisor Gena Netwal. At the time of this discipline, her duties were to provide legal and clerical support for three deputy district attorneys, an investigator and a victim advocate assigned to Courtroom 3E. In 2011, all legal secretaries were required to issue subpoenas no later than five weeks before the trial date. [Netwal, 9:07 am.] Appellant's Performance Expectations Plan (PEP) contained this standard before and after her transfer to the County Court division. [Exhs. B-1, 2-9.] In April 2016, Appellant's County Court deputies met with her and told her it would be helpful to get subpoenas issued between six and eight weeks before the trial dates. [Appellant, 11:07 am.]

As part of the evaluation process, Netwal sought feedback about Appellant's performance from two of the deputies in 3E. On Sept. 20, 2016, Deputy District Attorney Kate Horton reported that Appellant's subpoena of the wrong person in a child abuse case led to dismissal of the case. She also told Netwal that subpoenas had not yet been issued for her upcoming trials. Netwal researched those cases, found the deputy was correct, and initiated the disciplinary process by letter dated Sept. 21, 2016. [Netwal, 10:45

am.] The letter stated that Appellant failed to issue subpoenas eight weeks prior to trial, as expected by the three attorneys then assigned to Courtroom 3E. Netwal listed three cases where subpoenas were issued four weeks before trial, and five where subpoenas had not yet been issued for Oct. 31st and Nov. 2<sup>nd</sup> trial dates. [Exh. 1.]

Appellant gave both a verbal and written response at the pre-disciplinary meeting on Oct. 10, 2016, admitting that her erroneous subpoena “resulted in the [child abuse] case being dismissed.” [Exh. A-1.] As to the untimely subpoenas, Appellant stated that her PEP set the standard as five weeks out, and the deputies’ statement in April expressed a mere preference for earlier subpoenas. Appellant said she informed them at the meeting that she would do her best to accommodate that when possible, but it would take time to reach that goal. [Exh. A-2.] Because the letter cited the previous Career Service Rules, it was re-issued and another pre-disciplinary meeting held on Oct. 24, 2016. At that meeting, Appellant relied on her prior statements, and informed the participants that she would meet the 8-week expectation “if time permits.” [Exh. 2-4.] The Agency concluded that Appellant was “continuing in [her] refusal to perform the work in the timeframe required.” [Exh. 2-4].

In its Oct. 28, 2016 disciplinary letter, the Agency found that Appellant had generated a subpoena with the wrong first name in August, 2016, leading to dismissal of a child abuse prosecution. It also found that she failed to send subpoenas five weeks before trial in three cases, and had not sent them within eight weeks of trial in other cases set for October, 2016. [Exh. 2-2.] Appellant stipulated at hearing that the disciplinary letter accurately reflects the information regarding her issuance of the subpoenas in the case numbers listed, and offered in addition that the average subpoena was issued with a lead time of 4.84 weeks before the trial date. [Hearing, 9:30 am; Exh. F.]

The Agency decision-maker was Operations Supervisor Gena Netwal. She found that Appellant neglected her duty to issue accurate subpoenas in the case dismissed in August, failed to comply with her supervisor’s order to issue timely subpoenas, and failed to meet her standards of performance as to the issuance of subpoenas. Appellant was given a six pay-period reduction in pay of 11.35%, calculated to be about equal to a five-day suspension. [Exh. 2.]

### **III. ANALYSIS**

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that the temporary reduction in pay was within the range of discipline that can be imposed under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

#### **A. VIOLATION OF DISCIPLINARY RULES**

##### **1. Neglect and carelessness, CSR § 16-29 A.**

This rule, a combination of previous CSR §§ 16-60 A and B, prohibits a failure to perform a known duty as well as poor performance of a duty. See In re Gutierrez, CSB 65-11, n1 (4/4/13); In re Galindo, CSA 39-08 (9/5/08) (decided under prior rules). Ms. Netwal found Appellant was careless because she issued a subpoena to the victim

instead of the parent in a misdemeanor child abuse case, resulting in its dismissal. Appellant admits the mistake and the unfortunate result. The evidence is clear that Appellant performed her duty to issue the requested subpoena without checking to ensure the name she entered into the document was the witness requested by the Assistant City Attorney, thus carelessly issuing the subpoena for the wrong witness in violation of this rule.

2. Failure to comply with order or perform assigned work, CSR § 16-29 F.

This rule contains two separate violations: failure to comply with a reasonable work order, and failure to perform assigned work an employee is capable of performing. Under the first portion of the rule, the Agency argues that the deputies' April conversation with Appellant constituted an order to issue subpoenas within six to eight weeks prior to trials. The evidence indicates otherwise.

Appellant was the only one from that meeting to testify at hearing. She recalled that the trial deputies told her "it would be helpful" to get subpoenas out six to eight weeks before the trial dates. Appellant told them she would be happy to try, but it would take her awhile to achieve that time frame. [Appellant, 11:21 am.] Her written response to the pre-disciplinary letter corroborates that testimony. Moreover, the deputies did not complain to her supervisor that she had refused an order or that their subpoenas were untimely. The deputies are not Appellant's supervisors, even though they give her work assignments. Appellant informed Netwal during their PEP meeting that "my attorneys prefer the 6 to 8 weeks". Netwal was aware that Judge Doris Bird in 3E "runs a very tight docket". Nonetheless, Netwal testified that she did not direct Appellant to obey that preference, nor amend the PEP in July to tighten the subpoena time frame. [Appellant, 11:45 am; Netwal, 10:29; Exh. 2-9.] Netwal documented their meeting, but did not present her notes to prove that she ordered Appellant to issue subpoenas under the six- to eight-week standard. [Netwal, 10:33 am.] Netwal confirmed that the attorneys' statement was a "request" or "preference". [Netwal, 9:12, 10:46 am.] All three deputies cycled out of 3E by September. [Netwal, 10:50 am.] Ms. Horton was not at the April meeting, having begun in 3E after Judge Bird was assigned to another courtroom. [Netwal, 10:44 am.] Based on all this evidence, I find that Appellant reasonably interpreted the deputies' mention of a six- to eight-week lead time for subpoenas as a preference, not an order. There is no evidence that Appellant violated an explicit order in failing to meet her PEP standard to issue the first three listed subpoenas within five weeks.

This rule may also be violated by a failure to perform assigned work. In support of the second portion of the rule, the Agency asserted that Appellant was capable of doing the work because she had met that standard before. [Netwal, 9:57 am.] Appellant does not challenge her ability to issue subpoenas within five weeks. However, the Agency failed to show that Appellant actually failed to issue the subpoenas in question. The evidence proved that Appellant ultimately issued the requested subpoenas, although she did so in three cases in an untimely manner. As the rule targets failure to do assigned work at all, rather than work done in an inadequate manner, the evidence does not support a finding that Appellant violated the second part of the rule. See In re D'Ambrosio, CSA 98-09, 7 (5/7/10).

3. Failure to meet performance standards, CSR § 16-29 G.

A violation of this rule is proven if the Agency established a performance standard, clearly communicated it to Appellant, and Appellant failed to meet it. See In re Macieyovski, CSA 28-14, 7 (10/13/14). Fairness requires that if a standard is changed, that too must be clearly communicated in order to hold Appellant responsible to meet the new standard. In re Mounjim, CSB 87-07, 4 (1/8/09).

The Agency does not dispute that it knew of the discussion with the deputies before amending Appellant's PEP on Aug. 12, 2016, and that it did not change the five-week expectation to six to eight weeks for issuing subpoenas. That fact can be read consistently with Netwal's testimony that various deputies expressed different subpoena lead times, but that she did not amend the PEP standard because it was unrealistic to formally amend PEPs based on the changing expectations of rotating courtroom deputies. "That's just not a good use of anybody's time." [Netwal, 9:07 am.] Where even the supervisor describes the alleged standard as a request or a preference, the evidence does not prove the Agency clearly communicated to Appellant that six to eight weeks was her new performance standard.

In any event, Appellant stipulated that she failed to issue subpoenas within the five-week deadline in the first three cases listed in the disciplinary letter. Since the PEP clearly sets five weeks as the performance standard for issuing subpoenas, the Agency established a violation of this rule by virtue of her failure to meet that standard in the three listed cases.

**IV. PENALTY DETERMINATION**

At hearing, the Agency succeeded in proving that Appellant violated two of the asserted career service rules by carelessly issuing a subpoena to the wrong person, resulting in dismissal of a child abuse case, and by late issuance of subpoenas in three cases. Operations Supervisor Netwal testified that the erroneous subpoena was by far the most serious violation to her. "Even if the subpoena timelines weren't an issue, ... I would have done the exact same discipline." She related that there had never been a case dismissed because of a team member's error during her ten years of supervising. The consequences were serious, and Netwal was mortified. "There's a child that is in danger ... I couldn't believe a seasoned legal secretary of over 15 years could make such an amateur, careless mistake. ... I couldn't apologize enough to the attorney for the dismissal of this case." [Netwal, 10:02 am.] Appellant had received a written reprimand from her former supervisor on Feb. 19, 2016 based on tardy arrivals to work, but Netwal did not consider it in her penalty determination. [Exh. 3.]

When she first confirmed that Appellant caused the dismissal of the child abuse case, Netwal wanted Appellant terminated. After listening to her attorney at the pre-disciplinary meeting, and considering Appellant's long-term history with the Agency, she decided that Appellant could correct her conduct with an appropriate penalty. Netwal determined that a \$3 an hour reduction in pay for six pay periods, to begin after the holidays, would galvanize Appellant to improve without being unduly punitive. As a result, Netwal imposed an 11.35% reduction in pay, which equals about \$3 an hour. She noted that the penalty appears to have been effective as to both the erroneous and late subpoenas, since there has been no recurrence of either problem. Appellant has

now discovered a docket tool that allows her to calendar subpoenas for between six to eight weeks prior to trial, and has used it to help her issue timely subpoenas. In addition, "I try very hard to double check my work especially when I am issuing trial subpoenas." [Exh. A-1.] I find that the penalty was well-suited to the seriousness of the offense and its purpose to motivate Appellant to improve her performance.

**V. ORDER**

Based on the foregoing findings of fact and conclusions of law, the Agency's action is affirmed.

Dated this 31st day of January, 2017. |



Valerie McNaughton  
Career Service Hearing Officer

**NOTICE OF RIGHT TO FILE PETITION FOR REVIEW**

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at [www.denvergov.org/csa](http://www.denvergov.org/csa). **All petitions for review must be filed with the:**

**Career Service Board**

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**AND opposing parties or their representatives, if any.**