

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

Appeal No. 311-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOYCE MENDEZ, Appellant

Agency: DENVER DEPARTMENT OF PARKS AND RECREATION,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Joyce Mendez (hereinafter "Appellant") filed August 10, 2001. Appellant challenges the Department of Parks and Recreation's (hereinafter "Agency") decision to terminate Appellant for allegedly participating and assisting in the conversion of Agency property for personal use by her supervisor.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on October 15 and 16, 2001 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Linda Davidson, with Senior Personnel Analyst Juan Marsh present for the entirety of the proceedings and serving as advisory representative for the Agency. Appellant was present and was represented by Robert J. Bruce, Attorney at Law.

Witnesses for the Agency included Appellant as an adverse witness, Denver District Attorney Investigator Thomas P. Haney, Jr., and the following Agency employees: Mr. Marsh, Deputy Manager of Parks Abel Shaw, Public Information Officer Judy Montero, and Manager James Mejia.

Appellant's witnesses included Appellant.¹

Agency Exhibits 1-3 and 7 were admitted by stipulation. Agency Exhibits 4-6 were admitted over Appellant's objections that they contained hearsay, were cumulative and /or were irrelevant. Appellant's Exhibit D, pages 113-118 were admitted without objection.

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

¹ Appellant's subpoena of Senior Chief Deputy District Attorney Phillip Parrott was quashed as discussed below in Preliminary Matters.

ISSUES

1. Whether the Agency has demonstrated by a preponderance of evidence that Appellant knowingly participated and assisted in the conversion of Agency property for the personal use of her supervisor, or should have known of her participation in such activities.
2. Whether Appellant knowingly participated in a cover-up and concealment of stolen Agency property, or should have known of her participation in such activities.
3. Whether the Agency has demonstrated by a preponderance of evidence that Appellant benefited in any way from her participation and assistance in the alleged conversion of Agency property and concealment of stolen Agency property.
4. If so, whether through the actions described above in 1 through 3, Appellant engaged in:
 - a) Gross negligence or willful neglect of duty in violation of CSR Rule 16-50 A. 1);
 - b) Theft or gross neglect in the use of Agency property in violation of CSR Rule 16-50 A. 2);
 - c) An act of dishonesty, falsifying official records, the acceptance of a bribe or the use of an official position for personal advantage in violation of CSR Rule 16-50 A. 3);
 - d) Failure to meet established standards of performance in violation of CSR Rule 16-51 A. 2);
 - e) Failure to maintain satisfactory working relationships with the public in violation of CSR Rule 16-51 A. 4);
 - f) Failure to observe departmental regulations in violation of 16-51 A. 5);
 - g) Unauthorized use of Agency equipment in violation of CSR Rule 16-51 A. 7);
 - h) Conduct not specified in CSR Rule 16-50 and 16-51 which may otherwise be cause for discipline; and/or
 - i) Acts detrimental to the public interest in violation of the former CSR Rule 16-22 A. 22).
5. Whether the Agency demonstrated just cause for disciplining Appellant.
6. 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 had been an employee for the City and County of Denver since 1975 and had been employed by the Agency since 1988. She began that year as an Administrative Assistant, subsequently serving in the following positions until her termination on July 19, 2001: Data Processing Programmer Analyst, Senior Analyst, Administrative Operations Supervisor, and Support Services Administrator. Appellant has had purchasing authority since the beginning of her tenure with the Agency in 1988.
2. Appellant has a Master's Degree and is a well-educated woman. She served under four different supervisors from 1988 to 2001. She accepted increasingly broad responsibilities through her several title changes during that period. Appellant reports that her performance ratings since the beginning of her tenure with the City and County have largely been "exceeds expectations" or

"outstanding." The Agency did not challenge this assertion. Appellant has no prior disciplinary history.

3. Both the Agency and Appellant described her last position as Support Services Administrator, which she held at the times most relevant to this case, as an "umbrella" position. While it is not clear when Appellant's various title changes occurred in relation to changes in her duties, her position evolved over a period of time to its state at the time of her separation as follows.
 - a. During the early to middle 1990's the City and County of Denver underwent a citywide employment audit. Every position in the city system was audited for potential reclassification during this process. The Agency underwent management reorganizations near the end of the citywide audit. An individual named Mike Flaherty and Appellant worked alongside one another on a number of projects during the mid-1990's. Mr. Flaherty's position was dissolved during the Agency's re-organization in 1996, and several of the programs and responsibilities he had previously administered became those of Appellant. Thereafter she managed the Buffalo Bill Museum, Pahaska Tipi, Chief Hosa Lodge & Camp Ground, and various other contracts. She oversaw the Municipal Golf Program until a new golf administrator was appointed, and conducted a revenue study in preparation for its transfer to the new golf administrator. She reorganized the Four Mile House from a previously fragmented entity into an integrated foundation. Appellant testified these ventures were reportedly losing money prior to Appellant's assignment to them, and reported they are now producing revenues for the City. The Agency presented no evidence to rebut these contentions.
 - b. Prior to his retirement in 1998, Acting Deputy Manager of Parks Ron McKittrick worked alongside Appellant on administration of budget, capital equipment, and fleet management operations. When Mr. McKittrick's position was abolished and he retired in January of 1998 (*see*, Exhibit D, p. 114), these responsibilities became solely Appellant's. One of her responsibilities in fleet management was to monitor bills the Agency received from fleet management in order to assure all charges were reasonable and that overcharges were not being made. Appellant also initiated the state-mandated Underground Utilities Program.
 - c. Charles Robertson was appointed as the Deputy Manager of Parks late in 1997 or early in 1998. In this position he was Appellant's new supervisor. Appellant's title was Administrative Operations Supervisor, pay grade 808, at the time of Mr. Robertson's appointment.² Some time during 1998, Mr. Robertson assigned Appellant to be in charge of citywide administration of the Agency, and designated her as acting Deputy Manager in his absence. Appellant then became the Agency's liaison with the Office of Management and Budget, Denver City Council, representative of the Mayor at various city functions, and chairwoman of a variety of committees. Appellant became responsible for developing personnel policies and regulations, and park maintenance standards.

² Although it is not clear when, at some point the positions of Deputy of Parks and Deputy of Recreation, previously separate positions, were merged. Recreation Deputy Jim Peros resigned and Mr. Robertson was the new Executive Deputy Manager of Parks and Recreation.

4. By the time of her termination, Appellant supervised over 20 individuals and administered a budget of \$28 million.
5. In January of 1998, Appellant made an individual reclassification request to the CSA, pursuant to CSR Rule 7-66 b) and c), presumably based on some of her newly acquired responsibilities. Her position was audited and her request for reclassification was denied at that time.
6. In May of 1998 Mr. Robertson filed a reclassification request on Appellant's behalf pursuant to CSR Rule 7-66 e). The CSA conducted another audit of her position and it was upgraded to Support Services Administrator, pay grade 812, as of December 16, 1998. This was the second-highest non-appointed pay grade in the Agency, with only the position of Finance Director being more highly paid.³ However, there are other positions in the Agency with pay grade 812.
7. While it is unusual for a position to be upgraded four pay grades in a single audit, there is no evidence that the May, 1998 audit by the CSA resulting in Appellant's promotion was in any way conducted improperly or was based on information that was inaccurate at the time of the audit. The CSA subsequently re-audited the position upon Mr. Mejia's appointment as Agency Manager in June of 2001, and it was downgraded to a pay grade of 810. However, there is insufficient evidence to establish whether the duties of the position had changed from the time of the May, 1998 audit to that time.
8. Beginning in approximately December of 1998, Mr. Robertson requested that Appellant accompany him on a number of shopping trips. Mr. Robertson had purchasing authority, as did Appellant. Appellant testified that Mr. Robertson asked her to bring purchase order forms and city credit cards on these trips. Appellant testified she recalls purchasing various office supplies and items for Mr. Robertson during these shopping trips, and signing the purchase orders for those purchases, over the course of the two-year period prior to her termination.
9. Appellant testified there are several different ways the Agency typically purchases supplies. First, employees with purchasing power could simply go to the store and purchase needed items themselves, which Appellant described as a "generally accepted way of doing things" under the administration at the times relevant to this case. Second, one could call general services, which is the city's procurement agency responsible for stocking small office supplies. Third, one could call the vendor responsible for stocking certain other items. Fourth, one could prepare a purchase requisition for purchases over \$500.00.
10. Appellant testified that she was not Mr. Robertson's secretary or administrative assistant, and that he had an administrative assistant. Appellant testified that despite this, Mr. Robertson frequently requested that she and other employees "ride along" with him on shopping trips and various other excursions around the city. Appellant testified she knows that others also accompanied him on these shopping trips because she would supply them with purchase order blanks and city credit cards upon their request.
11. Appellant testified she recalled accompanying Mr. Robertson on a shopping trip to two different locations in search of a specific TV/VCR Combo, and recalled one of the sales clerks they

³ Only the Director and Deputy Manager positions (both appointed by the Mayor) are higher-paid than the Director of Finance.

talked to during this purchase. It is undisputed that the purchase occurred on December 31, 1998 (*see*, Exhibit 3).

12. Appellant testified she recalled accompanying Mr. Robertson, and identified her own signature on the purchase orders, for the following items: a camcorder purchased October 9, 2000 from Robert Waxman's; camcorder repair at Waxman's on November 8, 2000 upon Mr. Robertson's request.⁴
13. Appellant verified her signature on purchase orders, but did not distinctly recall accompanying Mr. Robertson on shopping trips or making the purchases, for office supplies from Office Depot on October 9, 2000, and a digital camera purchased October 10, 2000. The October 9, 2000 office supplies appear on the same purchase order list as the camcorder Appellant admits purchasing. However, there is no evidence in the record that Mr. Robertson was connected with an October 10, 2000 digital camera purchase, or that this purchases was otherwise improper.
14. Appellant testified that during their purchase of the TV/VCR Combo, the camcorder and various other supplies, Mr. Robertson would say things to her such as, "We use these items in the Parks Division, right?" and "We distribute these items to our offices, right?" to which Appellant responded in the affirmative.
15. Appellant testified that after these various shopping trips, she recalls Mr. Robertson dropping her off at the office and sometimes driving away with the purchases still in his car. Appellant testified she did not recall ever seeing the TV/VCR Combo or the camcorder in the office. Appellant testified she did not ask Mr. Robertson where he was taking these items and he never told her where he was taking them. Appellant testified that she did not know where he was taking the items they had purchased, but did not suspect he was using them for his own personal benefit until she became aware that the Denver District Attorney's Office convened a Grand Jury investigation surrounding Mr. Robertson's alleged conversion of Agency property in late March or early April of 2001. Appellant testified that around that same time, she recalls Mr. Robertson telling her what the investigation was about. She testified that Mr. Robertson "needed to return items he had taken" to the Department, and that she learned of the allegations in this way.
16. Appellant testified she did recall accompanying Mr. Robertson and signing the purchase order for "PC Anywhere" software, designed to facilitate remote communication between two personal computers. Appellant testified she thinks it was during the beginning of 2001, but does not recall when this specific purchase was made. Appellant testified that during the evening shortly after Mr. Robertson purchased the software, he called her at home, told her the software was not working properly, and said "you have to make it work for me." Appellant testified she went to Mr. Robertson's home, and his A&W Restaurant, which he had privately owned for approximately two years at that time. Appellant testified she recalls working on personal computers in each of these locations in which the remote software had been installed, to get the software facilitate communication between the computers. Appellant testified she cannot recall whether this incident happened before or after the initiation of the DA's investigation of Mr. Robertson.

⁴ Although Appellant did not directly testify to the date of this repair, presumably it was on November 8, 2000. *See*, Exhibit 3.

17. Under cross-examination, Appellant denied becoming suspicious that Mr. Robertson was using the software for personal purposes upon observing the locations of its installation, because Mr. Robertson worked all hours of the day and night and it did not surprise her that he might be working on City business while at his private restaurant. Appellant further testified that she considered going to Mr. Robertson's house and place of business within the scope of her duties because her boss told her to do this. Appellant testified, "I don't think I had the option to disagree. I was told to go, and I went...I had no choice in the matter because he was my boss. He did not accept no for an answer..." Appellant testified that while Mr. Robertson never directly threatened her in any way, she did whatever he told her to do because she had observed what happened to employees who did not follow his orders, and implied in her testimony that Mr. Robertson engaged in retaliation toward employees who did not follow his orders. Appellant testified under cross examination that she would probably go and babysit for Mr. Robertson if he told her to because she feared what he might do if she did not do what she was told.
18. Appellant testified she is sure she did not accompany Mr. Robertson or sign a purchase order for the HP Office Jet fax/copier January 30, 2001. The Agency elicited no testimony as to the December 5, 2000, Panasonic fax. The Agency did not offer Appellant any purchase orders to refresh her recollection of these purchases or the other purchases listed in Exhibit 3, and no such purchase orders appear in the exhibits.
19. Parks and Recreation Public Information Officer Judy Montero testified that around March 13 or shortly before, she received a press inquiry from Andrew Hudson, Mayor Wellington Webb's press secretary. Mr. Hudson told her that Channel 4 Reporter Brian Moss had inquired about the purchase of a dozen grease filter terminator canisters during the Summer of 2000 and their whereabouts. Mr. Moss told Ms. Montero it had been alleged that the grease filters were being used in Mr. Robertson's private A&W Restaurant. Ms. Montero testified that Mr. Hudson requested a purchase order number for the grease filters. Ms. Montero testified that she researched the purchase order and faxed a copy of it to Mr. Hudson. Ms. Montero testified that the purchase order was not signed by Appellant. She testified that right around this time, she saw Mr. Robertson at her office and she asked him about the grease filters. Mr. Robertson told Ms. Montero he would have Appellant and Maintenance Superintendent Gerald Tennyson "work with" her on the inquiry.
20. As of March of 2001, all of Appellant's golf program responsibilities had long since been transferred to the new golf administrator. Appellant had no knowledge of the current status of golf vendor contracts and accompanying arrangements at that time.
21. On or around March 13, 2001, Mr. Robertson approached Appellant and Mr. Tennyson about the grease filters. Appellant testified that Mr. Robertson told her the grease filters were intended for use at the City Park Golf Course Clubhouse. Appellant and Mr. Tennyson then went to Ms. Montero's office. Ms. Montero asked them if the Agency had purchased the grease filters, and if so, why. Appellant and Mr. Tennyson responded that the grease filters were for "preventative maintenance." Ms. Montero testified that both Appellant and Mr. Tennyson were "cavalier" and presented like the issue was "no big deal." Ms. Montero testified that while Parks and Recreation has a number of concessionaires, it was her understanding that they are all

run and maintained by private vendors under contract with the Agency. Ms. Montero testified that Appellant's and Mr. Tennyson's responses to her questions were "vague" and she felt they did not give any very good reasons for needing a dozen grease filters. She asked Appellant and Mr. Tennyson to go and get some information confirming the grease filters were needed for Agency use, and something to show that grease filters in Mr. Robertson's restaurant were purchased privately and were not Agency property. Appellant and Mr. Tennyson agreed to do this.

22. Mr. Tennyson called Ms. Montero later that afternoon and told her that eleven of the grease filters were at the Agency's warehouse, and the twelfth had been installed at the City Park Golf Course Clubhouse. Ms. Montero testified she knew that the City Park Golf Course Clubhouse had been razed and verified that this was the same facility Mr. Tennyson was referring to. He confirmed that it was. Ms. Montero then asked Mr. Tennyson to bring the remaining grease filters to her office.
23. Appellant and Mr. Tennyson returned to Ms. Montero's office the following day accompanied by maintenance employee Max Maestas. Appellant had a copy of the fiscal year 2001 Agency budget containing a preventative maintenance portion purportedly justifying the purchase of the grease filters. Mr. Maestas told Ms. Montero that the missing grease filter had not been installed at Mr. Robertson's A&W Restaurant, but that he had installed it at the Clubhouse. Appellant and Mr. Maestas told Ms. Montero that something was wrong with the computer system and they were not able to produce a work order for the installation of the grease filter at the Clubhouse.
24. Appellant testified that she recalled going with Mr. Robertson to his A&W Restaurant in March of 2001⁵, where he picked up two fire extinguishers. They then took the extinguishers to her home where she placed the extinguishers in her garage. She testified Mr. Robertson had asked her to keep them in her garage until Mr. Tennyson could pick them up and take them to the Agency's maintenance facility for use in the kitchen area there. Appellant testified that the maintenance facility was closed when they picked up the extinguishers, so Mr. Robertson could not deliver them himself. She testified that her home is between Mr. Tennyson's home and his office at the maintenance facility. Appellant testified that based on what Mr. Robertson told her, she was aware that he was "concerned" about their purchase. Appellant at first denied going "to" the A&W Restaurant with Mr. Robertson, but after much detailed clarification on further examination by the Agency, she admitted riding along in the car to the A&W parking lot where she waited in the car as Mr. Robertson went in and retrieved the extinguishers. Appellant denied that she knowingly "hid" the extinguishers in her garage for Mr. Robertson.
25. Appellant testified she believed Mr. Tennyson was to come by the next day on his way to work to pick up the extinguishers, but he never came and got them. After several days passed, she gave these items to her attorney for delivery to the District Attorney's Office in the criminal investigation. Appellant testified that shortly after this incident she did become suspicious that they had been purchased with Agency money because the criminal investigation had been initiated and certain allegations against Mr. Robertson had come to her attention by that time. There is no evidence that Appellant assisted in the purchase of the fire extinguishers.

⁵ Exhibits 4 and 6 indicate this was on approximately March 14, 2001.

26. Denver District Attorney Investigator Tom Haney testified that he interviewed Appellant several times during his investigation of the allegations against the Agency relevant to this case. He testified that based on her comments to him during these interviews, he had a very clear impression that Appellant knew at the time the purchases were being made that Mr. Robertson was using items purchased during their various shopping trips for his own personal benefit, and that she agreed to participate in a cover story concerning the grease traps.
27. In his testimony, Mr. Haney repeated no direct quotes by Appellant made during his interviews with her. Mr. Haney testified only as to his conclusions regarding the totality of the interviews.
28. Appellant denies knowingly participating in a "cover story" designed to deliberately mislead the press about the grease traps. She testified that Mr. Robertson told her they had been purchased for preventative maintenance for City facilities, and that she did not know anything more about them than what Mr. Robertson had told her. She denies telling Investigator Haney she agreed to participate in any deliberate deception. Appellant further denies telling Investigator Haney that she knew at the time of the purchases that Mr. Robertson was taking the property purchased during the shopping trips, and maintains that Haney must have misunderstood her statements about when she became aware that Mr. Robertson had been taking this property.
29. The Supporting Affidavit for Arrest Warrant of Defendant Gerald Tennyson, a sworn statement by Mr. Haney who was available for cross-examination, relays several admissions to Mr. Haney by Mr. Tennyson against his interest. Among those statements are the following. "Tennyson stated that between (September 1, 1998 and June 15, 2001) Tennyson either directly or indirectly caused Purchase Orders to be used to obtain goods that were paid for by the City of Denver, which were converted to the private use of Charles Robertson... Tennyson further stated that he was aware that the goods purchased were intended for the private use of Charles Robertson and that the goods were not used or intended to be used at Parks and Recreation Facilities... Tennyson stated that he was responsible for the following incidents of Embezzlement of Public Property:... 3. On 6/26/00, (grease filter) terminator canisters were purchased from Long and Associates... for \$425.00. 4. on 1/7/99, fire extinguishers were purchased from Rocky Mountain Fire and Safety... for \$195.00... (the above items... were purchased for, installed in, or intended for use in Robertson's A&W restaurant.)" The Affidavit included further admissions by Mr. Tennyson that he purchased air conditioning equipment using Agency money which he had installed in his own home. These further admissions did not implicate Mr. Robertson in any way.
30. In mid to late March of 2001, the Agency's Human Resources Acting Director and Senior Personnel Analyst, Juan Marsh, received several documents from Ms. Montero and the Denver District Attorney's Office, indicating the DA's intent to press criminal charges against Mr. Robertson, Mr. Tennyson, Mr. Maestas and Appellant based on the alleged conversion of Agency property and/or complicity therein. (See, Exhibits 4, 5 and 6) Mr. Marsh subsequently had several conversations with individuals at the DA's Office involved in the criminal investigation, and learned that a Grand Jury investigation was underway. He testified that the Agency refrained from conducting an independent investigation to avoid interfering with the pending criminal and Grand Jury investigations. Mr. Marsh testified that other than conversations with Ms. Montero concerning her interactions with Appellant about the grease filters, he based his decision to contemplate disciplinary action against Appellant on the

information contained in the DA's documentation, comments from the investigators, and his knowledge of Appellant's duties.

31. A list of items allegedly purchased with Agency money was attached to Exhibit 6, but this document is the Supporting Affidavit for Arrest Warrant for the arrest of Mr. Robertson, not Appellant. There is nothing definitive in the list or the Affidavit tying any of these specific purchases directly to Appellant. This is the list included in the Contemplation and Dismissal letters (Exhibits 3 and 2, respectively).
32. Mr. Marsh offered the following opinion based on his experience as Human Resources Supervisor. Given his understanding of Appellant's responsibilities as a supervisor of administrative functions (*see*, Exhibit 7), coupled with the fact that Mr. Robertson had an administrative assistant, Appellant's shopping trips with Mr. Robertson could not reasonably be interpreted as one of her assigned job duties, was a needless expenditure of a highly paid administrator's work time, and was not typically an activity performed by employees at Appellant's level. Mr. Marsh testified that Appellant's position is one involving a high level of public trust. He testified that Appellant's analogy of her situation to that of a secretary who was simply following the instructions of her supervisor is an inaccurate and misleading characterization of Appellant's circumstances. He testified that he would "absolutely not" equate Appellant's position with that of a secretary. Mr. Marsh testified that Appellant should have accounted for what was happening to multiple purchases for which she signed the purchase orders, which made her responsible for them. He testified that her level of responsibility required her to take some action to stop this activity rather than tacitly participate in it for two years. He testified that Appellant should have reported the suspicious purchasing activity to the Manager of Parks and Recreation, the Director of Finance Administration, the City Auditor, Human Resources, the police department or the City Attorney's Office. He testified that Appellant would have had recourse through the Career Service Authority if she had experienced any retaliation for such a report.
33. Mr. Marsh testified that there are no concessionaires maintained by the City and County, but that the contract vendors are responsible for maintaining their own concession facilities as part of their contractual responsibilities. He testified that he knew of no good business reason for the Agency to purchase grease traps.
34. Mr. Marsh testified that he had worked with Mr. Robertson on a number of disciplinary actions against employees, and that in Mr. Marsh's experience, Mr. Robertson was less likely than other supervisors to take disciplinary actions. When Mr. Robertson did take disciplinary actions, Mr. Marsh at times considered them less severe than may have been appropriate under the circumstances. Mr. Marsh testified that he never observed Mr. Robertson engaging in any behavior that could be considered retaliatory.
35. Deputy Manager of Parks Abel Shaw, successor to Mr. Robertson, testified that he worked closely with Mr. Robertson and described him as "nonconfrontational." Mr. Shaw testified that he worked under Mr. Robertson's supervision, and that Mr. Robertson never threatened him or anyone else to his knowledge. Mr. Shaw testified that Mr. Robertson asked him to take over the supervision of some employees with which Mr. Robertson was having difficulties in order to avoid disciplinary situations, in the hopes they would do better under different supervision. Mr.

Shaw testified that he concurred with the opinions of Mr. Marsh and Mr. Mejia that they could proceed in a disciplinary action against Appellant based on the information they had, and that the allegations which formed the basis of the criminal investigation concerning Appellant could be proven "if we had to." Mr. Shaw testified that his decision to support the disciplinary contemplation and subsequent action were based on the recommendations of Human Resources.

36. Agency Manager James Mejia testified that he became aware of a pending criminal investigation almost immediately upon his appointment in June of 2001. He testified that he had some general conversations with officials from the DA's Office who remained fairly vague because of the pending criminal investigation. He testified that Mr. Robertson had already tendered his resignation when Mr. Mejia was appointed, but did not actually resign until approximately June 15, 2001. Mr. Mejia testified that Appellant's position was considered a management level position and described it as one of "ultimate responsibility" and of "absolute and complete trust." He testified that there are only three or four positions at that level in the Agency. He testified that the total Agency budget for the present fiscal year is approximately \$75 million, establishing that Appellant controlled approximately a third of the Agency's total budget. Given the level of her duties and responsibilities, Mr. Mejia testified, there was "no question in my mind" that her failure to take some alternative actions constituted violations of the CSR Rules indicated in the disciplinary documents. He testified that for an individual of this caliber to go on shopping trips unnecessarily was not only abnormal in his experience, but that just the trips themselves were an inefficient use of time and talent and a misuse of City funds. Mr. Mejia testified that the Agency has a stock of TV's, VCR's, and camcorders, so while it would not be out of the question that these items might be used for Agency business, it should be odd to an employee to assist in such purchases without a known need for them, given that the Agency already has such items. He testified that an employee at pay grade 812 "certainly would know" why such goods were being purchased, particularly if she were the one signing the purchase orders for them. Finally, Mr. Mejia testified that the reputation of the Agency has been so marred by the criminal investigation and media exposure arising from these events that it has been forced to engage in a tremendous amount of trust reparations, not only with the general public, but with the City Council. This has required a complete and tedious restructuring of the Agency's City Council procurement and negotiations process, even on existing projects.
37. The Agency initiated a Contemplation of Disciplinary Action against Appellant (Exhibit 3). A pre-disciplinary meeting was held on July 26, 2001. Present were Appellant and her attorney, Mr. Marsh, Mr. Mejia and Mr. Shaw. At the pre-disciplinary meeting, Appellant elected not to respond to the allegations based on her involvement in the pending criminal investigation. The Agency therefore based its decision on the documentation it had from the criminal investigation, without input or response from Appellant.
38. On August 2, 2001 the Agency dismissed Appellant from her position for various violations of CSR Rules 16-50 and 16-51 (Exhibit 2).
39. On August 10, 2001, Appellant timely filed her appeal giving rise to this case.

PRELIMINARY MATTERS

1. Appellant's Subpoena of Phillip Parrott

Counsel for Appellant endorsed and subpoenaed Senior Chief Deputy District Attorney Phillip Parrott, the DA to whom the criminal investigation related to this matter was assigned, as a witness to Appellant's alleged statements against her interest during interviews by the DA's Office. Assistant District Attorney Henry R. Reeve filed a Motion to Quash this subpoena on October 12, 2001.

During the first day of hearing, prior to proceeding on the merits in this matter, the hearing officer heard arguments on the Motion to Quash. Mr. Reeve was present and argued the Motion to Quash. He argued on behalf of Mr. Parrott that there was an ongoing Grand Jury investigation regarding similar issues related to other employees of the Agency, although the issues directly related to this case had been resolved through plea agreements with the involved individuals, including Appellant, Mr. Robertson, Mr. Tennyson and Mr. Maestas. Mr. Reeve posited that as a matter of policy as well as standing case law, calling prosecutors and attorneys in general is to be avoided and should only be done as a last resort to avoid necessitating their withdrawal from representation, ethical violations, conflicts of interest, disclosure of attorney-client privilege or work product information, disruption of related criminal investigations, and violation of executive privilege in violation of 13-90-107, C.R.S. (2001). He argued that Mr. Parrott was only present at two of the many interviews of Appellant, and had no relevant or material knowledge as to the incidents in question. He further alleged that the subpoena was unreasonable and oppressive because other witnesses were available with the same or more reliable knowledge of the events in question than Mr. Parrott. Citing Colorado case law, Mr. Reeve argued that Appellant had failed to make the requisite showing of the necessity of calling Mr. Parrott.

Counsel for Appellant countered that the criminal investigation related to the issues in this matter had been resolved. He argued that Mr. Parrott had first-hand knowledge as to the reason Appellant elected not to speak on her own behalf at the time of the predisciplinary meeting, and may be able to rebut some of the testimony the Agency intended to proffer from Investigators Haney and Augusta concerning Appellant's alleged admissions against interest during the DA's investigation.

The hearing officer considered these arguments and ruled as follows. Mr. Reeve correctly cited several cases standing for the general proposition that calling an attorney to a party in a case, as a witness in that case, is to be avoided. *See, e.g., Williams v. District Court*, 700 P. 2d 549 (Colo. 1985); *People v. District Court*, 790 P.2d 332 (Colo. 1990). As Mr. Reeve argued in his Motion to Quash, the Court in *Williams* set forth requirements to be applied to the subpoena of an attorney by the opposing party, citing several cases in which prosecutors had been subpoenaed as defense witnesses. The requirement most relevant to this case is that Appellant must have shown a compelling need for such evidence, which could not be satisfied by some other source.

However, the circumstances in this case differ from the controlling case law and statutes in two significant ways. First, this is an administrative personnel proceeding, not a criminal trial, and is only ancillary to the criminal trial. Second, the prosecutor was no longer an attorney in an active

case involving Appellant, since the charges against Appellant had already been dispensed with. These distinctions only serve to solve a few of the difficulties which arise here, because Mr. Parrott remained involved in related criminal investigations, and still had ethical, privilege, and work-product concerns to protect. On the other hand, since the Agency intended to call the investigators from the criminal case, Appellant should likewise be allowed to call such agents to rebut that information.

Based on all these considerations, the hearing officer initially partially granted the Motion to Quash, permitting Appellant to call Mr. Parrott only for the very limited purpose of rebutting testimony by the criminal investigators concerning Appellant's alleged admissions against interest. However, during the course of the hearing it became apparent through additional testimony that Appellant's criminal attorney had been present at all of Appellant's interviews by the DA. At that time Mr. Reeve renewed his Motion to Quash, and the hearing officer granted the Motion in full for Appellant's failure to show unavoidable and compelling need, in light of the other individual, who no longer represented Appellant in the matter, and who was present during all of these interviews. This individual would clearly have been better qualified to rebut the Agency's evidence than would someone who was present at only two of the interviews. See, e.g., United States v. Torres, 503 F.2d 1120 (2nd Cir. 1974).

2. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a dismissal, 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.

3. Burden of proof

In civil administrative proceedings such as this one, the level of proof required in order for a party to prove its case is by a *preponderance of the evidence*. In other words, to be meritorious, the party must demonstrate that the assertions it makes in support of its claims are more likely true than not.

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

just cause for the suspension action. *See, In the Matter of the Appeal of Vernon Brunzetti*, Appeal No. 160-00 (Hearing Officer Bruce A. Plotkin, 12/8/00). 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. It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

- 1) Gross negligence or willful neglect of duty.
- 2) Theft, destruction, or gross neglect in the use of City and County property of any agency or entity having a contract with the City and County of Denver...
- 3) Dishonesty, including but not limited to: altering or falsifying official records... using official position or authority for personal profit or advantage, including kickbacks, or any other act of dishonesty not specifically listed in this paragraph.
- ...20) Conduct not specifically identified herein may also be cause for dismissal.⁶

Section 16-51 Causes for Progressive Discipline

- A. The following unacceptable behavior or performance may be cause for progressive discipline.... It is impossible to identify within this rule all conduct which may be cause for discipline. Therefore, this is not an exclusive list.

⁶ The Agency included the following portions of the old CSR Rule 16-22, the former Causes for Dismissal Rule effective until April 15, 1999, because a portion of the alleged activities took place prior to the rule change. Those portions of 16-22 similar to the present Rule at 16-50 have been omitted here:

- 5) Conduct while on duty which violates the common decency and morality of the community.
- 22) Acts detrimental to the public interest.

- ...2) Failure to meet established standards of performance...
[the Agency listed Priority 1 Job Responsibility in Appellant's PEP being compliance with Work Rules]
- ...4) Failure to maintain satisfactory working relationships with...the public.
- 5) Failure to observe departmental regulations.
- 6) Carelessness in performance of duties or responsibilities.
- 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County of Denver.
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.⁷

2. Allegations in Dispute

The hearing officer admonished both parties at the opening of the proceedings that this was a *de novo* hearing, and that the hearing officer would neither rely upon nor consider any conclusions arrived at by the prosecution team in the criminal investigation. The Agency was expected to present evidence sufficient to prove its allegations by a preponderance of the evidence before the hearing officer.

However, the Agency offered no purchase orders signed by Appellant into evidence. While it offered a few purchase orders to Appellant during her testimony and she verified her signature and the date of two of the specific occasions she accompanied Mr. Robertson on these trips, she did not specifically recall other trips and the Agency offered her no additional purchase orders for verification while on the stand. Instead, the Agency relied on the list which appeared in Attachment B of Exhibit 6, of items allegedly purchased with Agency money. Yet this document is attached to the Supporting Affidavit for Arrest Warrant for the arrest of Mr. Robertson, not Appellant. There is nothing definitive in the list or the Affidavit tying any of the purchases directly to Appellant.

Instead, the Agency offered the testimony of Investigator Haney. Mr. Haney testified that he went through all the purchase orders with Appellant and that she recalled some of them very specifically, but that some of them she did not. Mr. Haney's testimony offered virtually no more specific details about which purchases Appellant recalled than her own testimony did. He offered no further testimony or evidence which would directly link Appellant to the most of the specific purchases listed in Attachment B of Exhibit 6.

Mr. Haney further testified to his conclusion that "it was clear" to him based on what he heard her say that she knew at the time of the purchases what was happening, and that she

⁷ The Agency included portions of the old CSR Rule 16-23, the former Causes for Progressive Discipline Rule effective until April 15, 1999, which are virtually identical in their content to the new Rule at 16-51.

participated in the cover-up. Yet Mr. Haney did not offer any testimony of direct statements by Appellant against her own interest tending to demonstrate why he concluded this.

Mr. Haney basically testified to conclusions he drew after his own review of the evidence. The hearing officer has before her virtually none of the evidence upon which Mr. Haney relied in arriving at his conclusions. As a consequence, most of his testimony has been disregarded as lacking in foundation and unsupported by the record.

Similarly, two of the Supporting Affidavits for Arrest Warrants (Exhibits 4 and 6), upon which the Agency has so heavily relied, contain strings of conclusory statements on the ultimate facts of Appellant's alleged knowing participation, with no explanation of the evidence or information leading the author, Investigator Agusta, to arrive at those conclusions. While these documents were admitted as business records, the assumption of their reliability can only go so far as to the accuracy with which they reflect Investigator Agusta's conclusions. Investigator Agusta was not called as a witness to explain her basis for these conclusory statements. Once again, the hearing officer has none of the evidence upon which the Investigator relied in arriving at these conclusions. For these reasons, most of the information contained in Exhibits 4 and 6 has been disregarded as lacking in foundation and unsupported by the record.

In contrast, Exhibit 5 contains a series of statements made by Mr. Tennyson against his interest. Statements against interest by a defendant are completely different than conclusory statements by Investigators. They are considered reliable in their own substance and are themselves an exception to the hearsay rule. Since these statements are contained in an official investigative document in the form of a sworn statement and the author was available for cross-examination, the hearing officer concludes that reasonable and prudent persons would find these admissions against interest reliable in the ordinary conduct of their affairs, and has given them some weight. The only evidence presently before the hearing officer tending to prove that Mr. Robertson actually converted Agency property is contained in the admissions by Mr. Tennyson in this Affidavit that he willingly participated in such activities. The hearing officer finds the reliability of these admissions supported by the fact that Mr. Tennyson further admitted to being the sole beneficiary of some of the purchases he made, and therefore clearly was not merely trying to pin the questionable activities on another to evade criminal prosecution himself. This evidence raised a rebuttable presumption that Mr. Robertson in fact converted the Agency property in question, and Appellant did not rebut this presumption or otherwise refute the allegations against Mr. Robertson.

Regarding the list of items alleged in the disciplinary documentation, (*see*, Exhibits 2 and 3) Appellant readily admits to participation in purchase of the TV/VCR Combo on December 31, 1998 and the camcorder on October 9, 2000. Appellant further verified her signature on the purchase order of October 9, 2000 which included several hundred dollars worth of additional office equipment and supplies in addition to the camcorder, although she did not specifically recall those additional purchases. She did recall the camcorder repairs and verified that purchase order date of November 8, 2000. She does not recall when the PC Anywhere Software was purchased, but does recall participating in that purchase. Appellant does not dispute that she accompanied Mr. Robertson on these among many shopping trips, and signed for the purchases, only that she had any knowledge of wrongdoing in the purchases.

However, the Agency failed to offer any purchase orders to Appellant for verification of her signature, or otherwise refresh her recollection sufficiently to elicit an admission, concerning the remaining items on the list in question, including the Office Supplies (7/30/99, 12/4/00 and 12/21/01), Panasonic Fax (12/5/00), HP Office Jet (1/30/01) and 20' Cable (2/1/01). Appellant has no direct recollection of these purchases and has not admitted under oath to participation in them. Furthermore, there is no evidence anywhere in the record to establish what the fate of these items was. The Agency has therefore failed to demonstrate her culpability regarding these items and the hearing officer has consequently disregarded them in the analysis below.

3. Analysis of the Remaining Evidence

a. The arguments.

The Agency asserts that the high level of responsibility represented by Appellant's supervisory, administrative and budgetary duties requires that she should have known better than to participate in purchases of items for which there was no apparent immediate need, with her supervisor, who would then drive away with these purchases. He had the same purchasing authority as she did, and had an administrative assistant who should have been the person to assist him with such things. The Agency maintains she assumed responsibility by signing the purchase orders. It further argues that she knowingly assisted Mr. Robertson in covering up his use of the grease filters in his private restaurant and in hiding the fire extinguishers. Finally, the Agency alleges that Appellant surreptitiously benefited by Mr. Robertson's successful bid to reallocate her position to a much higher pay grade in exchange for her participation in the illegal purchases.

Appellant responds that she was an unwitting victim of Mr. Robertson, who was the real culprit in this case. She equates her alleged participation and level of knowledge to that of a secretary who is simply doing what she was told. She never knew anything was amiss until right around the time of the criminal investigation of Mr. Robertson's alleged misappropriations, when that investigation began bringing some of the allegations to light. She asserts that she went with him on these shopping trips and signed the purchase orders because he was her boss and he told her to, and this practice was common under his administration and supervision, not only with her but with many employees. She asserts that he would verify through questions to her that the items being purchased were the kinds of products used by the Agency. Appellant posits that even the remote computer software she helped Mr. Robertson get running on the computers in his home and private restaurant did not cause her concern, because Mr. Robertson worked constantly and it was not unlikely that he would be working on Agency business while at the restaurant. She maintains that she did not know anything more about the grease filters than she was told by Mr. Robertson and Mr. Tennyson, that she had no knowledge about their location, use, or necessity and therefore did not and could not have participated in what was later characterized as a "cover story" concerning the grease filters. Finally, Appellant maintains that she did not know or suspect anything improper about the fire extinguishers, but rather simply thought she was holding them until Mr. Tennyson could transfer them to one of the Agency facilities.

The Agency argues that Appellant's defenses are contradictory. On the first day of the hearing, she characterized Mr. Robertson as an individual whom she so feared that she would have done practically anything he told her to avoid his retaliation. On the second day she described him

as a dynamic leader who was always on the move, was always working and who brought many positive changes to the Agency. On the one hand, the Agency points out, Appellant claims she participated out of fear for her job. On the other hand, Appellant argues she participated out of ignorance. Further, even assuming Appellant were unaware of his wrongdoings, the Agency asserts that Appellant had an affirmative duty to investigate circumstances which, given her level of experience, she should have recognized as apparent improprieties. Finally, the Agency asserts the evidence supports that Appellant knew what was going on all along.

b. The City Charter, Revised Municipal Code and Fiscal Rules.

This case involves issues of fiscal control and responsibility. The hearing officer has jurisdiction over dismissals resulting from "Conduct which violates the Charter of the City and County of Denver or the Revised Municipal Code of the City and County of Denver." *See*, CSR Rule 16-50 A. 17).

Title I of the Revised Municipal Code states at A7. 1-1:

[The City Auditor] shall...see that rules and regulations are prescribed and observed in relation to accounts, settlements and reports, that no appropriation of funds is overdrawn or misapplied, and that no liability is incurred, money disbursed or the property of the city and county disposed of contrary to law or ordinance...

The City and County of Denver Fiscal Rules, promulgated by the City Auditor pursuant to the above authority, state in pertinent part as follows:

PREAMBLE

...The purpose of these fiscal rules is to provide clear standards for the conduct of fiscal and financial affairs within Denver's government. The rules are consistent within applicable sections of the Charter, Revised Municipal Code, [and] executive orders...

The Fiscal Rules describe the purpose, process and limitations on all matters involving the direct and indirect use of City funds, facilities and equipment. The Fiscal Rules provide instructions for conduct of the City's business, as well as, methods for controlling, accounting for, and reporting financial transactions.

* * *

"PROPRIETY OF EXPENDITURES" under Chapter 3, Section 13 of the Fiscal Rules, reads in pertinent part:

13.01 Purpose

The purpose of this rule is to clearly set forth the city's policy as to the propriety of expenses which may be charged to the city

13.02 Authority

Charter A1.9.
Charter A7.1-1.
Charter A7.2.

13.03 Responsibility

It is the responsibility of all expending authorities to adhere to the guidelines set forth in this rule...

13.20 POLICY

Costs which may be charged to the City:

- .01 Are for official city business purposes only;
- .02 Are, in the opinion of the expending authority, reasonable under the circumstances of the specific situation.
- .03 The City will receive some benefit or is legally due...

* * *

Chapter 4, Section 3 of the Fiscal Rules, titled "REPORTING SUSPECTED OR ACTUAL THEFT OR EMBEZZLEMENT," reads as follows:

Section 3.01 Purpose

The purpose of this Fiscal Rule is to set out the responsibility of the agency/department head and/or employee for reporting suspected or actual theft or embezzlement.

Section 3.02 Authority

Charter A1.10...

Section 3.20 POLICY

It is the policy of the City and County of Denver that information regarding the actual or suspected diversion of the assets of the City shall be disclosed promptly to protect the assets of the City...

Section 3.32 Suspected Theft or Embezzlement

- .01 An employee who reasonably believes that City assets have been diverted to an unauthorized use should report such suspicion to the first level of supervision above the employee who the employee reasonably believes will take appropriate corrective action...

c. Appellant's culpability and claims of ignorance about the fate of the purchases.

The hearing officer is persuaded that Appellant had reason to suspect Mr. Robertson's questionable activities. The hearing officer is unpersuaded by Appellant's argument of absolution by Mr. Robertson's having asked her during shopping trips, "We use these things at the Agency, don't we?" If anything, as a matter of common sense, Mr. Robertson's general question about the items being the kinds of things the Agency used not only fails to establish the need for such items at the moment. It further should have raised a red flag, in the mind of a reasonable person of Appellant's education and experience, that there was no specific need for the item at that particular moment. If anything, such a question at the very least raised Appellant's duty, particularly as the signatory of the purchase orders, to inquire further about why Mr. Robertson thought the purchase necessary at that time.

The most damning evidence against Appellant is the PC Anywhere software incident. She participated in the purchase and knew the software was purchased with City money. Mr. Robertson called her after hours to get the software to work. She witnessed first-hand that he had installed the software in his home and personal business computers. Yet she asked him no questions whatsoever about this activity, and claims she was "absolutely not" suspicious about this.

The hearing officer is not persuaded that Appellant did not even suspect that Mr. Robertson was on the take at this point. Appellant is an educated woman in a high-level governmental management position, who oversaw the citywide administration of the Agency. Appellant's job description includes in paragraph 9 that she "recommends and controls budgetary expenditures." She managed a \$28 million budget, and described one of her fleet management duties as reviewing all charges for apparent improprieties. All this clearly indicates a high level of fiscal knowledge and responsibility. Under these circumstances, Appellant's claim that Mr. Robertson's activities did not at least appear suspicious is not credible. By this point, Appellant had available to her facts which would have placed any reasonable person on notice that, at a minimum, further inquiry was warranted.

Even more troubling is Appellant's testimony that she could not recall whether the software incident happened before or after she became aware the criminal investigation had ensued. This does not make any sense whatsoever. Knowledge of the investigation would have confirmed in the mind of any reasonable, responsible person her affirmative duty to report suspicious activity. It is not credible for Appellant to claim she could not remember whether criminal investigation for converting Agency property was underway when she went to his house and restaurant, to get software she had helped him purchase with Agency money to work. The profound lack of credibility behind Appellant's account of this whole episode tends to cast suspicion on all her denials and claims of ignorance.

Public employees entrusted with the expenditure of public funds have a fiduciary duty to ensure the proper expenditure of those funds. When Appellant was entrusted with the expenditure of public money, she became a fiduciary and owed the highest duty of care with regard to such a trust responsibility. As the purchase order signatory, Appellant assumed responsibility for these purchases as the "expending authority." Pursuant to the Fiscal Rules set forth above, Appellant owed a duty of due care in complying with the requirements of knowing that the purchases were for City use and were reasonably necessary in her opinion. Appellant was further under an affirmative

duty to report any suspicions of the propriety of these purchases and activities to the appropriate authorities, which would have arisen from her determinations, had she inquired as she was required to do.

The hearing officer is unpersuaded that Appellant's alleged ignorance, assuming this were the case, somehow releases her from culpability. It is neither sensible nor consistent with the Fiscal Rules to conclude that Appellant should be permitted to turn a blind eye to the ultimate purpose for which money was being spent, using her purchasing authority, and then claim ignorance. It is this very kind of conduct that the Career Service Rules attempt to proscribe when they refer to "gross negligence and willful neglect."

Even if ignorance were an excuse in this case, Appellant's general defenses are inconsistent. During cross-examination about her assisting Mr. Robertson with the software, she described him as someone from whom she felt sufficient duress that she would have done practically anything he told her to. If Appellant were participating out of fear, then she had to know what it was she feared not participating in. If she were truly ignorant of what Mr. Robertson was doing, then she had nothing to fear.

The hearing officer therefore finds Appellant's claims of ignorance of impropriety under these circumstances unpersuasive. Based on the above analysis, the hearing officer concludes that Appellant's role in the above-described activities constitutes gross negligence, willful neglect of duty, gross neglect of the use of City and County property, failure to meet established standards of performance, failure to maintain satisfactory working relationships with the public, failure to observe departmental regulations, carelessness in the performance of responsibilities, unauthorized use of City equipment, acts detrimental to the public interest, and conduct not specified in the regulations also constituting cause for termination; namely, complicity in theft.⁸

d. Appellant's alleged participation in the cover-up.

The hearing officer would have been less persuaded that Appellant had participated in a cover-up of the grease filters, were it not for this other evidence of Appellant's intentional turning of a blind eye to activities any reasonable person of Appellant's education and employment would find at least highly suspicious. Ms. Montero was also unfamiliar with what these devices were and how they might be used. Appellant's claim that she knew only what Mr. Robertson and Mr. Tennyson told her was, in isolation, credible, particularly since all her prior golf program responsibilities had been transferred to the new golf administrator by that time. In light of the mounting evidence of Appellant's incredible claims of ignorance and denial of any responsibility, however, the hearing officer finds Appellant's denials in this regard also less than reliable and lacking in credibility.

Similarly, the hearing officer is unpersuaded by Appellant's claim that she did not knowingly "hide" the fire extinguishers. Appellant went with Mr. Robertson to the restaurant, observed him taking the fire extinguishers from the restaurant, and held them in her private garage until an Agency employee could come and take them to an Agency office for use in its kitchen. It is simply not credible given Appellant's education, apparent intelligence, and level of responsibility,

⁸ See, 18-1-603, C.R.S. (2001) which defines "Complicity" as follows: "A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises or encourages the other person in planning or committing the offense.

for her to claim she did not know she was "hiding" them. Appellant knew Mr. Robertson was attempting to return them to the Agency. She knew Mr. Robertson had previously had them in his private business. She knew he was "concerned about their purchase." The only sensible conclusion is that the fire extinguishers were Agency property being privately used, and surreptitiously being returned to the Agency. Finally, this all happened the day after Ms. Montero asked Appellant to provide proof that grease traps purchased with Agency money had not been installed in Mr. Robertson's A&W Restaurant.

The hearing officer concludes that Appellant knowingly participated in the attempted transfer of this evidence from Mr. Robertson's private restaurant back to the Agency. Appellant's participation in these activities constitutes dishonesty, and conduct not specified in the regulations also constituting cause for termination; namely, complicity in theft.⁹

Based on the totality of this evidence, the hearing officer concludes the Agency had just cause for disciplining Appellant.

e. Appellant's alleged benefit from her participation.

The hearing officer is not persuaded that Appellant benefited from her participation in Mr. Robertson's conversion of Agency property through his successful efforts to win her a promotion for the following reasons. First, there is substantial evidence in the record that Appellant's duties expanded rather dramatically with the various reorganizational phases the Agency went through and the resulting abolition of certain positions. Mr. Mejia, in his testimony, described Appellant as being considered the "point person" in the Agency with the broadest knowledge of its inner workings, further supporting that Appellant's responsibilities had grown significantly as the evidence of the changes in her duties over time suggests. The Agency did not provide any definite time line during which these various changes occurred, and the hearing officer understands that new duties must be possessed for a certain period of time before the Career Service will consider them permanent. Therefore, the different results in the CSA audits of January and May of 1998 in themselves are not necessarily suspicious. In addition, there is no evidence to suggest any impropriety in the May, 1998 CSA audit which resulted in the reallocation of her position.

Based on this evidence, the hearing officer concludes that the Agency has failed to demonstrate by a preponderance of the evidence that Appellant used her official position for personal profit or advantage in violation of CSR Rule 16-50 A. 3).

4. Severity of the discipline.

Appellant posits that the discipline in this case is excessive in light of these considerations. First, her work record has been exemplary and beneficial to the Agency. Second, there have been no prior instances of discipline. Finally, the true culprit in this case was her supervisor, and Appellant was herself an unwilling, unknowing, unbenefitting victim of his illegal activities. She asserts that if any discipline should be imposed, the Agency should observe the Rules recommending progressive discipline and impose something less than termination.

⁹ See, footnote 8, above.

CSR Rule 16-10, Purpose, states in relevant part that "...the type and severity of discipline shall be reasonably related to the seriousness of the offense...." Section 61-20, Progressive Discipline, state as follows 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...
 - b) Written reprimand...
 - c) Suspension without pay...
 - d) Involuntary demotion...
 - e) Dismissal...
- 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.*

(Emphasis added.)

The hearing officer agrees with the Agency that Appellant's position is one of ultimate public trust and fiscal responsibility. She was a high-level, high-profile employee, who represented appointed officials, and at times the Mayor himself on behalf of the Agency. She had access to the property of the City and County and its vendors and associates, and control over \$28 million of the taxpayers' dollars. She must be held to a higher standard of honesty and level of accountability because of this. Instead, she wilfully, grossly neglected that heightened trust responsibility by signing purchase orders and turning her head allowing another to furnish his private home and restaurant. Her failure to protect the public interest has contributed to severe, costly damage to the Agency's trustworthiness in the eyes of the public, the City Council, and others.

The Agency has a duty to see that its employees do not engage in any acts which reflect negatively on the trustworthiness of the government, jeopardizing the public trust. Appellant must be punished commensurate with that heightened trust responsibility and her failure to maintain it. Such punishment should set an example of absolute intolerance for all other such employees who might feel the need to turn a blind eye to obviously suspicious activity such as that in which Appellant participated.

While progressive discipline is preferable where it is practicable, it is not required as suggested by the emphasized wording or CSR Rule 16-10 (above). In addition, CSR Rule 16-50, A. "Causes for Dismissal," states: "A lesser discipline other than dismissal *may be imposed where*

circumstances warrant." (Emphasis added) The Career Service Board has consistently applied these rules recommending progressive discipline as permissive and not mandatory.

The hearing officer finds the Agency's reasoning for the severity of punishment in this case to be within the range of reasonable alternatives under the controlling regulations and the circumstances of this case. She concludes that Appellant's termination was reasonably related to the severity of the offense, in light of the ramifications to the Agency and to City Government at large.

CONCLUSIONS OF LAW

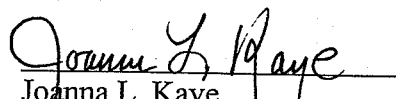
1. The Agency has demonstrated by a preponderance of evidence that Appellant should have known she participated and assisted in the conversion of Agency property for the personal use of her supervisor. Appellant had an affirmative duty under the City of Denver Revised Municipal Ordinances and Fiscal Rules to insure the purchases were reasonably necessary, and to investigate and report suspicious activities in which she was directly involved.
2. The Agency has demonstrated by a preponderance of evidence that Appellant knew she participated and assisted in a cover-up and concealment of stolen Agency property, giving rise to the affirmative duties set forth in Conclusion 1.
3. The Agency has proven by a preponderance of evidence that through the actions described above in 1 through 3, Appellant engaged in:
 - a) Gross negligence of willful neglect of duty in violation of CSR Rule 16-50 A. 1);
 - b) Gross neglect in the use of Agency property in violation of CSR Rule 16-50 A. 2);
 - c) Failure to meet established standards of performance in violation of CSR Rule 16-51 A. 2;
 - d) Failure to maintain satisfactory working relationships with the public in violation of CSR Rule 16-51 A. 4);
 - f) Failure to observe departmental regulations in violation of CSR Rule 16-51 A. 5);
 - g) Unauthorized use of Agency equipment in violation of CSR Rule 16-51 A. 7);
 - h) Conduct which violates the Charter of the City and County of Denver and the Revised Municipal Code of the City and County of Denver in violation of CSR Rule 16-50 A. 17);
 - i) Acts detrimental to the public interest in violation of the former CSR Rule 16-22 A. 22); and
 - j) Conduct not specified in CSR Rule 16-50 and 16-51 which is otherwise cause for discipline, namely complicity in theft of Agency property.
4. The Agency failed to demonstrate by a preponderance of evidence that Appellant directly benefited from the activities alleged in this case, and therefore that she used her position for personal profit or advantage in violation of 16-50 A. 3).
5. The Agency demonstrated just cause for disciplining Appellant.
6. The Agency demonstrated that its termination of Appellant is reasonably related to the seriousness of the offenses given the totality of the evidence.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant is **AFFIRMED** and **MODIFIED** as follows: the termination letter should be amended by deletion of references to the use of position for personal profit or advantage, if any, and to the items it did not prove Appellant assisted in purchasing, as set forth under **Allegations in Dispute**.

This case is hereby **DISMISSED**.

Dated this 8th day of November, 2001.


Joanna L. Kaye
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 **DISMISSAL ORDER** by depositing same in the U.S. mail, postage prepaid, this 8th day of November, 2001 addressed to:

Robert J. Bruce
Attorney at Law
730 - 17th Street, Suite 370
Denver, CO 80202

Joyce Mendez
5695 W. 51st Ave.
Denver, CO 80212

I further certify that I have forwarded a true and correct copy of the foregoing **DISMISSAL ORDER** by depositing same in the interoffice mail, this 8th day of November, 2001, addressed to:

Linda M. Davison
Assistant City Attorney
Employment Law Section

Amy Greenburg
Department of Parks and Recreation

Virginia Granado