

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 111-09

DECISION (ERRATA)

IN THE MATTER OF THE APPEAL OF:

LINDA CLAYTON, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Linda Clayton, appeals a thirty-day suspension assessed by her employer, the Department of Aviation (Agency), from January 6, 2010 through February 26, 2010, for alleged violations of the Career Service Rules (CSR). A hearing concerning this appeal was held on February 23, 2010. Bruce A. Plotkin, Hearing Officer presided. The Agency was represented by Robert D. Nespor, Assistant City Attorney, while Ms. Clayton was represented by Michael O'Malley, Esq. Agency Exhibits 1-17 were admitted without objection, as were Clayton's exhibits A-J.

The Agency alleges misconduct for two instances where Clayton wrongly claimed overtime for attending meetings and wrongly claimed to have attended a third meeting although it had been cancelled. The analysis of this decision is organized around the dates of those alleged incidents of wrongdoing. The Agency states attendance at the meetings is voluntary and not subject to overtime payment. Clayton responds the rules are vague; that she obtained approval to claim overtime pay for attending SAT meetings and that her claim of having attended a cancelled meeting was a simple mistake of memory. For reasons which follow, the Agency's decision to suspend Ms. Clayton for 30 days is **AFFIRMED**.

II. ISSUES

The following issues were presented for appeal:

- A. whether Clayton violated any of the following Career Service Rules: 16-60 E., J., K., or L.

- B. if violated any of the aforementioned Career Service Rules, whether the Agency's decision to assess a 30-day suspension conformed to the purposes of discipline under CSR 16-10.

III. FINDINGS

Ms. Clayton is employed as an Assistant Aviation Operations Manager, (AAOM) working rotating shifts in Airport Operations at Denver International Airport (DIA). Jason Perez is an AOM (Aviation Operations Manager). He supervises Clayton and assessed discipline in this case.

August 26, 2009. In August 2009, Clayton became interested in joining the Strategic Action Team (SAT) committee¹ at work. She was informed by email on August 26, 2009, by her then-supervisor Alvin Lorenzo, that employees are permitted to incorporate the time to attend SAT meetings into their 40-hour work week, but that overtime pay is not permitted for attending them. [Exhibit 6]. Since non-exempt² SAT committee employees are permitted to count their attendance at SAT meetings as part of their work week, they must punch in and out of the meeting location.

September 15, 2009. Perez became Clayton's supervisor on September 15, 2009. Almost immediately afterward, and without mentioning Lorenzo's August 26 directive, Clayton informed Perez, that her attendance at an SAT meeting on September 15 resulted in 2.5 hours of overtime. [Exhibit 3-2]. Perez emailed back to her on September 23 to question whether overtime was authorized for SAT meetings, but Clayton did not reply. Perez then checked with his supervisor, Lisa Gahm, who determined SAT meetings are not eligible for overtime. Perez, still unaware of the August 26 memo, sent Clayton an email to this effect on September 25, 2009, telling her to adjust her schedule so that she did not exceed 40 hours for the week. (Exhibit 5).

Perez subsequently learned about Lorenzo's memo to Clayton stating that overtime was not authorized for attendance at SAT meetings. Perez assumed there had been a misunderstanding about the overtime issue, and permitted Clayton to claim overtime for her attendance at the September 15, 2009 SAT meeting, [Exhibit 5], but he made it clear to her that overtime would not be allowed for subsequent meetings. [Exhibit 6]. Clayton replied she would abide by his directive. [Exhibit 3-2; Exhibit 5].

On **October 13, 2009**, Clayton attended another SAT meeting. Perez was on vacation and Larry Watson was the AOM supervisor on duty. Clayton did not mention the earlier orders from Lorenzo and Perez regarding overtime. Watson, who was unaware of the aforementioned directives, approved overtime for

¹ The SAT committee is a forum for any interested DIA employee to provide input into improving operations at DIA.

² i.e., not exempt from overtime pay pursuant to the Fair Labor Standards Act (FLSA). CSR 8-30 A.1.

Clayton's attendance at the October 13 SAT meeting. When Perez returned from vacation, he questioned Clayton about her overtime claim. She replied the overtime rules seemed vague, so she had further researched the overtime issue with Deputy Manager of Maintenance and Engineering Ruth Rodriguez, co-worker Alan Schnur, and determined overtime for SAT meetings would be allowed if approved by John Kinney, Deputy Manager of Aviation Operations. [Exhibit 3-2]. Perez met with Rodriguez, Schnur and Gahm. Each affirmed overtime was not approved for SAT meetings. Perez emailed Clayton the results of his review on November 3, 2009. [Exhibit 5].

October 27, 2009 – The normally-scheduled SAT meeting was canceled. [Ex 13-2]. October 27 was a day off for Clayton, so she was unaware of the cancellation notice emailed the same day as the meeting.

November 4, 2009. Perez told Clayton to meet him regarding her overtime claim for the October 13 SAT meeting and to discuss her timecard for the current two pay periods. As Perez entered the designated meeting location, he observed Clayton asking Adam Steffl, another AOM supervisor, to add 2 hours to her timecard for attending the October 27 SAT meeting. Upon seeing Perez enter the room, Steffl deferred Clayton's request to Perez. [Ex 3-2]. Perez was called to another meeting before he could discuss Clayton's timekeeping, so he sent her an email the next day, November 5, asking her to state her hours for the current two work weeks. Clayton replied by email, stating, that in addition to her regular hours, she attended a two-hour SAT meeting on October 27. [Exhibit 9].

When Perez reconciled Clayton's timecard for the period including October 27, he noticed Clayton had not punched in for the SAT meeting. He discovered the meeting had been cancelled in advance. [Exhibits 3-3; 11; 13-2; Perez testimony]. His curiosity piqued, Perez also found Clayton had not used her badge on October 27 to enter any of the DIA parking lots, nor had she used her badge to enter any DIA facility. [*Id.*].

November 11, 2009. Based on his findings, above, Perez told Clayton to meet with him on November 11. Perez asked Clayton why she didn't punch in for the SAT meeting on October 27. Clayton replied she took the bus and forgot her badge. She added the October 27 meeting took place in an unsecured area of the main terminal building, thus negating the need for a badge entry. She also recalled all SAT members attended that meeting and they broke into smaller work groups. Perez asked again about those in attendance, and Clayton confirmed the entire group attended. Perez, then for the first time, told Clayton he heard the meeting was cancelled. Clayton insisted the meeting took place.

November 12, 2009. The next day Clayton called in sick, but sent an email to the leader of her SAT sub-committee to ask about the October 27 SAT meeting. He replied it had been cancelled. Clayton then sent an email to Perez in which she stated Perez was correct about the October 27 meeting. Clayton

apologized for the two-hour SAT issue, and asked Perez to correct the matter by allowing her to use two hours of sick time or leave without pay. Referring to the October 27 SAT meeting 16 days earlier, Clayton explained "I just couldn't recall those weeks ago." [Exhibit 13].

The Agency issued a letter in contemplation of discipline on November 23, 2009. A pre-disciplinary meeting was held on December 2, 2009. Clayton elected not to have a representative attend. She provided a written statement at the meeting. [Exhibit C]. On December 16, 2009, the Agency issued its formal notice, imposing a 30-day suspension. This appeal followed timely on December 23, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

Personal jurisdiction: As an employee at Denver International Airport, Clayton is a member of the Career Service personnel system, and may appeal her discipline under the Career Service Rules. Charter §§ 9.1.1. E.(vi), 9.8.2.(A); CSR 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR 19-10 A.1.b., as the direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove Clayton violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend Clayton for five days complied with the purposes of discipline. CSR 16-20. The standard by which the Agency must prove its claims is by a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 E. Any act of dishonesty, which may include, but is not limited to... 3. Lying to superiors... with respect to official duties, including work duties ... or false reporting of work hours.

An employee violates this rule by making a knowing misrepresentation within the employment context. In re Mounjim, CSA 87-07, 6 (7/10/08), *modified*, CSB (1/8/09). The Agency claimed Clayton was dishonest in falsely claiming overtime and work hours for attending the above-referenced SAT meetings on September 15, October 13, and October 27, 2009. [Perez testimony; Exhibit 3]. As for most claims of dishonesty, credibility is critical, since the agency must prove the employee knowingly

misrepresented the truth. [Mounjim]. There was no dispute Clayton's claim for pay occurred within the employment context. Regarding the remaining element of "knowingly" misrepresenting the truth, the concept of acting "knowingly" derives from the criminal code, which defines the term, in pertinent part, as "being aware" or acting "willfully." [Colorado Revised Statutes 18-1-501(6) (2009)]. The following evidence is relevant to the determination of the "knowing" element of credibility.

a. The September 15, 2009 SAT meeting. Clayton received Lorenzo's notice on August 26, 2009, that specified overtime was not allowed for attendance at SAT meetings. Nonetheless, she claimed overtime on her timecard for attending the subsequent SAT meeting on September 15. [Exhibit 7-1]. In addition, Perez specifically informed Clayton several times that she was not to claim overtime for attending SAT meetings. [Perez testimony; Exhibits 5, 6, 8]. Because Clayton was aware of her supervisor's directives against it when she claimed overtime for attending the September 15, 2009 SAT meeting, she was dishonest in violation of CSR 16-60 E.

b. The October 13, 2009 SAT meeting.

Clayton testified at hearing that she never submitted a claim for overtime for attending any SAT meeting between August 26 and October 27, 2010. [Clayton testimony]. Her claim was supported as to the October 13 SAT meeting by Larry Watson, AOM. Watson was the AOM on duty in Perez' absence during the week of October 10-17. In reviewing Clayton's time for that week, Watson recalled Clayton said she wasn't sure if overtime was approved for SAT meetings. [Watson testimony]. Watson added, however, "nor did she advise me of any guidance, procedures or directives stating these [SAT] meetings were voluntary and as such attendance would be without pay." [Exhibit J]. Clayton's assertion at hearing, that she affirmatively advised Watson that overtime is not approved for SAT meetings, is not convincing in light of her failure to raise any credibility issue with Watson's recollection.

In light of (1) Lorenzo's unmistakable email to Clayton on August 26, 2009 stating overtime was not authorized, [Exhibit 5], (2) Clayton's affirmation to Perez on September 23 that she would abide by his no-overtime directive concerning SAT meetings, and (3) Perez' subsequent reminder to Clayton on September 25 that overtime was not allowed, [Exhibit 5], then Clayton was aware of the overtime prohibition when she told Watson she did not recall if overtime was approved for attending SAT meetings. She was also dishonest in failing to advise Watson there was such a directive. Silence, when the situation calls for a known response, is just as dishonest as an overt expression of dishonesty, since both are intended to deceive.

c. The October 27, 2009 SAT meeting.

The Agency also claimed Clayton was dishonest for submitting work hours based upon her alleged attendance at the cancelled October 27, 2009 SAT meeting. One facet of the Agency's proof of Clayton's knowing dishonesty was demonstrating Clayton had not been to the airport at all on 10/27, as shown by

her lack of badge access to any DIA parking or building. In response, Clayton explained her badge record reflected no parking access because she took the bus that day. She also explained her badge record revealed no building access on 10/27 because the SAT meeting was moved to the main terminal, in an area of public access, where badges are not required. [Exhibit 3-3; Clayton cross-exam]. This incongruously specific response lacks credibility since the location of the meeting is irrelevant in light of the meeting being cancelled. [Exhibits 11; 13-2]. It is also an oddly detailed memory in light of Clayton's claim that she couldn't remember one meeting from another when she began attending only at the end of August, and claimed a mistaken memory for a meeting only one month earlier.

Clayton also claimed she met with just her subcommittee on 10/27, while the rest of the SAT committee's meeting was cancelled. "I think I may have put myself down for one of our meetings when the rest of the SAT team may have been cancelled... I thought we met in the MT [main terminal] somewhere else that day." [Exhibit 13]. However, the next day she admitted to Perez there had been no meeting at all, [*ibidem*], whereas, only one day earlier, she told Perez she was certain everyone on the SAT committee was in attendance.

Clayton also stated she was not knowingly dishonest about the above-stated incidents as she merely sought clarification of an inherently ambiguous policy concerning overtime. This argument misdirects the real issue. Even if a policy is ambiguous, but a supervisor's directive concerning the policy is unambiguous, an employee's feigning ignorance of the directive and attempting to circumvent the policy, here by allowing Perez and Watson to be misdirected, is dishonest in violation of CSR 16-60 E.³

In sum, the totality of these circumstances point inexorably to Clayton's initial dishonesty, and her ongoing dishonesty in attempting to cover up the initial violation. The preponderant evidence establishes she was aware of her supervisors' repeated directives not to claim overtime for attending SAT meetings, yet again and again she attempted to circumvent those directives by feigning ignorance about those directives when she discussed overtime with Perez, with Watson, by failing to inform Steffl about the directive when circumstances dictated she should, and by her ever-changing explanations for why she claimed attendance at the cancelled October 27 SAT meeting. Each of these deceptions was dishonest in violation of CSR 16-60 E.

□

³ Certainly, an employee may raise legitimate concerns regarding an ambiguous or unjust policy or rule in an attempt to clarify the ambiguity or change the unjust policy or rule without running afoul of the Career Service Rules; however even legitimate concerns do not justify disregarding a lawful directive in the mean time.

2. CSR 16-60 J. Failing to comply with the lawful orders of an authorized supervisor or failing to do assigned work which the employee is capable of performing.

This rule contains two discrete violations, failure to comply with an order and failure to perform assigned work, whether or not under direct order. At issue here was the first phrase, failing to comply with the lawful orders of an authorized supervisor. There was no dispute that Lorenzo's directive was a lawful order of an authorized supervisor. Lorenzo instructed Clayton not to claim overtime for attending SAT meetings. Similarly, Perez, who was also Clayton's supervisor, instructed her several times not to claim overtime for attending SAT meetings. Perez also made it clear that Clayton was to adjust her schedule by conferring with him, in order to end up with 40 hours per work week, barring any snow or other emergencies for which overtime is authorized. [See Exhibit 5]. Pursuant to the discussion immediately above, Clayton evaded her supervisors' orders. A violation of the first phrase of this rule may be proven by an employee's evasion of a directive, as well as by her direct refusal to comply. This violation is proven by a preponderance of the evidence.

3. CSR 16-60 K. Failing to meet established standards of performance including either qualitative or quantitative standards...

This rule covers performance deficiencies that can be measured either by qualitative or quantitative standards. In re Castaneda, CSA 79-03, 12 (12/18/02). The Agency claimed Clayton failed to follow established time-keeping standards that were known to her by claiming overtime not due and by claiming hours not served for attending a cancelled SAT meeting. Clayton denied asking for overtime for attending any SAT meeting, and claims she simply forgot the details of the day on which she believed she attended the cancelled SAT meeting.

Clayton agreed she was trained in, and shared responsibility with Perez, to account accurately for her work hours. [Perez testimony; Appellant cross-exam]. "All overtime eligible (non-exempt) employees are required to use time clocks to record the actual number of hours worked... All supervisors and employees shall received [sic.] training on the proper use of the KRONOS timekeeper system." [Exhibit 4-2]. Intent is irrelevant in determining whether there has been a violation of this rule. Thus, when Clayton inaccurately claimed credit for time she did not work on October 27, nothing more was required to find a violation of this rule. The employee's intent and the circumstances surrounding a violation of this rule is appropriately addressed only with respect to the degree of discipline.

4. CSR 16-60 L. Failure to observe written departmental or agency regulations, policies or rules.

The Agency alleged Clayton violated the "Department of Aviation Policy and Procedure Pay and Leave Management #2002." [Exhibit 3-1; Exhibit 4]. In pertinent part, the Agency's Policy reads: II. USE OF TIME CLOCKS A. 1. "All

overtime eligible (non-exempt) employees are required to use KRONOS time clocks to record the actual number of hours worked." [Exhibit 4-2]. For the same reasons as found above, Clayton's failure to account accurately for her actual number of hours worked, constitutes a violation of the Agency's policy, and therefore constitutes a violation of this rule.

V. DEGREE OF DISCIPLINE

The purpose of discipline is to correct inappropriate behavior if possible. In determining the appropriate degree of discipline, the Career Service Rules require appointing authorities to consider the severity of the offense, an employee's past record, and the penalty most likely to achieve compliance with the rules. CSR 16-20.

A. Severity of proven offenses.

Dishonesty concerning hours worked is an inherently egregious violation and may subject an employee to severe sanctions.

B. Past Record

This suspension is the fifth disciplinary action against the Appellant in her 10-year employment. In mitigation, this is the first disciplinary matter in the past five years. [See exhibits 14-17]. In aggravation, however, Clayton was suspended for one day in 2005, *inter alia*, for dishonesty. In that case, she made an illegitimate request for sick leave. Thus, in both the 2005 case and the present case, Clayton dishonestly claimed pay to which she was not entitled.

C. Penalty most likely to achieve compliance.

This case establishes the second disciplinary instance of Clayton's dishonesty. Since the prior disciplinary action failed to dissuade Clayton's dishonesty, the Agency's choice to mete a significant suspension in the current case comports with the principles of progressive discipline as described in the Career Service Rules. CSR 16-50.


D. Other considerations.

Based upon the discussion, above, the Agency's election to suspend Clayton for 30 days was neither clearly excessive nor based upon considerations unsupported by a preponderance of the evidence. In re Mounjim, CSA 87-07, 18 (7/10/08), *citing* In re Delmonico, CSA 53-06, 8 (10/26/06).

VI. ORDER

The Agency's decision to suspend Clayton for 30 work days, from January 6, 2010 through February 26, 2010, is **AFFIRMED**.

DONE April 6, 2010.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

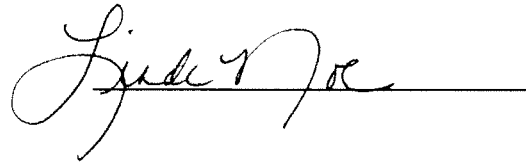
BY FAX:

(720) 913-5720

Fax transmissions of more than ten pages will not be accepted.

I certify that, on April 6, 2010, I delivered a correct copy of this DECISION to the following, in the manner indicated:

Ms. Linda Clayton, 8294 Eaton Way, Arvada, CO 80003	(via U.S. mail);
Michael O'Malley, Esq., Michaelomalleylaw@hotmail.com	(via email);
Ms. Kathy Hand, Kathy@legalnavigators.net	(via email);
City Attorney's Office at Diefiling.litigation@denvergov.org	(via email);
Maureen Pacheco, HR, Maureen.Pacheco@denvergov.org	(via email).

A handwritten signature in cursive script, appearing to read "Linda Noe", is written over a horizontal line.