

CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 26-11

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

JOAQUIN GONZALES,

Appellant/Petitioner,

vs.

COMMUNITY PLANNING AND DEVELOPMENT, and the City and County of Denver,
a municipal corporation,

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision on the grounds outlined below.

I. FACTUAL BACKGROUND

Appellant was employed by the City and County of Denver since November 16, 1984, and had incurred no discipline prior to his termination. As one of two Chief Building Inspectors for the Zoning and Neighborhood Inspection Services (NIS) within Community Planning and Development, Appellant supervised a crew of inspectors who conduct on-site inspections to enforce zoning and building codes and other municipal ordinances related to real property. Chief Inspector Tim Kristofek supervised the other crew of city inspectors, and both worked together to administer the unit.

On March 9, 2011, Appellant notified Inspection Services Manager Michael Sizemore that he wanted to schedule both inspection crews (his and that of Mr. Kristofek) to attend a bulk plane training for Friday March 11. That training never occurred as Appellant authorized the crews to leave a couple of hours early on that date, without informing either Mr. Sizemore or Mr. Kristofek. Although the training was scheduled for 1:00 pm, it did not take place but Appellant entered work hours on the City's Kronos time and pay system for all the inspectors on his crew from 1pm to the

end of the shift, 3:30 pm. Mr. Kristofek was unaware of the request to conduct training on March 11 and was on leave on March 11. When Appellant was asked by Amelinda Whitley, a member of Mr. Kristofek's crew, if Appellant was going to let Kristofek know about the cancellation of the training Appellant told Ms. Whitley "don't worry about this" and when asked again he said he would "take care of it." Appellant asked Whitley to call the four inspectors who were already in the field and tell them to enter training from 1 to 3 pm on their log sheets, but that they could leave for the day once they returned to the office. Most of these inspectors entered training on their daily logs, but did not log out on Kronos.

The following Monday Kristofek noticed that his crew had not punched out on Friday and asked several members of his crew what had happened. One inspector told him "we had training," and Appellant approached Kristofek and asked him to log his crew out at the usual time for Friday in Kronos because they had been in training. Kristofek did so. Later, Anna Valdez, another member of his crew asked Kristofek if Appellant had informed him that the crew did not do training. Kristofek then questioned Inspector Whitley who confirmed that Appellant told them that Sizemore had approved the training but that Appellant authorized them to go home instead.

Kristofek was concerned that he had entered false work hours on his crew's pay records based on Appellant's statements and decided to discuss the issue with Appellant. Part of Kristofek's concern was due to the fact that he was still on probation and his manager, Sizemore, was out until Thursday so he could not discuss the issue with Sizemore. On Tuesday Kristofek asked to meet with Appellant and told him that he knew the training had not been held and expressed his concern about Appellant lying to him and undermining his relationship with his crew. Appellant later apologized for lying about the training. Kristofek later decided he needed to discuss the issue with Sizemore on Thursday when he returned to the office.

On March 17, Kristofek informed Sizemore that the training had not occurred but that Appellant nonetheless asked him to enter training hours into Kronos for his crew. Sizemore later asked Appellant how the training had gone, and Appellant responded that it had gone well. Sizemore then asked Whitley about the training and she told him that she had not done the training.

Sizemore was very concerned that Appellant's conduct may adversely impact his own ability to improve the culture at NIS. The division was placed under Sizemore's supervision in June 2008, and he was charged by his manager with improving a heightened sense of teamwork and ethical standards. In July 2008, Sizemore developed an action plan citing as areas for improvement: 1) accurate time reporting; 2) elimination of favoritism by supervisors; 3) development of more trust and respect for supervisors; 4) encouragement of ethical conduct; 5) improvement of cohesion among the teams; and 6) regular meetings every two weeks to promote teamwork and

emphasize this new direction. Sizemore specifically counseled Appellant about the need for improvements outlined in the action plan.

After learning about the cancellation of training in March 2011, Sizemore consulted with his supervisors, placed Appellant on investigatory leave. Fifteen employees were interviewed, including Appellant. The Agency initiated pre-disciplinary proceedings. Sizemore made the decision to terminate, despite Appellant's lack of previous discipline, after concluding that Appellant's act in urging inspectors to falsify their time records and lying to Kristofek had sent a message to NIS staff that was inconsistent with his action plan, harming the Agency and internal relationships in ways that could not easily be repaired. Appellant timely appealed his termination.

The Hearing Officer found that Appellant's conduct, violated CSR 16-60 E. 1. and 3 (Dishonesty, including falsifying Kronos records, lying to supervisor and false reporting of work hours); CSR 16-60 O (Failure to maintain satisfactory work relationships); and CSR 16-60 S (Unauthorized absence from work), The Hearing Officer found that the evidence as a whole does not establish that the dismissal was motivated by an intent to discriminate against Appellant because of his national origin, Hispanic. The Hearing Officer also determined that the Agency had failed to establish violations of CSR 16-60 A (Neglect of duty); CSR 16-60 (B) (carelessness in performing duties); CSR 16-60 C.1. (Theft, destruction or neglect in the use of City property); CSR 16-60 F (Using official position or authority for personal profit or advantage); CSR 16-60 (K) (failing to meet established standards of performance), and CSR 16-60 (L) (Failure to observe departmental procedures) The Hearing Officer affirmed the Agency's termination of employment based on the three violations.

II. FINDINGS

A. Appellate Jurisdiction

We adopt the reasoning of the Hearing Officer's decision in this matter except as it relates to Neglect of duty § 16-60 A.¹

The Board finds that it has jurisdiction to review the Hearing Officer's decision under CSR 19-61 (D) (insufficient evidence).

B. Sufficiency of the Evidence

¹ The Board disagrees with the legal analysis of the Hearing Officer as stated in § 1 Neglect of duty under § 16-60 A. As an exempt employee, Appellant did not have an hourly work requirement and, as such, the Hearing Officer's legal analysis is inconsistent with legal requirements that relate to exempt employees. However, the Board's disagreement with the Hearing Officer's legal analysis in this regard has no impact upon the Hearing Officer's decision or the Board's decision in this case.

Under CSR 19-61 (D), the Board may reverse the Hearing Officer's decision only if it is not supported by the evidence in the record and is clearly erroneous. Appellant contends that the Hearing Officer's decision is not supported by the evidence and is clearly erroneous. We disagree. While the testimony during the hearing was undoubtedly conflicting, it is the Hearing Officer's responsibility to judge the credibility of witnesses, determine motive, bias or prejudice, and decide the weight to be given to all the evidence.

When the evidence is conflicting, the Board may not substitute its own conclusions for those of the Hearing Officer simply because there may be evidence in the record supporting a different result. See, Lawry v. Palm, 192 P.3d 550, 558 (Colo. App. 2008). The Board is required to review the Hearing Officer's decision under a "clearly erroneous" standard. Here, the record demonstrates more than sufficient evidence supporting the Hearing Officer's findings and conclusions and the decision is therefore not clearly erroneous.

C. Degree of Discipline

The guidelines that must be used in assessing the appropriate level of discipline in a career service appeal are found in CSR 16-20:

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

We find the Hearing Officer correctly analyzed the reasonableness of Appellant's dismissal under CSR 16-20.

For the reasons identified by the Hearing Officer, termination of employment was an appropriate and reasonable level of discipline.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision and Order of December 1, 2011, is **AFFIRMED**.

SO ORDERED by the Board on April 19, 2012, and documented this 4th day of May, 2012.

BY THE BOARD:



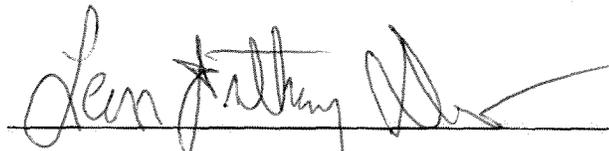
Acting Co-Chair

Board Members Concurring: Patti Klinge, Michelle M. Lucero, Esq., Amy Mueller, and Colleen M. Rea, Esq.

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **Findings and Order** on May 8th, 2012, in the manner indicated below, to the following:

Joseph A. Salazar, Esq.,	<u>jsalazarlaw@hotmail.com</u>	(via email)
City Attorney's Office,	<u>dlefilng.litigation@denvergov.org</u>	(via email)
HR Services,	<u>HRServices@denvergov.org</u>	(via email)
CSA Hearing Office,	<u>CSAHearings@denvergov.org</u>	(via email)



Leon A. Duran