

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

Appeal No. 156-04

ORDER

IN THE MATTER OF THE APPEAL OF:

GLENN J. SCHULTZ, Appellant,

Agency: Denver Zoological Foundation, and the City and County of Denver, a
municipal corporation.

The hearing in this appeal was held on April 28, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Duane Montano, Esq. The Agency was represented by Assistant City Attorney Mindi L. Wright. Having considered the evidence and arguments of the parties, the Hearing Office makes the following findings of fact, conclusions of law and enters the following decision:

FINDINGS AND ANALYSIS

This is the appeal of a written reprimand of Appellant Glenn J. Schultz, an H.V.A.C. Maintenance Technician for the Denver Zoological Foundation of the City and County of Denver (Agency). Appellant filed a grievance of the written reprimand in compliance with Career Service Rule (CSR) § 18-12. This timely appeal asserts that the written reprimand violated the Career Service Authority (CSA) disciplinary rules and rules prohibiting harassment and retaliation.

I. BACKGROUND

Appellant was given a written reprimand on September 30, 2004 for six asserted violations of zoo policy and Career Service Rules: 1) smoking in a non-smoking area at the zoo; 2) taking a pen from the supervisor's office after permission to take it was denied, 3) obtaining pens by persistent requests to the pen supplier's representative, 4) representing that he had a private source for free zoo tickets, 5) making improper requests for zoo tickets, and 6) falsely representing that he could obtain behind the scenes zoo tours.

The Agency charged Appellant with violations of the following subsections of CSR § 16-50 A., Discipline and Termination:

(2) Theft, destruction, or gross neglect in the use of City and County property and or property of any agency or entity having a contract with the City and County of

Denver; theft of property or materials of any other person while the employee is on duty or on City and County premises.

(3) Dishonesty, including but not limited to: altering or falsifying official records or examination; accepting, soliciting, or making a bribe; lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically listed in this paragraph.

(7) Refusal to comply with the orders of an authorized supervisor or refusal to do assigned work which the employee is capable of performing,

(17) Conduct which violates § 2-51 of the City Charter's Code of Ethics requiring employees "to adhere to high levels of ethical conduct so that the public will have confidence that persons in positions of public responsibility are acting for the benefit of the public," and

(20) Other unspecified conduct.

Appellant was also charged with violations of the following subsections of CSR § 16-51 A., Causes of Progressive Discipline:

(4) Failure to maintain satisfactory working relationships with the public,

(5) Failure to observe departmental regulations,

(10) Failure to comply with the instructions of an authorized supervisor, and

(20) Other unspecified conduct.

II. EVIDENCE

The parties stipulated to the admissibility of Agency's Exhibits 1 -7. Appellant offered no exhibits.

In support of the written reprimand, the Agency presented testimony that Appellant disregarded its rules on smoking, requests for zoo tickets, and behind the scenes tours. Appellant's supervisor also testified that Appellant took a pen from the supervisor's office after being told not to, and pressed the supplier's representative for more free pens. The Agency claims that it considered these incidents, most of which occurred during a four-week period, as an indication that Appellant was using his employment at the zoo as a method of obtaining privileges, zoo admissions and goods, in violation of the city's Code of Ethics and personnel rules.

A. Violation of Smoking Policy

Multi-trade Supervisor Arthur Benton, Appellant's supervisor, testified that the zoo policy prohibited smoking in all but designated smoking areas, which are located away from public and animal areas. The policy was communicated in a memo distributed to each employee's desk and posted in all shops. Mr. Benton personally delivered a copy to Appellant, and counseled him about smoking in non-designated areas. Appellant admitted he had been told not to smoke in animal areas, but denied the policy was in writing.

Human Resources Director Leslye Bilyeu testified she saw Appellant smoking his distinctive cigars in his cart and elsewhere in the zoo about three times a month between June and September 2004. She also saw Appellant throw the white-tipped butts on the ground, and at other times recognized the strong, sweet smell of the cigar or saw the butts in his cart or on the zoo grounds. Mr. Benton stated Appellant's cart was easily recognizable, and was nicknamed "the Popemobile" because Appellant had rebuilt it. Mr. Benton has seen Appellant smoking in his cart and in animal areas, and has received reports from several people that Appellant smokes in the animal areas. One such incident was reported by a zookeeper named Nicole on August 16, 2004. Upon questioning by Mr. Benton about that incident, Appellant denied smoking. Mr. Benton stated Appellant has taken steps to improve his compliance with the smoking policy since the issuance of the written reprimand.

Appellant testified that he had been told he could smoke in animal areas before the zoo opens. He stated he did most of his smoking on the west side of the stone building, where he would use his cart as an ashtray. He admitted that the butts have fallen off his cart when he has forgotten to remove them at the end of a break, and that this occurred as often as once a day. He testified that, on the day he was accused of smoking in an animal area by Nicole, he called her to get permission to enter the animal area, as required by policy. He said he was not smoking, and that he remained outside the building. Nicole told Appellant she smelled smoke. Appellant testified the zookeeper could not have smelled smoke, since he was 100 yards from the building, and the outside air was not being pulled into the building through the disconnected HVAC system. Appellant testified he is now making substantial efforts to quit smoking.

B. "Drain-O-Rooter" Pens

Both parties agree that Appellant was in Mr. Benton's office on Sept. 16, 2004 filling out a truck log. A number of pens were in a cup for the use of those filling out the forms. Appellant picked up a red pen labeled "This pen has been stolen from 'Drain-O-Rooter'", and asked Mr. Benton if he could have it. From that point, the testimony diverges.

Mr. Benton stated there was activity in the office, but that he communicated to Appellant that he could not have the pen. The next day, Mr. Benton noticed the pen

was gone, He went from shop to shop looking for it, now concerned that the safety and work equipment kept in his office was no longer secure. Mr. Benton saw the pen in Appellant's pocket, and took it from him. [Testimony of Mr. Benton.]

Appellant testified that he used and liked the pen while in Mr. Benton's office. He waved the pen and asked Mr. Benton twice if he could have it. He recalled that Mr. Benton was on the phone, nodded or shook his head at Appellant, and said, "[g]o, go, go." Appellant said he did not wait to clarify what Mr. Benton meant, and left with the pen. The next day, Mr. Benton reached in Appellant's shirt pocket, extracted the pen, and said, "[y]ou stole my pen" in front of two or three other employees. [Testimony of Appellant.] In his prehearing statement, Appellant said, "I never stole Mr. Benton's pen that was on his desk, rather I asked for the pen and was told to take it." Appellant identified the pen at the hearing and tendered it to the hearings officer. The pen appears to be of a type commonly distributed for advertising purposes.

Mr. Benton testified that a few days later Appellant showed him he had four more pens. Mr. Benton was later told Appellant had annoyed the company representative, who gave him the pens in order to get Appellant to leave him alone. [Exh. 1, p. 2.] Appellant testified that one day he was asked to escort the Drain-O-Rooter representative to the sea lions' exhibit. On the way, Appellant told him he liked the company's pens, and asked him if he had an extra one. Appellant said he was only given one pen as a result of his request.

C. Zoo Tickets

The Agency asserts that Appellant told Mr. Benton he can get as many zoo tickets as he wants from his "sources", and that Appellant improperly asked Administrative Assistant Claire Olekszyk for thirty zoo tickets for himself and Dallas Meads. Mr. Benton informed Appellant that "comp" zoo tickets must be requested from Operations Office Manager Carol Flohr. [Exh. 1, pp. 2 - 3.] In his prehearing statement, Appellant said Mr. Benton had asked him to help Jack Madrill get eight tickets for his family and friends, since the administrative assistant was out of them. Appellant added that he asked Ms. Olekszyk for only eight tickets.

The 2002 zoo policy notes that the purpose of free passes was to defuse visitor complaints, avoid cash refunds, cultivate membership or donations, and reward exceptional service by vendors or service providers. The zoo policy specifies that requests for tickets must be made to the Vice President for Marketing and Public Relations. In addition, "[a] modest allotment" of tickets is given to each zoo vice president who may approve requests based on their merit. [Exh. 7.] At hearing, Mr. Benton testified that he had a division policy that his employees must make requests for nine or fewer tickets to Ms. Flohr. Requests for ten or more must be processed through a zoo vice president.

Appellant testified that Public Service employee Jack Madrill asked for help to obtain tickets for up to ten visiting family members. Mr. Madrill assists the zoo by

keeping its 100-year old sewer system operational. On cross-examination, Appellant admitted Mr. Benton did not ask him to get tickets for Mr. Madrill, in contrast to the statement made in Appellant's prehearing statement.

D. Behind-the-Scenes Tours

The written reprimand was also based upon an allegation that Appellant had told Mr. Benton he could arrange for approval of a behind-the-scenes tour for members of Mr. Benton's family. [Exh. 1, p. 3.] Appellant responded that he offered to speak to zookeeper Liz Hooton about arranging a tour of the service areas for "safe" animals, and that such an offer was common practice among employees. [Appellant's Prehearing Statement, pp. 2 – 3.]

Mr. Benton testified that his mother visited the zoo on Senior's Day, Sept. 14, 2004. At the end of the day, Appellant offered to arrange a behind-the-scenes tour for Mr. Benton or his family. Mr. Benton considered this offer a violation of their tour policy, which is based on an important safety issue for visitors and animals. In Mr. Benton's opinion, Appellant was implying by this offer that he could use his personal relationship with zookeeper Hooton to circumvent the policy. Mr. Benton considered the statement a boast that Appellant had the influence to obtain special favors at the zoo.

Appellant testified that the conversation that day was one of the few casual conversations he had ever had with Mr. Benton, during which Mr. Benton shared that his mother and granddaughter really liked coming to the zoo. Appellant disputed Mr. Benton's statement of zoo tour policy, and instead indicated that Mr. Haeffner would testify to the true policy in effect at the time.

Senior Curator Rick Haeffner testified that the policy requires an advanced written request to him for approval of a tour of the animal service areas. The policy was put in place in 2001 by means of a posted memo. Written requests were required to prevent interference with animal care and to allow an analysis of the impact of such tours on staff time. The only exception is a request by a zookeeper to another zookeeper, which may be made verbally on the day of the request. Mr. Haeffner's examination of the zoo database indicates that Appellant made no requests for behind-the-scenes tours in 2004.

On September 30, 2005, Mr. Benton issued a written reprimand to Appellant based upon the above incidents, and Mr. Benton's conclusion that he needed to get Appellant's attention by a formal disciplinary action, since he believed his verbal counseling of Appellant had not been effective to stop the behavior.

Appellant appealed the reprimand, citing that the action culminated two years of harassment and retaliation. Appellant claims he has been harassed by Ms. Flohr based on an unsuccessful private business transaction between the two. Appellant believes Ms. Flohr influenced Mr. Benton to impose the reprimand. [Appellant's Prehearing Statement.] Appellant testified that he was told he couldn't leave messages in the

Operations Office for his friend and fellow employee Ms. Hooton, although other employees were allowed to leave personal messages.

CSA Recruitment Analyst Jane Lujan testified that Appellant and Ms. Hooton came to see her to discuss certain management practices at the zoo. Ms. Lujan referred them to Parks and Recreation Human Resources Director Alvin Howard. Ms. Lujan recalled that Appellant was “very agitated”, but that he did not claim he was being harassed or intimidated. CSA Employee Relations Supervisor Stacey Schalk testified that her department maintains a contact log for all employee calls requesting information or counseling about any employment issue. She searched that log for the months of September and October 2004, and found no contacts under Appellant’s name.

III. ANALYSIS

A written reprimand is an appealable action under CSR § 16-40. In this de novo hearing, the Agency has the burden of proof to sustain any discipline by a preponderance of the evidence. CRS § 13-25-127. Appellant has the burden of proof as to his claims of harassment and retaliation. In re Vialpando, CSA 100-03, p. 7 (3/31/04).

A. Theft

Appellant is charged with violating the CSA policy prohibiting theft of City and County property for taking the pen from Mr. Benton’s office. The facts indicate that both Mr. Benton and Appellant were rushed during their brief exchange. Appellant interpreted Mr. Benton’s ambiguous answer to be permission to take the pen and a request that he leave the office. The pen is a marketing device of nominal value given to Mr. Benton in his capacity as Multi-Trade Supervisor. It was thus the property of the City and County of Denver. Mr. Benton placed it in a cup with other pens for use by employees when they came into his office to fill out their truck logs. After he removed it from the office, Appellant carried the pen in his pocket at work. Given these facts, Appellant was not unreasonable in interpreting his supervisor’s actions as permission to take the pen and leave the office. CSR § 16-50 A. 2) requires an intent to permanently deprive another of his property. See CRS § 18-4-401(1)(a). Since the pen was for the use of City employees in the performance of their jobs, and Appellant’s possession of the pen was consistent with that use, the Agency did not establish that Appellant was guilty of theft within the meaning of the rule.

As to the related charge that Appellant pressured a Drain-O-Rooter representative into giving him four more pens, Appellant gave the only first-person account of the incident. He testified that he complimented the pen’s ease of writing, and asked the representative for an extra pen. Since the pens were by their nature a marketing tool to be given away to customers to remind them of the company’s services, a request for one is not proof that Appellant exerted pressure on the representative sufficient to constitute theft.

B. Dishonesty

The disciplinary letter asserts that Appellant's behavior violated the city policy against acts of dishonesty. "Dishonesty" includes both false statements and acts of deception such as misappropriation. Webster's Unabridged Dictionary 525 (Encyclopedic Ed. 1979). The specific examples given within CSR § 16-50 A. 3) indicate that the section is intended to include all types of dishonesty related to an employee's service with the City.

The evidence indicates that the Agency disciplined Appellant for what it determined was a pattern of attempting to use his City employment for private gain, in violation of CSR § 16-50 A. 3). That section prohibits "using official position or authority for personal profit or advantage." The Agency asserts that the incidents involving the pens, tickets and tours support that pattern.

Appellant argues that the pen incident was a miscommunication which does not support a finding of intent to steal the pen. Appellant also claims that since he did not actually obtain zoo tickets or behind-the-scenes tours, he did not act dishonestly. The Agency counters that Appellant attempted to circumvent policy to obtain tickets, and misrepresented that he had the ability to obtain special tours.

As to the pen incident, I concluded above that the context of the exchange between Appellant and Mr. Benton on Sept. 16th does not establish that Appellant intended to steal the pen. I also find that Appellant's removal of the pen from the office and request for additional pens from the company representative does not establish any other basis for a finding of dishonesty under subsection 3).

Next, the Agency argues that Appellant was dishonest in making a request for "comp" zoo tickets to the wrong official. However, the Agency's evidence as to the person to whom such requests were to be made was unclear. The written policy specifies that all requests are to be made to the Vice President for Marketing and Public Relations or an appropriate vice president. [Exh. 7.] Mr. Benton testified his policy was that requests are to be made to Operations Supervisor Carol Flohr. He stated his employees come to him first, and he refers them to Ms. Flohr. The evidence indicates that Appellant asked Administrative Assistant Claire Olekszyk for either eight or thirty tickets, but he never got them. I find that the act of requesting tickets from a person unauthorized to grant them is not itself dishonest. In other similar instances, Mr. Benton simply referred the requester to the proper person. The Agency did not submit evidence supporting a conclusion that Appellant intended to deceive Ms. Olekszyk by mentioning Dallas Meads as one of the persons desiring the tickets.

The evidence as to the special tours issue is that Appellant offered to talk to his friend, Zookeeper Liz Hooton, to arrange a behind-the-scenes tour for Mr. Benton or his family. The Agency claims this was an attempt to contravene tour-approval procedure and was dishonest. In his prehearing statement, Appellant elaborated on the offer he made to Mr. Benton. Appellant said he told Mr. Benton that he could ask Ms. Hooton to

ask Dale Leeds or Mr. Haeffner to approve a tour. Mr. Haeffner testified that as Senior Curator he has the authority to approve tours. It does not appear that using a zookeeper as an intermediary to request a tour is a violation of the approval policy. Therefore, Appellant's offer, without more, does not demonstrate dishonesty.

It likewise does not appear that Appellant's violation of the smoking policy was itself dishonest within the meaning of CSR § 16-50 A. 3). Therefore, the Agency has not met its burden to prove that the actions of Appellant were dishonest in violation of that section.

C. Refusal to Comply with Orders

There is no dispute that employees are not permitted to smoke in animal areas under commonly understood zoo policy. Appellant admits he was aware of that policy, and had been instructed to obey it. He also admits that he did smoke in animal areas before the zoo opened for the day. Based on these admissions, I find that Appellant violated the zoo policy on smoking. That policy was an order of an authorized supervisor which was based on concern for animal safety, as well as an effort to maintain a positive image for the zoo and consistency with the visitors' no-smoking rule. Appellant disregarded that clear directive, citing verbal permission given to smoke in animal areas before the zoo opened. I find that his violation of the no-smoking policy was so clearly against the zoo's mission to protect the animals that it amounts to a refusal to comply with the orders of his supervisor, in violation of CSR §§ 16-50 A. 7).

D. Code of Ethics

The Agency contends that Appellant's statements and behavior with regard to the pen, zoo tickets and tours violated the City's Code of Ethics, which exhorts employees to adhere to high levels of conduct in order to inspire public confidence and avoid the appearance of impropriety. The written reprimand was issued based on Mr. Benton's belief that Appellant used his zoo employment to obtain benefits not available to the public, in violation of the Code of Ethics. Appellant argues in response that he believed he had permission to take the pen, and that he did not obtain any special favors such as tickets or tours as a result of the behavior alleged.

The City and County of Denver is justifiably concerned that public employees act for the benefit of the public, as taxpayers fund city operations. The City has "a legitimate interest in maintaining the public's confidence in the integrity of [public] service." See Crandon v. United States, 110 S.Ct. 997, 1005 (1990). Supervisors should be concerned by indications that their employees are using their jobs to obtain special favors at taxpayer expense. Within the space of three days, Mr. Benton heard Appellant make two comments that indicated he believed he could influence friends to obtain zoo privileges for himself or others; namely, free tickets to the zoo and behind-the-scenes animal tours. The issue therefore is whether Appellant's actions violated the spirit or letter of the City Charter's Code of Ethics.

Conduct violates the spirit of the ethics code if it would cause the public to lose confidence that public employees are acting in the public interest. The analogous charge of using public office for private gain in the federal sector requires proof of actual gain. Burkett v. General Services Administration, 27 MSPB 119, 121 - 122 (1985). To prove the existence of an appearance of impropriety, it must be shown that the employee's private interest would reasonably create an appearance of influencing his public duties or interests. Fontes v. Dept. of Transportation, 51 MSPR 655 (1991). Relevant to this determination is the value of the item accepted and its potential to influence public action. Wells v. Dept. of Defense, 53 MSPR 637 (1992).

I find that Appellant's removal of the complimentary pen from Mr. Benton's office would not create an appearance of private gain to a reasonable person who learned of it. Likewise, Appellant's solicitation of between one to four pens from the company representative is not the kind of incident that would harm the public's perception of city employees or create an impression of misuse of the privilege of city employment.

The remaining allegations are that Appellant tried to obtain tickets from an unauthorized employee, and offered to arrange a special tour through a friend who is a zookeeper. It is undisputed that Appellant did not obtain a benefit in the form of zoo tickets or tours for himself or others. It is also unlikely that taxpayers would become distrustful if they learned a zoo employee requested complimentary admissions tickets or offered to assist in arranging a tour of animal service areas. The evidence therefore does not support a charge of a violation of the City Charter's Code of Ethics.

E. Unsatisfactory Work Relationships

The evidence reveals that Appellant and Mr. Benton had not enjoyed a pleasant work relationship when this discipline arose. However, both men reported that the situation has improved since that time, based presumably on additional efforts by both to get along, and on the fact that Appellant has complied with the smoking rules. It appears that the relationship was only temporarily damaged by the irritant of the smoking issue and Mr. Benton's belief that Appellant was using his job for personal gain. I find that the evidence does not support a finding that Appellant violated CSR § 16-51 A. 4).

F. Failure to Obey Instructions and Departmental Regulations

Appellant admitted he was instructed not to smoke in animal areas, and that despite those instructions he did smoke in those areas before the zoo opened for the day. Based on these admissions, I find that Appellant violated the zoo policy on smoking in animal areas. He therefore failed to comply with the instructions of his supervisor, in violation of CSR §§ 16-51 A. 10), and failed to observe departmental regulations, in violation of CSR § 16-51 A. 5).

G. Other Unspecified Conduct

The Agency has not alleged that there is conduct justifying discipline that is not specifically covered by the personnel rules.

IV. RETALIATION AND HARASSMENT CLAIMS

Appellant has appealed the discipline on the grounds that it is an attempt to harass him, and to retaliate against him for complaining about harassment to the CSA Employee Relations Department [Testimony of Appellant.] Appellant has not alleged that he is a member of any group protected from discrimination or retaliation under CSR §§ 15-21, 15-30 and 15-100.

In addition, Appellant failed to establish that he perfected his claim of harassment pursuant to CSR § 15-103. Appellant testified that about three months before the hearing in this appeal he and Liz Hooton told someone in CSA's Employee Relations Department that management was not allowing Appellant to pick up Ms. Hooton inside the zoo gate. Recruitment Analyst Jane Lujan testified that Appellant and Ms. Hooton complained to her of zoo management practices unfavorable to them, and that she referred them to Agency Human Resources Director Alvin Howard. Appellant did not testify that he communicated a complaint of harassment to Mr. Howard. The Career Service Authority requires that all employee contacts be recorded in its searchable employee log. The log for September through October does not show any contact by Appellant. [Testimony of Employee Relations Supervisor Stacey Schalk.]

Even if Appellant's conversation with Ms. Lujan is considered to be an employee complaint of harassment, it did not occur before the imposition of discipline, and therefore does not support a claim of retaliation. Therefore, Appellant has failed to meet his burden to establish either harassment or retaliation.

V. PENALTY

"The purpose of discipline is to correct inappropriate behavior or performance." The Career Service Rules require an agency to consider the gravity of the infraction and to determine the type of discipline needed "to correct the situation and achieve the desired behavior or performance."

Mr. Benton testified that he imposed the written reprimand because he was concerned about Appellant's continuing disregard of departmental rules and instructions, and wanted to get his attention. Mr. Benton noted that Appellant has had no subsequent violations of the no-smoking policy. Appellant volunteered that he has taken substantial step to quit smoking since he spoke to Mr. Benton about the problem.

It is undisputed that Appellant has no prior discipline in his five years with the department. The penalty of a written reprimand was appropriate given the pattern of noncompliance with the no-smoking rule, as balanced by Appellant's admirable past

discipline record. The minor discipline has obviously succeeded in its intended goal to give Appellant formal notice of the need to improve. I find the penalty is appropriate under Rule 16 of the Career Service Rules.

ORDER

The written reprimand issued by the Agency on September 30, 2004 is hereby AFFIRMED.

Dated this 20th day of
June, 2005.

Valerie McNaughton
Hearing Officer
Career Service Board

S:\Share\hearings\Cases\Schultz, Glenn J\decision.doc

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this 20th day of June, 2005, addressed to:

Duane Montano, Esq.
1246 Delaware St.
Denver, CO 80204

Glenn J. Schultz
665 Hooker St.
Denver, CO 80204

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this 20th day of June, 2005, addressed to:

Mindi L. Wright
Assistant City Attorney
Litigation Section
201 West Colfax Avenue Dept 1108
Denver, CO 80202

Leslye Bilyeu
Human Resources Department