

DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: June 28, 2018 11:14 PM ▲ COURT USE ONLY ▲
Plaintiff: Stephanie Southard v. Defendants: Civil Service Commission of the City and County of Denver; and City and County of Denver, a municipal corporation.	Case Number: 15-CV-031405 Courtroom: 275
ORDER RE: JUDICIAL REVIEW OF THE CIVIL SERVICE COMMISSION'S ORDER REINSTATING DISCIPLINE	

THIS MATTER comes before the Court on Plaintiff Stephanie Southard's complaint seeking judicial review pursuant to C.R.C.P. 104(a)(4) of Defendant Civil Service Commission's order reinstating her suspension and termination from her position as an officer of the Denver Police Department, filed on August 25, 2015. The court, having reviewed the record, pleadings and relevant portions of the Court's file, having reviewed the parties' briefs, and being otherwise fully advised in the premises, HEREBY FINDS and ORDERS as follows:

STATEMENT OF FACTS

This appeal from the Decision and Final Order of the Civil Service Commission dated March 23, 2015 ("Commission's Order") reinstating Officer Stephanie Southard's ("Officer Southard's") suspension and termination arises from a relationship and a series of incidents between Officer Southard, a Denver police officer, and Nathan Sanchez ("Officer Sanchez"), a former Denver police officer. What follows is a brief summary of the evidence, taken primarily from the Findings, Conclusions and Order dated August 25, 2014 entered by Hearing Officer Hazel Hanley ("Hearing Order").

In October 2011, Officer Southard began a romantic and sexual relationship with Officer Sanchez, who was married and still employed by the Denver Police Department ("DPD"). Officer Southard was not married. The two had met while working on calls, began spending increasing amounts of time together, and eventually became intimate. For a majority of the 21

months they were involved, they would meet at one or the other's home on Mondays and Tuesdays, when they were both off-duty, and engage in consensual sexual activities. They kept their relationship secret from Officer Sanchez's wife, Erika Sanchez ("Mrs. Sanchez").

In January 2013, Officer Southard transferred to the department's DUI Unit. Because DUI officers are able to travel anywhere in the city, this new position allowed her greater freedom of movement. Officer Southard used this flexibility to meet Officer Sanchez on numerous occasions while they were both on duty. According to Officer Southard, these on-duty meetings were for conversation and occasionally involved hand-holding and hugging, but no sex. Officer Sanchez eventually claimed that they had sexual contact at some of these meetings while they were on duty.

On June 17, 2013, Mrs. Sanchez discovered Officer Southard's number on her husband's telephone, and asked him about it. Officer Sanchez confessed the affair to Mrs. Sanchez later that day. Mrs. Sanchez sent text messages to Officer Southard later that evening. In the early morning of June 18, 2013, Officer Southard, having not heard from Officer Sanchez, drove by his home, but left without making contact with him. She drove to a nearby park, and was seated in her vehicle crying when she was confronted by Mrs. Sanchez, who then followed her in her vehicle for some distance. Officer Sanchez did not communicate with Officer Southard again until June 19.

In the early morning hours of June 19, after an evening out with friends, and frustrated that she still had not heard from Officer Sanchez, Officer Southard decided to seek him out. Knowing that Officer Sanchez was on duty, Officer Southard used a police scanner to determine his whereabouts. She located him, but could not approach him because he was busy on a call. After he finished the call, Officer Sanchez recognized Officer Southard's personal vehicle driving past him, made a U-turn, and followed her.

Officer Sanchez pulled alongside Officer Southard at the traffic light at Yosemite and Colfax. Officer Sanchez contends that Officer Southard exited her vehicle and came towards him, yelling at him. Officer Southard denies this. In any event, Officer Sanchez asked her to follow him for a conversation. She agreed, and they drove to a church parking lot in Aurora. Officer Sanchez testified that Officer Southard assaulted him at the church, breaking his necklace, scratching his neck, and causing his watch to fall off. Officer Southard testified that those events did not occur, but acknowledged that she raised her voice during their exchange. In either case, they agreed to go elsewhere, and Officer Sanchez led Officer Southard to a parking lot at the Lowry Sports Complex. Once again, Officer Sanchez testified that Officer Southard also assaulted him there, although his description of the attack has varied over time. And, again, Officer Southard testified that she did not attack him, but grabbed both of his wrists when he thrust his hands at her face and pushed them away, during which she believes his watch came

off. Despite the alleged physical conflict, both officers acknowledge that they talked at the Sports Complex parking lot for between one and two hours before parting ways.

On the evening of June 20, while both were on duty, Officer Southard texted Officer Sanchez through her police computer that she had his watch. She continued to text him, but he did not respond. She then encountered Officer Sanchez at a traffic light, and they agreed to have another conversation. They drove to yet another parking lot, this one at Alameda and Dahlia. Officer Sanchez was on the telephone with his wife when this encounter began, put the phone on speaker function, and Mrs. Sanchez testified that she was able to hear some portions of the ensuing exchange. Officer Sanchez testified that Officer Southard exited her vehicle, approached his, and became angry when she saw that he was wearing his wedding ring, and assaulted him for a third time, scratching him above his left eye in the process. Officer Sanchez also testified that Officer Southard drew her service revolver, and made several statements suggestive of an intention to commit suicide. Officer Sanchez also testified that Officer Southard reentered her vehicle, held her service revolver to her head and put it in her mouth, and never saw her reholster the weapon. Mrs. Sanchez testified that she heard her husband say words to the effect “no, Stephanie, don’t do it.” Officer Southard’s version of these events differ dramatically. She acknowledged that she had exited her vehicle, came over to Sanchez’s, and reached inside the window to hold his hand. She denies that she assaulted him in any way, scratched him, or that she ever drew her service weapon. Shortly thereafter, Officer Sanchez received a duty call and had to leave. He told Officer Southard, through the police computer system, to wait for him. She stayed for a short period, but then left, and Sanchez did not return. Officer Sanchez acknowledges that he did not report the suicidal conduct he claims to have witnessed by Officer Southard, because he did not want anyone at work to know about their affair.

On June 21, Mrs. Sanchez reported the situation to the DPD Internal Affairs Bureau (“IAB”). IAB held interviews that day with Officer Sanchez, Mrs. Sanchez, and Officer Southard. Officer Sanchez and Officer Southard were each interviewed again in January, 2014. In all of these interviews, Officer Sanchez claimed that Officer Southard had engaged in sexual activity with him while they were both on duty, and that she attacked him at their meetings on June 19 and 20. However, Officer Sanchez’s descriptions of these events evolved significantly over time, both during and between interviews. He resigned from the DPD while disciplinary charges were pending against him. As noted, Officer Southard denied that she had ever had sex with Officer Sanchez while on duty, or ever attacked him.

Based on Officer Sanchez’s allegations of physical violence, Officer Southard was charged with Assault in the Third Degree in violation of C.R.S. §18-3-204, Harassment, in violation of C.R.S. § 18-9-111(1)(a), and Disorderly Conduct, in violation of C.R.S. § 18-9-108(1)(c) in the Arapahoe County Court. In December 2013, Officer Southard pled guilty to Reckless Endangerment, in violation of § 18-3-208 C.R.S., and Disorderly Conduct.

On April 14, 2014, Deputy Director of Safety Jess Vigil, acting on behalf of the Executive Director of Safety (“EDOS”), issued his Departmental Order of Disciplinary Action (“DODA”), in which he found that Officer Southard had violated three DPD rules: Conduct Prohibited by Law, Sexual Misconduct, and Commission of a Deceptive Act. Applying the DPD’s disciplinary matrix, the EDOS ordered that Officer Southard be suspended for 15 days without pay for the first offense, and be terminated for the latter two.

Officer Southard appealed the EDOS’s order, and Hearing Officer Hazel Hanley (the “Hearing Officer”) conducted a two-day evidentiary hearing in July 2014. Based on the record generated both before and during the hearing, the Hearing Officer ruled in her 25-page Hearing Order that EDOS’s DODA was clearly erroneous and reversed the discipline on all three charges. The EDOS appealed to the Commission, which found that the Hearing Officer had misapplied the CSC Rules, and reinstated discipline against Officer Southard on all charges in its Order. Officer Southard’s complaint for judicial review followed.

STANDARD OF REVIEW

Colorado Rule of Civil Procedure 106(a)(4) permits a district court to review agency action “where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion.” The district court’s review is limited to “a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion based on the evidence in the record before the defendant body or officer.” C.R.C.P. 106(a)(4)(I); *Ad Two, Inc. v. City & Cty. of Denver ex. rel. Director of Aviation*, 9 P.3d 373, 376 (Colo. 2000); *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007); *Woods v. City & Cty. of Denver*, 122 P.3d 1050, 1053 (Colo. App. 2005). The agency’s proceedings “are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency.” *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990); *Bourgeron v. City & Cty. of Denver*, 159 P.3d 701, 706 (Colo.App. 2006).

An abuse of discretion exists if “the agency has misconstrued or misapplied applicable law.” *Freedom Colo. Info., Inc. v. El Paso County Sheriff’s Dep’t*, 196 P.3d 892, 900 (Colo. 2008); *DeLong v. Trujillo*, 25 P.3d 1194, 1197 (Colo. 2001); *Cruzen v. Career Serv. Bd.*, 899 P.2d 373, 375 (Colo. App. 1996). The court must uphold the agency’s decision if there is a reasonable basis for the agency’s application of the law. *Cruzen*, 899 P.2d at 375; *Lee v. State Bd. of Dental Examiners*, 654 P.2d 839, 844 (Colo. 1982).

An abuse of discretion also exists if “the decision under review is not reasonably supported by any competent evidence in the record.” *Widder v. Durango Sch. Dist. No. 9-R*, 85

P.3d 518, 526 (Colo. 2004); *Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996); *Coleman v. Gormley*, 748 P.2d 361, 364 (Colo. App. 1987) (quoting *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308-09 (Colo. 1986)). “‘No competent evidence’ means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Widder*, 85 P.3d at 526-27; *Cruzen*, 899 P.2d at 375. An agency exercises its authority arbitrarily when it “fail[s] to give candid and honest consideration of evidence before it.” *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001) (quoting *Van DeVegt v. Bd. of Cty. Comm'rs*, 55 P.2d 703, 705 (Colo. 1936)).

ANALYSIS

This case presents difficult legal questions under the Denver City Charter and the Commission's Rules pertaining to discipline of DPD officers regarding the proper scope of a hearing officer's review of disciplinary action taken by the EDOS, as well as of the Commission's review of the hearing officer's disposition. The resolution of these issues is critical to the outcome of this case, which turns, to an extraordinary degree, on the relative credibility of Officers Southard and Sanchez. As a frame of reference for the analysis which follows, the court will first briefly review the relevant provisions, before analyzing their application in this particular case.

1. The CSC disciplinary framework contemplates an evidentiary hearing before a neutral Hearing Officer where evidence in addition to that which was before EDOS is received, including sworn testimony.

In its general provisions pertaining to the Classified Service, the City Charter sets forth procedures for the discipline of police officers and the review of those disciplinary proceedings. Denver City Charter (“Charter”), §§ 9.4.14 and 9.4.15. The review procedures contemplate an adversarial hearing before a neutral hearing officer, at which both the officer and the EDOS may offer evidence, of which a record must be made. Charter §9.4.15(C). The Commission is authorized to adopt rules regarding pre-hearing matters and the conduct of the hearing. *Id.* The Hearing Officer is required to “review the full record before him or her and ... make written findings, affirming, reversing, or modifying the disciplinary action in whole or in part.” *Id.*, § 9.4.15(D). The Hearing Officer's decision may be appealed either to the Commission or to the district court. *Id.*, § 9.4.15(E). Again, the Charter authorizes the Commission to “provide for procedural matters regarding disciplinary appeals before the Commission.” *Id.*

In terms of deciding the appeal, § 9.4.15(F) of the Charter provides, in relevant part, as follows:

In deciding the appeal, the Commission shall rely upon the evidence presented to the Hearing Officer except when the appeal is based on new and material evidence. All factual findings by the Hearing Officer shall be binding on the Commission, and the Commission may not resolve disputed issues of fact. Review of a Hearing Officer decision by the Commission shall be limited to the following grounds: (a) new and material evidence is available that was not available when the appeal was heard by the Hearing Officer, (b) the decision of the Hearing Officer involves an erroneous interpretation of departmental or civil service rules, (c) the decision of the Hearing Officer involves policy considerations that may have effect beyond the case at hand, or (d) the discipline affirmed or imposed by the Hearing Officer is inconsistent with discipline received by other members of the department under similar circumstances.

Following the Commission's decision, either party may then seek judicial review in the district court in accordance with the Colorado Rules of Civil Procedure, which "shall not be extended further than to determine if the Commission has exceeded its jurisdiction or abused its discretion under the provisions of this Charter." *Id.*, § 9.4.15(G). *See*, C.R.C.P. 106(a)(4)(I).

Pursuant to the authority delegated to it in the Charter, the Commission promulgated Rule 12 pertaining to Disqualification and Disciplinary Appeals, Hearings & Procedures ("Rule 12"). Prior to the amendment which became effective March 9, 2013, and which applies to this case, Rule 12, § 8.D provided that the hearing before the hearing officer was "De Novo, that is, considering the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered. The Manager of Safety shall have the burden of proof (by a preponderance the evidence) to justify any disciplinary action administered." Rule 12, § 8.D (5/12/2008). However, in the amendment of March 9, 2013, reference to a de novo hearing was eliminated, and Section 8.D was amended to require that the Department of Safety was to proceed first to "present sufficient evidence to create a reasonable inference of the correctness of the sustained Rule violation(s) and the imposed penalty(s) as contained in the Departmental Order Of Disciplinary Action." Rule 12, § 8.D.2 (3/9/13). Then, the officer could proceed to present evidence, and each party "shall be entitled to present oral (testimony of witnesses) or documentary evidence, to cross-examine witnesses, and to submit any other evidence as may be required for a full disclosure of the facts." *Id.*, § 8.D.4. In addition, Section 9.B was extensively amended to provide a new standard of review. In pertinent part, that section now provides as follows:

1. The Hearing Officer *shall give due weight to the necessity of the maintaining by the Manager of Safety¹ of administrative control of the respective Department.*
 - a. Hearing Officers shall not substitute their judgment for that of the Manager of Safety concerning any policy considerations underlying the discipline, to include the interpretation of Departmental rules and regulations, and may only reverse or modify the Manager’s decision concerning policy considerations when it is shown to be clearly erroneous...
 - b. A Hearing Officer may reverse or modify the Manager of Safety’s Departmental Order of Disciplinary Action on the basis of issues raised by the Petitioner concerning policy considerations, a sustained Rule violation or an imposed penalty, only when it is shown to be clearly erroneous.
 - c. A Departmental Order of Disciplinary Action shall be deemed to be “clearly erroneous”, in whole or in part, in the following circumstances:
 - i. The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;...

Rule 12, § 9.B.1(*italics* original and cited to Charter §9.4.15(D). Section 9.D of Rule 12 provides that “**The Hearing Officer’s findings of evidentiary fact** contained in the decision shall be binding on the Commissioners.”(**boldface** original, and cited to Charter § 9.4.15(F). This is repeated and Section 11.J.5, which adds that “The Commission may not resolve disputed issues of fact.”

In conformity with the Charter §9.4.15(F), and as relevant here, the Commission’s review of the Hearing Officer’s decision is limited to the following:

2. Erroneous Interpretation of Departmental or Civil Service Rules: The decision of the Hearing Officer involves an

¹ The Manager of Safety is now known as the Executive Director of Safety, or EDOS.

erroneous interpretation of departmental or Civil Service Rules...

3. Policy Considerations that may have effect beyond the case at hand: The decision of the Hearing Officer involves policy considerations that may have effect beyond the case at hand. (This may include, but not be limited to, policy-setting precedent.)...

Rule 12, §§ 11.D.2 and D.3.

Thus, in summary, the Charter and Rule 12 contemplate that a police officer who is disciplined by the EDOS has the right to an adversarial hearing before an impartial Hearing Officer at which he may present testimonial and documentary evidence, not all of which will have been before the EDOS when it issued its DODA. At the conclusion of the hearing, the Hearing Officer is required to make findings of evidentiary fact, which become binding upon the Commission on appeal. However, the Hearing Officer may reverse or modify the EDOS's disciplinary action only when it is shown to be "clearly erroneous," meaning that "although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole." The Commission's review of the Hearing Officer's decision, as relevant here, is limited to where the decision "involves an erroneous interpretation of departmental or Civil Service Rules," or "involves policy considerations that may have effect beyond the case at hand." Rule 12 §§ 11.D.2 and D.3.

It is with this disciplinary framework in mind that the court now turns to the merits of the present appeal.

2. The Commission acted in excess of its jurisdiction and abused its discretion in reinstating the EDOS's discipline of Officer Southard for Sexual Misconduct and Commission of a Deceptive Act.

The EDOS disciplined Officer Southard for "engag[ing] in [] conduct... for the purpose of sexual gratification" while on duty, in violation of RR-106.2 (Sexual Misconduct). This discipline was based on two specific factual contentions testified to by Officer Sanchez. DODA, at 6. First, Officer Sanchez claimed that on 25-30 occasions, he reached into Officer Southard's police cruiser while she sat in the driver's seat and penetrated her vagina with his fingers. Second, Officer Sanchez claimed that Officer Southard performed oral sex on him once in June 2013, while he stood beside her open driver-side door and she sat in the driver's seat. Officer Sanchez testified to both contentions in the hearing.

The EDOS also disciplined Officer Southard for “knowingly commit[ting] a materially deceptive act” in violation of RR-112.2 (Commission of a Deceptive Act). This discipline was based solely on the conclusion that she lied about having sex on duty during the IAB investigation. DODA, at 1.

Officer Southard argues that the Commission abused its discretion and exceeded its jurisdiction in reinstating the discipline based on these two charges by failing to give fair and honest consideration to evidence that was properly before it. The court agrees. The Commission effectively ignored the Hearing Officer’s findings of evidentiary fact on the critical factual issues for these two disciplinary charges. The Court considers each charge in turn, with a preliminary discussion on the issue of credibility.

A. The Commission disregarded the Hearing Officer’s findings of evidentiary fact that Officer Sanchez’s testimony was not credible while Officer Southard’s testimony was credible.

Hearing officers generally have the power to make findings regarding the credibility of witnesses. *Varsity Contractors & Home Ins. Co. v. Baca*, 709 P.2d 55, 57 (Colo.App. 1985). Within the CSC disciplinary framework, such findings are ones of evidentiary fact, and therefore are binding on the Commission on review, and may not be disturbed by either the Commission or this court. Denver Charter § 9.4.15(F); Rule 12 § 11.J.5; *Nixon v. City and County of Denver*, 343 P.3d 1051, 1057 (Colo. App. 2014)(“... the Commission was required to defer to the Panel’s findings of historical fact, including the finding that Nixon was credible, ...”). *see also*, *Varsity Contractors, supra*, 709 P.2d at 57 (“[r]esolution of the credibility of witnesses by the hearing officer is a question of evidentiary fact which is binding on review.”)

However, the Commission is not bound by “the hearing officer’s findings of ultimate fact, mixed findings of fact and conclusions, or conclusions of law.” CSC Rule 12 § 11.J.6; *Nixon, supra*, 343 P.3d at 1055. In this case, Officer Southard and the Commission dispute whether the Hearing Officer’s resolution of the sexual misconduct and commission of a deceptive act charges should be treated as binding evidentiary facts or non-binding ultimate conclusions.

“Evidentiary facts are the historical facts underlying the controversy,” while ultimate conclusions are “conclusions of law or mixed questions of law and fact that are based on evidentiary facts and determine the rights and liabilities of the parties.” *Samaritan Institute v. Prince-Walker*, 883 P.2d 3, 9 (Colo. 1994) (citing *Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268, 1272 (Colo. 1990)); *Nixon, supra*, 343 P.3d at 1056. Ultimate facts “as a general rule [are] framed in the language of the controlling statute or legal standard.” *Federico*, 788 P.2d at

1272. Evidentiary facts, by contrast, may be recognized when the issue is “a purely factual question to be determined from the evidence without reference to a legal standard.” *Samaritan Institute*, 883 P.2d at 9.

In this case, the Hearing Officer made a blanket finding that Officer Sanchez was not credible on any disputed fact. Hearing Order, at 9, 13. In fact, the Hearing Officer concluded that Officer Sanchez was “an inveterate liar.” *Id.*, at 18. She explained her rationale for disbelieving Officer Sanchez in extraordinary detail, the specifics of which fall into three general categories: Officer Sanchez’s history of dishonesty, his incentive to be dishonest, and specific evidence that he was dishonest in this case.

Initially, the Hearing Officer found that Officer Sanchez has a record of dishonesty. Not only did he conceal an extra-marital affair from his wife for nearly two years, he also lied about his official duties as a police officer. In 2007, Officer Sanchez was disciplined by the Denver Police Department for lying to his superior officer. This misconduct ended his prospects for advancement in the police force and was a circumstance that needed to be disclosed to defense counsel in any case in which he might appear as a witness. Hearing Order, at 6.

Next, the Hearing Officer found that Officer Sanchez had an incentive to give false testimony against Officer Southard, even at the cost of his dead-end career. When his wife discovered the affair, Officer Sanchez’s first concern was to save his marriage. *Id.* at 10. Mrs. Sanchez subsequently testified that his “admission” about on-duty sex helped save that marriage by convincing her that he had come clean about his relationship with Officer Southard. Tr. 7/18/14 85:13-23. The Hearing Officer found that Officer Sanchez “shaded his IA statements and his testimony against Southard to repair his relationship with his wife.” Hearing Order, at 8.²

Finally, the Hearing Officer found that there was compelling evidence that Officer Sanchez’s testimony in the hearing was dishonest. His demeanor seemed, in the Hearing Officer’s assessment, to indicate deception. She recited that he slouched in his chair, mumbled, continually touched his mouth, and appeared to invent rather than recall the details of conversations. *Id.* at 9. The Hearing Officer even observed that, in her 27 years of taking witness affidavits from witnesses in about 100 cases per year as an attorney for federal agencies, she had “never had an occurrence witness relate both sides of conversations like Sanchez did.” *Id.*, at 9. Most importantly, Officer Sanchez’s sworn testimony at the hearing was inconsistent with both his own prior statements and the scant physical evidence that did exist. The Hearing Order is chock full of the Hearing Officer’s findings regarding inconsistencies in Officer Sanchez’s testimony, but a few stand out.

² The Hearing Order is replete with references to the parties’ motivations, “narratives,” and intentions, especially those of Officer Sanchez and Mrs. Sanchez, for which the factual basis is not always evident. While these references are distracting, and unnecessary in many instances, the court finds that the Hearing Officer’s conclusions regarding Officer Sanchez’s motivation to repair his relationship with his wife is well supported in the evidence.

First, Officer Sanchez' description of the sex he claims to have had with Officer Southard while on-duty evolved substantially over time. In his first IAB interview in June 2013, Officer Sanchez initially told the investigator that there was no "sex or anything like that" at his on-duty meetings with Officer Southard. Over an hour and a half later, Officer Sanchez revised his story. In his new version, he stated that he would touch Officer Southard "on an intimate spot" "every once in a while," but she would only touch him over his clothes. *Id.*, at 6. The version which included digital penetration and oral sex did not arise until seven months later, at Officer Sanchez's second IAB interview in January 2014. There, Officer Sanchez claimed that he had penetrated Officer Southard's vagina 25-30 times in the 23 weeks they were able to meet on duty. He also claimed for the first time that Officer Southard performed oral sex on him, even though he denied any such activity in the first IAB interview, which had been conducted barely two weeks after the oral sex supposedly occurred. *Id.*, at 7-8.

Second, Officer Sanchez claimed that Officer Southard assaulted him at the Lowry Sports Complex on June 19, but offered no less than four irreconcilable descriptions of the alleged attack, which ran the gamut from Officer Southard never successfully striking him to having backhanded him hard enough to stun him. *Id.*, at 14.

Third, Officer Sanchez testified that he did not purposefully follow Officer Southard on June 19. However, GPS tracking records and HALO video prove that Officer Sanchez made a U-turn to follow Officer Southard's car after she passed him. Exhibit 11. At the hearing, Officer Sanchez even denied that the police vehicle depicted on the HALO video was his assigned unit, but the Hearing Officer found that the movement depicted on the video matched the GPS map of his assigned unit. Hearing Order at 12, n.13, and 13. This was one of the very few pieces of physical evidence in the case, and demonstrated clearly and irrefutably that Officer Sanchez had been untruthful with respect to this factual issue. *Id.*, at 12.

Fourth, although Officer Sanchez contended in his first IAB interview that he had been attempting to cut off the relationship for approximately six months, text messages indicate that he had been planning what turned out to be their last off-duty tryst with Officer Southard on Sunday, June 17, 2013, and had sex with her on Monday, June 18, 2013. That was a mere three days before his first IAB interview in which he claimed months long efforts to terminate the relationship. *Id.*, at 9-12. The Hearing Officer concluded that "Sanchez was not trying to break up with Southard for the six months of January through June, 2013." *Id.*, at 12.

These examples were indicative to the Hearing Officer of a theme to Officer Sanchez's testimony: it was inconsistent about critical inculpatory facts, and either unsupported or disproved when impartial evidence was available for comparison.

By contrast, the Hearing Officer found Officer Southard to be credible. She had no history of dishonesty, and her demeanor was unexceptionable in the hearing. Her testimony was completely consistent with both of her IAB interviews apart from one minor and ultimately immaterial issue (whether she listened to police radio bands on her official radio or her cellphone in order to locate Sanchez). Overall, Officer Southard showed none of the indicia of dishonesty that led the Hearing Officer to discredit Officer Sanchez. *Id.*, at 9.

The Hearing Officer's conclusions regarding the relative credibility of the parties takes on extraordinary importance in this particular case. With the sole exception of whatever Mrs. Sanchez could hear over the telephone of the parties' exchange in the parking lot at Alameda and Dahlia on the evening of June 20, 2013, Officers Southard and Sanchez were the only witnesses to virtually every fact or circumstance of significance in this case. To put it in the vernacular, this was a classic "he said/she said" case. Accordingly, the Hearing Officer's findings of evidentiary fact in this regard take on outsized importance to the resolution of this case.

The Commission essentially disregarded the Hearing Officer's findings on credibility, and focused instead on two issues. First, as had The EDOS, the Commission focused on the fact that Officer Sanchez's version of events was sufficiently incriminating and prejudicial to his own interests, in addition to those of Officer Southard, that it took on extra credibility. DODA, at 6; Commission Order, at 6. Second, the Commission focused on the videotape of Officer Southard's initial IAB interview on June 21, 2013, in which she was demonstrably emotional, concerned primarily with who had reported the affair, stated repeatedly that she was going to lose her job, and asked rhetorically how she was going to explain the circumstances to her father. Exhibit 10; Commission Order, at 6-7. The Commission concluded that this amounted to evidence of a guilty conscience, unexplained by either the alleged assaults (which Officer Southard denied had occurred at all) or the off-duty aspects of the affair (which it found Officer Southard knew were not a violation of departmental rules, and therefore could not have been the source of her anxiety). *Id.*, at 7.

The merits of these conclusions to one side³, they amount to no more than the Commission's attempt to resolve disputed issues of fact pertaining to the parties' credibility, which is prohibited by both the Charter § 9.4.15(F) and Rule 12 §§ 9.D and 11.J.5. Here, as in *Ricci v. Davis*,

³ The Hearing Officer interpreted these circumstances differently. With respect to Sanchez's admissions against interest, the hearing officer concluded that he hated his dead-end job, and was willing to sacrifice it in order to preserve his relationship with Mrs. Sanchez. Hearing Order, at 8. With respect to Officer Southard's demeanor and body language in her initial IAB interview, the Hearing Officer interpreted those as a product of natural raw emotion and fear of losing her job, as well as shame for having had an affair with a married man, and the shame and anguish she knew it would cause her dad. Hearing Order at 19-20.

To permit a board to look outside the four corners of the hearing panel's findings and base its ultimate findings, in whole or in part, on the "cold" hearing transcript would[] 'defeat one purpose of having an impartial hearing panel... and place decisions based on the evaluation of evidence in the hands of a body which has not actually seen and heard the witnesses.

627 P.2d 1111, 1119 (Colo. 1981)(quoting *Blair v. Lovett*, 582 P.2d 668, 671 (Colo. 1978)). There, as here, "[s]uch a holding would not comport with the legislative intent underlying the statutory scheme." *Id.* As noted, the Charter and Rule 12 contemplate an adversarial evidentiary hearing, the purpose of which is to allow the hearing officer to make findings of fact based upon the whole record, which inevitably will include the sworn testimony of witnesses that were simply not available to the EDOS.

With respect to the Hearing Officer, the court finds that her determination that EDOS's conclusion was "clearly erroneous" in the sense required by Rule 12, i.e., that "although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole," is amply supported by a candid and honest consideration of the whole record generated at and before the hearing.

B. The Hearing Officer did not impermissibly conduct a hearing *de novo*.

The Commission states repeatedly that the Hearing Officer impermissibly conducted a hearing *de novo*, as though she were operating under the "old Rule 12," and that her only function under the "new Rule 12" was to determine whether the EDOS's conclusion was "clearly erroneous." Commission Order, at 3.

To be sure, the version of Rule 12 which came into effect in March, 2013 deleted specific reference to a "hearing De Novo, that is, considering the matter anew, the same as if it had not been heard before and as if no decision previously have been rendered," Rule 12, § 8.D.2 (5/12/08). However, the Charter and Rule 12 still require an evidentiary hearing before an impartial hearing officer, at which both sides have the opportunity to present sworn testimony and documentary evidence, and at the conclusion of which the hearing officer is obligated to "issue a written decision which includes findings of fact and conclusions of law affirming, reversing, or modifying the disciplinary action in whole or in part." Rule 12, §9.A. Moreover, the Director's disciplinary action shall be deemed to be "clearly erroneous" if, "although supported by the evidence, is contrary to what a reasonable person would conclude from *the record as a whole* [emphasis supplied]." *Id.*, §9.B.1.c.i. The phrase "the record as a whole" certainly includes that portion of the record which was before the EDOS, but also includes the additional,

and perhaps different, evidence received at the hearing. Otherwise, the Charter's requirement of an evidentiary hearing would be rendered meaningless.

Thus, the disciplinary framework anticipates that the hearing officer will have additional and perhaps different information available at the conclusion of the hearing than was available to the EDOS when the disciplinary action was taken. The additional information would almost certainly include myriad details upon which a factfinder relies in determining the credibility of witnesses, since the Hearing Officer would have presided over the hearing where they testified. *cf.*, C.J.I.-Civ 3:16 (jurors routinely instructed that they "are the sole judges of the credibility of the witnesses and the weight to be given their testimony," and that they should consider the witnesses' "means of knowledge, strength of memory, and opportunities for observation; reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether the testimony has been contradicted or supported by other evidence; their bias, prejudice, or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses"). The Charter requires that the "Commission shall rely only upon the evidence presented to the Hearing Officer" in deciding the appeal. Charter §9.4.15(F). Thus, the Commission is obligated to consider all of the evidence, including that which was presented to the Hearing Officer at the hearing, but may not have been available to the EDOS initially.

C. The Hearing Officer correctly placed the burden of proof on Officer Southard.

The Commission concluded that, in addition to conducting a hearing *de novo*, the Hearing Officer impermissibly put the burden of proof on the EDOS instead of Officer Southard. Commission Order, at 5. It is settled law that the burden of proof is properly on the disciplined officer to show that the Director's decision was clearly erroneous. *Marshall v. Civil Service Commission*, 401 P.2d 96 (Colo. App. 2016).

Under the Charter and Rule 12, the presentation of proof in a hearing officer's review has two phases. First, the Director must "present sufficient evidence to create a reasonable inference of the correctness of the sustained Rule violation(s) and the imposed penalty(s)" in the order. Rule 12 § 8.D.2.; Charter § 9.4.15(C). In this phase, "the evidence offered *initially* by the [Director] of Safety shall be limited to evidence, including materials, considered as the basis of the Order." Rule 12, § 8.D.2. (emphasis added). In other words, the Director must make a *prima facie* showing that the evidence available at the time of the order justified discipline. Here, the Hearing Officer correctly applied the first part of the burden when, despite her final decision to reverse the DODA, she noted that "Respondent [EDOS] met its burden through evidence that ... raised a reasonable inference of correctness in Respondent's conclusion that [Officer Southard] violated RR-106.2, RR-112.2, and RR-115.1." Hearing Order, at 22.

The second phase of the presentation of evidence requires the police officer to establish that the Director's order was clearly erroneous. Rule 12 § 8.D.3; C.R.S. § 24-4-105(7). The evidence offered by the police officer must be weighty enough that "a reasonable person would conclude from the record as a whole" that the Director's order was clearly erroneous. Rule 12 § 9.B.1.c.i. As discussed above, the evidence Officer Southard presented to at the hearing was legally sufficient to meet this burden: a reasonable person considering the record as a whole - including the Hearing Officer's conclusion that the only evidence that Officer Southard had sex with Officer Sanchez while on duty and then lied about it came from Officer Sanchez, whom the Hearing Officer concluded was "an inveterate liar" - would certainly conclude that the EDOS's determination to the contrary was clearly erroneous. Thus, the Hearing Officer correctly placed the ultimate burden of proof on Officer Southard, and concluded that she had borne it. Hearing Order, at 23.

D. The Commission's ultimate conclusions were not warranted by the Hearing Officer's findings.

The Commission has the "responsibility to make its own ultimate conclusions of fact," but it does not make those conclusions in a vacuum. *Nixon v. City & Cty. of Denver*, 343 P.3d 1051, 1056 (Colo. App. 2014). Even though the Commission must reach ultimate conclusions independently, those conclusions "must be fully warranted by the basic facts embodied in the [Hearing Officer's] formal, written statement of [her] findings." *Ricci v. Davis*, 627 P.2d 1111, 1117 (Colo. 1981).

In this case, however, the Commission stated that while it "understands the Hearing Officer's factual findings are binding on us, they are, in a sense, advisory to the larger issue of ultimate conclusions of fact... We believe that the facts lead us in a direction opposite from the one chosen by the Hearing Officer." Commission Order, at 8. The Commission reweighed Officer Sanchez's testimony and found him credible based on its own criteria, ignoring the Hearing Officer's finding that his testimony was unbelievable. Commission Order, at 6. It concluded that Officer Southard had sex on duty, ignoring the Hearing Officer's finding that Officer Southard did not perform any of the sex acts she was accused of. *Id.* at 7. In this latter conclusion, it relied exclusively on inference and speculation, without any direct evidence that the sex acts ever occurred. *Id.* at 6-7.

In this case, at least with respect to the sexual misconduct and commission of a deceptive act charges, the evidentiary facts found by the Hearing Officer and the ultimate conclusions of fact essentially merge. In other words, Officer Southard either had sex with Officer Sanchez while on duty, or she did not. The only two witnesses with direct knowledge of whether she did or did not were Officers Sanchez and Southard. It is difficult for the court to understand how,

given that the Commission was bound by the finding that the only credible witness testified that they did not have sex while on duty, it could nevertheless conclude that it was not clearly erroneous (meaning that, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole) to conclude that they did. It is equally difficult for the court to understand how, if the only credible witness told the truth about the matter, how the Commission could nevertheless conclude that it was not clearly erroneous, in the same sense, for the EDOS to conclude that she lied. To be sure, the Hearing Officer had the benefit of the additional evidence, and most critically, her observations of both Officer Sanchez and Officer Southard as they testified to these matters under oath, which the EDOS did not have. However, both the Charter and Rule 12 require that the Hearing Officer's determination be made on the basis of "the full record before him or her," Charter §9.4.15(D), and "the record as a whole," Rule 12, §9.B.1.c.i, rather than only those portions of the record that had been available to the EDOS. Again, to make such an artificial limitation on the Hearing Officer's deliberative process would be to render the adversarial hearing required by the Charter a nullity and meaningless. Accordingly, any such interpretation must be rejected. *Colorado Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 212 (Colo. App. 2007).

In this respect, this case is distinguishable from *Lawley v. Department of Higher Educ.*, 36 P.3d 1239 (Colo. 2001), in which the court concluded that there was various circumstantial evidence which could have led the State Personnel Board to conclude that the Defendant had engaged in intentional discrimination based upon sex, despite the Defendant having offered a nondiscriminatory explanation for its decision to terminate the plaintiff's position, which a division of the Court of Appeals found persuasive. That case involved the multiple-step, back and forth analytical framework required for the determination of intentional discrimination under state law, which the Supreme Court had adopted in *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997) from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). This case, by contrast, involves no such complexity or mystery. The simple question in this case is whether Officer Southard had sex with Officer Sanchez while on duty, and then lied about it. While the Commission cataloged several undisputed facts regarding the relationship between Officers Sanchez and Southard, Commission Order, at 7, neither individually nor collectively do they amount to having sex while on duty. Again, the Hearing Officer's conclusion, based upon the complete record before her, parts of which had concededly not been available to the EDOS, was that the Director's conclusion was clearly erroneous, and that conclusion is well supported by the record as a whole.

For all the foregoing reasons, the court HEREBY REVERSES the Commission's reinstatement of Officer Southard's termination on the Sexual Misconduct and Commission of a Deceptive Act charges.

3. The Commission properly reinstated Officer Southard's discipline for conduct prohibited by law

The third charge for which Officer Southard was suspended was violation of RR-115.1 of the DPD Operations Manual, which provides as follows:

Officers shall obey the Charter of the City and County of Denver, City Ordinances, all state and federal statutes, all lawful court orders, and all other applicable laws whether criminal, civil, traffic, or administrative.

With respect to her interactions with Officer Sanchez on June 19 and 20, 2013, Officer Southard was originally charged in the Arapahoe County Court with Assault in the Third Degree, in violation of C.R.S. §18-3-204, Harassment in violation of C.R.S. § 18-9-111(1), and Disorderly Conduct in violation of C.R.S. §18-9-108(1)(c). On December 20, 2013, she pled guilty pursuant to a deferred judgment agreement to Reckless Endangerment, in violation of C.R.S. §18-3-208 and Disorderly Conduct. EDOS determined that “[p]ursuant to the disciplinary matrix, her guilty plea operates as conclusive proof that Officer Southard violated [RR 115.1]” DODA, at 8.

The Hearing Officer concluded that Officer Sanchez was not credible on any disputed fact, including with respect to the incidents in the three different parking lots that occurred on June 19 and 20, 2013, and were the basis for the criminal charges. Hearing Order, at 9 and 13. With respect to Officer Southard's guilty pleas, the Hearing Officer cited two portions of a passage under the heading “Effect of Finding or Plea of Guilty,” within the section regarding “Conduct Prohibited by Law” from Appendix D of the Denver Police Department Discipline Handbook, which provide as follows:

...Actions that occur within the criminal justice system that establish an officer's violation of a criminal law (such as a guilty verdict following a trial or a guilty plea) generally will be considered by the Department/Manager of Safety as proving, for disciplinary purposes, that the officer has engaged in conduct that is prohibited by law.

[A]ny ... type of criminal disposition that essentially requires an admission that the officer engaged in forbidden conduct (such as a plea of nolo contendere or a deferred judgment) will conclusively establish a violation of the disciplinary rule based on the conduct at issue in the criminal case.

Exhibit 17, Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines (“Discipline Handbook”), Appendix D, at 4. Hearing Order, at 24-25.

The Hearing Officer focused on the qualifier “generally” in the first passage quoted above, and concluded that “[t]here is no reason to consider Southard’s plea as proof in this particular case,” based upon her conclusion that the plea “was not a matter of guilt, but a strategy to preserve a career in law enforcement.” Hearing Order, at 24, 25 (emphasis original). The Hearing Officer also concluded that it was improper for EDOS to have imposed an aggravated penalty, stating simply that “[t]o allow a suspension with the aggravating penalty of 15 days is wrong,” based upon her finding that Sanchez was not credible on any disputed fact, and therefore the penalty was “clearly erroneous on these credibility findings.” Hearing Order, at 25.

The Commission reviewed this conclusion first, believing that “the Hearing Officer’s resolution of this charge proves our larger point.” Commission Order, at 2. The Commission held as follows:

We are hard-pressed to think of a scenario where it could be considered clearly erroneous for the EDOS to consider a guilty plea to criminal charges as evidence of the officer’s violation of RR-115.1, Conduct Prohibited by Law. The plea is conclusive proof, an absolute admission, that Appellant violated state law.

Id., at 3. The Commission went on to observe that

while we certainly would have looked askance at a Hearing Officer disregarding a knowing, informed, voluntary guilty plea under our old rules, we are stunned that this could occur in the context of determining whether the EDOS was clearly erroneous. Indeed, we think it could not have occurred had the Hearing Officer followed the current Rule 12. We are convinced that the Hearing Officer ignored the current Rule 12 and improperly conducted a *de novo* hearing in which she improperly imposed the burden of proof on EDOS and improperly found his evidence wanting.⁴

Id. The Commission went on to conclude that, based upon Officer Southard’s obvious intelligence, the fact that she was represented when she entered her plea, the lack of any evidence

⁴ This conclusion that the Hearing Officer ignored current Rule 12 and improperly conducted a *de novo* hearing appears to be its “larger point” to which the Commission earlier referred.

that she was coerced into making her pleas, and that the pleas “amount to an admission of fact that she engaged in misconduct and an admission of law that she was guilty of crimes,” the EDOS was not clearly erroneous. *Id.* The Commission also regarded Officer Southard’s concern that she would not be able to avoid a conviction on the more serious charges, despite the district attorney’s criminal burden of proof of beyond a reasonable doubt as “underscore[ing] the reasonableness of EDOS’s conclusions leading to discipline, and further convinces us that his decision to issue discipline was not clearly erroneous.” *Id.*, at 4. Finally, the commission held that the Hearing Officer had misinterpreted the first portion of the passage from the Discipline Handbook quoted above, stating that

[t]his provision of the Handbook gives the EDOS, and only the EDOS, the option of ignoring the guilty plea as proof of misconduct. We do not believe this provision of the Handbook allows the Hearing Officer to impose this option, this exception to the rule, on the EDOS under any circumstances.

Id.

The Commission’s resolution of the Conduct Prohibited by Law charge squarely raises the amendments to Rule 12 which became effective in March, 2013 pertaining to the Hearing Officer’s Decision and Order, and provide as follows:

B. In reviewing the disciplinary action:

1. The Hearing Officer *shall give due weight to the necessity of the maintaining by the Manager of Safety of administrative control of the respective Department.*
 - a. Hearing Officers shall not substitute their judgment for that of the Manager of Safety concerning any policy considerations underlying the discipline, to include the interpretation of Departmental rules and regulations, and may only reverse or modify the Manager’s decision concerning policy considerations when it is shown to be clearly erroneous...
 - b. A Hearing Officer may reverse or modify the Manager of Safety’s Departmental Order of Disciplinary Action on the basis of issues raised by

the Petitioner concerning policy considerations, a sustained Rule violation or an imposed penalty, only when it is shown to be clearly erroneous.

- c. A Departmental Order of Disciplinary Action shall be deemed to be “clearly erroneous”, in whole or in part, in the following circumstances:
 - i. The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;...

Rule 12, §9.B (3/09/13) (*italics* in original, and cited to Charter §9.4.15(D)).

EDOS did not cite any portions of the Discipline Handbook in the DODA, and simply regarded Officer Southard’s guilty plea “as conclusive proof that [she] violated [RR-115.1, Conduct Prohibited by Law].” DODA, at 8. The Commission did cite the passage of the Discipline Handbook upon which the Hearing Officer relied, but interpreted it as giving “the EDOS, and only the EDOS, the option of ignoring the guilty plea as proof of misconduct.” Commission Order, at 4. This court interprets these conclusions by EDOS and the Commission as amounting to judgments concerning policy considerations underlying the discipline, including the interpretation of Departmental Rules and Regulations, as to which Rule 12, §9.B.1.a prohibits the Hearing Officer from substituting her judgment or reversing or modifying the EDOS’s decision unless it is shown to be clearly erroneous. The same prohibition applies to the EDOS’s judgment regarding the appropriate level of penalty. *Id.* The court concludes that the Hearing Officer did not demonstrate that EDOS’s judgment with respect to policy considerations underlying the interpretation of RR-115.1 or the imposition of a suspension of 15 days was clearly erroneous. Indeed, both portions of the passage from the Discipline Handbook, and particularly the second one set forth above, insofar as it refers specifically to deferred judgments “conclusively establish[ing]” a violation, demonstrate that the EDOS’s interpretation is not clearly erroneous.

It is certainly true that persons accused of crimes will frequently enter into guilty pleas to lesser charges for which there is no factual basis. A common if simplistic example is that persons accused of speeding in traffic court often plead guilty to defective vehicle, even though there is no evidence that there was anything wrong with their vehicle, simply to avoid conviction on the more serious charge and the resulting higher number of points being assessed against their license. However, a healthy respect for the Charter’s and Rule 12’s imperative of EDOS maintaining administrative control of the DPD, together with the practical reality that re-

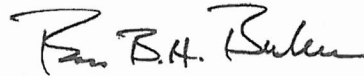
examining the factual merits of a criminal charge to which an intelligent police officer has voluntarily pled guilty in the context of a departmental disciplinary action would be unduly cumbersome, leads this court to the conclusion that the EDOS's and the Commission's conclusions regarding these policy considerations and the interpretation of DPD's own rules and regulations were not clearly erroneous. Therefore, the court HEREBY AFFIRMS the Commission's reinstatement of Officer Southard's discipline with respect to the Conduct Prohibited by Law charge.

CONCLUSION

For the above reasons, the Commission's Order reinstating discipline against Officer Southard is AFFIRMED IN PART AND REVERSED IN PART, in accordance with this Order.

DATED this 28th day of June, 2018.

BY THE COURT.



Ross B.H. Buchanan
Denver District Court Judge

