

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

Appeal No. 27-01

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**FINDINGS AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**DOLORES GALLEGOS, Appellant**

Agency: GENERAL SERVICES, THEATRES AND ARENAS,  
and THE CITY AND COUNTY OF DENVER, a municipal corporation

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**INTRODUCTION**

This matter comes before the Career Service Board on appeal by Dolores Gallegos (hereinafter "Appellant") filed February 27, 2001. Appellant challenges the Department of General Services, Theatres and Arenas' (hereinafter "Department" or "Agency") decision to terminate her employment because Appellant used Agency credit to purchase home-office equipment without authorization after she was in an automobile accident, then failed to notify or reimburse the Agency until it confronted her about the charges when she returned to work.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Wilkerson ("hearing officer") on May 4, 2001 at the Career Service Authority Offices. Appellant was present and was represented by Amado Cruz, Esq. The Agency was represented by Assistant City Attorney Mindy Wright, with the Department's Operations Administrator, Jennifer Macy, present for the majority of the proceedings and serving as advisory representative for the Agency.

Witnesses for the Agency included Ms. Macy, the Department's Computer Support Liaison Nikki Sandoval, and the Department's Deputy Manager Fabby Hillyard.

Appellant's witnesses included Appellant's husband Martine Gallegos, and Appellant herself.

The parties stipulated to the admission of Agency's Exhibits 1 through 7 and Appellant's Exhibit E. Appellant withdrew Exhibits A through D. No other exhibits were offered or admitted.

For purposes of the Findings and Order, the Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

### ISSUES

1. Whether the Agency demonstrated that Appellant's actions constitute:
  - a) Theft, destruction, or gross neglect in the use of City and County property in violation of CSR Rule 16-50 A. 2);
  - b) Dishonesty, including altering or falsifying official records, lying to supervisors or falsifying records with respect to official duties, using official position or authority for personal profit or advantage, or otherwise acting dishonestly in violation of CSR Rule 16-50 A. 11);
  - c) Failure to meet established standards of performance, including either qualitative or quantitative standards, in violation of CSR Rule 16-51 A. 2);
  - d) Conduct not specified in CSR Rule 16-50 and 16-51 which may otherwise be cause for discipline.
2. Whether the Agency demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
3. If so, whether the Agency's termination of Appellant is reasonably related to the seriousness of the offense given the totality of the evidence.

### FINDINGS OF FACT

1. Appellant was the accounts payable clerk for the Department, and also handled part of the Department's payroll duties. She was an Agency employee for a total of thirteen years. The first ten were devoted exclusively to payroll. Her primary duty became accounts payable in January of 1999, when the individual previously responsible for those duties resigned and Appellant assumed her responsibilities. Appellant is the only accounts payable clerk in the Department. Appellant has no history of reprimands or disciplinary actions.
2. As part of her duties, Appellant is responsible for reviewing all bills. Individuals responsible for opening the mail date-stamp the bills, then place these items in Appellant's box. Appellant enters the data relevant to the account payable into the computer, signs off on her review and then takes the item either to her direct supervisor, Terry McPherson, or to Deputy Manager Fabby Hillyard for his or her review and authorization. Any improper accounts payable which the accounts payable clerk might miss are therefore reviewed by either Mr. McPherson or Ms. Hillyard.

3. On November 21, 2000, Appellant was involved in a car accident in which she sustained a fractured tibia fibula and cervical strain injury. She was hospitalized for surgery during which she had three pins and one titanium rod inserted in the broken bone in her leg. During her stay at the hospital, Appellant was administered morphine for the pain of her injuries. She was released from the hospital on November 24, 2000. The administration of morphine ceased upon her release from the hospital.
4. During the first several weeks after Appellant's release from the hospital, she was taking Tylenol with Codeine and Naprosin for pain. Appellant may have been on a third medication as well, but does not now clearly recall. She continued on these medications for an uncertain period of time, and later added or switched to other pain medications, including Vicodin and Flexeril on December 21, 2000 (*see*, Exhibit E). Appellant and her husband testified that during Appellant's convalescence she slept a lot, and that she was in pain, forgetful and repeated herself on several occasions. Both Appellant and her husband testified that she is normally active and alert, and these behaviors were not typical for Appellant.
5. During the week after Appellant's release from the hospital, she began sorting through her options during recovery. Her husband took her to the office by wheelchair on or around November 27. Appellant also had one three-way telephone conversation, on or around November 30. On both of these occasions she spoke with Ms. Hillyard and Mr. McPherson about the possibility of working part-time or full-time at home. The Agency representatives told her this would be possible if she could establish Internet access. The Agency witnesses testified that they told Appellant they could assist with transportation of Appellant's work papers to and from her house, and that the Department's computer liaison, Nikki Sandoval, could come to her home and help her establish Internet access. However, the Agency could not fund a home office and she would have to pay for the costs of setting up and operating her office from home herself. Appellant testified that as of those conversations, she understood the Agency's position that it could not fund a home office.
6. During the same week, Appellant also paid a personal visit to the office to speak with Ms. Sandoval about the details of establishing an Internet uplink. Ms. Sandoval told Appellant to contact AT&T as the potential Internet provider. Appellant did have conversations with AT&T that week and had arranged an appointment for the company to connect her computer on December 6, 2000. AT&T gave Appellant a list of items she would need in order to accomplish this. Appellant further spoke with Ms. Sandoval by telephone on several occasions during the week concerning this subject.
7. During the time period between November 27 and December 5, 2000, Appellant was also in communications with the Department's Operations Administrator, Jennifer Macy, concerning the possibility of Family Medical Leave (hereinafter "FML"). Appellant was further in communications with her insurance provider concerning what disability coverage they provided.
8. Ms. Hillyard, Ms. Sandoval and Ms. Macy testified that the conversations described in paragraphs 5 through 7 (above) were fairly detailed, and that Appellant did not appear to be under the influence of drugs or otherwise impaired during these conversations.

9. On Sunday, December 3, Appellant's husband took her to Office Depot by wheelchair, where she intended to purchase the items necessary to establish Internet access. These items were an anti-virus software device, a "PCI" board, and a box of floppy disks to back up her existing programs (*see*, Exhibit 6). Appellant had \$100.00 in cash with her at the time. According to the invoice in Exhibit 6, these items apparently could have been purchased for \$100.00. While Office Depot did not carry the PCI board Appellant needed, one of the clerks informed Appellant that one was available at a store across the street. There is no evidence in the record concerning whether Appellant proceeded across the street to purchase the PCI board, and if so, how she paid for it.
10. While Appellant was at Office Depot, she decided to pick up some paper for her printer as an afterthought, and asked an Office Depot clerk for assistance in finding the type of paper she used. The clerk told her that the type of computer paper she was looking for was for a dot-matrix printer which had become obsolete, and advised Appellant to purchase a modern printer. The clerk then directed Appellant to a printer on sale.
11. At some point during the discussion between Appellant and the Office Depot clerk, the option of using the Agency's Office Depot credit line to purchase this equipment was raised either by the clerk or by Appellant herself. Appellant was aware of the existence of this line of credit because of her position in accounts payable. Appellant decided to use the credit line to purchase the printer and other items, as the total exceeded \$100.00. Appellant testified that her state of mind at that moment was that she intended to pay the Agency back. Appellant testified that during this entire episode, she was still laboring under the assumption that she would be working at home the following week rather than going on leave, and that due to her disability she wanted to get everything she needed while she was there at the store.
12. Appellant then noted that a scanner was also on sale, and decided to purchase the scanner and scanner paper for a personal family history project she intended to pursue. There is no dispute that this item was not needed for work and was for personal purposes only. Appellant testified that her state of mind upon making this decision was that since she would be repaying the entire amount of the charge, the addition of non-work-related items was not relevant or important.
13. Mr. Gallegos testified that he was aware the Agency had told Appellant it could not cover the costs of setting up a home office. He admonished Appellant that she should not use the Agency's credit to make these purchases. Mr. Gallegos testified that Appellant said something to the effect that "I'm going to go ahead and do this now because I'm going to pay them back."
14. Appellant testified that the office uses e-mail distribution systems such as "Aspen" and "Mass-90" which distribute work-related information to the relevant employees. Appellant testified that she prints up all business-related e-mails and files them according to the subject matter. Agency witnesses testified that Appellant did not need a printer because of their offer to transport Appellant's paperwork to her at home. However, there is no testimony establishing that Appellant's need for a printer at home, or lack thereof, was specifically part of the discussions between Appellant and the Agency supervisors concerning the establishment of a home office.

15. Appellant proceeded to purchase both the printer and the scanner, as well as a printer cable, two boxes of printer paper, one box of photo-scanner paper, and one warranty for each of the two pieces of hardware, in addition to the items needed for Internet access. Appellant charged the entire amount of \$328.84 on the Agency's Office Depot account and did not put any of the \$100.00 in cash she had with her toward this amount (*see*, Exhibit 6). Appellant and her husband later returned home with the purchases, brought them into the house, and set them near the computer. Appellant eventually opened one ream of paper and one box of the computer disks
16. Appellant and her husband both testified that to their best recollection, the rest of the boxes remained closed until the time they returned the items to the Agency. None of the Agency witnesses knew whether the boxes were still closed when they were returned. Since the only evidence presently before the hearing officer on this issue is the testimony of Appellant and her husband, the hearing officer finds that the rest of the boxes and packages, including the printer and scanner, remained unopened.
17. At some point around December 4 or 5 of 2000, after Appellant purchased the equipment at Office Depot, Appellant had another three-way conversation, this time with Mr. McPherson and Ms. Hillyard. At that time Mr. McPherson informed Appellant that the Agency determined she could not work part-time at home. Because of the workload, the position required full-time coverage, and it was not feasible for the Agency to have two people covering the duties it included. Therefore, the Agency informed Appellant she would have to either work full-time at home or choose some other option. Appellant testified that the purchase of the items at Office Depot did not come to her mind during this conversation.
18. On or around December 5, 2000, Appellant determined that she would receive personal injury protection "PIP" coverage through her automobile insurance in the event she took leave reasonably related to the accident, but that she would not receive such benefits if she were working and receiving income. At that time, Appellant elected to take advantage of this option and decided to take Family Medical Leave in order to convalesce. At that time she abandoned the plan to set up a home office and submitted her FML request to the Agency (*see*, Exhibit 4).
19. The Agency received Appellant's FML request and began processing the necessary paperwork. On December 8, 2000, it sent Appellant notification that she had been granted conditional FML (pending receipt of her doctor's certification of serious illness) with an effective backdate of November 27, 2000 (Exhibit 4).
20. Appellant and her husband both offered credible testimony that Appellant continued to exhibit the same unusual symptoms and behaviors described above in paragraph 4 for the next several weeks during her convalescence. Appellant testified that she forgot to pay her household bills during the month of December.
21. Sometime around the middle of December of 2000, the office held a Christmas party at an ice arena. Appellant attended this party with her daughter, who is also a city employee. Appellant was in a wheelchair at the time and her daughter wheeled her around on the ice.

Ms. Macy testified she saw Appellant at the party and that Appellant's demeanor was "usual and cheerful" at that time.

22. Agency witnesses testified that the Department is centralizing its computer system in an effort to achieve the universalization of all company computer hardware. Ms. Sandoval is the individual responsible for this centralization effort. As such, the Agency requires her authorization of all requests concerning computer hardware and supplies, for necessity and compatibility. Ms. Sandoval testified that she is also responsible for submitting orders for general office supplies as requested by employees.
23. One day in early January of 2001, while Appellant was still on leave, Ms. Sandoval was covering for an employee, Pam Moore, who normally opens the mail. Ms. Sandoval testified that she opened the bill from Office Depot (Exhibit 6, p.1). It caught her attention because it contained computer equipment she did not recall authorizing, and because she purchases company computer equipment from Comp USA, not Office Depot. Ms. Sandoval testified that in particular the scanner caught her attention, because the only individuals in the Department who use scanner equipment are in marketing. Ms. Sandoval testified that employees have purchased items on the Office Depot charge account without her authorization and that they have forgotten to tell her in the past, but that usually these are items such as notebooks, file folders, and the like, typically not exceeding \$50.00 in value.
24. Because this practice is not unheard of, Ms. Sandoval asked around the Department to see if someone had made this purchase on the Office Depot account and had forgotten to tell her. No one knew about the charge. Ms. Sandoval then went to Ms. Hillyard to inform her about the charge. Ms. Hillyard directed Ms. Sandoval to contact Office Depot and request a copy of the charge slip. Ms. Sandoval made the request and Office Depot sent the signed copy of the charge slip on January 22, 2001 (Exhibit 6, p. 2). The charge slip bears Appellant's signature.
25. Ms. Hillyard testified she consulted with Regina Garcia in the Department's Human Resources Section concerning what actions to take, and shortly thereafter prepared to issue a Notice of Contemplation of Disciplinary Action to Appellant.
26. Meanwhile, at some point in January, Mr. McPherson had asked Appellant to attend a training session on January 25, 2001. Appellant and Mr. McPherson both attended this training. While they were there, Mr. McPherson told Appellant of some problems he was having with a backlog in accounts payable. Appellant told Mr. McPherson she would come in to the office and help straighten out the problems sometime in the next couple of weeks while she was still on leave. It is clear that, by this point at the very latest, Appellant was aware Mr. McPherson was covering Appellant's duties during her absence. Appellant did not tell Mr. McPherson about the Office Depot purchase during these encounters.
27. On the morning of February 1, 2001, Appellant went in to the office to assist with the problems described by Mr. McPherson as she told him she would. Appellant was still on crutches at the time. She did not procure a return-to-work pass before going in. Appellant had been there approximately fifteen minutes when her presence became known to Ms. Hillyard, who immediately went with Ms. Macy to Appellant's office and asked Appellant if

she had a return-to-work pass. Appellant said she did not. Ms. Macy and Ms. Hillyard then hand-delivered a Contemplation of Disciplinary Action letter ("Contemplation letter") to Appellant (Exhibit 3). The Contemplation letter set the predisciplinary meeting for February 13, 2001. The Contemplation letter did not direct Appellant to return the items in question or otherwise give Appellant directions concerning what to do with them.

28. Appellant read the letter and immediately went to Ms. Macy's office. As both Appellant and Ms. Macy testified, Appellant stated to Ms. Macy that the allegations in the letter were "absolutely correct," that she had in fact used the city's credit to purchase the items, that she had intended to pay the account, and that she had forgotten to tell anyone and had forgotten she had done it until receipt of the Contemplation letter just then.
29. Appellant appeared at the predisciplinary meeting with her husband on February 13, 2001. Present on behalf of the Agency were Ms. Hillyard, Ms. Macy and Mr. McPherson. At the meeting, Appellant again stated that the allegations were completely true, and reiterated that she had meant to repay the Agency for the entire charge. Appellant further stated that this incident occurred on Sunday which was the only day she could get to the store, that she was thinking she would need most of these things for work the following week, and she did not want to have to return to the store in her condition. Appellant further stated that the items in question were still in the boxes and had never been opened. Appellant's husband stated that Appellant had been under a lot of strain due to the circumstances. Agency witnesses did not recall either Appellant or her husband discussing the medications she had been on or their effects on her at the time of the predisciplinary meeting.
30. Appellant and her husband brought all the items purchased at Office Depot to the meeting except the printer, the scanner and one ream of paper. These hardware items comprised the substantial bulk of cost in the charge. Appellant testified she did not bring these items because she was on crutches and could not carry them, and she did not know where they would be parking or how far it would be to get into the building. Mr. Gallegos testified that he was more worried about helping his wife get inside to the meeting than he was about the machinery. Appellant further testified that at that time she wasn't sure whether she would be returning these items to the store, turning them over to the Agency, or reimbursing the Agency for them. For these reasons, she left them at home and awaited instructions from the Agency.
31. At the time of the meeting, the Agency gave Appellant no instructions concerning what to do with the remaining items she had not yet returned. Appellant testified that she offered to write a check for the value of the remaining items she had not returned to the Agency. The Agency's cross-examination implies a challenge of this claim, in its question that since the meeting was audio taped, this offer should therefore be on the tape. Appellant responded she recalled making the offer after the meeting was over and therefore it might not be. The Agency called no witnesses on rebuttal to challenge Appellant's assertion that she made this offer.
32. Ms. Hillyard testified that she had been in her present position since August of 1999 and had Appellant as her accounts payable clerk for this entire period of time. Ms. Hillyard testified that until this incident, she had never had any concern about Appellant's honesty and

trustworthiness. However, Ms. Hillyard testified it alarmed her that Appellant, being in a position of fiscal responsibility and trust such as this one, would take advantage of the situation as she did. Furthermore, as this was a purchase under \$500.00, it might have escaped detection completely since only bills over \$500.00 are reviewed for approval by the Agency's purchasing department. Ms. Hillyard testified that she determined this to be a theft because Appellant purchased these items for herself after being told the Agency could not fund a home office, and because of the time that had passed during which Appellant failed to come forward and inform anyone in the Department of what she had done. Ms. Hillyard felt she would not be able to trust Appellant in such a position in the future. Ms. Hillyard testified she did not know Appellant was on pain medications at the time of the predisciplinary meeting, or at any relevant time.

33. The Agency issued Appellant a letter of termination on February 21, 2001 (Exhibit 2). In this letter, the Agency made a demand for delivery of the remaining items as a condition of Appellant's receipt of her final check.
34. Sometime after the predisciplinary meeting on February 21, 2001, Mr. Gallegos brought the printer, scanner and box of paper to the office. A conference was in session that day. Mr. Gallegos delivered the items and then left.
35. Appellant appealed the Agency's decision on March 2, 2001 (Exhibit 1).

## PRELIMINARY MATTERS

### **1. The Hearing Officer's Jurisdiction**

The hearing officer finds she has jurisdiction to hear this case as a dismissal case, pursuant to CSR Rule 19-10 b), 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 dismissal... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's dismissal was not disputed by either party to this case.

### **2. Burden of proof**

It has been previously established that the Agency responsible for terminating a career service employee bears the burden of establishing, by a preponderance of the evidence, that it

had just cause for the disciplinary action. The Agency must also demonstrate that the severity of discipline is reasonably related to the offense in question. See, In the Matter of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99). The burden of proof was not disputed by either party to this case.

## DISCUSSION

### **1. Rules the Agency alleges Appellant violated.**

The Agency posits Appellant violated the following relevant portions of CSR Rule 16, DISCIPLINE:

#### Section 16-50 Discipline and Termination

##### 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...

- 2) Theft, destruction, or gross neglect in the use of City and County property and or property... theft of property or materials of any other person while the employee is on duty...
- ...11) Dishonesty, including but not limited to: altering or falsifying official records... lying to superiors or falsifying records with respect to official duties, including work duties, disciplinary actions, or false reporting of work hours; using official position or authority for personal profit or advantage, including kickbacks; or any other act of dishonesty not specifically included in this paragraph.
- ...20) Conduct not specifically identified herein may be cause for dismissal.

#### Section 16-51 Causes for Progressive Discipline

A. The following unacceptable behavior or performance may be cause for progressive discipline.... Failure to correct behavior or committing additional violations after progressive discipline has been taken may subject the employee to further discipline...

- ...2) Failure to meet established standards of performance, including either qualitative or quantitative standards.
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.

## 2. Analysis of the evidence.

The objective facts of this case are virtually undisputed. The Agency asserts, and Appellant readily concedes, that she charged the items in question on the Agency's account, having known about the existence of the account as a result of her position as the accounts payable clerk for the Agency. She then failed to inform the Agency, pay back the money or return the items until the Agency notified her of its knowledge that she had done it.

Where the Agency and Appellant diverge is in their positions concerning Appellant's subjective intent. The Agency argues that Appellant's story doesn't "add up" for the following reasons. First, Appellant appeared in sufficient control of her faculties during the first two weeks after her release from the hospital to consult with them in detail about the potential of setting up a home office. She was capable enough to call AT&T, consult with the company about what she needed to establish an Internet home link, make a list, and pursue getting the items. She was in consultation with the Agency about FMLA, and with her insurance company concerning her accident benefits. Yet Appellant claims she was not able to recall that she had made the charge and to inform the Agency, until they discovered it and approached her. Appellant further purchased equipment not necessary for her to work at home, and failed to contribute her own cash to the bill, at a store which was further from her home than other Office Depot stores.<sup>1</sup> In essence, based on these arguments, the Agency asserts that a preponderance of evidence supports Appellant's deliberate attempt to rob the Agency of the value of these items, then conceal the charge by failing to disclose it, with the intent of keeping the equipment at the Agency's expense. The Agency posits that in doing what she did, Appellant engaged in an act of theft and dishonesty.

Appellant has consistently maintained that she never intended to keep the equipment without paying for it, but instead intended to pay back the charge from the very beginning. She contends that she is in fact guilty, but in her own words, is "guilty of not thinking." She asserts that the medications, the pain, and general upheaval of her life clouded her judgment and led her to make a bad decision, then to forget about the entire matter when she switched course and elected not to work from home. Appellant counters that she never meant to deceive the Agency at all. Therefore this is not an act of theft or dishonesty, but of admittedly terrible judgment which was the result of uniquely stressful circumstances.

The only real dispute in this case is therefore the *intent* of Appellant's actions. The hearing officer observes that theft and dishonesty are crimes of requisite intent as a matter of common sense if not Colorado Statute. Appellant's alleged intent clearly played heavily in the Agency's decision to terminate her. The hearing officer's charge in this case is therefore a determination of Appellant's intent, and therefore of her subjective state of mind at the time she made the purchase in question.

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<sup>1</sup> The Agency's point about the location of the Office Depot in question is lost on the hearing officer. The Agency proffered no testimony from Appellant on cross-examination concerning why she and her husband might have been in that neighborhood to do their errands as opposed to some other location, or what the possible significance of choosing that particular outlet might have been. While the Agency's questions hint at some meaning behind this issue, that meaning was never explained, in opening or closing arguments, direct or cross examination, or otherwise. The hearing officer has therefore disregarded this point.

The hearing officer must therefore assess the credibility of the witnesses and weigh that credibility in light of the totality of the evidence. The hearing officer finds the testimony of all the witnesses in this case, both those of the Agency and Appellant, to be highly credible. Ms. Hillyard's trust in Appellant has obviously been very damaged by Appellant's actions. But Ms. Hillyard's state of mind is based partially on her conclusion that Appellant acted to intentionally defraud the Agency by using Agency funds to set up a personal office at home.

That conclusion is not consistent with Appellant's actions and other circumstantial evidence. First, there is no evidence that at the onset Appellant argued the point, exhibited anger or disappointment, or otherwise reacted negatively when the Agency told her they could not fund a home office for her.

In addition, if Appellant had intended to permanently deprive the Agency of the value of these items, she would have had to anticipate reviewing and concealing the bill herself. Yet Appellant likely did not have any idea how long she would be at home as a result of her injuries, and therefore did not know when she would return to the office or whether she would be there to intercept the bill or not. Appellant also knew that either Mr. McPherson or Ms. Hillyard would review this bill for authorization, and she must have particularly known this was more likely than not if she were not at the office when it was received.

There is also substantial affirmative evidence to support Appellant's assertion of her intentions. The fact that Appellant went to the store with \$100.00 militates against the Agency's theory of Appellant's intent to defraud, in that it tends to support Appellant's original intent to pay for the items with her own money. Appellant's expressed state of mind to her husband at the instant she was making these purchases was that she intended to pay the Agency back for them and so it was all right. This state of mind is further supported in her immediate reaction upon being confronted with the purchase, when she went directly to Ms. Macy and said, "this is absolutely correct," then proceeded to confess and explain her intent to repay the Agency. In fact every time Appellant has spoken about her actions from the first day forward, including while under oath, she has consistently expressed the same intent. Finally, the hearing officer found the assertions and demeanor of both Appellant and Mr. Gallegos while on the stand to be highly credible.

The hearing officer further finds credible Appellant's explanation that she did not think she needed Ms. Sandoval's approval for these items as computer hardware. Appellant stated she did not think she needed to do this because they were not going to be integrated into the office computer system, but rather that she was going to pay the Agency back and keep them at home. The hearing officer agrees with this rationale, and concludes that the office requirement of authorization for computer equipment requests by Ms. Sandoval is irrelevant to Appellant's actions.

The hearing officer is not persuaded by the Agency's argument that most of Appellant's work is boilerplate and could have been printed up at work for her then transported to her home, and that therefore Appellant did not need a printer to work from her home. There is no evidence that the parties specifically discussed the issue of a printer one way or the other in their dialogues about Appellant's working at home. In addition, based on the evidence presently before the

hearing officer, Appellant's decision to purchase a printer came at the Home Depot during the discussion about paper, which was after she had the conversations with Agency officials concerning the home office option. The Agency's option, while understandably a possibility, sounds like an unreasonably cumbersome mode of operation for the Agency to expect Appellant to assume as the alternative, in the absence of specific discussion on the point. Appellant's anticipation of the use of the printer while working at home is therefore not unreasonable based on this evidence.

Furthermore, Agency witnesses responded under cross-examination that employees in the office occasionally make purchases on the Office Depot account without first seeking authorization and/or forget to inform Ms. Sandoval of the purchases. That this was a larger amount than those other unauthorized purchases does not completely negate the mitigating fact that the Agency does permit such activity of occur on occasion. Appellant may have been lulled into a false sense of security by such activity, notwithstanding that she may have taken advantage of it in her state of circumstantially impaired judgment.

Finally, a preponderance of the evidence supports Appellant's contention that she did not tell the Agency about the charge because she forgot about it. First, it is unlikely as a matter of common sense that if Appellant had not forgotten, she would then have gone on FML for an indefinite period, knowing that the bill for the items would be opened and reviewed by her superiors in her absence, which is precisely what happened. Finally, despite that Appellant knew that Mr. McPherson was covering her duties while she was on leave, she did not say anything to him at the training when she offered to come in and help him with the backlog. Under such circumstances as these, Appellant's failure to tell the Agency was not an act of concealment, but rather a *failure* to conceal. The fact that the boxes remained unopened, and Appellant's immediate and candid confession to Ms. Macy, all lend additional credibility to Appellant's contention that she forgot about the purchase of the hardware in question, rather than that she intended to appropriate the items at the Agency's expense.

Appellant's lapse in memory further supports that her original intent was not ill motivated but instead that she intended to repay the charge. It is unlikely that any individual intending to commit a crime would simply forget to cover her tracks after the crime had already been committed, particularly under such circumstances as these, where she would surely be caught if she did not take steps to conceal her actions.

The hearing officer is not persuaded that just because Appellant had enough wits to try to handle her work problems by attempting to set up an Internet link and a home office, and was able to appear at the office Christmas party with her daughter, these things somehow establish that Appellant was thoroughly aware of everything she was doing and was immune from making this kind of mistake. Appellant's attempts appear to be somewhat admirable in light of the fact that she had just been in a serious accident, was badly injured, had surgery to insert pins in her leg, was in pain and on medication, and yet immediately pressed on to pursue her options despite the difficulties she faced. Both she and her husband presented credible testimony that her memory was affected by the totality of circumstances. One does not have to be catatonic in order to have a lapse in memory, or in judgment, or both. On the contrary, the hearing officer finds it more likely than not that Appellant's initial state of mind was, just as she claims, that she was trying to get what she needed while she was at the store and had the chance, given that she

was injured, in a wheelchair, on medication, and reliant on her husband and others for transportation and assistance.

There is no evidence that Appellant has engaged in an abuse of her office at any other time. The fact that Appellant has never been reprimanded or disciplined on any other occasion in thirteen years further establishes that this type of abuse has never happened before, and that it is more likely than not that it would not have occurred at any other time under normal conditions. The hearing officer concludes that the timing of this incident is no coincidence. It was a result of a number of factors -- Appellant's state of mind influenced by pain, physical disability and inconvenience, medications, the influence of the clerk's suggestions, the periodic use of the Office Depot account by others, and the desire to resolve her quandary -- which combined to lead her to engage in an error in judgment.

Based on the foregoing analysis, the hearing officer concludes that a preponderance of the evidence supports Appellant's contention that she went to the Office Depot with the intent of purchasing only what she needed for an Internet uplink, that she intended to pay for those items herself, and that the clerk and sale tags persuaded her to buy the additional equipment. The hearing officer further concludes that Appellant made the purchase on the Agency's Office Depot account with the intent to repay the Agency at the time she so acted, and that she did not intend or attempt to make the Agency fund her home office behind its back. Finally, the hearing officer concludes by a preponderance that Appellant subsequently forgot about the purchase until it was brought to her attention on February 1, 2001.

In the absence of a preponderance of evidence demonstrating the requisite intent to permanently deprive the Agency of the value of these items, and to conceal the purchase, Appellant's actions do not constitute a theft as the Agency asserts. In addition, since Appellant forgot about the purchase, she was not deliberately deceitful in her failure to inform the Agency.

#### **4. Severity of the discipline.**

All this is not to say that Appellant's actions were appropriate or acceptable. Once Appellant decided to commit this indiscretion, she went the extra step of purchasing an expensive piece of hardware, the scanner, which she admitted was for personal purposes. Appellant clearly is, indeed, guilty of "not thinking."

Clearly, the Agency understandably has an interest in deterring the potential for abuse Appellant's actions represent. However, the mitigating circumstances in this case must be considered in a determination of the appropriate discipline. Appellant's circumstances were not typical. Appellant has never been reprimanded or disciplined, and Ms. Hillyard testified that until this happened she had no reason to mistrust Appellant. Given the mitigating circumstances affecting Appellant's judgement, and the fact that a preponderance of evidence demonstrates that Appellant did not intend to permanently deprive the Agency of the value of the equipment, the hearing officer is not persuaded that termination is reasonably related to Appellant's offense.

Mitigating circumstances notwithstanding, in light of Appellant's lapse in judgment, combined with the militating factor of her purchase of an additional costly item clearly for

personal purposes, the hearing officer concurs that some form of moderately severe punishment is appropriate in this case.

The hearing officer is not prepared to completely supplant the Agency's judgment with her own. The most reasonable alternative for all parties involved in this case is to allow the Agency to reconsider the harshness of its discipline, based on the premise that Appellant did not intentionally commit an act of theft, but rather engaged in a serious lapse in judgment while that judgement was circumstantially impaired through no fault of her own. The hearing officer is hopeful that the Agency will arrive at a reasonable alternative discipline better suited to that infraction as supported by the totality of evidence in this case, and that Appellant will accept the alternative disciplinary action as justified by the seriousness of her lapse in judgement.

### CONCLUSIONS OF LAW

1. The Agency demonstrated by a preponderance of the evidence that Appellant's actions constitute:
  - a) Gross neglect in the use of City and County property, namely the Agency's Office Depot account, in violation of CSR Rule 16-50 A. 2). Appellant did not intentionally engage in an act of theft by a preponderance of the evidence in this case, nor did she destroy any Agency property. However, because her actions constituted gross neglect, they are therefore nonetheless a violation of this Rule.
  - b) Conduct not specified in CSR Rule 16-50 and 16-51 which may otherwise be cause for discipline. Appellant engaged in an abuse of the knowledge of her position, which is one of fiscal trust, albeit while under stress and while her judgement was impaired through no fault of her own.
2. The Agency has failed to demonstrate by a preponderance of evidence that Appellant engaged in:
  - a) Dishonesty, including altering or falsifying official records, lying to supervisors or falsifying records with respect to official duties, using official position or authority for personal profit or advantage, or otherwise acting dishonestly in violation of CSR Rule 16-50 A. 11). Appellant forged no documents, but affixed her own signature to the charge slip. Her failure to inform the Agency was an unintentional act of forgetfulness under stress rather than an act of dishonesty. She did not intend to profit from the exchange since she intended to repay the charge.
  - b) Failure to meet established standards of performance, including either qualitative or quantitative standards, in violation of CSR Rule 16-51 A. 2). Ms Hillyard testified that she added this alleged violation as a result of Mr. McPherson's discovery while Appellant was on leave that she was "in arrears" in some of her payments. The Agency failed to offer any evidence substantiating such a charge other than Mr. McPherson's hearsay statements, and failed to call Mr. McPherson himself as a witness to speak to this charge. In addition, Appellant testified that this claim by officials at McNichols was an error on

the part of new management there, that the account had actually been delayed in an approval process outside Appellant's control, and was thereafter paid. Therefore, the Agency failed to establish grounds for this allegation by a preponderance of the evidence.

3. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
4. In light of the totality of evidence in this case, the Agency's termination of Appellant is not reasonably related to the seriousness of the offense.

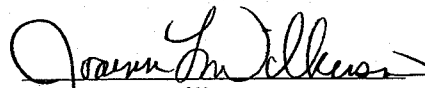
### **DECISION AND ORDER**

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant is REVERSED. This case is REMANDED to the Agency for the determination of an alternative disciplinary action reasonably related to Appellant's actions given the hearing officer's conclusions, based on a preponderance of the evidence, that Appellant did not act with the intent to defraud the Agency, to permanently deprive the Agency of the value of the items in question, or to conceal the purchase from the Agency.

The Agency is ORDERED to MODIFY the letter of termination according to the discipline as determined by the Agency, and to delete the alleged violations set forth above in Paragraph 2 of the hearing officer's Conclusions of Law, as unsubstantiated by a preponderance of the evidence. The existing letter of termination (Exhibit 2) shall be removed from Appellant's files and replaced with the modified version.

The hearing officer RESERVES JURISDICTION over this case pending the imposition of the alternative disciplinary action as determined by the Agency, and notification of the Career Service hearings office of that action by one or both parties to this case.

Dated this 21<sup>st</sup> day of May, 2001.

  
Joanna L. Wilkerson  
Hearing Officer for the  
Career Service Board

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 21<sup>st</sup> day of May, 2001, addressed to:

Amado L. Cruz  
Attorney at Law  
2055 S. Oneida St. Suite 260  
Denver, CO 80224

Dolores Gallegos  
4556 Alcott St.  
Denver, CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** depositing same in interoffice mail, this 21<sup>st</sup> day of May, 2001, addressed to:

Mindi L. Wright  
Assistant City Attorney

Tom Migaki  
Department of General Services

Theatres and Arena's  
Ron Bernstein

V. Granado