

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

Appeal No. 11-05

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**DECISION**

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IN THE MATTER OF THE APPEAL OF:

**MICHAEL O. OWOEYE**, Appellant,

vs.

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

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**I. PROCEDURAL INTRODUCTION**

Mr. Michael Owoeye (Appellant) appeals a three-day suspension by his employer, the Denver Zoo (Agency), for alleged violations of Career Service Rules on December 27, 2004. The suspension was assessed on January 24, 2005. The Appellant timely filed his appeal on February 1, 2005. A hearing concerning the appeal was held on June 6, 2005 before Hearings Officer Bruce A. Plotkin. The Agency was represented by Mindi Wright, Esq., with Ms. Leslye Bilyeu serving as the Agency's advisory witness. The Appellant represented himself.

Agency exhibits numbered 1-5 were admitted over objection. Appellant's Exhibit A was admitted without objection. The Agency presented the following witnesses: Mr. Rick Haeffner, and Mr. Stephen Venne. The Appellant testified on his own behalf with no additional witnesses.

**II. ISSUES**

The following issues were decided on appeal:

- A. whether the Appellant violated Career Service Rules (CSR) §§16-50 A. 1), 14), 20), and §§16-51 A. 2), 6), 10), and 11);
- B. if the Appellant violated any of these rules, whether the sanction of a three-day suspension without pay was reasonably related to the seriousness of the offense(s), in light of the Appellant's past record;
- C. whether the Agency wrongfully created a hostile work environment against the Appellant;
- D. whether the Agency unlawfully retaliated against the Appellant.

### III. FINDINGS

#### A. Background

The Appellant is an experienced relief zoo keeper at the Denver Zoo (Agency). As a relief zookeeper, he rotates working in four of the five areas of the zoo. On Monday, December 27, 2004 at 8:50 a.m., during the Appellant's shift, Rick Haeffner, Senior Curator, noticed a young, female polar bear named Cranberry running oddly around the Polar Bear Secondary Exhibit; then he saw a second, large adult male polar bear, later determined to be Olaf, chasing her. Haeffner knew those two bears should never be together.

Haeffner radioed immediately to the Appellant. The Appellant responded, but the transmission was garbled. Haeffner tried several times to re-radio to the Appellant, but received no response. It was later found the reason for the break-down in communication was the Appellant's radio was set to a different frequency than either the normal one used for his section or the frequency used for emergency calls.

Haeffner called to the Tropical Discovery area, told them he had an emergency at the Polar Bear exhibit, and needed them to bring all their fire extinguishers. Haeffner directed two keepers to climb to the top of the exhibit and, in accordance with emergency protocol, discharge extinguishers at Olaf should he approach Cranberry. Several times Olaf approached Cranberry, and a keeper discharged a CO<sup>2</sup> extinguisher toward him, but with minimal effect.

After hearing the emergency radio transmissions, Vickie Hunter, Area Supervisor, arrived at the exhibit to help. At the same time, Haeffner called the veterinary clinic to instruct them he might need a polar bear tranquilized, and to report immediately to the exhibit. Haeffner then called security to instruct officers to report in case he needed crowd control. Soon, several more zookeepers were assisting in the emergency.

Haeffner directed one of the zookeepers to spray his extinguisher at Olaf to attempt to direct him toward the transfer area away from the exhibit. Instead, Olaf moved around the pool separating him from Cranberry. On her own, Cranberry spotted her opportunity and scurried around the pool the opposite way and into the transfer area, where she was safely secured away from Olaf. Haeffner then decided to leave Olaf in the exhibit to calm down so that he could be transferred later when he was less anxious.

After both animals were safely secured, Haeffner questioned the Appellant who acknowledged when he transferred Cranberry from the Main Exhibit along the transfer aisle toward the secondary exhibit, he failed to secure Olaf's door. When Olaf saw Cranberry, he followed her into the secondary exhibit before the Appellant could secure him. Haeffner also questioned the Appellant about the lack of radio communication. The Appellant replied his radio did not work properly.

A pre-disciplinary meeting was held on January 12, 2005 at the zoo. The Appellant appeared without a representative and gave a statement. On January 27, 2005, the Agency

sent the Appellant , its notice of suspension for three days, effective February 16, 2005. The Appellant filed his timely appeal February 1, 2005.

B. Jurisdiction

Jurisdiction was not challenged at hearing. The Hearings Officer finds the subject of suspension is properly before him under the Career Service Rules. The jurisdictional filing dates were properly met by the parties.

#### **IV. ANALYSIS**

The Agency alleges the Appellant's actions, or failure to act, violate the following Career Service Rules:

A. CSR 16-50 A. 1) Gross negligence or willful neglect of duty.

Gross negligence", under CSR 16-50 A. 1), means negligence which is flagrant or beyond all allowance, or showing an utter lack of responsibility. In re Keegan, CSA 69-03 (3/31/04), In re Daneshpour, CSA 88-03, p.10 (12/30/03). A willful neglect of duty, under 16-50 A. 1), transcends any form of negligence and involves conscious or deliberate acts. In re Keegan, CSA 69-03 (3/1/04).

The Agency offered the following evidence to support its assertion that the Appellant violated CSR 16-50 A. 1). The Appellant has been a relief zookeeper for over ten years, and has worked with carnivores for over five. He acknowledged that Cranberry and Olaf should never be together under any circumstances. [Appellant testimony]. Haeffner testified that without a carefully planned and extended introduction, "male polar bears kill non-family female polar bears," and no such introduction has been or should be planned for these two bears. He added there was a substantial risk of harm or death to Olaf as well, because, had the use of tranquilizers become necessary<sup>1</sup>, Olaf may have sought refuge in or fallen into the pool. It takes about an hour to drain the pool and Olaf would have drown. Finally, he added, if there is injury or death to a zoo animal resulting from a preventable cause, federal regulators can and do level stiff fines or even close zoos for such violations. [Haeffner testimony]. The Appellant's immediate supervisor, Steve Venne affirmed Olaf and Cranberry should never be together "in any way, shape or form." [Venne testimony]. These statements were not challenged by the Appellant.

The Appellant conceded his failure to secure Olaf before bringing Cranberry to the exhibit was his mistake. [Appellant testimony and Appeal form]. He testified at hearing that the reason he forgot was that he was required by his supervisor to transport a water sample for testing, and the added chore made him rush, resulting in his failure to focus on securing Olaf.

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<sup>1</sup> The use of tranquilizers was an increasing likelihood, as Olaf was not responding to the first level of protocol, discharging fire extinguishers.

Venne responded to the Appellant's allegation by stating the other zookeepers also have the same responsibility of transporting water samples and have not complained their focus suffered. He stated the entire day's activities for a relief zookeeper can be accomplished in 7 ½ hours, including lunch and breaks. He also testified each zoo keeper is well-aware of his or her responsibilities, including animal and people safety, as a result of quarterly meetings that cover safety. Venne also testified that, for the ten zookeepers under him, he drafts each zookeeper schedule, including bold-face type for key responsibilities. Then he covers the schedule with each zookeeper. Venne also asks each relief zookeeper to re-visit with the regular zookeeper when assigned to areas not worked recently. [Venne testimony].

The Hearings Officer finds the Agency established a violation of CSR 16-50 A. 1) by a preponderance of the evidence for the following reasons. The Appellant is experienced and well trained in his obligation to ensure the separation of carnivorous species. He admitted it was wrong not to secure Olaf. The potential harm to one or both polar bears was imminent and it was significant. Under these circumstances, it was beyond all allowance for the Appellant to leave Olaf unsecured before leading Cranberry her exhibit. Since the transport of a water sample was within the range of his normal activities, and other zookeepers accomplish this task without additional stress, the Appellant's argument - that the Agency's requirement for him to transport the water sample was the ultimate cause for Olaf's access to Cranberry - does not overcome the Agency's establishment of this violation.

B. CRS 16-50 A. 14) 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 to City and County Property.

Under this rule, an employee's failure to use a safety device or observe a safety regulation may result in a violation in any of three ways: 1. when there is a nexus between an employee's omission and injury to the employee or another; 2. when the employee's omission jeopardizes the safety of the employee or others; or 3. when the employee's omission results in damage or destruction of city property.

The first part does not apply here, as the Agency did not present any evidence that any injury resulted to the Appellant or anyone else. The second part, "jeopardizes the safety of self or others" does not apply, even though Cranberry's life was in jeopardy, and perhaps Olaf's as well. The common meaning of the adjective pronoun "others" refers to an additional or further person or thing of the type already mentioned. Since "others" refers back to "self", then the plain meaning of "others" in this context is humans, and not animals. The third part of the rule, "results in damage or destruction to City and County Property," was also not proven by the Agency, as no evidence of damage or destruction was presented. Since there was no injury, no person in jeopardy of injury, and no property damaged, the Agency failed to prove the Appellant violated CRS 16-50 A. 14) by a preponderance of the evidence.

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

Since the Agency has identified specific conduct that was the basis for its discipline of the Appellant, this violation is dismissed.

D. CSR 16-51 A. 2) Failure to meet established standards of performance including either qualitative or quantitative standards.

Three requirements are prerequisites to finding a violation of this rule: 1. a prior-established standard; 2. clear communication of that standard to the Appellant; and 3. the Appellant's failure to meet such standard. See e.g. Pabst v. Industrial Claim Appeals Office, 833 P.2d 64, 64-65 (Colo. App. 1992), In re Routa, CSA 123-04, 3 (1/28/05).

Regarding a prior-established standard, Venne testified extensively regarding safety protocols and safety training for zookeepers. On Haeffner's orders, Venne conducts quarterly safety reviews with the ten zookeepers under his supervision. The Appellant did not dispute he attended those meetings. In addition to the established standard of emergency radio use, the Appellant admitted he understood it was an established safety issue not to secure Olaf.

Regarding clear communication of these safety protocols, Venne testified that, at each quarterly meeting, he explains the use of the current radio system, especially as it relates to emergencies. He demonstrates how to switch to the emergency radio channel in cases of emergency. Venne also asks during each review if anyone has any question about radio use. He testified the Appellant did not raise any question regarding radio use. [Venne testimony].

The Appellant replied he was trained in the proper use of the radio only after the 12/27/04 Cranberry emergency. The Hearings officer is not persuaded. The Appellant signed his attendance at meetings during which radio protocol training was reviewed prior to the Cranberry incident. [Exhibit 5]. Also, Venne was very specific about his insistence on repeating emergency radio protocol in each meeting, and visually demonstrated the zookeepers' moaning, rolled-eyed response to his radio demonstration, as if the zookeepers were saying "yeah yeah, for the umpteenth time, we know how to use the radio." The Hearings Officer finds Exhibit 5 and Venne's testimony convincing by a preponderance of the evidence that the Appellant was amply trained in emergency protocol for radio use before 12/27/04, and understood or should have understood its proper use.

The Agency has established by a preponderance of the evidence that there were two prior, established standards in the use of hand-held radios by zookeepers in emergencies, and in always knowing the location of and securing predators. The Agency has also established that Venne clearly communicated those standards to the Appellant. It also established that the Appellant failed to follow both those standards in the Cranberry emergency on 12/27/04. Having found the Agency established each of the three-part test referenced above by a preponderance of the evidence, the Hearings Officer concludes the Appellant violated CSR 16-51 A. 2).

E. CSR 16-51 A. 6) Carelessness in the performance of duties and responsibilities.

This provision is distinguishable from CSR 16-50 A. 1) above in that it does not require either the reckless disregard of the consequences or the intentional performance failures that are necessary to establish either “gross negligence” or “willful neglect.” In re Casteneda, CSA 79-03 (1/14/04), In re Ortiz, CSA 196-02 (11/15/02). All that is required here for the Agency to prove a violation is to establish that the Appellant had an important work duty or responsibility, and was heedless and unmindful of that duty, with the result that potential or actual significant harm resulted. See In re Ortiz, CSA 196-02, 16 (11/15/02).

It has already been established that the Appellant’s duties include animal safety, and that he was amply trained therein. It is also clear the Appellant understood the danger of allowing a large male polar bear access to a non-family female, and therefore securing such carnivore was an important duty. Further, the Appellant admitted it was an error to allow Olaf access to Cranberry. The consequence of that error was potentially grave injury or death to one or two polar bears. The Hearings Officer finds that, given the likelihood that without Haeffner’s prompt intervention Cranberry would have been injured or killed, the Appellant’s leaving Olaf unsecured was heedless and unmindful of his duty to protect the safety of an animal in his care.

The Appellant protested that no harm came to the bears, therefore there should be no violation. [Appellant Appeal and testimony]. To condone misconduct only because no actual harm results would be to violate the purpose of the Career Service Rules to correct inappropriate behavior. CSR 16-10.

The Appellant also replied that pressure from his supervisor to deliver a water sample outside the zoo caused him to “lose focus” and forget to secure Olaf’s cage. [Appellant testimony]. As found above, this task was within the normal range of activities for zookeepers and does not overcome the Appellant’s duty to secure a carnivore. Based upon these findings, the Hearings Officer finds the Appellant violated CSR 16-51 A. 6) by a preponderance of the evidence.

F. CSR 16-51 A. 10) Failure to comply with the instructions of an authorized supervisor.

On August 19, 2004, the Appellant was given a written reprimand for leaving a door unlocked to the hyena area on August 3, 2004. The Notice of Discipline stated “[t]here is an immediate need for your improvement in this area. Specifically, we expect you to pay closer attention to proper safety procedures so this will not happen again.” [Exhibit 3]. It is this order the Agency claims the Appellant violated when he failed to secure Olaf on 12/27/04.

The Appellant answered there was a conspiracy against him by other zookeepers who were out to “get” him. At hearing in the present case, he denied having left the hyena door open in the August 3, 2004 incident, and claimed that incident was in retaliation for his citing problems during meetings prior to that time.

A *prima facie* case for retaliation is made by showing (1) a protected employee action, (2) an adverse action by an employer either after or contemporaneous with the employee's protected action, and (3) a causal connection between the employee's action and the employer's adverse action. Poe v. Shari's Mgmt. Corp., 188 F. 3d 519 (10<sup>th</sup> cir.1999), *citing* Morgan v. Hilti, Inc., 108 F. 3d 1319, 1324 (10<sup>th</sup> cir. 1997), In re Green, CSA 130-04, (1/7/05).

In his testimony at hearing, the Appellant established the first two tests: that he addressed issues of wrongdoing at the zoo; then he was given a verbal reprimand after his criticisms. As to the third test, establishing a causal connection, the Appellant asked Venne "[w]hy do you want to get me fired?" something Venne adamantly denied, replying "not unless you don't do your job. I think you have plenty to contribute." The Appellant then asked Venne "[d]on't you think my input [at meetings prior to the Aug. 3 incident with a hyena cage] causes this [discipline]?" Venne, again denied there was any connection between the Appellant's contributions at meetings and his leaving Olaf unsecured, or the discipline that resulted. Also in response to the Appellant's claim of retaliation, Venne stated each prior discipline of the Appellant was based upon a report from a different zookeeper, and his investigation revealed no conspiracy, leading him to believe there was no pattern of conspiracy.

In his own testimony during hearing, the Appellant stated "anyone can set you up." He also stated that prior incidents resulting in discipline against him all arose after he gave input at meetings, and since he has stopped giving input, no more incidents have arisen.

None of the Appellant's claims, individually or together, establish a causal connection between his complaints and the Agency's discipline. Merely stating that others are out to "get" him is insufficient to state a claim of retaliation. Finally, he established no causal connection between his complaints at meetings and any subsequent Agency action against him. The Agency has proven, by a preponderance of the evidence, that the Appellant violated CSR 16-51 A. 10). It's August 2004 discipline contained a clear order to pay closer attention to proper safety procedures, and the Appellant violated that order again on December 27, 2004.

G. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

As the Agency has established specific conduct which resulted in discipline to the Appellant, this violation is dismissed.

## **VI. APPELLANT'S HARASSMENT CLAIM**

The Appellant bases this claim upon an undated incident in which a co-worker called him a name. Appellant failed to state a claim upon which Hearings Officer has jurisdiction to grant relief. He failed to state any facts tending to support that this incident was anything other than a single offensive utterance. Indeed, he failed to state what the offensive utterance was, if it was directed at him as a member of a protected class, if it was within a time which might be related to the Agency's discipline against him, or if it was anything other than an

isolated incident, all requirements of a *prima facie* case. See In re Marin, CSA 64-02 (5/19/02). Besides, Venne testified he recognized the comment was inappropriate, immediately addressed the issue with the offending co-worker, and reprimanded him for his inappropriate comment. He also addressed it the next meeting, making clear such comments would not be tolerated. The co-worker apologized to the Appellant, and the Appellant admitted he has had no subsequent name-calling problems. The Appellant failed to state a *prima facie* case for harassment.

## **VII. CONCLUSION**

Based upon the discussion, above, the Hearings Officer concludes the Agency proved the Appellant was in substantial violation of the CSR 16-50 A. 1), 16-51 A. 2), 6), and 10). Further, the Appellant failed to establish a *prima facie* case of harassment. What remains is the propriety of the level of discipline assessed by the Agency.

## **VIII. LEVEL OF DISCIPLINE**

The purpose of discipline is to correct inappropriate behavior or performance. CSR 16-10. The degree of discipline depends upon the seriousness of the offense, taking into consideration the employee's past record. *Id.*

It was amply established that the nature of the Appellant's violation was among the most serious possible at the zoo. Animal lives were endangered, in violation of the most important duty of a zookeeper, to ensure the safety of people and animals.

Even if this were Appellant's first violation, termination could have been assessed, given the gravity of the infraction. When taking into consideration the Appellant's disciplinary history for safety violations, including the same type of violation less than six months previously, the Agency's choice of a three-day suspension was well within the range of reasonable alternatives available to it. Notably, the Appellant at all times during the hearing failed to acknowledge the least responsibility for his conduct. He blamed other co-workers for setting him up, he blamed his supervisor for rushing him and for seeking his ouster from employment, and he blamed the Agency for not training him in the proper use of his radio. None of these allegations was proven. To the contrary, there was no evidence any other employee took action causing the Appellant's rule violations, no evidence of Agency harassment or retaliation, and ample proof the Appellant was trained to use his radio.

Finally, the Appellant claimed the Agency assessed lesser discipline against two other zookeepers for similar, failure-to-secure violations. Haeffner responded he approved of the one-day suspensions in those cases, and found them equitable compared with the Appellant's three-day suspension because the other zookeepers had no prior discipline. [Haeffner testimony].

For the reasons stated above, the Appellant's three-day suspension was reasonably related to the seriousness of the offense, and took into consideration the employee's past record. This incident was grave, it was at least a second violation in which the Appellant failed to secure a carnivore, it was his third discipline in the last two years, and other zookeepers who received lesser discipline for presumably similar offenses had no prior discipline.

## **VI. ORDER**

The Agency's suspension of the Appellant for three days without pay beginning June 16, 2004 is hereby AFFIRMED.

DONE this 10<sup>th</sup> day of June, 2005.

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Bruce A. Plotkin  
Hearing Officer  
Career Service Board

**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\_\_\_\_day of June, 2005, addressed to:

Mr. Michael O. Owoeye  
21300 E 48<sup>th</sup> Place  
Denver, CO 80249

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

Mindi L. Wright, Esq.  
Assistant City Attorney  
Litigation Section

Ms. Leslye Bilyeu  
Denver Zoological Foundation

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