

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

Appeal Nos. 68-02

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOHN D. WORTMAN, Appellant,

v.

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

INTRODUCTION

For purposes of these Findings and Order, John D. Wortman shall be referred to as "Appellant." The Denver Zoological Foundation shall be referred to as the "Zoo" or "Foundation." The Department of Parks and Recreation shall be referred to as "Parks and Rec." The City and County of Denver shall be referred to as the "City". They will be referred to collectively as the "Agency." The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held January 16, and 17, 2003, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and was represented by John R. Palermo, Esq. The Agency was represented by Mindi L. Wright, Esq., Assistant City Attorney, with Leslye Bilyeu serving as the advisory witness.

The Hearing Officer has considered the following evidence in this decision:

The following witnesses were called by and testified on behalf of the Agency:

Dean Paulson, Dr. Lynn Kramer, Leslye Bilyeu, Dr. Brian W. Klepinger

The following witnesses were called by and testified on behalf of the Appellant:

Appellant, Paul Linger, Jose Trujillo, Carol Flohr

The following exhibits were offered and admitted into evidence on behalf of the Agency:

Exhibits 1 - 11, 15 - 18

The following exhibits were offered and admitted into evidence on behalf of the

Appellant:

None

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 – 4, 10, 15

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

Exhibit 19

NATURE OF APPEAL

Appellant is appealing his one-week suspension for alleged violations of CSR §§16-50 A. 18) and 20) and 16-51 A. 2), 4), 5), 7) and 11). He is seeking reversal of the disciplinary action, removal of the suspension from his personnel files and back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

Whether the Hearing Officer has subject matter jurisdiction over this appeal?

Whether Appellant violated CSR §§16-50 A. 18) and 20) and 16-51 A. 2), 4), 5), 7) and 11)?

If Appellant violated any provisions of CSR §§16-50 and 16-51, what is the appropriate sanction?

Did the imposition of discipline violate provisions of CSR §§16-10, 16-20 1), 16-30 E 2) and 16-30 B 1) and 2)?

PRELIMINARY MATTERS

Appellant filed a Motion for Testimony of Witness by Telephone. The proposed witness, Dr. Mark Bekoff, is a professor at the University of Colorado at Boulder. He was obligated to conduct class at the University on the two days scheduled for the hearing. The Hearing Officer reserved ruling on the Motion, seeking clarification whether Dr. Bekoff was unable to appear in person at any time during those two days. When it was determined that Dr. Bekoff would not be able to appear in person, the Hearing Officer granted the Motion. However, as the evidence adduced at the hearing narrowed the issues before the Hearing Officer, Appellant determined that Dr. Bekoff's testimony was not material and he was not, in fact, called as a witness.

FINDINGS OF FACT

1. Appellant is the General Curator at the Denver Zoo, a position he has held for seventeen and a half years. Appellant is a CSA employee, not an employee of the Denver

Zoological Foundation. The terms of his employment are governed by Career Service Rules.

2. The Foundation operates and manages the Zoo under a cooperative agreement with the City.

3. As General Curator, Appellant supervises the four curators of specific animal groups. His department is the largest at the Zoo, accounting for one-quarter of the Zoo's budget. He reports to Dr. Lynn Kramer, Vice President for Biological Programs. Dr. Kramer, in turn, reports to Dr. Brian Klepinger, Executive Vice President and Chief Operating Officer, who reports to Dr. Clayton Freiheit, President and Chief Operating Officer. Dr. Freiheit reports to the Foundation Board of Trustees.

4. All employees at the Zoo, whether CSA or Foundation employees, are required to comply with the March 6, 1998, computer policy authored by Dr. Clayton Freiheit, President of the Foundation. It provides that all the hardware and software on the computers are owned by the Zoo. It also sets forth policies regarding Internet access and use:

Internal and External – e-mail

Both the internal and external e-mail systems belong to DZF and may only be used for company purposes. Employees may not use e-mail to make defamatory or offensive comments about other employees. Copying or distributing copyrighted materials without permission through e-mail is prohibited. Do not forward e-mail unless you are given permission from the sender. Retain only essential e-mail messages. The C[omputer] S[creening] C[ommittee] reserves the right to delete all e-mail messages after 30 days. Zoo administration reserves the right to access and read any user's e-mail at any time.

Internet

The CSC reserves the right to make the final determination of whom shall have Internet access. Selection criteria includes (sic) the need to communicate to other institutions or vendors; accessibility to research tools; and the amount of time necessary to perform these tasks.

Internet e-mail access will be determined separately from Internet Access, partly because it is an additional expense. Internet e-mail will reflect an employee's position rather than a personal name. Internet usage may only be used to enhance your job performance. Supervisors are responsible for determining how an employee may access the Internet. The Internet may not be used for games, personal finance, and investments or to access inappropriate entertainment sites.

(Exhibit 11, p. 2-3)

5. Appellant's e-mail address at the Zoo is gencurator@denverzoo.org.

6. On or about July 10, 2001, a copy of an e-mail allegedly from Appellant was found at a printer. It is a response to an e-mail from "Kathy Ryan," who is not a current Zoo employee. He was responding to Ms. Ryan's inquiry about a Denver Zoo Guide project. In the message from Appellant, he tells Ms. Ryan that he finds Dr. Freiheit and Angela Baier "to be

completely corrupt individuals." He calls Ms. Baier a "100% liar" and Dr. Freiheit "a washed up old man that is carried by group of butt-kissers and boy friends that he has hired." He goes on to write that "the zoo has been misdirected for so long that it has become a corporate joke for animal abuse. So that's what I think of this place!" He tells Ms. Ryan to contact Mr. Keplinger about the project. He also tells Ms. Ryan that Dr. Klepinger "is a complete ass hole." (Exhibit 6-6)

7. It was stipulated that Appellant never sent the July 10, 2001 message to Ms. Ryan. At the predisciplinary meeting, Appellant did not deny writing the e-mail, only not sending it. Before the Hearing Officer, Appellant stated he started writing the e-mail, but it was "embellished" by "someone else" who added the "derogatory stuff." Appellant did not know who that person was. He stated that he had started writing the e-mail and then went to lunch. When he returned from lunch, it wasn't there. He stated that, for him, it was obvious that the message "had been tampered with."

8. The e-mail to Ms Ryan shows it was printed at 11:59 a.m. (Exhibit 6-6)

9. The e-mails from and to Ms. Ryan were found at the printer by an unidentified person. That person left it on Dr. Klepinger's chair. Dr. Klepinger brought it to Dr. Freiheit's attention. They brought it to Dr. Kramer for investigation.

10. Dr. Klepinger testified that, although he knew Appellant was not happy, he was surprised at the depth of emotion in the e-mail.

11. Appellant admitted that it is well known that he is not happy with the Zoo's current administration.

12. Dean Paulson, Director of Information Services at the Zoo was asked to check whether the e-mail was "real," *i.e.*, actually came from Appellant's computer. Mr. Paulson went to Appellant's computer and copied all the materials located in Appellant's "My Documents" and e-mail folders from the local hard drive onto the network. Mr. Paulson used an administrative password to get into Appellant's computer. He did not tamper with any of the information he found. He then imported the information into a new machine and copied the information onto a CD-rom that was designated "read only." He did this once in July 2001 and then again on six other, randomly chosen, occasions. Mr. Paulson gave each CD to Leslye Bilyeu, Human Resources Director, for safekeeping. Eventually he put all the information onto one CD—rom. The e-mail and other documents contained in Exhibits 5, 6 7, 8, 9, 16, 17, and 18 were all downloaded either from Appellant's e-mail or from his document files on his computer.

13. Mr. Paulson testified that Internet users could have an administrative block placed on e-mails from a particular sender or send a reply to a friend saying that messages are inappropriate and that they should not be sent. Mr. Paulson said that he did not see any messages from Appellant to others saying, "Please don't send."

14. Because all copies made by Mr. Paulson are "read only," the information on the CD-rom can be read by other viewers but cannot be modified.

15. Appellant testified that unknown persons were using his computer without his permission. He testified that this happened when he was away from his desk. He complained about it to others. He mentioned it to Mr. Paulson in September or October 2001.

16. Mr. Paulson admitted that Appellant and three or four others complained about night-staff employees using their computers after hours. He stated that each person would have his or her own password to access the computer network and that, even after accessing the computer system, the person would not be able to tamper with the documents found under Appellant's own password, such as his document files or e-mail account.

17. Carol Flohr, administrative support supervisor at the Zoo, testified that on weekends people got onto her computer. As they did not have her password, they were not in her personal files. They were just using her terminal.

18. The earliest e-mail entered as an exhibit is dated December 18, 1998. (Exhibit 9) The last e-mails are dated December 20, 2001. (Exhibit 6-15 and 6-16)

19. The documents retrieved from Appellant's document files are dated April 20, 1992 (Exhibit 16), August 3, 1993 (Exhibit 17) and February 27, 1996 (Exhibit 18). Exhibit 16 discusses a "proposed Zoo tour" that "should concentrate on the sizes of the animal's sexual organs." The primary topic of the tour would be "how a penis should be worshipped." Exhibit 17 is a series of "greeting macros" which proposes several salacious and derogatory statements for salutations and "respectful letter-ending phrases" to be used when responding to "irritating" situations. Exhibit 18 is a dirty joke about "tool envy."

20. Appellant does not remember writing the documents contained in Exhibits 16 through 18. He admits that they are "unpleasant." He said that the August 3, 1993, macros might have been something he did in a "humorous mode."

21. Paul Linger, former Assistant Director of the Zoo until his retirement in January 1997, testified that he received the e-mail found at Exhibit 7-3, which was sent to him on March 29, 2000. Mr. Linger stated that he thought it was "hilarious" not "disgusting" and that it accurately reflected Appellant's "sense of humor."

22. The e-mail sent to Mr. Linger on March 29, 2000, refers to other parties' sex lives, several derogatory comments about Dr. Freiheit, including references to his sexual orientation and a statement he is "scoring crack in the park on Wednesdays." Dr. Klepinger is referred to as having been on medical leave "to have his head surgically removed from his ass." (Exhibit 7-3)

23. According to Dr. Kramer, only persons who are referenced in the e-mails were told about or shown them. They were not shown to anyone else.

24. Dr. Kramer and Dr. Klepinger testified that the comments in the e-mails did not change their opinions of the persons mentioned in them. Dr. Klepinger testified that he was disappointed as someone in Appellant's position was essentially trashing colleagues and Zoo administrators to others. He stated that he lost respect for Appellant as a result.

25. In an e-mail sent on February 11, 2000 to a "Mike," Appellant writes that he can respond to Mike's e-mail messages. The message contains personal information, including comments about his sex life, his wife and his child. (Exhibit 7-1) Another series of e-mails dated to "Mike", dated August 21-23, 2001, are entirely personal in nature and contain references to his family and his sex life. (Exhibit 6-7 through 6-8)

26. On October 12, 2001, Appellant sent an e-mail to "Doug" which read:

Hi Doug

Long time no see. How are you doing? I understand that the zoo has asked for terrorists to put us out of our misery. I hope to hear from you. John W.

(Exhibit 6-9)

27. Appellant testified that "Doug" is James Fletcher, a former Zoo employee. He stated that he was in contact with Mr. Fletcher after a bear was killed in front of another bear in front of a United States Department of Agriculture inspector. His message was not meant to be a threat as he did not intend to have women and children shot by terrorists at the Zoo.

28. Appellant said that the other e-mails were sent to or received from former Zoo employees or other people in the national zoo community.

29. In early June 2001, there was an incident with an elephant bolting through a crowd of patrons at the Zoo when a 55-gallon barrel was dropped near her. As a result of this incident, and other matters involving the care of elephants in captivity, Dr. Marc Bekoff, professor of biology at the University of Colorado and a well-known animal rights activist, wrote an editorial that appeared in the *Rocky Mountain News* on or about July 7, 2002. He had also given interviews about the incident right after it occurred. On July 5, prior to the publication of this editorial, Dr. Bekoff was in contact with Appellant, sending him a copy of the editorial. Appellant sent Dr. Bekoff an e-mail on July 8, telling him that it was a "good editorial." A copy of the editorial and the correspondence between Dr., Bekoff and Appellant were found in Appellant's e-mail. (Exhibit 6-1 through 6-6)

30. In addition to complimenting Dr. Bekoff for the editorial on July 8, Appellant wrote:

Due to an unfortunate climate here, I need to ask you to use my home email which is [e-mail address omitted].

(Exhibit 6-5)

31. Dr. Klepinger and Dr. Kramer denied that they were upset by Appellant being in contact with Dr. Bekoff. They stated that, if they knew of Dr. Bekoff's interviews and the editorial before hand, they would have contacted the Zoo Administration and Marketing to give them a "heads up" so they could be prepared for the public's reaction. They believed Appellant should have done the same.

32. The Notice of Discipline for this case states:

[...] It is clear that you knew such communications with Mr. (sic) Bekoff were inappropriate and not allowed since you instructed him to contact you at home and not at work. This communication with Mr. (sic) Bekoff focused on the treatment of elephants at the Denver Zoo in June 2001. Mr. (sic) Bekoff even provided you with a courtesy copy of his commentary on the editorial in the Rocky Mountain News regarding elephant treatment. The timing of those e-mails suggest that information provided by you may have lead to articles criticizing the Denver Zoo operations in the local newspapers.

(Exhibit 2-4)

33. On Sunday, November 18, 2001, Appellant sent an e-mail to Dr. Bekoff in which he wrote:

The USDA inspection report is all true and obviously public knowledge. The bear incident was sad and tragic; the seal lion pool drainage situation and chemical testing an unfortunate error of judgement (sic) by Mr. Leeds; the other items were relately (sic) minor. I am not in the loop for elephant information, but I am aware of the problems being investigated at the zoo in Springfield and the USDI elephant transfer permit questions. Thanks for the information.

(Exhibit 6-10)

34. The USDA report referenced in the e-mail was critical of the Zoo. The "bear incident" was the one in which he was in contact with Mr. Fletcher.

35. Appellant claimed that the "venting" e-mails were not his, but the "humorous" ones were. Appellant did not testify as to which he considered which.

36. Appellant was given notice of contemplation of discipline on February 14, 2002. (Exhibit 3)

37. A pre-disciplinary meeting was held on March 18, 2002. During the meeting, Appellant stated that, although he had communications with Dr. Bekoff, he denied divulging confidential information to him. As a result, a charge of violating CSR §16-50 16) (divulging confidential information from official records to unauthorized individuals) was dropped. Appellant was found to have violated CSR §§16-50 A. 18) and 20) and 16-51 A. 2), 4), 5), 7) and 11). His statement at the meeting, prior disciplinary history and work record were considered in imposing discipline. He was suspended for one week commencing Sunday, March 24, 2002, ending Thursday, March 28, 2002. (Exhibit 2)

38. Appellant was issued a Verbal Warning in February 1997 for making offensive and intemperate remarks to Dr. Freiheit and Jose Trujillo, Director of Facilities at the Zoo. (See, Exhibit 3-5)

39. Appellant denied that he was told not to use equipment for anything other than strictly for Zoo business. He stated that he was not told until September 2001, at a senior staff

meeting, that there was no expectation of privacy in Zoo equipment. He stated he has not received outside e-mail since April 1, 2002 (*i.e.*, after he was disciplined). He stated that out of 4,000 e-mails, only a handful are unprofessional.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR Rule 16 governs discipline. CSR §16-10 sets out the purpose of the Rule:

The purpose of discipline is to correct inappropriate behavior or performance. The type and severity of discipline depends on the gravity of the infraction. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority or designee will impose the type and amount of discipline she/he believes is needed to correct the situation and achieve the desired behavior or performance.

The disciplinary action taken must be consistent with this rule. Disciplinary action may be taken for other inappropriate conduct not specifically identified in this rule.

CSR §16-20, Progressive Discipline, provides in relevant part:

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:
 - a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency file on the employee;
 - b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
 - c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority;
 - d) Involuntary demotion, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority; and
 - e) Dismissal, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority.
- 2) Wherever practicable, discipline shall be progressive. However, any measure or level of discipline may be used in any given situation as appropriate. This rule should not be interpreted to mean that progressive discipline must be taken before an employee may be dismissed.

CSR §16-50, Discipline and Termination, provides, in relevant part:

A. Causes for dismissal.

The following may be cause for dismissal of a career service employee. A lesser discipline other than dismissal may be imposed where circumstances warrant. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 18) Conduct which violates an executive order which has been adopted by the Career Service Board.
- 20) Conduct not specifically identified herein may also be cause for dismissal.

CSR §16-51, Causes for Progressive Discipline, provides, in relevant part:

A. The following unacceptable behavior or performance may be cause for progressive discipline. Under appropriate circumstances, immediate dismissal may be warranted. Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline, up to and including dismissal from employment. It is impossible to identify within this rule all potential grounds for disciplinary action; therefore, this is not an exclusive list.

- 2) Failure to meet established standards of performance including wither qualitative or quantitative standards.
- 4) Failure to maintain satisfactory working relationships with coworkers, other City and Count employees or the public.
- 5) Failure to observe department regulations.
- 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.
- 11) Conduct not specifically identified herein may also be cause for progressive discipline.

CSR § 15-80, *et seq.*, sets out the electronic communications policy. It provides, in relevant part:

§15-80 Electronics Communications Policy

§15-81 Policy

[...] Employees who have access to one or more forms of electronic media

and services, including but not limited to computers, e-mails, telephones, voice mail fax machines, external electronic bulletin boards, wire services, on-line services, and the internet should use these services for official business.

[...] all employees should remember that electronic media and services provided by the City are City property and their purpose is to facilitate and support City business.

§15-82 Prohibited Communications

Electronic media shall not be used for knowingly transmitting, retrieving, or storing any communication that is:

- A. discriminatory or harassing;
- B. derogatory to an individual or group;
- C. obscene;
- D. defamatory or threatening; or
- E. engaged in for any purpose that is illegal or contrary to the City's policies or business interests.

§15-83 Personal Use

The City provides electronic media and services primarily for employees' business use. Limited, occasional or incidental use of electronic media for personal, non-business purposes is understandable as long as it is of a reasonable duration and frequency, does not interfere with the employee's performance or job duties, and is not in support of a personal business. Employees are expected to demonstrate a sense of responsibility and not abuse this privilege. Abuse of this privilege may result in correct action, up to and including dismissal.

§15-84 Access to Employee Electronic Communications

Employees cannot have an expectation of privacy with respect to messages or files sent, received, or stored on the City's electronic communication systems, including Internet activity. Any information gathered or communicated using the City's electronic communication systems can be accessed, monitored, and read by authorized employees.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matters shall be subject to appeal:

- b) Actions of an appointing authority: Any action of an appointing authority

resulting in dismissal, suspension, involuntary demotion, disqualification, layoff, or involuntary retirement other than retirement due to age which results in alleged violation of the Career Service Charter Provisions or Ordinance relating to the Career Service, or the Personnel Rules.

Analysis

The City Charter C5.25 (4) requires the Hearing Officer to determine the facts in this matter "de novo." This has been determined to mean an independent fact-finding hearing considering evidence submitted at the de novo hearing and resolution of factual disputes. *Turner v. Rossmiller*, 35 Co. App. 329, 532 P.2d 751 (Colo. Ct. of App., 1975)

Because this is an appeal of a disciplinary action (one-week suspension), the Agency has the burden of proof to demonstrate that its decision was within its discretion and appropriate under the circumstances.

Appellant has been charged with violating two provisions of CSR §16-50 A., one being the violation of an Executive Order which has been adopted by the Career Service, the other being the catchall provision for "conduct not specifically identified." CSR §§16-50 A. 18) and 20). Both of these are dismissed.

The Agency cites Executive Order 16 (concerning the use of electronic mail) as the basis for the violation of CSR §16-50 A. in the Notice of Discipline. A copy of the Executive Order is a proposed exhibit. However, the Executive Order was not entered into evidence, either by stipulation or upon motion to admit. There was also no testimony that the Executive Order was adopted by the Career Service Board or that it was meant to apply to equipment owned by an agency operating under a cooperation agreement with the City. Without any evidence about the Executive Order and admission into evidence, the violation of CSR §16-50 A. 18) was not established. It is dismissed.

Similarly, the violation of CSR §16-51 A. 7) is dismissed for the failure to establish an element of the charge, *i.e.*, that the computer was City equipment. The only testimony elicited is the computer is owned and maintained by the Foundation, not the City. The Internet domain is not a City of Denver e-mail address (*i.e.*, ending in "ci.Denver.co.us.") It is "denverzoo.org," demonstrating that it belongs to the Foundation. Since the Agency failed to prove that Appellant was misusing City equipment, this violation must also be dismissed.

Appellant is also charged with violating CSR §16-51 A. 5), failing to observe department regulations. There seem to be two bases for this violation. First is the CSR's electronic communication policy (CSR §15-80, *et seq.*)¹ The second basis is the Zoo's own computer policy regarding e-mail usage.

Reliance upon the CSR electronic communication policy is problematic because it refers to the electronic media and services "provided by the City." These services are deemed "City property and their purpose is to facilitate and support City business." As stated above, the Agency did not prove the nexus between the City's property and the Zoo. This basis for the

¹ While the Agency did not place Exhibit 12, which is a copy of CSR §15-80, *et seq.*, into evidence, the Hearing Officer can take judicial notice of the policy since it has been adopted as a Career Service Rule.

violation has not been established.

The Zoo's own policy, which was adopted in March 1998 and distributed to all employees, whether Career Service or Foundation employees, specifically provides that the e-mail may only be used for "company purposes" and may not be used to make defamatory or offensive comments about other employees. It also warns that Zoo administration may access and read any user's e-mail at any time. (Exhibit 11)

Appellant denied that he saw this policy prior to the hearing. The Hearing Officer does not believe this assertion. Ms. Bilyeau testified that it was distributed and applied to both CSA and Foundation employees (*cf.*, the policy at proposed Exhibit 13, which was not admitted into evidence as it was for Foundation employees only). Consistent with Ms. Bilyeau's testimony is the fact the policy is addressed to "All Employees," not just Foundation employees.

The evidence shows that Appellant was using his e-mail for other than Zoo purposes. The August 23, 2001, e-mail to "Mike," the October 12, 2001, e-mail to "Doug," the multiple e-mails from and to "Pat" and the jokes received from others (see, Exhibit 6-7 through 6-16) do not deal with Zoo business and contain offensive material.

The Hearing Officer did not believe Appellant's story that the e-mail response contained at Exhibit 6-6 was begun by him but that the offensive material was added by some unknown person while Appellant was at lunch. The derogatory and offensive comments made in this e-mail are consistent in tone and style with the comments found in the other e-mails which Appellant admits sending. However, since Appellant never sent this e-mail – and while the Hearing Officer suspects that is because he hit the "print" icon rather than the "send" icon by mistake – Appellant did not violate the policy by distributing offensive comments to Ms. Ryan on July 10, 2001. The Hearing Officer is also not considering the e-mails to Dr. Bekoff (Exhibit 6-1 through 6-5) as part of this allegation. While it might have been unwise for Appellant to send these from his Denver Zoo e-mail address, he has a protected First Amendment right to provide information of public concern to Dr. Bekoff (*see*, discussion below). The fact the communications did not place the Zoo in the best light do not make them defamatory or offensive.

The violation of CSR §16-51 5) has been established because Appellant violated the Zoo's e-mail policy.

Appellant is charged with violating CSR §16-51 A. 2), failure to meet established standards of performance including either qualitative or quantitative standards. The Agency submitted a copy of Appellant's classification specifications as an exhibit. (Exhibit 15) The Hearing Officer finds that this is a document that might be used to establish performance standards. However, the Agency did not tie the job description to the conduct which forms the basis of this matter. This allegation is dismissed.

Appellant is charged with an alleged violation of CSR §16-51 A. 4) failure to maintain satisfactory working relationships with coworkers. There are two problems with this charge. Appellant was well known to disagree with his superiors at the Zoo even before the e-mail to Ms. Ryan was discovered. Both Appellant and the Zoo's witnesses testified to this fact. The Zoo's witnesses were just surprised by the level of his anger. Yet, the Zoo never disciplined Appellant for

his bad attitude before the discovery of the e-mails. If Appellant's attitude was such a concern, the Zoo should have disciplined Appellant earlier so that he could have corrected his behavior.

The other problem is that the evidence supporting Appellant's failures to work well with his coworkers come from statements made to third parties, not actual communications between Appellant and his superiors. Appellant apparently had an expectation of privacy in those e-mails, poorly founded as it was. Had the e-mail to Ms. Ryan never been discovered, Appellant's superiors would not have known how deep his anger was. This leads the Hearing Officer to conclude that Appellant was able to hide his disdain sufficiently to work with others at the Zoo. This violation is dismissed.

The violation of CSR §16-50 A. 20) is dismissed. This provision is meant to be a "catchall" for the unique serious misconduct not otherwise identified by the Career Service Board in its list of specific violations. It cannot be used to correct other CSR §16-50 A. violations where there has been a failure of proof.

The violation of CSR §16-51 A. 11) is likewise dismissed. The Agency produced evidence that established a violation of a specific provision of CSR §§16-51 A. This "catchall" provision is dismissed.

The last question for the Hearing Officer is the appropriate level of discipline. The Hearing Officer has considered all the evidence presented and the demeanor of the witnesses for both sides. It is clear to the Hearing Officer that the parties hold divergent views about the seriousness of Appellant's misconduct. The Zoo believes that Appellant's misconduct merits the one-week suspension he received and Appellant believes that he did nothing that requires he be disciplined. Both sides are wrong. Appellant was using the e-mail to send personal messages, whatever their content, which is forbidden by the Zoo's policy on computer and Internet use. As a supervisor himself, Appellant had to know that this was wrong; the fact that he told Dr. Bekoff in July 2001 to write to him at home is evidence he knew it was wrong. Therefore, discipline is merited. The problem is, the Zoo over-reached when it imposed the one-week suspension.

According to the Zoo's witnesses, they first learned that Appellant was misusing his computer in July 2001. While it might have been unclear whether Appellant had sent the e-mail to Ms. Ryan, was clear Appellant was receiving unauthorized and inappropriate personal e-mails from others. The Zoo did not discipline Appellant immediately. It chose to wait and make six downloads from Appellant's e-mail mailbox to collect several personal and derogatory e-mails sent by Appellant. The lack of prompt disciplinary action is problematic when the Zoo is trying to establish that Appellant's misconduct was serious enough to require a suspension.

The failure to take immediate remedial action cuts against the purpose of progressive discipline, which is to correct inappropriate behaviors immediately. Then, if Appellant continued to send and receive personal e-mails, the more severe discipline of suspension would have been called for.

The Agency did not follow this course of action. Instead, it waited and downloaded personal e-mails for several months in order to collect enough offensive e-mails to support a one-week suspension. The failure to act promptly to correct Appellant's behavior cannot be condoned.

This failure also leads the Hearing Officer to question why this course of action was followed. The Hearing Officer believes the Zoo waited to discipline Appellant because the Zoo wanted to impose more than a written reprimand given the fact that Appellant had been in contact with a known critic of the Zoo.

Despite the statements made by the Zoo's witnesses that they are not angry with Appellant for being in contact with Dr. Bekoff, the Hearing Officer does not believe them. The Zoo's witnesses testified in identical language and in identical tones when every time they were asked about their reactions to Appellant's correspondence with Dr. Bekoff. Simply put, they were very well rehearsed in how to avoid stating that they were upset with Appellant and that the belated discipline was in retaliation for his having been in contact with Dr. Bekoff.

The Hearing Officer does not believe that Zoo officials were simply displeased because they could not give the Public Relations Department a "heads up" that De. Bekoff's editorial would be in the newspaper. The Hearing Officer concludes that Appellant's superiors were very angry with him for being in contact with Dr. Bekoff at all and permitting his portrayal of the Zoo in a very bad light. Dr. Bekoff's editorial merely added some fuel to the fire. But it did not cause the public relations problems the Zoo experienced in 2001. The elephant and bear incidents and the USDA report did that.

The Hearing Officer is concerned that Appellant was suspended for one week not because he was writing nasty notes to Paul Linger and others expressing his disdain of his superiors (as this disdain was very well known), but for his exercising a protected First Amendment right to speak out on issues of public interest.

To be protected, the speech [of a public employee] must be on a matter of public concern, and the employee's interest in expressing [him]self on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Waters v. Churchill, 511 U.S. 661, 668 (1994), citing *Connick v. Meyers*, 461 U.S. 138, 142 (1983), quoting *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 568 (1968).

The decision in *Pickering* is most instructive. The United States Supreme Court held that a public school teacher could not be constitutionally compelled to relinquish his First Amendment rights he would otherwise enjoy as a citizen to comment as a matter of public interest with regards to the operations of the school district for which he worked. This applies, the Court states, even when the comments are critical of the governmental employer. Public employees are free to speak on such questions without fear of retaliation by way of discipline. Absent proof of false statements knowingly or recklessly made, the public employee's exercise of his right to speak on issues of public importance may not be used as a basis for dismissal from public employment.

Likewise, the exercise of the right to speak out on issues of public interest cannot be used to impose the lesser, but still severe, discipline of a one-week suspension. The Hearing Officer finds that the Zoo imposed the one-week suspension not because the e-mails Appellant sent to his friends contained derogatory comments about Zoo personnel, but because he was in contact with

Dr. Bekoff about specific incidents involving the care of animals and the USDA report. This interpretation of the situation is supported by the fact that originally Appellant was charged with violating CSR §16-50 A. 16), divulging confidential information from official records to unauthorized individuals. (Exhibit 3-1) While this violation was dropped as a charge in the disciplinary letter, the factual basis underlying this charge remains. In particular, the comment "[i]t is believed that the information you provided to Mr. (sic) Bekoff was subsequently used as evidence to criticize the Denver Zoo" demonstrates the Zoo administration's anger at Appellant. (Exhibit 2-3)

Perhaps, the Zoo's administration, in order to disguise the discipline so it would not appear to be for exercising First Amendment rights, waited to build up the case against Appellant for several months, when it thought more discipline might be supportable. This violates CSR §16-10, *et seq.* The level of discipline imposed by the Zoo is found to be arbitrary and capricious and otherwise in violation of the rule or law. It must be modified.

The evidence adduced at the hearing established Appellant violated the Zoo's policy by using his office e-mail for personal purposes. He is to be disciplined for that and that alone.

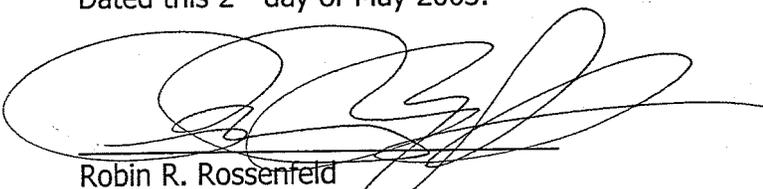
There were grounds for discipline when the Zoo found that Appellant was using his office e-mail for personal purposes, no matter the content, in July 2001. The Zoo admits that there was no proof that Appellant had sent the offensive e-mail, only that he was receiving it. But, according to the Zoo's policy on e-mail use, that should have been enough.

Given Appellant's prior disciplinary history (a verbal warning in February 1997) and long-time employment at the Zoo, a written reprimand should have been issued at that time to give Appellant the opportunity to correct his behavior. For this reason, the Hearing Officer imposes the discipline of a written reprimand.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer MODIFIES the disciplinary action as follows: The violations of CSR §16-51 A. 5) is AFFIRMED. The violations of CSR §§16-50 A. 18) and 20) and 16-51 A. 2), 4), 7) and 11) are DISMISSED. The Agency is ORDERED to MODIFY the discipline from a one-week suspension to a written reprimand, consistent with the findings in this decision. The Zoo is further ORDERED to repay Appellant his one-week's pay and all benefits attached thereto.

Dated this 2nd day of May 2003.



Robin R. Rossenfeld
Hearing Officer for the
Career Service Board