

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

Appeal No. 06-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

LOUIS VIGIL, Appellant

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

INTRODUCTION

This matter comes before the Career Service Board on appeal by Louis Vigil (hereinafter "Appellant") filed January 9, 2001. Appellant challenges the Department of General Services, Theaters and Arenas Division's (hereinafter "Agency") decision to suspend his employment for thirty days without pay after Appellant allegedly accessed an off-limits area occupied by a contract vendor.

The Agency posits that it had just cause to suspend Appellant for thirty days as follows. After a series of complaints by the Agency's contract food vendor, the Agency officials stressed at a staff meeting all employees must remain out of restricted vendor area. It also changed the locks accessing the off-limits area, making it accessible only by the use of a grand master key used for other secure areas. The Agency also placed a hidden camera in the off-limits area. On November 16 and November 20, 2000, the camera captured images of Appellant and another employee entering the kitchen area together.

The Agency then placed Appellant on investigatory leave. When he turned in his key, the Agency discovered the key had "JJJ Locksmith Co." stamped on it. The Agency used the "Best" lock system and the keys belonging to the Best system supposedly had "Best" stamped on them, not "JJJ Locksmith Co." In addition, the Agency discovered Appellant's key was a grand master key, which would allow him access to any door in the interior of the complex. Appellant was supposed to have a master key.

A hearing in this matter was held before Personnel Hearing Officer Joanna L. Kaye ("hearing officer") on July 30, 2001 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Sybil R. Kiskan, with Denver Performing Arts Complex's General Manager, Rodney J. Smith, present for the entirety of the proceedings and serving as

advisory representative for the Agency. Appellant was present and was represented by Jeffrey Menter, Attorney at Law.

Witnesses for the Agency included Appellant as an adverse witness, Custodial Supervisor Martin Farris, Operations Supervisor Anthony Tenorio, and Mr. Smith.

Appellant's witnesses included Appellant, and Senior Utility Worker Henry Mascarenas.

Agency's Exhibits 1 and 3 through 7 were admitted without objection. Exhibit 4A, the actual key collected from Appellant, was also admitted without objection. Exhibit 2 was admitted after Appellant clarified that the size of the sign it represented was much smaller than a complete sheet of paper. Appellant offered several photographs which were not admitted because they were not endorsed to the Agency prior to the time of the hearing.

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.

ISSUES

1. Whether the Agency has demonstrated by a preponderance of evidence that Appellant knowingly accessed a restricted area and took contract vendor property against Agency orders.
2. Whether the Agency has demonstrated by a preponderance of evidence that Appellant knowingly and improperly acquired a forged grand master key from an unauthorized outside source.
3. If so, whether through the actions described above in 1 and/or 2, Appellant engaged in:
 - a) An act of dishonesty in violation of CSR Rule 16-50 A. 3);
 - b) Failure to comply with the instructions of an authorized supervisor in violation of 16-51 A. 10); and/or
 - c) Conduct not specified in CSR Rule 16-50 and 16-51 which may otherwise be cause for discipline.
4. Whether the Agency demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
5. If so, whether the Agency's thirty-day suspension of Appellant is reasonably related to the seriousness of the offense given the totality of the evidence.

FINDINGS OF FACT

1. Appellant has been a custodian for the Agency's Denver Performing Arts Complex ("DPAC") for approximately ten years. His duties include emptying trash, vacuuming, cleaning windows, securing lights, and other general custodial duties in areas of the DPAC designated the responsibility of City employees.
2. In approximately 1992, the Agency changed the lock and key system for the DPAC as part of its renovation process. The Agency switched every lock in the facility to the "Best" security system. This system is a self-contained, graduated security system, in that the Agency creates its own keys using a punching device that designates increasing levels of security. The "grand master" keys open every door in the interior of the facility, including the most secure or sensitive areas. Only supervisors possess these keys. The "general master" or "master" keys open all interior areas which need to be cleaned and are typically the keys used by line custodians such as Appellant. None of the locks in the complex prior to the switch to the Best security system in 1992 are still in use.
3. From 1992 until approximately 1998, the facility still used keys for exterior doors called "perimeter keys." Employees such as Appellant typically carried two keys; a perimeter key and a master key. The exterior doors were changed to a keypad system some time in 1998 and they no longer required the use of a key. The Agency collected all perimeter keys around that time.
4. Assistant General Manager Brook Nichols was the individual in charge of the Best security system, including the changing of door cores, making keys, and distributing keys, from 1992 until approximately the latter half of 1998, when he left the Agency. At that time, Operations Supervisor Anthony Tenorio was trained in the Best security system and took charge of keying locks, and making and distributing keys.
5. Mr. Tenorio testified that he did not collect and reissue all the keys in circulation at the time he took over the locking system responsibilities, and that therefore, he could not be certain what keys were already in circulation at the time he assumed these duties.
6. Some time in 1998, Appellant suffered an injury and went on disability leave for a short period of time. Appellant contends that he turned in both his keys at that time, and that Mr. Tenorio issued him a new key when he returned. Mr. Tenorio testified that he does not recall one way or the other whether he took Appellant's keys or issued him a new one, but he testified that the Agency does not typically collect keys from individuals who go on extended leave.
7. Appellant contends that he recalls Mr. Tenorio issuing him only one key upon his return because the facility switched to keypads on the exterior doors and employees therefore no longer needed a perimeter key.
8. In 1998 the Agency opened the Boettcher Bistro as a food service for DPAC events. It contracted with Volume Services America, a contract food vendor for DPAC since 1995, to provide the services in the Boettcher Bistro. The Bistro has a kitchen which Volume Services America uses for supply storage. The kitchen area is accessible by two locking doors (indicated as "A" and "B" on Exhibit 1).

9. Appellant contends that since the opening of the Boettcher Bistro in 1998, one of his duties each morning has been to empty four trashcans located inside the Bistro kitchen area (indicated as "t" on Exhibit 1). Appellant testified that his direct supervisor, Martin Farris, told him to do this. He testified that Mr. Farris usually opened the kitchen doors for him and turned on the lights in the morning, and that the doors were usually ajar and the lights were usually on when he emptied the trash in the Bistro kitchen. Appellant testified he never unlocked the kitchen doors with his key.
10. Mr. Farris testified he has been Appellant's direct supervisor for over two years. He testified he has never instructed Appellant to empty the trash in the Bistro kitchen or to enter the kitchen for any reason. He testified that to his knowledge, there are not trashcans typically sitting in the four areas Appellant indicated with a "t" in Exhibit 1, although he could not recall what was typically in those areas. Mr. Farris testified that his instructions to Appellant were only to empty the trashcans in the Bistro which Volume Services America employees put outside the kitchen doors. Appellant's previous supervisor was Jeff Reyes. Mr. Reyes did not testify.
11. DPAC's General Manager, Rodney Smith, testified that since 1995 it has been general knowledge among all employees that the Volume Services America's locked storage areas such as the Bistro Kitchen are off limits. He testified that the Volume Services America employees have two trashcans on rollers which they typically roll inside the kitchen area during an event, and then they typically roll them outside the kitchen doors when the event is over. Mr. Smith testified that when Volume Services America puts all its supplies away in the kitchen after an event, there is not enough room for the trashcans. The Volume Services America employees remove any trashcans they want emptied by City employees from the Bistro kitchen and put them outside the kitchen doors.
12. Mr. Smith testified that in September of 2000, Volume Services America complained that small items such as chafing dishes, utensils, and sample wine bottles were turning up missing from its kitchen in the Bistro. Mr. Smith testified that he made an announcement at the September staff meeting that all employees must remain out of unauthorized areas, including the Bistro kitchen area. Mr. Smith testified that he could not recall seeing Appellant at this meeting, but he did recall seeing custodian Steve Perea at this meeting.
13. Mr. Tenorio testified that in September of 2000, after the complaints by Volume Services America, he changed the locks on the Bistro kitchen doors to require grand master keys.
14. Mr. Smith testified that Volume Services America continued to complain that items were missing from the Bistro kitchen, and was becoming increasingly upset. On approximately November 13, 2000, Mr. Smith placed a hidden camera inside the kitchen area.
15. At 8:33 a.m. on November 16, 2000, the hidden camera captured Appellant and Mr. Perea opening the far door from the camera (marked door B on Exhibit 1), entering the kitchen, and looking under the countertops. On the video, Mr. Perea either has his hand in his jacket pocket or is carrying something under his left arm the entire time he is in the kitchen. Mr. Perea clearly picks out a large spoon with which he eventually exits the kitchen. Appellant has something in

his hand which appears to be a frying pan, but the image is unclear. The total time Appellant and Mr. Perea are in the kitchen area is approximately 45 seconds. (See, Exhibit 3)

16. The hearing officer finds that the doors to the kitchen area were both closed prior to entry by Appellant and Mr. Perea on November 16, 2000 based on the following analysis of the video. Immediately prior to their entry, the room is dark with the exception of the light coming from a small glass-door refrigerator inside the kitchen area near the camera. No light is seen at the far end of the kitchen area, where door B is located. Upon that door being opened, there is clearly a light source outside the door which reflects onto a surface just inside the door. That reflected light is then blocked by the door opening the rest of the way, obscuring the view of the object reflecting the light. Mr. Perea and Appellant are then seen walking into the kitchen area when the light sensors are triggered by their entry, turning on the lights inside the kitchen. Door B had to be completely closed because if it were open even a crack, the light source outside the door which is observed reflecting on the surface inside the door would have been visible before Appellant and Mr. Perea opened the door.
17. Mr. Smith testified that door B cannot be closed and unlocked. He testified that the door is always locked. Based on the finding that the door was closed when Appellant and Mr. Perea opened it on November 16, the hearing officer therefore finds that either Appellant or Mr. Perea had to unlock door B with a key in order to open it.
18. On November 17, 2000, Mr. Smith put signs on the Bistro kitchen doors just above the doorknobs reading "VOLUME SERVICES AMERICA EMPLOYEES ONLY NO UNAUTHORIZED PERSONNEL" (see, Exhibit 2). The exhibit indicates the actual size of the lettering on the signs, which were approximately 1 1/2" to 2" tall and approximately 5" wide.
19. The video further shows that on the morning of November 20, 2000 Appellant and Mr. Perea entered the door nearest to the camera (marked door "A" on Exhibit 1), triggered the light sensor causing the lights to turn on, and then looked around briefly. Once again, no light appears through either door immediately prior to their entry, suggesting that the doors were completely closed. Appellant opens the door, looks around the edge of the open door, looks directly at the camera, apparently recognizes it as such, and then exits the room. Mr. Perea also looks around the door at the camera, then exits.
20. Prior to viewing the video during the hearing, Appellant had testified that on both occasions he and Mr. Perea went into the kitchen, the lights were already on and the door was ajar. This is not consistent with the images on the video and tends to cast doubt on Appellant's claims that he did not use his key to open the doors and enter the kitchen, and that the doors were open and the lights were usually on when Appellant went in to empty the trash.
21. Appellant testified that employees routinely borrowed kitchen items in spite of the fact they knew they were not supposed to be doing this. Appellant testified that such items (mostly glasses and other utensils) were typically left at the facility and eventually returned to the vendor areas. Appellant further testified that supervisors were aware of this and even did some of it themselves. As an example of this, Appellant testified that on approximately November 20, 2000, several employees held a potluck Thanksgiving Dinner in the facility. Appellant testified he saw several employees removing warmers and utensils from the Pavilion kitchen,

which was also a Volume Services America kitchen off-limits to City employees, and taking the items to the elevator, apparently heading in the direction of the pot luck. Appellant testified he watched Mr. Tenorio get on the elevator with these individuals and shake his head, presumably because they were taking things from one of the kitchen areas. Mr. Tenorio testified he does not remember this event and did not know employees were in the habit of borrowing items from the kitchen areas.

22. Mr. Smith testified that he observed Appellant and Mr. Perea on the videotape on both November 16 and November 20. On or around the afternoon of November 20, he called Appellant into his office and placed him on investigatory leave. Mr. Smith collected Appellant's key at that time.
23. It came to Mr. Smith's attention that the key he collected from Appellant had "JJJ Locksmith Co." stamped on the back of it instead of "Best."
24. Mr. Tenorio testified that he did not issue Appellant or anyone else a key with "JJJ Locksmith Co." on it at any time because all the keys in the system are "Best" keys. The Agency did not produce a log of any kind establishing which keys had been issued to which employees at which times and by whom.
25. Mr. Smith testified that he determined that JJJ Locksmith Co. is not a vendor for the Agency and never has been as far as he could determine. He testified he contacted JJJ Locksmith Co. and asked them how the City could have keys from their company when all the City keys are marked "DO NOT DUPLICATE." (See, Exhibit 4) Mr. Smith testified that JJJ Locksmith Co. employees told him that pursuant to a recent court case, if the company had a blank which matched the key, it could legally make a copy of the key despite the duplication prohibition on the key. JJJ Locksmith Co. further stated it makes hundreds of keys and could not possibly tell Mr. Smith who requested the copies or when they were made.
26. Mr. Tenorio testified that in an attempt to ascertain how Appellant had accessed the Bistro kitchen, he tried the key taken from Appellant in the kitchen doors and found that it unlocked the doors. Mr. Tenorio then compared the key with a grand master and discovered that Appellant's key was a grand master key. (See, Exhibits 4, 4A)
27. The back of Appellant's key is stamped with an "M." Mr. Farris testified that the grand master keys are all stamped with "GM," and that to his recollection, master keys are stamped with an "M." Mr. Farris showed his key to the hearing officer and it had "GM" stamped on the back of it in larger letters than the "M" appearing on the back of Exhibit 4A. Upon initial examination of Exhibit 4A, Mr. Farris testified that it appeared to be the type of key Appellant should have had because of the "M" stamped on the back. However, when he compared the key cuts to those in his grand master, he found them identical. Mr. Smith testified that the "M" on Exhibit 4A indicated the type of blank, or keyway, used to make the key, and was not any type of designation for "master." (See, Exhibits 4 and 4A)
28. Appellant testified that he never knew he was in possession of a grand master key until the City Attorney's questions during the hearing. Appellant testified he never tried the key in any locks requiring a grand master because he thought it was a master key.

29. The hearing officer has carefully observed the grand master key confiscated from Appellant and makes the following observations. The key is significantly scuffed, marked and worn, and has hand dirt caked in the grooves of the keyway. The general appearance of the key is that it is fairly used, and that it does not appear to be a key which was only used for a period of two months. Mr. Farris also observed the key, and testified that in his opinion the key did not appear to be new. Mr. Tenorio observed the key and testified it "had some wear on it." The hearing officer finds, based on these observations, that the key was in Appellant's possession much longer than two months.
30. Both the fronts of the Best keys and of the JJJ Locksmith Co. keys have language prohibiting duplication. The language is similar but not identical. Both keys have a border of stars on a crosshatch background around the tops. The borders are similar, but not identical, and the word "Best" appears in the middle of the star border on the Best keys. (See, Exhibits 4 and 4A) The print bearing the name of "JJJ Locksmith Co." is small, delicate, and not readily apparent when first looking at the back of a JJJ Locksmith Co. key (Exhibit 4A). It is the hearing officer's observation that these keys are very similar in appearance and that their differences are not readily apparent until one closely examines them side by side.
31. Appellant testified that to his knowledge, four other individuals had been issued JJJ Locksmith Co. keys; Fred Brown, Sam Gonzales, Bernard Chavez, Gina Vigil, and Henry Mascarenas. Mr. Tenorio testified that a total of four individuals were eventually discovered to have been in possession of JJJ Locksmith Co. keys: Appellant, Mr. Mascarenas, Mr. Brown, and a key collected by Facility Grounds Supervisor Manual Guerra from another employee. Mr. Smith testified that another employee, Oley Williams, also had a JJJ Locksmith Co. key, and that Mr. Williams' and Appellant's were the only two JJJ Locksmith Co. keys that were grand master keys. The others were master keys. Mr. Tenorio testified that he asked all these employees where they got these keys and they all told Mr. Tenorio they had gotten them from him. None of the other employees are still working for the Agency except for Mr. Mascarenas. They either quit or have been terminated since that time.
32. Senior Utility Worker Henry Mascarenas testified that when he discovered he was not supposed to have a key stamped "JJJ Locksmith Co." he reported it to the Agency and turned over the key. He testified he has not been disciplined for possessing such a key. He testified that Mr. Tenorio issued him this key shortly after he became a Senior Utility Worker several years ago.
33. Mr. Tenorio testified that he did recall issuing a key to Mr. Mascarenas, but he denied ever issuing a key to Mascarenas or anyone else with "JJJ Locksmith Co." stamped on the back.
34. On December 21, 2000, the Agency sent Appellant a letter notifying him of its contemplation of disciplinary action, setting a meeting for January 3, 2001 (Exhibit 6). In this letter the Agency informed Appellant of a video in which he and another employee entered the kitchen area. The letter did not include allegations that Appellant had taken anything from the kitchen area. The letter further indicated that Appellant was in possession of an unauthorized key which had been made by an outside company and was not issued by the Agency.

35. On January 3, 2001, the Agency held a predisciplinary meeting. The Agency did not show Appellant the videotape at the meeting. At that meeting, Appellant told the Agency that Mr. Tenorio had given him the key. Appellant also stated that he was in the room to check for trash, that he believed he was supposed to be in the room for that purpose, and that he did not know the area was off limits to him. Appellant testified that during the predisciplinary meeting he did not tell the Agency officials he took a pan and spoon to make eggs on the morning of November 16 because he was not aware at the time of the meeting that this was one of the allegations. He testified the reason they took utensils was that Mr. Perea was feeling ill that morning due to medication he was taking, and that his daughter had brought him some eggs which needed to be cooked. Appellant testified he had forgotten about this particular incident until he saw the videotape much later.
36. On January 5, 2001, the Agency issued Appellant a suspension from January 5 until February 16, 2001 (Exhibit 7). This was Appellant's first disciplinary action. Mr. Smith testified that of the four employees observed entering the Bistro Kitchen on the videotape, two who had prior disciplinary histories, including Mr. Perea, were terminated, and two, Appellant and one other, were given thirty-day suspensions.
37. On January 9, 2001, Appellant timely filed his appeal giving rise to this case.
38. Appellant did not see the tape until Friday, March 2, 2001, while preparing for the hearing to take place on Monday, March 5. That hearing date was subsequently continued.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a suspension 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... suspension... 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 suspension was not disputed by either party to this case.

2. 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.

- ...3) Dishonesty, including but not limited to: ... using official position or authority for personal profit or advantage... or any other act of dishonesty not specifically listed in this paragraph.
- ...20) Conduct not specifically identified herein may also be cause for dismissal.

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.

- ...5) Failure to comply with the instructions of an authorized supervisor...
- ...11) Conduct not specifically identified herein may also be cause for progressive discipline.

2. The arguments.

The Agency asserts that Appellant's story is a string of lies and excuses. First, it maintains that Appellant knew he was not supposed to be in the kitchen area because this was general knowledge among all the employees. The Agency specifically told employees at the September staff meeting that because of the complaints of theft, all employees were to remain outside the unauthorized kitchen areas. Finally, the Agency put up signs on the kitchen doors on November 17, 2000, indicating that only Volume Services America employees were authorized to enter. The Agency posits that there is not enough room in the kitchen area for trashcans when everything is put away after an event, which is why they are put outside the kitchen doors. Appellant's supervisor testified he never assigned Appellant the duty of emptying the trash in the kitchen. Nobody in the Agency has ever assigned Appellant the duty of emptying trash in the kitchen area which Appellant claims gave him the right of access to that area.

In addition, The Agency posits that none of the evidence or testimony supports Appellant's contention that the kitchen doors were always unlocked and open when he supposedly went in to empty the trash. On the contrary, all the Agency witnesses testified that unless there is an event in progress, the doors are always closed and locked, as they clearly appeared to be in the videotape. The Agency posits that the videotape clearly shows Appellant had to unlock the door when he and Mr. Perea came in the kitchen on November 16, 2000 because the door was closed and that particular door cannot be left in an unlocked position. In addition, contrary to Appellant's claims, the lights were not on either time he and Mr. Perea were captured on the videotape. Therefore, Appellant is lying when he claims the door was open ajar, and that he did not use his key to access the kitchen. For all these reasons, the Agency posits Appellant's assertion that he believed he was supposed to empty the trash in the kitchen area is totally lacking in credibility.

The Agency further maintains that Appellant was in possession of a grand master key which was apparently forged by JJJ Locksmith Co. and was not issued by any of its employees. The Agency argues that Appellant not only knew this, but that he improperly used the key to access an area he knew to be off limits to him, and took things from that area even after the Agency made it clear that employees were to stay out of unauthorized areas due to allegations of theft.

Finally, the Agency argues that Appellant never offered the explanation that he was helping Mr. Perea make eggs because his medication was making him sick until after Appellant saw the videotape. The Agency argues that this is just another excuse Appellant came up with to get out of trouble.

Appellant responds as follows. First, Appellant argues he has routinely accessed the kitchen area to check it for trash since the Bistro opened in 1998. He alleges he was told to do so by his supervisors, and was never told otherwise by anyone at any time. He contends that he was not at the September 2000 staff meeting and nobody in the Agency could testify that he or she ever specifically told Appellant that the kitchen was an off-limits area. Appellant contends that his reading eyesight is poor but that he does not wear his spectacles when he works because he does not need to read. He never noticed the sign over the doorknobs on the Kitchen doors until after he returned from suspension.

Second, Appellant responds he did not know he was in possession of an unauthorized key apparently forged by JJJ Locksmith Co., and was only one of several people in possession of such a key. Furthermore, Appellant never knew the key was a grand master key because, thinking it was a master key, he never bothered to try it in doors requiring a grand master key, including the Bistro kitchen doors. Appellant contends that the kitchen doors were left ajar and the lights were typically already on when he emptied the trash from that room, and that this therefore had to be the case on November 16 and November 20 when he and Perea were filmed entering the kitchen area.

Third, Appellant argues that at the time of the predisciplinary meeting, he did not offer the specific explanation of needing to help Mr. Perea make eggs on November 16 because he had not seen the video tape, did not recall the specifics of the morning in question until he saw the tape, and was not notified that taking something from the kitchen area was one of the accusations because it did not appear in the contemplation letter.

3. The hearing officer's analysis and conclusions.

The hearing officer finds many aspects of Appellant's explanation of how and why he accessed the kitchen lacking in credibility. The clearest inconsistency is in Appellant's claim that the kitchen doors were always open when he went in. The videotape establishes that there was an outside light source which only became visible when the door was opened, indicating that the door was completely closed when Appellant and Mr. Perea opened it. Since Mr. Smith testified that door B is always locked and cannot be unlocked, the door had to be unlocked with a key for Appellant and Mr. Perea to have entered it. Furthermore, since the only two grand master keys collected from the offenders were taken from Appellant and Mr. Williams, this means Mr. Perea was not in possession of a grand master key. Therefore, of the two individuals caught on videotape, it had to be Appellant who unlocked the door. Since Appellant basically admitted that he knew the door required a grand master key to open it, these facts cast doubt on Appellant's claim that he did not know he was in possession of a grand master key. In addition, the door did not require a grand master key until Mr. Tenorio changed the locks in September of 2000. This is inconsistent with Appellant's claim that he never used his key to open the kitchen doors or even tried it in the doors because they required a grand master key.

The hearing officer is furthermore not persuaded by Appellant's excuse that he thought he was supposed to empty trash from the kitchen, based on the consistent testimony from Agency witnesses which establishes the following. First, Mr. Farris had never given Appellant directions to empty the trash in the kitchen. Second, the trash receptacles were routinely placed outside the kitchen doors when the vendors wished for the City employees to empty them. None of the Agency witnesses recalled trashcans routinely left in the four locations indicated by Appellant. Third, contrary to Appellant's claims that the doors were left ajar so he could access the kitchen, Agency witnesses consistently testified that the doors were not left unlocked, and Mr. Ferris specifically denied unlocking the doors each morning to provide Appellant access.

In addition, while those areas are not all in plain view on the videotape, there are no trashcans to be seen anywhere in the kitchen. On the videotape of November 16, Appellant and Mr. Perea walked into the kitchen and straight to the counters where they eventually located the items they took. While Appellant claimed he had already been in the kitchen earlier that day to check the

trash, Mr. Smith testified that he watched the entire tape and saw no one in the kitchen area any time that morning before Appellant and Mr. Perea entered and took the items. Finally, while no one from the Agency could testify they directly told Appellant the kitchen area was off limits or place Appellant at the September, 2000 staff meeting, Mr. Smith specifically saw Mr. Perea at the staff meeting. The hearing officer finds that even in the unlikely event Appellant did not know the kitchen was off limits, it is more likely than not that since Mr. Perea, who was at the staff meeting, accompanied Appellant into the kitchen on the days in question, he would have said something to Appellant about the announcement at the staff meeting that the area was off limits to them.

Based on the foregoing analysis, the hearing officer concludes by a preponderance of the evidence that contrary to Appellant's claims, he did know he was not supposed to be in the Bistro kitchen, he knew he had a grand master key, and he used his key to access the kitchen. The hearing officer therefore further concludes that Appellant engaged in acts of dishonesty when he claimed not to have unlocked the kitchen doors, that the kitchen doors were usually open and were open on those mornings he was filmed entering the kitchen, and that he did not know he was not supposed to be in the kitchen area, and that he thought he was supposed to empty the trash in that area.

The hearing officer is not persuaded that Appellant deliberately acquired a forged key from JJJ Locksmith Co. It was one of approximately five JJJ Locksmith Co. keys discovered to have been in circulation. All five employees in possession of the keys said Mr. Tenorio had issued the keys to them. One of these individuals, Mr. Mascarenas, credibly testified as much under oath. Yet the Agency did not issue any disciplinary action against Mr. Mascarenas. And while the kitchen doors did require a grand master key after September of 2000, they only required a master key before that. The key in Appellant's possession was clearly much older than two months, and in fact appeared to be several years old. Mr. Tenorio testified it was possible the JJJ Locksmith Co. keys were already in circulation when he took over. The differences in the appearance of the JJJ Locksmith Co. keys and the Best keys are very subtle. It is therefore possible that Mr. Tenorio simply continued to re-circulate rogue keys which were already in circulation. In addition, at least one Agency witness, Mr. Farris, initially mistook the "M" keyway designation on the back of Exhibit 4A as indicating the key was a master key for the Agency's Best security system. It is not out of the question that Mr. Tenorio also mistook the grand master key in Appellant's possession for a master key when he issued it to Appellant. Based on all this evidence, while it is not clear where the keys came from, the hearing officer does not conclude that a preponderance of evidence supports the Agency's contention that Appellant deliberately required a forged key from an unauthorized outside source.

The hearing officer finds Appellant's explanation of helping Mr. Perea prepare eggs due to an upset stomach to be credible as completely consistent with what she observed on the videotape. The tape shows the two gentlemen entering the room, going straight for the counter and very deliberately looking for something. After a few seconds looking in a couple of locations, they take what clearly looks like a large serving spoon and what appears consistent with a frying pan. When they find these items, the two men then almost immediately leave the room. In other words, they behave as though they are there for the specific purpose of acquiring the cooking tools. In addition, Mr. Perea has something under his arm or has his hand in his pocket and appears to be holding something in there the whole time. This would be consistent with him carrying something, perhaps something fragile like eggs that he did not wish to fall out of his pocket.

The items the two men took did not appear to be items of which one would intend to permanently deprive the contract vendor. Mr. Tenorio testified that he located a large service spoon and a warmer pan in the break room in January and took them to the Bistro area. In addition, apparently many employees were in the habit of borrowing items from the kitchen and then leaving them lying around the facility for eventual return to the kitchen. Appellant testified he frequently rounded up glasses, utensils and other items left lying around the facility and returned them to the Bistro. Finally, several other employees were disciplined for accessing the kitchen areas which were supposedly known to be off limits. All these things corroborate Appellant's claim that employees were in the habit of borrowing things from the kitchen. The hearing officer finds Appellant's assertions that he and Mr. Perea were merely borrowing cooking utensils persuasive.

However, the excuse that "everybody does it" does not absolve Appellant for his failure to follow Agency directives to remain out of the kitchen area as off-limits. It was precisely because "everybody was doing it" that the vendor was complaining and the Agency had re-issued a specific directive to the staff to stay out of the off-limits areas. The hearing officer concludes that Appellant knowingly failed to follow the specific directives of his supervisors when he entered the kitchen on November 16 and November 20, 2000.

The hearing officer is not terribly troubled by the fact that Appellant did not offer this explanation at the disciplinary meeting. The allegations of him taking something from the kitchen were not included in the predisciplinary letter. He was not shown the videotape at the time of the predisciplinary meeting. The purpose of a predisciplinary meeting is to inform an employee of the allegations in order to give him an opportunity to respond. He cannot be expected to respond to allegations of which he has not yet been fully informed. While the Agency posited it did not notice the items being taken on the videotape until after the predisciplinary meeting and the omission of these specific allegations is therefore understandable, it is not entirely Appellant's fault he didn't respond to these allegations at the time of the predisciplinary meeting. If Appellant were in the habit of entering the kitchen to check trash, borrow things or whatnot with some frequency as he has admitted he was, he might very well have not recalled this specific incident until being shown it on the videotape.

The hearing officer concludes by a preponderance of evidence that Appellant did not take anything from the kitchen area with the intent to permanently deprive the contract vendor. Finally, the hearing officer concludes that a preponderance of evidence does not support the Agency's contention that Appellant deliberately acquired a forged grand master key.

4. Severity of the discipline.

Appellant posits that given he is a first-time offender with no disciplinary history, his suspension of thirty days was excessive and was not proper under the relevant portions of the following CSR Rule:

Section 16-20 Progressive Discipline

- 1) In order of increasing severity, the disciplinary actions which an appointing authority or designee may take against an employee for violation of career service rules, the Charter

of the City and County of Denver, or the Revised Municipal Code of the City and County of Denver include:

- a) Verbal reprimand, which must be accompanied by a notation in the supervisor's file and the agency's file on the employee;
- b) Written reprimand, a copy of which shall be placed in the employee's personnel file kept at Career Service Authority;
- c) Suspension without pay, a copy of the written notice shall be placed in the employee's personnel file kept at Career Service Authority...

The Agency asserts that Appellant's position is one of trust. Appellant is an employee and representative of the government who has access to the property of the City and County, and its vendors and associates. He must be held to a higher standard of honesty and level of accountability because of this, and he must be punished commensurate with that heightened trust responsibility. The Agency posits it must be able to rely on its employees to maintain a level of trustworthiness, particularly in relations with contractors such as Volume Services America, or risk losing the business of its established contractors. The Agency's position is basically that Appellant's perception of the seriousness of this crime does not take into consideration these more serious, far-reaching ramifications. It further points out that several other employees who were caught on the video who had any prior disciplinary history have been terminated.

The hearing officer is sympathetic that a thirty-day suspension appears severe when one considers that apparently nothing was actually taken from the vendor. However, she also agrees that Appellant is in a position which carries with it a heightened trust responsibility. While borrowing implements from a kitchen may not appear in isolation to be so serious a crime, the ramifications for city government can be far-reaching if employees behave in ways which might jeopardize its contractual relations or the public trust. City government runs the risk not only of losing existing contracts, but also of gaining a bad reputation among local businesses who might otherwise consider contracting with the government in the future. 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 trust of the public and those contractors. Appellant must be severely punished in order to set an example for all other employees who might feel the need to steal a cracker here or borrow a cooking spoon there. If any employees are allowed "minor" infractions, then they all may perceive such infractions as minor and continue to behave accordingly. This adds up to a much more serious problem for the Agency than any one incident might imply on its face. While progressive discipline is preferable where it is practicable, it is not required as suggested by the wording of CSR Rule 16-50, where the prohibition against dishonesty appears: "A lesser discipline other than dismissal *may be imposed where circumstances warrant.*" (Emphasis added)

The hearing officer therefore finds the Agency's reasoning for the severity of punishment in this case to be within the range of reasonable alternatives under the circumstances of this case. She concludes that the thirty-day suspension was not unreasonably related to the severity of the offense, in light of the ramifications to the Agency and its relations with contractors.

CONCLUSIONS OF LAW

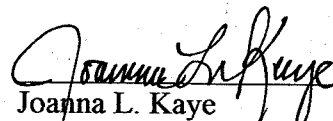
1. The Agency has demonstrated by a preponderance of evidence that Appellant knew he had a grand master key, that he knew he was not supposed to be in the kitchen area, that he used his key to access the area, and that he lied to the Agency when he denied these things.
2. Based on the above conclusions, the Agency has demonstrated that Appellant engaged in:
 - a) Dishonesty in violation of 16-50 A. 3).
 - b) Failure to comply with the instructions of an authorized supervisor in violation of 16-51 A. 10).
 - c) Conduct not specified in CSR Rule 16-50 and 16-51, which may otherwise be cause for discipline.
3. The Agency has not demonstrated by a preponderance of the evidence that Appellant deliberately acquired a forged grand master key from an unauthorized source, or that Appellant intended to permanently deprive the contract vendor of any items.
4. The Agency has demonstrated just cause for disciplining Appellant by a preponderance of the evidence.
5. In light of the totality of evidence in this case, the Agency's thirty-day suspension of Appellant is reasonably related to the seriousness of the offense, given that Appellant's position is one of trust involving the public at large and has an impact on existing relations with government contract entities.

DECISION AND ORDER

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

This case is hereby **DISMISSED**

Dated this 13th day of August, 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 **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 14th day of August, 2001, addressed to:

Jeffrey Menter
Attorney at Law
26 W. Dry Creek Cr., Suite 470
Littleton, CO 80120

Louis Vigil
4966 St. Paul St.
Denver, CO 80216

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** depositing same in interoffice mail, this 14th day of August, 2001, addressed to:

Sybil R. Kisken
Assistant City Attorney

Tom Migaki
Department of General Services

George Seaton
Theatres and Arena

V. Granado