

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal Nos. 32-09; 41-09

DECISION

IN THE MATTER OF THE APPEAL OF:

GLENN SCHULTZ, Appellant,

vs.

DENVER ZOOLOGICAL FOUNDATION, INC.,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

In these consolidated cases, the Appellant, Glen Schultz, appeals a ten day suspension, appeal #32-09, assessed by his employer on May 7, 2009. He also appeals his dismissal from employment on May 22, 2009, appeal #41-09. Schultz was represented by Michael O'Malley, Esq. The Agency was represented by Robert A. Wolf, Assistant City Attorney. Agency exhibits 1-21 were admitted without objection. Appellant's exhibits A and B were also admitted without objection. Immediately prior to hearing, the Appellant withdrew his appeal of the ten-day suspension, appeal #32-09. The hearing proceeded only on the dismissal case.

Following hearing, but prior to the issuance of this Decision, the Appellant submitted a three-part motion on September 17, 2009 (1) for re-hearing, (2) to quash his own testimony at hearing and (3) claiming ineffective assistance of counsel. In an order dated September 17, 2009, all three requests were denied.

II. ISSUES

The following issues were considered at appeal.

- A. whether Schultz violated any of the following Career Service Rules: CSR 16-60 A., B., D., E.1-3, J., O., or V.
- B. If Schultz violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss him complied with the purposes of discipline under CSR 16-20.

III. FINDINGS AND ANALYSIS

A. Introduction.

Shultz was a maintenance technician at the Denver Zoo. The Agency dismissed Schultz following three incidents of alleged misconduct. (1) Schultz sought to take home several logs which were being discarded by the zoo. He was given permission to take them but only on the specific conditions that he not load the logs on company time and that he not use company equipment. The Agency alleges he did both despite repeated warnings. (2) Schultz threw a box of dirty filters from a roof where he was working into a public area without looking and without warning. A cloud of dust from the used filters blew out of the box and covered zoo patrons who were upset by the incident. (3) Schultz raced his electric cart through the zoo during public hours. The Agency alleges his excessively high speed and unnecessary swerving caused a co-worker to have to avoid a ladder that fell out of Schultz's cart as he swerved around the worker.

1. Dirty filters incident.

a. Discussion.

On January 20, 2009, Steve Venne, area supervisor, testified he recognized Schultz' electric work cart parked in a public area under the breezeway roof which connects two exhibit buildings. [Exhibit B-1]. Suddenly, a loud noise startled him and other bystanders. He looked up to see a box had fallen from the roof. He looked up to the roof in the direction the box came from but saw no one. Two patrons complained to Venne that dust from the dirty filters covered them and their children. Venne apologized, and agreed what just happened was an unsafe practice. Venne testified he spent considerable time checking to see if the patrons were all right, explaining what just happened was not normal procedure, and explaining how to file a complaint. Venne also testified the filtered material that emanated from the box could contain animal hair, used hay particles, and other noxious material. [Venne testimony].

Beth Schoeberl is curator of primates and carnivores at the zoo. She also witnessed the dirty filter incident. She called up to the roof to hail Schultz but he did not answer. She radioed to him and told him what just happened was unacceptable. Schultz replied he hollered just before throwing the boxes, and felt that was good enough. She later sent an email to Benton to complain about the incident. [Schoeberl testimony; Exhibit 9].

The Appellant replied he did not violate any rule because (1) there is no written procedure in place for how to lower used filters from a roof; (2) his technique was normal practice; (3) he did not throw the box from the roof; rather, it was an accident, as the box of filters fell from the roof of his cart after he

carefully placed it there from the roof; and (4) he yelled "look out below!" before throwing the box of dirty filters from the roof. [Schultz cross-exam].

b. Alleged CSR violations.

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

The Agency did not present evidence that established what duty it alleged the Appellant neglected to perform. The evidence points somewhat in the direction of Shultz neglecting to adhere to safety standards in handling the dirty filters, however, the Agency did not allude to any particular standard, rule, directive, policy or order that may have applied to either incident. Benton testified there was no particular safety standard he could think of which the Appellant neglected. Without reference to a particular duty Shultz neglected, this violation cannot be sustained. In re Mounjim, CSA 87-07, 4 (7/10/08), *affirmed In re Mounjim*, CSB 87-07, 5 (1/8/09).

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

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

Schultz was ordered, within the context of his normal responsibilities, to change the air filters to the feline exhibit following complaints the air was stale, and not circulating well. The element of an important duty is established. Schultz' throwing a box of dirty filters off the roof into a public area was a careless performance of that duty. Schultz' explanations were not credible. First, common sense dictates that blindly throwing a box of dirty filters from a roof into a public area where zoo patrons are likely present is, at best, imprudent, and potentially dangerous. Second, Benton, whose credibility was not disputed, testified the Appellant's practice is not normal. [Benton cross-exam]. Finally, if, as claimed by Schultz, he did not throw the box, but placed it on his cart, there would have been no reason to yell "look out below!" This rule violation is established.

3. **CSR 16-60 E. Any act of dishonesty...**

The facts which establish a violation of CSR 16-60 B., immediately above, also establish Schultz was dishonest. When Benton inquired about the filters incident, he was attempting to investigate a serious incident with potential disciplinary consequences to an employee and liability consequences to the zoo.

Shultz' intentional misstatements, that the dirty filters slipped off his cart, and that he did not throw them from the roof, impeded Benton's investigation, in violation of CSR 16-60 E. 3.

4. CSR 16-60 O. Failing to maintain satisfactory relationships with co-workers, other City employees, or the public.

In unrebutted testimony, Venne and Schoeberl described their efforts to assuage the anger of two patrons when they and their young children were coated with dust from the filters Shultz threw off the connecting roof between the feline exhibits. [Exhibits 9, 10; Venne testimony; Schoeberl testimony]. An employee's unreasonable actions which cause harm to a member of the public, constitutes a violation of CSR 16-60 O. This violation is established.

5. CSR 16-60 V. Failure to use safety devices or failure to observe safety regulations which results in injury to self or others; jeopardizes the safety of self or others; or results in damage or destruction of City property.

While it is apparent that throwing a box of dirty filters carelessly into a public area is an unsafe practice, Agency witnesses acknowledged Shultz' method did not violate any safety regulation; nor was there any requirement to use a safety device for lowering the dirty filters to his cart or to the ground. Consequently no violation of this rule is found.

2. Log loading incidents

a. Discussion

The Agency claimed there were two separate incidents involving the Appellant's wrongful use of company time and equipment to take logs from zoo property for his own use. Due to construction of a new warehouse in the zoo, several large trees had to be removed, leaving logs 12"-18" in diameter and up to 15 feet long.

On January 12, 2009, Schultz asked if he could take some of the logs. His supervisor, Art Benton, had no objection, but referred Schultz to the planning department, and told Gene Roybal, master trades worker in the planning department, to instruct the Appellant not to remove the logs on zoo time or to use zoo equipment. Later the same day, Schultz asked Benton if he could borrow ratcheting tie-down straps to secure the logs in his truck. Benton repeated sternly to Schultz he was not to use company materials or time to remove the logs. Nonetheless, about 15 minutes later, Benton saw the logs strapped down on Schultz' truck. [Benton testimony; Exhibit 8]. The Appellant did not dispute this evidence.

On January 23, 2009, the Appellant asked Benton the whereabouts of a co-worker, Russ Durando, to help him use a Bobcat to load "another log" onto his truck. [Exhibit 1-2]. Benton replied "you can't do that. Russ does operate the equipment but you can't do that with our equipment." [Benton testimony]. Schultz became upset with Benton and left. Shortly afterward, at exactly Schultz' quitting time, Benton saw Schultz driving his truck out of the zoo with logs loaded in the back. [Benton testimony]. Schultz protested he loaded the logs himself on his own breaks and lunch hour and did not use the zoo's straps to secure them. [Schultz testimony].

Shultz explained he loaded one log during his lunch hour, then received Benton's permission to work straight through and leave early at 3:00 p.m. in order to load another log. This explanation is unlikely since Benton: denied he permitted such a schedule change, and his credibility was not seriously challenged; previously disciplined Shultz for his abuse of work time; [Exhibit 2]; required subordinates to clear any schedule changes, including lunch hour and breaks, with him or Roybal first, so as to avoid the appearance of abuse of work time. [Benton testimony].

In addition, the preponderance of the evidence does not support the Appellant's contention that Shultz used his own straps, rather than zoo straps, to tie down logs on his truck, because: shortly after the Appellant became upset that Benton forbade him to use the zoo's ratcheting straps, three ratcheting straps inexplicably disappeared; the straps Benton saw on the back of Schultz' truck were the same kind, color, and condition as that of the missing straps; the Appellant failed to explain the contradiction between his claim that the straps he used were his, while the same day, he asked Benton for permission to use zoo straps; Shultz had been disciplined previously for using company equipment and supplies without permission. [Exhibit 1-3, bottom; Exhibit 13].

b. Alleged CSR violations

1. CSR 16-60 E. Any act of dishonesty which may include, but is not limited to... 3. Lying to superiors... or false reporting of work hours.

For reasons stated immediately above, Shultz falsely claimed he did not use zoo property and did not use work time to secure zoo logs on his truck. Each is a violation of CSR 16-60 E. 3.

2. speeding cart incident 2/6/09.

a. Discussion.

Randall Dickson is an HVAC technician at the zoo. On February 6, 2009, during visitor hours, he saw Schultz driving his cart at high speed in a public

area. As Schultz passed Dickson, Schultz yelled “get out of my way!” and continued without slowing down. Dickson then saw Schultz continue at a high speed, and yelled at another employee, Roger Nelson, as Schultz swerved around him. As Schultz swerved, a ladder fell off the back of his cart. Nelson had to stop to avoid the falling ladder. Nelson was upset by the incident. [Dickson cross-exam]. Dickson wrote a report about the incident the same day. [Dickson testimony; Exhibit 11].

b. Alleged rule violations.

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

At the time of the cart incident, 1:45 p.m., Shultz was driving his electric cart between assignments during his normal work hours. Driving a cart was integral to the performance of Shultz’ duties.

Schultz claimed the allegations against him concerning the cart incident were unfounded for several reasons. First, Shultz claimed his cart cannot go fast enough to be a hazard. In response, Dickson described Schultz travelling at “a high rate of speed,” [Exhibit 11], which he later defined as about 12 m.p.h. [Dickson testimony], and “faster than my cart can go.” *Id.* While 12 m.p.h. might be a safe driving speed in many circumstances, it was inherently hazardous at the zoo during visitor hours where staff and visitors including, presumably, small children were present. In addition, Benton testified, without rebuttal, that the posted maximum safe speed for driving carts during visitor hours is 5.5 m.p.h. [Benton testimony]. Where the posted maximum speed for driving a cart is 5.5 m.p.h., and where staff and visitors are present, Appellant’s driving at 12 m.p.h. was a careless performance of his duties to adhere to a safe speed, and not to endanger agency customers.

2. CSR 16-60 O. Failure to maintain satisfactory relationships with co-workers...

The Agency did not state how it believed Shultz violated this rule. The Agency may be thinking Shultz violated this rule due to the consternation he caused his co-worker, Roger Nelson, when Nelson was forced to jump out of the way to avoid the ladder that fell off Shultz’ cart as Shultz swerved around him. [Dickson cross-exam]. Nelson did not testify, however, and Dickson’s report, [Exhibit 11], did not indicate the working relationship between him and Shultz or Nelson and Shultz was negatively affected. The Agency therefore failed to prove Shultz violated this rule by a preponderance of the evidence.

3. CSR 16-60 Failure to... observe safety regulations which... jeopardize the safety of self or others....

It is evident the posted speed of 5.5 m.p.h. was intended as a safety regulation. Shultz did not dispute there was such a posted speed limit. The preponderant of the evidence, above, proves Shultz was driving well in excess of that speed. This violation is established.

IV. LEVEL OF DISCIPLINE

The Appellant did not complain that any of the witnesses against him had reason to misstate their observations, or in any way had it in for him. Indeed, it appears Benton went out of his way for years to work with the Appellant's missteps. He engaged the Appellant in frequent conversation about Schultz' poor attitude and behavior. Each time Schultz promised to improve. Benton retained Schultz even when other supervisors called him to say they did not want Schultz working in their departments. Benton even offered outside counseling and anger management to the Appellant which the Appellant refused. [Benton testimony].

The effort Benton invested in trying to coax Schultz into decent behavior, and his frustration from years of Schultz' continued bad behavior, were palpably visible during Benton's testimony at hearing. Benton's great reluctance to fire Schultz was further manifest in his transition to the second person when he testified about dismissing Schultz.

It just got to a point where people in the zoo were not wanting him in their buildings. I was getting calls 'I don't want him doing my work, I don't want him in my building' and it was just constant problems. I would talk to Glenn. Glenn would tell me he would take care of it. Glenn would tell me he would try to straighten up. I offered to get him into classes. I mean I offered everything I could possibly do, and Glenn just didn't want to adhere to any of our policies, and so it just got to the point where Glenn just had to go because he wasn't following policy, he was just upsetting everybody in the zoo, he was just causing problems, and the last resort is to fire someone. That's what it got to. You had to fire him at that point. You just couldn't continue this way... I asked Glenn 'let's get together with the City, let's see if we can get you into some classes.' I asked Glenn if he was willing to go to anger management classes... but he was unwilling to do any of that stuff.

[Benton testimony].

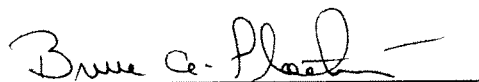
Shultz had a long history of refusing to comply with lawful orders, and refusing assistance to conform his behavior to acceptable standards. His

continual poor comportment was also demonstrated by his ongoing haranguing of security guards in the Webb Building. Shultz repeatedly badgered them with his obstinate refusal to comply with security measures. [Exhibits 6; 7]. Shultz' refusal to acknowledge he did anything wrong, even throughout hearing, and his refusal to accept counseling when offered by his supervisor, make it unlikely he would conform his behavior to acceptable standards.

V. ORDER

The Agency's dismissal of Schultz for misconduct on May 22, 2009 is AFFIRMED.

DONE October 1, 2009.


Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. CSR § 19-60, 19-62. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed as follows to:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

I certify that, on October 1, 2009, I delivered a correct copy of this Decision to the following, in the manner indicated:

Mr. Glenn Schultz, 665 Hooker St., Denver CO 80204 (U.S. mail);
Michael O'Malley, Esq., michaelomalleylaw@hotmail.com (via email);
Ms. Kathy Hand, kathy@legalnavigators.net (via email);
Denver City Attorney's Office, dlefilng.litigation@denvergov.org. (via email);
Ms. Leslye Bilyeu, Lbilyeu@denverzoo.org (via email).

