IN THE MATTER OF THE APPEAL OF:

PHAZARIA KOONCE,

Petitioner,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation.

Cross-Petitioner.

Captain Phazaria Koonce of the Denver Sheriff's Department ("Appellant") appealed otherwise non-appealable adverse employment actions taken against her by the Agency (a pre-disciplinary letter (July 13, 2013); a performance improvement, i.e., a PIP (July 29, 2013); a written reprimand (July 30, 2013); and a notice of demotion from the position of acting major back to her Career Service position of Captain (July 29, 2013))\(^1\) alleging that those actions were the product of discrimination and retaliation in violation of Career Service Rules. Specifically, she claimed that these allegedly adverse employment actions were taken as a result of her race and her gender, as well as in retaliation for having made a complaint of race and sex discrimination against a co-worker (Major Guerrero) in June, 2011, and for having refused to participate in mediation with Major Guerrero.

The race and gender discrimination claims were dismissed prior to hearing. After a full evidentiary hearing on the issue of retaliation, the Hearing Officer held that Appellant failed to prove that retaliation was a motivating factor in the adverse employment actions. Captain Koonce appeals that decision.\(^2\) The Agency has cross appealed several issues, including the Hearing Officer's holding that the U.S. Supreme Court's decision in University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013) should not inform her interpretation of Career Service Rules prohibiting retaliation. For the following reasons, we affirm the Hearing Officer's decision.

We first take time to note that Appellant, in her brief, appears to have misapprehended the nature of our review in this particular matter. While she has properly stated the requirements

\(^1\) None of these actions appear to amount to appealable discipline.
\(^2\) We do not interpret Captain Koonce's Petition for Review as appealing the dismissal of the discrimination claims.
should we be reviewing a disciplinary action, that is not what we are doing here. The matter comes before us on a rejection of Appellant's claim of retaliation, not a de novo review of a disciplinary action. Before the Hearing Officer, the Agency was not required to prove misconduct and justify discipline; rather, Appellant was required to prove that she engaged in protected conduct, suffered a materially adverse action and that said action was motivated by retaliatory animus resulting from the protected conduct. While it is true, as Appellant asserts, that the Board does not uphold discipline imposed unless it is reasonable, not clearly excessive and supported by the evidence\(^3\), the burden of proof, in this case, at all times rested with the Appellant.

Appellant first argues that the Hearing Officer erred by considering materials\(^4\) not part of the record. Appellant claims that this error warrants reversal under CSR 19-61 C (Policy Setting Precedent) and 19-61 D (Insufficient Evidence). We disagree.

First, the fact that the Hearing Officer may have erred in considering evidence not formally admitted into the record does not implicate any policy of the Agency, OHR or the City and County of Denver. We do not see this error as an adoption of a policy favoring such consideration, or any indication that the Hearing Officer intends to commit this error, as a matter of her personal policy in future deliberations.

Second, we do not see how any such improper consideration could warrant reversal of the Hearing Officer's decision based on insufficient evidence. If anything, Appellant complains of the existence of too much evidence, albeit evidence that should not have been considered. In any event, given all of the other evidence properly admitted and considered by the Hearing Officer, even assuming that the Hearing Officer did improperly consider evidence not part of the record, we find such error harmless in this case. We do not see how the exclusion of the evidence in question would have resulted in a finding that the Agency was motivated by retaliatory animus in taking the actions it did.\(^5\) We agree with the Hearing Officer that there is an utter absence of evidence in the record which could support a finding of retaliation, and further find the record replete with admissible evidence supporting the Hearing Officer's factual findings supporting her conclusion that Appellant failed to demonstrate a causal connection between her ostensibly protected activity, and the allegedly retaliatory actions complained of by the Appellant.

Appellant next argues that the preponderance of the evidence presented at the hearing established a causal connection between Captain Koonce's complaint of race and sex discrimination and adverse employment action. First, we must note that the preponderance of the evidence standard is not applicable to our review. That standard, of course, is the burden Appellant was required to meet at hearing. To the extent that the Hearing Officer's decision involved fact-finding which resulted in her concluding that Appellant failed to meet her burden, we do not make a de novo determination concerning those facts, but rather, we overturn factual

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\(^3\) A finding which would almost necessarily follow from a determination that the actions taken were the product of retaliation.

\(^4\) Portions of Agency Exhibits 6 and 8, transcripts of Internal Affairs interviews.

\(^5\) Appellant, at the bottom of page 4 of her opening brief appears to take issue with the fact that the Hearing Officer might have made a review of the parties proposed exhibits contained in the Prehearing Statements filed with the Hearings Office before the hearing. It strikes us, however, that said review, assuming it was, in fact, performed, is the precise reason these materials are filed, and not simply exchanged between the parties.
findings only of they are clearly erroneous. In addition, we do not review credibility
determinations and we do not re-weigh the evidence.⁶

In support of this argument, Appellant first claims that the evidence proves a causal
connection between protected activity and adverse employment actions based on “close temporal
proximity.” But the “close temporal proximity” argued by Appellant actually spans a time of
two years. Appellant, in June of 2011, charged her supervisor with race and sex discrimination,
which, assuming it was made in good faith, is certainly protected activity.⁷ But Appellant also
alleges that the adverse employment actions occurred in July, 2013. This two year gap between
protected activity and adverse employment actions lays to waste any claim that temporal
proximity evidences a causal connection. See, Richmond v. ONEOK, Inc., 120 F.3d 205, 209
(10th Cir.1997) (three-month period insufficient to establish causation).

Appellant next argues that the Agency took “unprecedented” actions against Appellant;
that complaints about Appellant’s conduct had never been made; that her supervisors had never
witnessed her act unprofessionally (except for one instance); that her PEPRs were exceptional;
and that now- Chief Diggins did not agree with Deputy Manager of Safety Kilroy’s course of
action. Even assuming all of things to be true, however, it still does not constitute evidence that
Appellant’s protected activity played any part in the Manager’s decision-making process.

The Hearing Officer determined that Appellant did not present proof of any causal
connection between her protected activity and adverse employment actions. After reviewing the
record, we agree with the Hearing Officer that the record contains no such proof. In any event,
we certainly cannot say that the absence of any factual findings supporting Appellant’s claim of
retaliation is clearly erroneous. There is record evidence supporting all findings made by the
Hearing officer.

For example, on page 5 of Appellant’s opening brief, Appellant states that her retaliation claim is brought under CSR 15-21 and
15-106 (which, in our opinion, she erroneously refers to as “state law”) and that federal law may guide this Board’s
analysis of that claim but is not dispositive. While we agree with the second portion of this statement, we do not
understand its import. Should we actually be guided by federal law in this case, we would undoubtly adopt the
standard for retaliation newly set out by the U.S. Supreme Court in Univ. of Tex. Sw. Med. Cir. v. Nassar, 133 S.Ct.
2517, 186 L.Ed.2d 503 (2013), a position Appellant specifically urges us not to adopt.

At page 10 of her brief, Appellant asserts that her refusal to attend mediation also amounted to protected activity.
Appellant offers no legal support for this claim, we know of none, and find that it is not. On the other hand, actual
participation in mediation would probably be protected. See, e.g., Kelley v. City of Albuquerque, 542 F.3d 802, 813–
14 (10th Cir.2008) (holding that participation in an EEOC mediation is a protected activity under Title VII.)

retaliatory reasons for its actions. See, e.g., E.E.O.C. v. PVNF, L.L.C., 487 F.3d 790, 805 (10th Cir. 2007).

The well-established McDonnell Douglas sequential analytical model, however, is not applicable to the Hearing Officer’s ultimate holding (save possibly for a determination of a directed verdict at the close of Plaintiff’s case). Instead, it is an analytical framework for the determination of summary judgment motions. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1226 (10th Cir. 2000) (“Once there has been a “full trial on the merits, the sequential analytical model adopted from McDonnell Douglas ... drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against” the plaintiff because of his or her protected status.”).

But even assuming the applicability of the McDonnell Douglas burden shifting requirements to this hearing, it remains immaterial to our determination of this case. Here, the Hearing Officer determined that Appellant had presented no evidence of causation. That is tantamount to a finding that Appellant failed to produce any evidence of the third prong of the required prima facie showing. Absent proof of a prima facie case, the Agency was not required to produce evidence of a legitimate, non-retaliatory reason for its actions. There is simply no need, nor any place for an analysis of pretext under the circumstances presented by this case. Given that the Hearing Officer found no evidence of retaliatory animus, that is, no evidence supporting a causal connection between the protected activity and the adverse employment action, the hearing could have been ended at the close of Appellant’s case in chief.9 The Agency never would have been required to present legitimate, non-retaliatory reasons for its actions. The question of pretext, therefore, never needed to be considered.

After reviewing Appellant’s remaining arguments supporting her petition, we find that Appellant is simply asking us to re-weigh the evidence, assess credibility differently than did the Hearing Officer, and come to a different ultimate conclusion than the one reached by our Hearing Officer. But we do not find Appellant’s presentation of the evidence so overwhelming so as to make us conclude, as a matter of law, that Appellant proved she was the victim of retaliation in violation of our rules.

In sum, The Hearing Officer found that Plaintiff had failed meet her burden and prove by a preponderance of the evidence that she had been subjected to retaliation. Appellant presented no evidence that the adverse actions she complained of were the product of retaliatory animus. We find the Hearing Officer’s findings and conclusions supported by record evidence, not the product of any misinterpretation of our rules and consistent with sound policy.

The Agency has cross-appealed, objecting to numerous evidentiary matters and certain legal conclusions made by the Hearing Officer, such as whether the issuance of a PIP is an adverse action for retaliation and whether the Hearing Officer should have adopted the Supreme Court’s Nassar standard for evaluating claims of retaliation under our rules.

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9 We do not hold that the Hearing Officer should have, or was required to terminate the appeal at this point.
The Agency urged the Hearing Officer to adopt the *Nassar* “because of” or “but for” test of causation in retaliation cases rather than the “contributing factor” or “motivating factor” standard which had been employed by the Court’s, and this Board, prior to *Nassar*. The Hearing Officer declined the suggestion and held that Appellant only needed to prove that retaliation was a motivating factor in the Agency’s decisions to take the allegedly adverse actions.

There is simply nothing in our rules regarding retaliation which requires them to precisely track federal law\(^{10}\). While we may, in certain circumstances, choose to follow federal or state court precedent\(^{11}\), we do so because we believe it to be sound policy, not because we are required to. It is not the policy of this Board, that to prove retaliation or harassment or discrimination under our rules, an Appellant must prove the equivalent of a federal case. Our rules may protect conduct, or prohibit conduct, which might be beyond the reach of federal or state law. The affect of *Nassar* is to make it more difficult for a party alleging retaliation to prove his or her case. We do not believe this is sound policy for the City and County of Denver.

In addition, the fact that lower courts have, according to this Supreme Court, been misinterpreting a statute, does not necessarily mean we have been misinterpreting our rule. If we had intended our anti-retaliation rules to require “but for” causation, we could have, and would have held such in any one of our prior cases. At no time did we need the Supreme Court to tell us (which it still has not) that we have been misinterpreting our rule. The Hearing Officer did not err when she failed to hold Appellant to the “but for” causation standard enunciated in *Nassar*.

We dismiss the remaining elements of the Agency’s Petition for Review finding them to be moot.

The Hearing Officer’s decision is AFFIRMED.

SO ORDERED by the Board on August 21, 2014, and documented this 6th day of October, 2014.

BY THE BOARD:

Colleen Rea
Chair (or Co-Chair)

Board Members Concurring:

Patti Klinge
Derrick Fuller
Gina Casias

\(^{10}\) This is not a situation where the rule is implemented specifically for the purpose of complying with federal law, such as CSR 11-150 (which speaks to compliance with the federal Family and Medical Leave Act (FMLA)) or CSR 11-170 (which guides our compliance with the federal Americans with Disabilities Act (ADA)).

\(^{11}\) For example, our holding above that a three month gap between protected activity and an adverse employment action is too long of a time period for an inference of causal connection.