

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

Appeal No. 67-03

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**THERESA MEGGITT**, Appellant,

Agency: DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,  
And THE CITY AND COUNTY OF DENVER, a municipal corporation.

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Hearing Officer Joanna Lee Kaye held a hearing in this matter on August 14, 2003 in the Career Service Authority Hearings Office. Assistant City Attorney Mindi L. Wright represented the Department of Safety, Denver Sheriff's Department (DSD or Agency). DSD Major Gary Anderson served as advisory witness for the Agency. Theresa Meggitt (Appellant) was present and represented herself.

**MATTER APPEALED**

Appellant, an Administrative Support Assistant III for the Denver Sheriff's Department, appeals a three-day suspension the Agency issued as a result of Appellant's alleged improper usage of the e-mail system on one occasion.

For the reasons set forth below, the Agency's action is **AFFIRMED**.

**ISSUES**

1. Whether the Agency has shown by a preponderance of the evidence that Appellant engaged in the action alleged.
2. If so, whether the action shown constitutes cause to discipline Appellant.
3. If so, whether Appellant's three-day suspension is reasonably related to the seriousness of the offense in question, taking into consideration Appellant's past employment record.

## PRELIMINARY MATTERS

The Agency filed a Motion in Limine on August 8, 2003 requesting that the hearing officer eliminate certain witnesses listed by Appellant as irrelevant. The hearing officer took up this Motion at the beginning of the hearing. After hearing arguments, she granted that Motion as to DSD employees Gayleen Joosten and Tanya Mason, two civilian employees not trained in the Agency's e-mail use policies until May 28, 2003. The Agency stipulated in turn that it did not train its civilian employees until that date, which was after the incident giving rise to this case.

The Agency's Motion was denied as to Sergeant Timothy Casorla and Captain Craig Meyer, the individuals in Appellant's immediate supervisory chain who were not involved in the decision to discipline Appellant, because in Appellant's prehearing statement she argued the Agency's failure to include them in the process constituted a violation of proper disciplinary procedure. The Motion in Limine was further denied as to Janet Burkhart, who received and printed the version of the e-mail that appears in Exhibit A on her home computer.<sup>1</sup>

## FINDINGS OF FACT

Based on the evidence presented at the hearing, the hearing officer finds the following to be fact:

1. Appellant is an Administrative Support Assistant III. She has worked for the Operations Unit of DSD since September 1, 2000. She is a career-status employee with no prior disciplinary actions.
2. The Operations Unit comprises the Denver City Jail's administrative functions, commissary, mail room, gym, laundry and library. It is considered the hub of the Agency.
3. Undersheriff Fred J. Oliva (Oliva) was appointed to the position of Director of Corrections on August 20, 2000. He immediately recognized a widespread hostile work environment problem surrounding sexually inappropriate behavior throughout the Agency, with multiple languishing complaints of sexual harassment by both employees and citizens, and more such reports regularly coming in. The Agency had several civil discrimination lawsuits pending against it which required legal representation, settlements and other costly actions at the public expense. Oliva was particularly concerned about the sexually inappropriate behavior because the Agency is a jail environment.
4. Oliva adopted a policy of zero tolerance for any kind of sexually-oriented conduct in the office. Shortly after his appointment to the position of Director, he made a

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<sup>1</sup>Appellant withdrew the other witnesses listed in the Agency's Motion in Limine after oral arguments.

general announcement to all employees of the zero-tolerance policy toward all such conduct.

5. A procedural component of the Agency's zero-tolerance policy is that complaints in the nature of sexual harassment are turned directly over to the Major in charge of the unit. That supervisor is then required to immediately report the incident to Internal Affairs. The investigation results are then dispensed by Oliva himself. As a result of this procedural component in cases involving allegations of sexual harassment, immediate supervisors are not involved in resulting disciplinary actions.
6. Director Oliva aggressively pursued his zero-tolerance policy regarding sexually inappropriate conduct. By the beginning of 2001, several employees, including supervisors, were disciplined as a result of such inappropriate conduct.
7. Appellant is a civilian employee. At the time of her hire, civilian employees were not consistently trained in the Agency regulations, including the DSD regulations prohibiting use of city equipment for personal uses that are prejudicial to the efficient operation, reputation, or good name of the Agency (see, Exhibit 2). Appellant had not been trained in these regulations as of February 14, 2003.
8. On February 14, 2003 at 10:23 a.m., an e-mail titled "What is Marketing?" was sent from an account titled "Sweettесе@yahoo.com," which is Appellant's home e-mail address (Exhibit A).<sup>2</sup> 32 individuals, including 24 DSD employees, are listed as recipients of this e-mail.
9. At 10:24 a.m. on February 14, one minute after the e-mail was sent from Appellant's home address, the same e-mail, titled "What is Marketing?" was sent from "Meggitt, Theresa – DSD," which is Appellant's DSD e-mail address (Exhibit 4). The contents of this e-mail and its list of recipients are identical to the one in Exhibit A.
10. February 14, 2003 was a Friday. The e-mails in Exhibits 4 and A were both sent while Appellant was at work.
11. Appellant has a teenage daughter at home who regularly uses the e-mail system with the address of "Sweettесе@yahoo.com."
12. The e-mail at issue (see, Exhibit 4) is a series of oblique allegories. The e-mail compares various scenarios of a woman picking up a man at a party by telling him how good she is in bed, to different forms of marketing. The first two paragraphs of the e-mail read as follows:

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<sup>2</sup> Appellant's witness, Janet Burkhart, was one of the recipients of the e-mail sent from Appellant's home on February 14, 2003. She printed the hardcopy of this document which now appears as Exhibit A on March 8, 2003 (see, bottom of Exhibit A).

People often ask for an explanation of marketing.  
Perhaps the following analogies will help clear it up:  
You see a handsome guy at a party.  
You go up to him and say,  
"I'm fantastic in bed."  
That's Direct Marketing.

The e-mail continues in a similar vein with seven more such allegories and is intended to be humorous.

13. Exhibits 4 and A are both hard-copy printouts which could have been manipulated to misrepresent any portion of the e-mail.
14. An exchange server is a computer hardware item that processes e-mails being sent from one location and received by another. The server stores accurate electronic data concerning the original recipients, senders, points of origin, times sent and contents of the e-mails it processes. However, after two weeks this electronic data is automatically erased from the Agency's exchange server. Therefore, if the electronic data concerning a given e-mail is to be retrieved, from this server, it must be retrieved within the two-week period after the e-mail is sent.
15. One of the recipients of the February 14, 2003 e-mail in Exhibit 4 was DSD Maintenance Supervisor Michael Paul (Paul). He read the e-mail within minutes of its sending. Paul determined that the e-mail had sexual undertones inappropriate for the workplace. As a supervisor, Paul felt he had a responsibility under the Agency's zero-tolerance policy to report the e-mail. He could not use his printer at the time, so instead he forwarded the e-mail to his supervisor, DSD Maintenance Supervisor Steve Perez (Perez), in the nature of a report.
16. Paul sent the e-mail to Perez at 10:32 a.m., eight minutes after he received it (see, Exhibit 4). Paul had no reason to retaliate against Appellant and did not alter the e-mail in Exhibit 4 in any way before sending it to Perez. Paul's statement in this regard was credible.
17. Five minutes later, at 10:37 a.m. Perez forwarded the e-mail to Internal Affairs (IA) Captain Mike Horner, Denver County Jail Major Vicki Connors, and Denver County Jail Division Chief Robert Maher (Exhibit 4).
18. The clocks in the computer terminals at DSD are independently set and management has noted in the past that some of them are inaccurate. Perez' clock in his computer was one hour slow at the time, and therefore shows the e-mail was sent one hour earlier, at 9:37 a.m.
19. On February 19, 2003, Agency supervisors brought Appellant a copy of the Agency's Computer User Agreement, which she read and signed at that time (Exhibit D). This was the first time Appellant had seen the Computer User Agreement. This Agreement includes a statement that the signatory agrees to use

Agency computer equipment responsibly and in accordance with the Agency's "Code of Responsibility," which the document states is attached thereto.<sup>3</sup>

20. Sergeant Silver Gutierrez (Gutierrez), investigator for IA, was assigned to investigate the e-mail of February 14, 2003 (Exhibit 4). Gutierrez interviewed Appellant on February 21, 2003. During the interview he showed her a hardcopy of the e-mail in question. Appellant screened the first two paragraphs of the e-mail. She admitted sending the e-mail to the recipients on the "To" line. She stated she knew what she had done was wrong, but added that the e-mail was only intended for entertainment purposes to lighten the atmosphere, and that she did not intend to send similar e-mails in the future (see, Exhibit 2.) Appellant also noted that she had not seen or signed the Computer User Agreement yet when she sent the e-mail. Appellant told Gutierrez another employee was sending similar e-mails, and took Gutierrez to the other employee's terminal where they retrieved a sample.
21. Gutierrez concluded the investigation and founded the incident because of Appellant's admission. He did not retrieve any electronic data concerning Exhibit 4 from the Agency's exchange server.
22. The Agency prepared a letter informing Appellant of its Contemplation of Disciplinary Action dated March 21, 2003 (Exhibit 3). A predisciplinary meeting was held on April 8, 2003. Present were Appellant, Oliva, Gutierrez, and three division chiefs. During the meeting, Appellant again admitted sending the e-mail that Gutierrez had questioned her about during the investigation, and that it was inappropriate to do so. Appellant was not shown the e-mail in question again during the predisciplinary meeting.
23. After the predisciplinary meeting, Oliva consulted with the three division chiefs. They recommended a three- to five-day suspension. As the final decision-maker, Oliva considered the long-standing hostile work environment problems within the Agency, and the nature of the e-mail in question. He further considered Appellant's good performance record, and decided that the lesser suspension term of three days was appropriate in this case.
24. The Agency prepared a letter dated April 16, 2003, notifying Appellant of her three-day suspension (Exhibit 2). Appellant timely appealed on May 5, 2003 (Exhibit 1).
25. During the hearing, Appellant denied sending the e-mail in question. Her explanation for earlier admitting that she sent the e-mail was that she did not get a good look at it during the interview with Gutierrez. Her explanation is unpersuasive and is not supported by the evidence. Her denial is not credible.

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<sup>3</sup> Exhibit D does not have the referenced "Code of Responsibility" attached to it.

## DISCUSSION

### 1. Jurisdiction.

The hearing officer finds she has jurisdiction to hear this case as a suspension pursuant to CSR 19-10 b), which states as follows in relevant part:

#### Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in ...suspension... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

### 2. Burden of Proof.

The City Charter, C5.25 (4) and CSR 2-104 (b) (4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.) In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

The Agency responsible for disciplining a career-status employee bears the burden of showing cause for the disciplinary action. CSR 5-62. The hearing officer must also find the severity of discipline is reasonably related to the nature of the offense in question, in light of the employee's past record. CSR 16-10; see, Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

### 3. The Agency has shown cause for disciplining Appellant.

- a. ***The Agency has proven that Appellant sent the e-mail in question by a preponderance of the evidence.***

The Agency has shown it is more likely than not that following series of events occurred. Paul received the email (Exhibit 4) at 10:24 a.m. Within eight minutes he opened it, read it, and forwarded it to Perez. Perez forwarded it to IA and an investigation was initiated. Based on the "From" line of the e-mail indicating Appellant's DSD e-mail address, Investigator Gutierrez interviewed Appellant. During the interview Appellant read the first two paragraphs, admitted sending the e-mail, admitted it was

wrong of her to do so, and said she intended it for purposes of levity and entertainment. Appellant repeated these admissions during the April 8, 2003 predisciplinary meeting.

***b. Appellant's denial that she sent the e-mail is inconsistent with the evidence and lacks credibility.***

Appellant's theory of the case depends on several unlikely claims by Appellant. Primary among those is Appellant's eleventh-hour recantation of her earlier admission that she sent the e-mail in question. During her testimony, Appellant asserted that she was nervous during the interview with IA and did not look carefully at the document. She argues that at first glance, the e-mail looked like one she might have sent, but that she read only the first two paragraphs, and the rest of the document was obscured by attachments and Post-Its. Only later, when she got a better look at the document as an attachment to the Agency's prehearing statement, did she realize she had not sent it.

This explanation lacks credibility. It is not likely that Appellant would admit to sending something for which she was being investigated by IA without taking a good look at it. Furthermore, Appellant admitted reading the first two paragraphs of the e-mail. As a series of similar sexually-oriented allegories, the first two paragraphs are an accurate representation of the essence entire e-mail. If Appellant read those two paragraphs, then she essentially knew what the entire e-mail was about. This knowledge is further underscored by her statement to Gutierrez that she knew the e-mail was inappropriate, and her statement of intent; that she sent it for amusement purposes to lighten the work atmosphere. Appellant could only have offered this explanation if she knew the e-mail in question was both humorous, and inappropriate, at the time of the IA interview. If Appellant knew all this, then she more likely than not knew whether she sent it.

Appellant further implicated another individual for sending similar material over the e-mail system during this interview. When the investigator accompanied her to that employee's terminal they did in fact find similar material in her e-mail system. Appellant would have to know the nature of the e-mail she was accused of sending if she were to further relate another employee was sending such material.

Appellant's comments and actions in general during her interview with Gutierrez belie that her knowledge of the e-mail in question was more than she now asserts. For these reasons, the hearing officer concludes that Appellant was familiar enough with Exhibit 4 during the interview with Gutierrez to know what she was confessing.

***c. Appellant's explanation for the existence of Exhibit 4 is unpersuasive.***

There are two versions of the e-mail: Exhibit A from Appellant's home computer, and Exhibit 4 from her terminal at work. Appellant's denial that she sent Exhibit 4 required an explanation for where it came from. She explains its existence with the following theory.

Appellant argues that as a hard copy, Exhibit 4 could have been manipulated to appear as though it came from her terminal. Under Appellant's theory, the version in Exhibit A is the correct, unaltered one. It was sent from her home by an unknown person (probably her daughter) while Appellant was at work at 10:23 a.m. on February 14, 2003. Then one of the recipients manipulated the e-mail to make it appear to have been sent by Appellant from her computer terminal at work. Therefore, under Appellant's theory of the case, someone at the Agency manufactured Exhibit 4 in order to frame her.

Appellant points out that the time stamp on Perez' e-mail to the supervisors indicates it was sent to them at 9:37 a.m., before the e-mail was sent to Paul. She argues this raises question as to the accuracy of the time stamps on the e-mails and suggests the document has been altered. Appellant asserts that the only way to prove where the e-mail really originated and the original, accurate time and contents is to provide the electronic information stored in the Agency's servers. She asserts that since the Agency has not provided that electronic information, it has not proven its case against her.

There are several weaknesses in Appellant's theory for the origins of Exhibit 4. The hearing officer is first unpersuaded by the time discrepancy in the "Sent" time from Perez to the supervisors. All the rest of the stamps in the sequence of e-mails in Exhibit 4 indicate a credible sequence of events. The e-mail from Perez to the supervisors is the only one out of a reasonable sequence. It is more likely than not that the clock in this particular terminal is an hour behind. The hearing officer finds that one incorrect time stamp in the sequence does not make the rest of the sequence as it is indicated in Exhibit 4 unreliable. She concludes that with the exception of that one time stamp being one hour behind, the sequence indicated on Exhibit 4 is correct.

Appellant's theory that Exhibit 4 was manufactured to frame her does not withstand scrutiny for several other reasons, among them being the time sequence suggested in Exhibit 4. The e-mail from her home indicates it was sent to Maintenance Supervisor Michael Paul and the others at 10:23 a.m. Therefore, either Paul opened the e-mail, conceived a plan against Appellant, altered the e-mail to make it appear to have come from Appellant's work terminal, and then forwarded it to Perez all within nine minutes, or Perez (or someone else) also altered the e-mail by changing the "sent" time of 10:32 that appears in Exhibit 4.

The hearing officer finds a conspiracy among several DSD maintenance supervisors against Appellant to be unlikely and unsupported by any corroborating evidence. This limits the likely suspects of such e-mail manipulation to Paul himself. However, Paul credibly testified that he opened and forwarded the email that appears in Exhibit 4, and had no reason to create false allegations against Appellant. Even if Paul had a motive to frame Appellant by fabricating Exhibit 4, it is not likely that Paul received the e-mail, opened it, conceived a plan against Appellant, manipulated the copy in his system, and forwarded it to Perez, all within nine minutes. The hearing officer finds that Paul did not do so. She therefore concludes that the correct version of the e-mail in question is the one that appears in Exhibit 4.

The hearing officer is further not persuaded that the Agency failed to prove its case because it failed to retrieve the electronic information from the Agency's server establishing the origin of Exhibit 4. IA concluded that the incident happened because Appellant admitted sending the e-mail. Once she admitted to the incident, there was no need to retrieve the electronic data. The Agency need only prove its case by a preponderance of the evidence. In light of the lack in credibility of Appellant's recantation of her admission, the Agency has made its case even in absence of the electronic data.

#### **4. The severity of the discipline is within the range of reasonable alternatives.**

In determining the appropriateness of a given disciplinary action, the test is whether the severity of discipline is "reasonably related" to the seriousness of the offense. See, CSR 16-10. To be reasonably related, the discipline chosen must be "within the range of reasonable alternatives available to a reasonable, prudent agency administrator." See, Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining the reasonableness of the discipline, the hearing officer therefore will not substitute her judgment for that of the Agency unless the discipline is clearly unreasonable, excessive, or substantially based on considerations that are unsupported by a preponderance of the evidence.

As the new Director in August of 2000, Oliva assumed responsibility for an Agency rife with hostile work environment actions against it, languishing complaints between employees and by the public, and continuing problems with sexually inappropriate interactions. His policy of zero tolerance is justified under those circumstances. When the supervisors consulted after the predisciplinary meeting, they discussed a suspension of up to five days. Oliva decided on a lesser suspension because he took into consideration Appellant's past good work record and lack of any prior disciplinary actions.

Finally, Appellant's alleged ignorance of the rules and User Agreement governing e-mail usage is unpersuasive. Appellant works in Operations, the hub of the Agency. Whether she had been specifically trained on this issue or not, the Agency's zero-tolerance policy regarding sexually inappropriate exchanges is widely known throughout the Agency. While Appellant might have genuinely only intended to provide levity, she should have known better than to choose this particular e-mail with which to do that.

Under the totality of these circumstances, a three-day suspension is within the range of reasonable alternatives available to Oliva as a prudent Agency administrator.

### **CONCLUSIONS OF LAW**

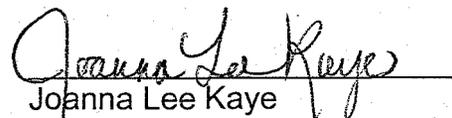
1. The hearing officer has jurisdiction to hear this case and render a decision.
2. The Agency has demonstrated by a preponderance of evidence that Appellant engaged in violations of the following:

- a) CSR 16-51 A. 5) Failure to observe departmental regulations, including the Agency's regulations limiting use of the computer system in ways prejudicial to the smooth functioning and good name of the DSD;
  - b) CSR 16-51 A. 6) Carelessness in the performance of responsibilities;
  - c) CSR 16-51 A. 8) Neglect in the use of City property.
3. The Agency has shown cause for disciplining Appellant.
  4. In light of the totality of evidence in this case, the Agency's decision to suspend Appellant for three days is reasonably related to the seriousness of the offense that has been shown.

### DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Agency's decision to suspend Appellant for three days is AFFIRMED.

Dated this 10<sup>th</sup> day of September, 2003.

  
Joanna Lee Kaye  
Hearing Officer for the  
Career Service Board