INTRODUCTION

The Denver Police Department Discipline Handbook (the “Matrix”) permits the Manager of Safety (“Manager”) to aggravate the presumptive penalty imposed upon an officer in cases where the Manager has imposed discipline for similar conduct within a specified time period preceding the date of the current offense. In this case we must consider whether the Manager may extend the four-year time period for a category B violation in a situation where the Manager did not impose discipline for the prior offense until after the date of the current offense. After careful review of the applicable provisions of the Matrix, we conclude that such an extension would conflict with the plain language of the Matrix provisions setting forth the procedures for calculating the time frame for considering prior violations. Specifically, permitting the Manager to aggravate discipline based on discipline imposed after the date of the current offense would impermissibly extend the time frames expressly set forth in section 18.1 of the Matrix.
FACTUAL BACKGROUND

The Commission adopts the material facts set forth in the Hearing Officer’s Findings, Conclusions, Decision and Order (“Hearing Officer’s Decision”). The Hearing Officer’s Decision describes the underlying facts in great detail. Hearing Officer’s Decision at 3-5. For purposes of this opinion, it is sufficient to describe the following material facts. On or around the early morning hours of September 20, 2009, Officer Eric Sellers was working off-duty security at a Denver bar. During his shift, he became involved in the forcible ejection of an intoxicated patron from an adjacent establishment. At some point during the altercation the patron suffered a facial laceration, although it is not clear how or when the patron was injured. Because the patron suffered an injury during the ejection, Sellers should have completed out a use of force report, which he failed to do.

Shortly after the incident, the Denver Police Department (“Department”) initiated an internal affairs investigation into Sellers’ conduct. On January 5, 2010, the initial investigator, Lt. Jimmy Martinez, recommended that Officer Sellers be sanctioned for a violation of RR-607 – Failure to Make, File or Complete Official Records – and recommended a written reprimand within the presumptive range. Shortly thereafter, on January 21, 2010, that recommendation was endorsed by Lt. Martinez’s superior officer, Cpt. Calo. After Cpt. Calo’s review, the Department took no additional action or review of this disciplinary matter for more than one year.

During the pendency of this disciplinary matter, Officer Sellers was disciplined for similar conduct in a separate incident. Specifically, on August 9, 2010, the Manager imposed discipline on Officer Sellers for certain violations, including violation of RR-102.1.

On May 4, 2011, more than 15 months after Cpt. Calo completed his review in this case – Division Chief Klee, entered her recommendations in this matter. Chief Klee recommended that
Sellers be disciplined for violation of RR-102.1 – Duty to Obey Departmental Orders – as it pertains to Operations Manual 105.02(1) a.5. She recommended a penalty of 32 fined hours. Approximately three months later – nearly two years after the underlying incident took place – on August 4, 2011, the Department informed Officer Sellers that it contemplated disciplining him for violation of RR-102.1 as it pertains to Operations Manual 105.02(1) a.5 with a penalty of 32 fined hours.

Approximately three months later, on November 8, 2011, the Manager sustained the violation of RR-102.1 as it pertains to Operations Manual 105.02(1) a.5 against Officer Sellers. This was a Category B violation under the Matrix, with a presumptive penalty of a written reprimand. The Manager imposed an aggravated penalty of 16 fined hours because “[w]hen this incident occurred [Sellers] was already under investigation for a similar incident . . . .” Id. at 5.

All told, the investigation into Officer Sellers’ conduct, and the imposition of discipline for failing to file a use of force report took more than two years.

**PROCEDURAL HISTORY**

On November 18, 2011, Officer Sellers timely filed an appeal of the disciplinary order. A hearing on the appeal was held on March 12 and 13, 2012. The Hearing Officer issued her decision on April 12, 2012. The Hearing Officer affirmed the violation of RR-102.1 against Sellers for failure to properly submit a use of force report. However, the Hearing Officer reduced the penalty to a written reprimand. The Hearing Officer determined that the Manager had improperly increased the punishment based on similar conduct that was only under investigation at the time of the underlying incident. The Hearing Officer determined that under the plain language of the Matrix, a penalty may only be increased based on similar prior conduct
when discipline has been *imposed* at the time of the underlying offense, not when the prior incident is merely *under investigation*.

On March 13, 2012, The Manager filed his notice of appeal to this Commission. The Manager filed his Opening Brief on July 30, 2012. Officer Sellers filed an Answer Brief on September 24, 2012. The Manager filed a Reply brief on October 9, 2012. Officer Sellers did not file a cross-appeal contesting the Hearing Officer’s decision to affirm the underlying rule violation. Thus, the only issue before us is whether the Hearing Officer properly interpreted the Matrix when she reduced the penalty imposed by the Manager in this case.

After considering the briefs and argument and reviewing the record and decision below, we rule as follows:

**DECISION**

**A. Basis for Appeal**

The Charter of the City and County of Denver (“City Charter”) limits our review of the *Hearing Officer’s Decision* to certain defined circumstances. *See* City Charter § 9.4.15(F); *Woods v. City & County of Denver*, 112 P.3d 1050, 1052 (Colo. App. 2005). In this case, the City appealed the *Hearing Officer’s Decision* on two separate grounds: (1) the *Decision* involves an erroneous interpretation of Departmental or Civil Service rules, and (2) the *Decision* involves policy considerations that may have effect beyond the case at hand. *City’s Notice of Appeal* at 2.

The *Hearing Officer’s Decision* turns upon an interpretation of the DPD Disciplinary Matrix and the Disciplinary Handbook adopted to explain and implement the Matrix. To the extent that the Handbook and Matrix can be considered Departmental Rules, we find we have jurisdiction over this appeal. Accordingly, we conclude that this appeal is properly before the Commission.
B. Standard of Review

The Charter of the City and County of Denver ("City Charter") and Commission Rule 12 address the standard of review for appeals to this Commission. The Hearing Officer’s findings of evidentiary fact are binding upon the Commission. City Charter § 9.4.15(F); Commission Rule 12 § 11(J)(5). The Charter expressly states that the Commission may not resolve contested issues of fact. City Charter § 9.4.15(F). The Commission is not bound by the Hearing Officer’s findings of ultimate fact, conclusions of law, or mixed findings of law and fact; these findings are subject to de novo review. See Vukovich v. Civil Service Com’n of City and County of Denver, 832 P.2d 1126, 1128 (Colo. App. 1992) (citing Blaine v. Moffat County School District RE No. 1, 748 P.2d 1280, 1287 (Colo. 1988)).

Given that the underlying facts surrounding the discipline are not in dispute, the only issue before us is whether the Hearing Officer erred in her determination concerning the proper use and interpretation of the Matrix. Accordingly, our review of this case is de novo.

C. Aggravation of Discipline for Repeat Violations of the Same or Similar Conduct.

It is undisputed that the Matrix permits the Manager to impose an aggravated penalty based on repeated violations of the same or similar offenses when a second or subsequent offense falls within a specifically prescribed time period. See Matrix § 18.1 ("The matrix addresses repeated violations of the same offense or offenses of an equal or greater conduct category by raising discipline levels when the second and subsequent offenses fall within specified time frames."). The method for establishing the applicable time frame also does not appear to be in dispute.

Sections 18.1 and 18.2 of the Matrix describe in detail the process by which the Manager may impose an aggravated penalty for the same or similar conduct. Section 18.1 provides that,
“[o]nce the current violation is sustained, a disciplinary history review will determine whether it is a repeat violation or whether there are prior violations of an equal or greater conduct category within the prescribed time frame.” (Emphasis added.) Section 18.1 then prescribes the applicable time frames for each level of offense. For purposes of this case, the offense is a level B offense; thus, the prescribed time frame is four years. *Id.*

Section 18.2 provides instructions for determining the temporal boundaries of the applicable time frame. It provides, in relevant part:

> For the purpose of calculating the [subsection 18.1] time frames, the date of prior violations being considered is the date of imposition of discipline by the Manager of Safety or the date of the issuance of a reprimand by the Chief of Police. The date of the current violation is considered to be the date on which the violation occurred.

Under this section, the four-year time frame starts “on the date on which the violation occurred” and extends back four years from that date. In this case, the applicable time frame would be the four year period immediately prior to date of the incident, *i.e.* September 20, 2005 through September 20, 2009. As noted above, this application of section 18 does not appear to be in dispute. *See Sellers’ Answer Brief* at 3; *Manager’s Reply Brief* at 2-3 (“Section 18.2 says that the four-year “time frame” is determined looking back four years from the date of the current violation. . . . Since the violation here occurred on or about September 20, 2009, for purposes of reviewing disciplinary history, the Manager must consider prior discipline dating back to September 20, 2005.”) (internal citation omitted).

Relying on section 18.2, the Hearing Officer then looked at the date in which discipline was imposed in the prior case – August 9, 2010. Because this date falls outside of the four year time period described by section 18, *i.e.* September 20, 2005 through September 20, 2009, the Hearing Officer determined that the Manager could not impose an aggravated penalty. We agree. The plain language of the Matrix expressly defines the four-year time period during
which discipline must have been imposed for similar prior conduct. Thus, in this case in order for prior discipline to be used as the basis for aggravating penalty imposed on Officer Sellers, the prior discipline must have been imposed on Sellers within the four years immediately preceding the date of the current offense, \textit{i.e.} between September 20, 2005 and September 20, 2009.

The Manager appears to argue that Section 18.2 merely sets forth the earliest possible date by which discipline for similar conduct must have been imposed in order to be considered for purposes of aggravating the penalty in the current case. \textit{See} Manager’s Reply Brief at 3-4. (“In this case, the Manager sustained the current violation on or about November 11, 2011 . . . . Looking back to September 20, 2005, Petitioner has one prior violation for the same conduct, for which was imposed on or about August 9, 2010.”) (internal citation omitted). Thus, argues the Manager, so long as discipline was imposed for the similar prior conduct after September 20, 2005, it may be used to aggravate the penalty imposed on Officer Sellers.

We disagree with the Manager’s interpretation. As demonstrated by this case, this interpretation of section 18 has the effect of extending the applicable time frame beyond those expressly described in section 18.1. In this case, the Manager’s interpretation would permit the Manager to extend the time frame to encompass discipline imposed for similar conduct between September 20, 2005 through November 18, 2011 – a period of a more than six years. However, the Matrix expressly states that the prior violations must occur within the prescribed time frame. Matrix § 18.1 (“Once the current violation is sustained, a disciplinary history review will determine whether it is a repeat violation or whether there are prior violations of an equal or greater conduct category \textit{within the prescribed time frame}.”) (emphasis added). The Manager’s interpretation of the handbook would effectively write these prescribed time frames out of the Matrix.
The Manager argues that his interpretation of the Matrix is entitled to deference because he is effectively an administrative agency interpreting a statute that he administers. *Reply Brief* at 4-5. He further argues that a failure to provide such deference in this case will undermine his authority to manage the department. *Id.* We disagree with both assertions.

First, even if we were to assume that the Manager’s interpretation of the Matrix and the Handbook are entitled to some form of deference, such deference only applies when the statute or rule at issue is silent or ambiguous on a particular issue. *People v. Van De Weghe,* --- P.3d ---, 2012 WL 5871041 (Colo.App. 2012) at *1 (“If … language is unambiguous, we enforce it as written without resort to other rules of interpretation.” In this case, the Matrix expressly delineates the precise time frame for the consideration of prior disciplinary actions. Because, the Manager’s interpretation of this provision conflicts with the plain language of the Matrix, is not entitled to deference.

Second, we reject the City’s argument that a decision affirming the Hearing Officer’s decision in this case will somehow cause the “Manager [to] lose[] all control over his department.” *Reply Brief* at 4. In recent opinions, this Commission has strongly affirmed its commitment to civilian oversight of the police department and the Manager’s authority to maintain administrative control over the department. However, such authority does not encompass the power to disregard the plain language of the rules governing the imposition of discipline. In this case, we merely hold the Manager to the same standard that he expects of the public safety officers under his authority: to abide by the rules as written.

**CONCLUSION AND FINAL ORDER**

For the reasons set forth above, the *Hearing Officer's Decision* is AFFIRMED. The Manager of Safety’s imposed penalty of sixteen fined hours is reduced to a Written Reprimand. The Manager
of Safety shall re-instate any benefits lost by Officer Sellers as a result of the imposition of the fined hours.

Filed this 7th day of January, 2013.

FOR THE CIVIL SERVICE COMMISSION
CITY AND COUNTY OF DENVER

By: Earl E. Peterson
Executive Director