

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

Appeal No. 44-07

DECISION

IN THE MATTER OF THE APPEAL OF:

GEOFFREY STRASSER,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Geoffrey Strasser, appeals his dismissal from employment with the Department of Parks and Recreation on July 16, 2007, for alleged violations of specified Career Service Rules. A hearing concerning the appeal was conducted by Bruce A. Plotkin, Hearing Officer, on October 3, 2007. The Agency was represented by Robert A. Wolf, Assistant City Attorney, while the Appellant was represented by Casey Paison, Esq. Agency Exhibits 1-10 were admitted while 11-14 were withdrawn prior to hearing. Appellant's Exhibits D-Q were admitted while A, B, C, and R were withdrawn. The following witnesses testified for the Agency: Mr. Joe Pinson, Mr. David Jerrow, Mr. Earl Jones, Mr. Scott Rethlake, and a 17 year old minor (the intern). The Appellant testified on his own behalf during his case-in-chief, and presented no other witness. While the Appellant originally claimed his dismissal was motivated by unlawful harassment and retaliation, [Appeal], he withdrew those claims prior to hearing. [Appellant's Response to Order to Show Cause and Amended Notice of Appeal].

II. ISSUES PRESENTED FOR APPEAL

- A. Whether the Appellant violated any of the following Career Service Rules: 16-60 D, O, Y, or Z.
- B. If the Appellant violated any of the aforementioned Career Service Rules, whether the Agency's decision to dismiss the Appellant conformed to the purpose of discipline under CSR 16-20;

III. FINDINGS

The Appellant was employed by the Agency's golf division for 18 years. He began as a starter/ranger in 1989, and was promoted to Assistant Golf Professional at the Willis Case Golf Course in 2006, the position he occupied at the time of his dismissal. Except for a written reprimand in 2006 for reasons unrelated to this case, he had no other record of disciplinary action, and his yearly work performance evaluations were rated "exceeds expectations" (12 years), "strong" (one year), or "successful" (one year).¹

The Appellant was on duty on the evening of June 18, 2007. A 17-year old male intern was assigned to work with him. The Appellant asked the intern "[h]ave you ever seen Britney Spears'² boobs before?" When the intern replied no, the Appellant continued "well let's look it up." The Appellant entered a Google[®] internet search for "Brittany Spears nude" on the computer located at the check-in desk of the pro shop. The shop was still open, and during this search a customer entered. The Appellant minimized the search results, waited on the customer, then reopened and returned to his search. He opened one of the search links and told the intern "[l]ook, there she is sucking a dick." The intern glanced at the screen, saw the image described by the Appellant, then went outside to avoid the Appellant. Later, when the Appellant was in the back office, the intern made a "print screen" copy of the web sites accessed by the Appellant's search, [Exhibit 2], which occurred between 7:36 and 7:41 p.m.

Four days later, June 22, after consulting with his parents, the intern reported the matter to Joe Pinson, the Appellant's immediate supervisor, and provided Pinson with the copied web sites accessed by the Appellant, and also provided a typed statement about the incident. [Exhibit 3] The matter was quickly referred up the chain of command. The intern's father came in to speak with Pinson on June 22nd, angry about the matter, and he threatened to sue. The following day, the Agency placed the Appellant on investigatory leave. [Exhibit 5]

A pre-disciplinary meeting was convened on July 11, 2007 by Scott Rethlake, Director of Golf and the Agency's hiring authority. David Jerrow, the Appellant's second level supervisor, also attended for the Agency. The Appellant attended with his legal counsel, Michael Dowling, and both made statements. On July 16, 2007, Rethlake dismissed the Appellant from employment by letter dated the same day. This appeal followed on July 26, 2007.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A. 1. a. as a direct appeal of a dismissal. I am required to conduct a *de novo* review, meaning to consider all the evidence as

¹ 14 evaluations were provided in the evidence.

² A pop star.

though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion throughout the case to prove the Appellant violated one or more cited sections of the Career Service Rules, and to prove its decision to terminate the Appellant's employment complied with CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 D. Unauthorized...use of the internet...

The Agency's proof that the Appellant violated this rule appears to duplicate its proof for CSR 16-60 Y., below, for violation of the Career Service Rules that implement the City's Electronic Communications Policy. CSR 15-80 *et seq.*

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

This rule requires that some significant breakdown in a working relationship was caused by the offender. The workplace, as in life outside it, is a sociological tangle of personal as well as professional relationships. Sometimes those relationships include offensive interactions. This rule should not be used as a bludgeon against all improprieties. A simple affront, without more, is an insufficient basis upon which to find a violation of this rule.³

The Agency claimed the Appellant violated this rule because the intern was no longer comfortable after his interactions with the Appellant on the evening of June 18, [Agency closing statement]. The intern was undeniably offended by the Appellant's actions in asking him about and showing him pornography at work. "The situation was really uncomfortable for me. I didn't think one of my bosses would ever do something like that." [Intern testimony, *see also* Exhibit 3].

Up to the time of the incident, the intern's relationship with the Appellant was positive. [Intern testimony, Appellant testimony] It is unknown if the incident caused a significant breakdown in the relationship subsequent to the incident, because the incident occurred near the end of their shift, and the Appellant was placed on investigatory leave then fired without ever working with the intern again.

³ See, e.g. In re Hernandez, CSA 03-06 (5/2/06) (male nurse continued, after counseling, to call co-workers, including female Dr., "honey" and "babe." Termination reduced to 30 day suspension; In re Freeman, CSA 40-04, 75-04 (3/3/05) (Appellant playfully slapped co-worker too hard. Termination reduced to 1 day suspension); In re Tafoya, CSA 72-04 (10/29/04) (Appellant's continued sarcasm and inability to maintain satisfactory work relationships matched by that of "victims." Termination reduced to 60 day suspension).

The intern's discomfort at his boss showing him pornography, which he described as "weird" and "uncomfortable," is insufficient by itself to establish whether his working relationship with the Appellant was significantly harmed without some indication he would be less able subsequently to work with the Appellant. The Agency's conjecture during closing argument is not evidence. The Agency therefore failed to prove, by a preponderance of the evidence, that the Appellant caused a significant breakdown in his relationship with the intern in violation of this rule.

3. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive orders, or any other applicable legal authority.

The Agency claim under this rule is that the Appellant violated CSR 15-81, 15-82, and 15-83 of the City's "Electronic Communications Policy. CSR 15-82 specifically prohibits "knowingly... retrieving or storing any communication that is...obscene." It is self-evident that a photograph of an oral sex act is currently obscene. The Appellant replied he neither viewed nor showed that particular image to the intern. I have already found that the Appellant lacks credibility on this point, and the intern's contrary recollection was unassailed. The intern's testimony was buttressed by Exhibit 9, a disk of the links established by the Appellant's Google[®] search, including the aforementioned image.

The Appellant also claimed, alternatively, that even if the four internet links depicting frontal views of female genitals were among those links displayed in response to his Google[®] search, he did not view them, as they were merely four among 6,000 possible links displayed as a result of his query. As stated *supra*, the intern's recollection of having viewed the picture the Appellant described as "look, there she is sucking a dick" is more credible, by a preponderance of the evidence, than the Appellant's denial.

Additionally, the Appellant's professed surprise that such graphic images would appear as a result of his search is not credible. The explicit pictures contained in the links resulting from his search of "Brittany Spears nude" represent the unsurprising outcome of the Appellant's search for nude pictures. I find the Appellant's knowing retrieval of obscene photographs as a result of his internet search on a City computer was a violation of CSR 15-82, and did not comport with the permissible occasional use of city computers for personal purposes pursuant to CSR 15-83.

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

To sustain a violation under this rule, the Agency must prove the Appellant's conduct hindered the agency's effectiveness, i.e., its ability to carry out its mission, or was prejudicial to the good order of the agency, i.e., the internal structure and means

by which the agency achieves its mission. In re Simpleman, CSA 31-06, 10 (10/20/06) (decided under former CSR 16-60 Y), *affirmed* In re Simpleman, CSB 31-06 (8/2/07).

The Agency did not produce evidence of the Agency mission, and did not produce evidence how the Appellant might have imperiled that mission. A similar dearth of evidence failed to establish how the Appellant's conduct was prejudicial to the internal structure or means by which the agency achieves its mission. Therefore the Agency failed to prove the Appellant violated this rule.

V. DEGREE OF DISCIPLINE

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 (1) the severity of the offense, (2) the employee's past record, and (3) the penalty most likely to achieve compliance with the rules. CSR 16-20. Thus the rule emphasizes twice the need to correct behavior, once at the beginning and once at the end.

The Appellant was less than completely candid about the events on the evening of June 18, as there is little question he accessed obscene material on a work computer, in violation of CSR 15-82, then showed it to a minor under his supervision, an aggravating factor. The Agency claimed the Appellant was dishonest about viewing and showing pornography and therefore was untrustworthy. [Rethlake testimony] However, the Agency did not find the Appellant sufficiently untrustworthy to charge him with dishonesty. Nonetheless, because the Appellant violated CSR 15-82, and the offense involved a minor under his supervision, some discipline is warranted.

On the other hand, the Agency's conclusory assessment that the Appellant is a likely repeat offender [Rethlake testimony] was not supported by a preponderance of the evidence: his largely unblemished record during 18 years employment with the Agency, his admission of some wrongdoing, his stated willingness to "do whatever it takes" to retain his employment; and his apology at the pre-disciplinary hearing ("the Appellant admitted to accessing inappropriate material on the computer during work hours...he said it was a lapse of judgment and basically would like us to forgive him"). [Rethlake testimony] In short, the preponderance of the evidence indicates the Appellant would be able to correct, and not repeat, his mistakes.

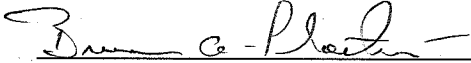
In In re Encinias, CSA 02-07, n.7 (5/15/07) a recent review of past cases in which dismissal was sustained concluded the appellants in those cases violated a fundamental tenet of their agency's mission. It also stands to reason that an egregious single event that caused irreparable damage, such as violence in the workplace, would be cause to sustain an agency dismissal. This case does not rise to that level. When the critical circumstances of this case are considered as a whole - the seriousness of the offense mitigated by the age of the minor (over 17), the Appellant's past record, and the likelihood of reform - the purpose of discipline under CSR 16-20

is not served by the Appellant's dismissal.

VI. ORDER

The Agency's discipline of the Appellant by dismissal on July 16, 2007, is MODIFIED. Dismissal is replaced by a 30 day suspension. The Appellant is ordered reinstated to the classification he occupied at the time of dismissal, with back pay and benefits restored *nunc pro tunc* July 17, 2007.

DONE October 16, 2007.



Bruce A. Plotkin
Career Service Board Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this Decision under 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 certificate of delivery, below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules). All petitions for review must be filed by mail, hand delivery, or fax, as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

S:/Share/hearings/Cases/Strasser, Geoffrey 44-07/8-2-07 Decision.doc

I certify that I delivered a copy of the foregoing Decision on October ____, 2007, in the manner indicated below, to the following:

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