CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 11-49A

ORDER ON MOTION TO DENY PETITIONER'S REQUEST AND TO DISMISS APPEAL

IN THE MATTER OF THE APPEAL OF:

DOUGLAS HOWARD,
Appellant,

vs.

DEPARTMENT OF AVIATION,
And the City and County of Denver, a municipal corporation,
Agency.

Petitioner-Appellant Douglas Howard is a Staff Information Technology Developer employed by the Department of Aviation (Agency) at Denver International Airport. The Agency imposed a disciplinary temporary reduction of pay against Petitioner for conduct which allegedly violated nine separate Career Service Rules.

Petitioner appealed the discipline and a hearing was held. The Hearing Officer found that the Agency had proven six of the alleged Rules violations. More specifically, the Hearing Officer determined that Petitioner violated CSR 16-60(A) (Neglect of Duty) and 16-60(J) (Failure to Follow Rightful Orders) in that on 40 separate occasions he failed to properly punch in for work at the designated location, despite having been given specific instruction to do so (16-60 A and J); and in adjusting his own work schedule without obtaining authorization (16-60 J). The Hearing Officer also determined that Petitioner violated CSR 16-60(E)(3) (Dishonesty) when he misrepresented to his supervisors that he had been working, when, in fact , he had been working out in DIA's fitness center.

The Hearing Officer also found that Petitioner had violated CSR 16-60(K) (Failure to Meet Performance Standards) and CSR 16-60(T) (Reporting to Work after Scheduled Start Time) by being late for work on a multitude of occasions. The Hearing Officer also held that the Petitioner had worked unauthorized overtime on four occasions, in violation of CSR 16-60(U) (Unauthorized Performance of Overtime). Based on these rules violations the Hearing Officer sustained the reduction in pay imposed by the Agency.

Petitioner filed a timely Petition for Review. For the following reasons we reject the arguments posed by the Petitioner in his Petition and brief and AFFIRM the decision of the Hearing Officer.

Petitioner initially alleges the existence of newly discovered evidence. To reconsider the Hearing Officer's decision based on this ground, Petitioner must demonstrate that, "[n]ew and material evidence is available that was not available when

the appeal was heard by the Hearing Officer" (CSR 19-61A). Specifically, Petitioner claims, "There is evidence in CSA records that were not available at the hearing that will show that management was not timely and careless with my PEP reviews not only in 2010 and 2011, but in fact, this has been the trend for the last 7 years." (Petitioner's brief, p. 2) This argument fails on several levels.

First, it is plain from the description of the allegedly new records, provided by Petitioner in his brief, these documents do not constitute "new" evidence. The documents were clearly in existence at the time the hearing was held and were available to the Petitioner for his use, had he or his attorney wanted to acquire them and use them at the hearing. What Petitioner really seems to be arguing is that his attorney should have adopted a different strategy and attempted to use the documents at hearing. This second guessing of legal strategy does not turn these documents into newly discovered evidence.

In addition, again, based on the description of the new evidence, we do not believe that the evidence is "material". Petitioner was disciplined for tardiness, untruthfulness, not following orders, and working unauthorized overtime. None of the documents he claims as newly discovered evidence appear to have any bearing on the issues for which Petitioner was disciplined. Consequently, Petitioner has not proven that the missing documents were material to this case.

Petitioner next claims we should reverse the Hearing Officer on the ground of policy setting precedent. Here, Petitioner attempts two policy arguments. First, he argues that it is policy that employees, including him, are permitted to punch in for the beginning of the work day at remote locations. We perceive two problems with this claim. First, even if this were to be a policy, we fail to see how the Hearing Officer's decision on this issue implicates considerations beyond the appeal at hand, as required by CSR 16-61(C). Second, and maybe more important, is the fact that there is no support in the record proving the existence of any such policy. What the record does reflect, and the Hearing Officer found, was that Petitioner was specifically instructed to punch in at one location, and he consistently violated that directive and punched in at a different location.

Petitioner next argues that an employee is permitted to be seven minutes late for the start of his workday because Kronos, the City's time, attendance, and payroll system, allegedly has a seven-minute rounding feature which permits employees to be up to seven minutes late for the start of their work days before they can be deemed officially late. But we have reviewed the record and find no evidence supporting a claim that there is any such policy permitting employees to be seven minutes late for the start of their work day before they are officially considered late, regardless of how Kronos may record or keep track of time. We wish to make this perfectly clear. If a supervisor directs an employee to start work at a set time, and the employee is not at his or her work station, ready to begin work at that time, the employee is late.[1]

The Petitioner also takes issue with the finding that he worked unauthorized overtime. Again, we do not see how this finding implicates policy considerations

[1] Petitioner also argued that the record did not demonstrate or prove he abused sick leave. But we do not see where the Agency charged petitioner with abusing sick leave, or anywhere in the decision where the Hearing Officer found Petitioner to be guilty of abusing sick leave.

beyond the case at hand. In any event, the Hearing Officer found that Petitioner did, intentionally, work unauthorized overtime. Petitioner's bald assertion that the Hearing Officer was wrong does not provide grounds for overturning this finding.

Finally, Petitioner argues that the Hearing Officer's decision was not supported by sufficient evidence. This argument is simply an assertion that Petitioner's testimony should have been credited over the testimony of the Agency's witnesses. But it is well-settled we will not re-weigh the Hearing Officer's conclusions as to the credibility of witnesses. Determining the credibility of witnesses is uniquely within the province of the Hearing Officer. *In the Matter of the Appeal of Bobby Rogers and the Denver Sheriffs Department*, No. 25-08A. In any event, we find all of the Hearing Officer's factual determinations supporting her findings of rules violations to be supported by record evidence.

For all of these reasons, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on August 2, 2012, and documented this 16th day of August, 2012.

BY THE BOARD:

Derrick Fuller

Board Members Concurring:

Colleen M. Rea (Co-Chair)
Derrick Fuller
Michelle Lucero
Amy Mueller

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **ORDER ON MOTION TO DENY PETITIONER'S REQUEST AND TO DISMISS APPEAL** on August 16, 2012, in the manner indicated below, to the following:

City Attorney's Office, Office of the City Attorney, Litigation Section	via email: dlefiling.litigation@denvergov.org
Douglas Howard c/o Don Sisson Don Sisson, Esq.	via email: dsisson@elkusandisson.com
Career Service Hearing Office	via email: CSAhearings@denvergov.org
HR Services	via email: HRServices@denvergov.org

Deborah Saracen