

**CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
STATE OF COLORADO**

Appeal No. 40-17A

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

PASQUALE TAMBURINO,
Appellant-Respondent,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency-Petitioner.

Where are the bullets; where were the bullets; who had the bullets?

Pasquale Tamburino (Appellant), a civilian employee of the Denver Sheriff Department (DSD), was assigned to the DSD's Vehicle Impound Facility ("VIF") on the night that Fernando Olivas-Ordonez's stolen car was recovered by the Denver Police Department and brought to the VIF. Approximately twelve hours after the VIF's receipt of the vehicle, Mr. Olivas-Ordonez and his friend, Brian Nguyen, went to the VIF to identify the vehicle.

Approximately five days after the VIF's receipt of the vehicle, Denver Police processed the vehicle. That processing included an inspection of the vehicle as well as the taking of 37 photographs of the vehicle. The inspection failed to turn up the presence of any bullets or shell casings in the car. Similarly, none of the photographs taken of the car revealed the existence of any bullets or shell casings.

Subsequent to this processing, a Denver Police Detective phoned Mr. Olivas-Ordonez. Mr. Olivas-Ordonez informed the Detective that he had found bullets and shell casings in the car when he initially went to identify it at the VIF. The day after this phone call, two DPD Detectives went back to search the vehicle, and again, they found no bullets or shell casings.

The next day, one of the detectives phoned Mr. Olivas-Ordonez to inform him that after an additional search, they still had not found any bullets or shell casings in the car. Later that day, however, Appellant himself phoned one of the Detectives and told him that he (Appellant) had observed bullets in the vehicle. Four days later, DPD

Detectives once again inspected the car but this time, the detectives found two bullets and a shell casing inside.

The case of the missing, disappearing and re-appearing bullets caused the Agency to initiate an investigation. As a result of the investigation, the Agency determined that Appellant had taken possession of the bullets, failed to process them, and then committed deceptive acts when he placed the bullets back in the car before the last DPD inspection and when he lied during the investigation in claiming that he had not taken possession of the bullets. While the failure to properly process the bullets resulted in Appellant receiving some discipline, his alleged commission of deceptive acts got him fired.

Appellant appealed his discharge to a Hearing Officer. The Hearing Officer agreed with the Agency that Appellant knew of the existence of the bullets and shell casing and had failed to properly process them.

The Hearing Officer also determined, however, based on evidence not considered by the Agency's disciplinary decision-maker (Sheriff Firman) but adduced by Appellant at hearing, that Appellant had not taken possession of the bullets and, as a result, had not committed deceptive acts by denying his having taken possession, or by placing the bullets back in the vehicle (an act that would have been impossible for him to accomplish if he never had possession of the bullets). Accordingly, the Hearing Officer vacated the discharge and modified the discipline to a written reprimand in acknowledgement of Appellant's failure to properly process the bullets and shell casing.¹

The Agency has appealed the Hearing Officer's decision to this Board. We AFFIRM the Hearing Officer's decision.

The Agency argues that we need to reverse the Hearing Officer's decision based on Career Service Rule 19-61(D)² which gives us the ability to overturn a hearing officer's decision when that decision is not supported by record evidence, that is, when the factual findings are clearly erroneous.

The thrust of the Agency's argument is there is more and better evidence in the record supporting its position and the Hearing Officer should have credited their witnesses and adopted their position.

For example, the Agency notes that Mr. Olivas-Ordonez testified at hearing that his friend, Brian Nguyen, upon inspection of the vehicle at the VIF, found bullets and a shell casing in the car and that he gave them to "the officer" (presumably Appellant). Similarly, Mr. Nguyen testified that he found the bullets and shell casing and that he gave them "to the guy that took [him] out to go see the car" (Appellant). If this had been

¹ Appellant, at hearing, admitted to being aware of the existence of the bullets and shell casing, as he was made aware of them by Mr. Nguyen who had informed Appellant that he had found them in the car.

² This Rule is now CSR 21-21(D).

the only testimony concerning the possession of the bullets, we undoubtedly would have found the Hearing Officer's decision to be suspect. But it was not.

The Hearing Officer based his decision on the testimony of one Toyja Copeland. Ms. Copeland worked at the VIF and was present when Messrs. Olivas-Ordonez and Nguyen came to the VIF to first inspect the recovered stolen vehicle. She testified that as the two were leaving the facility, they caught her attention, and one of them informed her that they had discovered bullets in the car, which she could see they were holding in one of their hands. She testified further that they then left the VIF and that Appellant was not present for this discussion.

Ms. Copeland's testimony, according to the Hearing Officer, was bolstered by the testimony of one Judy Tafoya. Ms. Tafoya was also an employee at the VIF. She testified that she witnessed the conversation between Ms. Copeland and Mr. Olivas-Ordonez and Mr. Nguyen and that she heard one of the two gentlemen mention that they had taken bullets from the vehicle. She further testified that Ms. Copeland, at the time, acknowledged to her that one of the men had the bullets in his hand.

We find this testimony to be sufficient to support the Hearing Officer's finding that Appellant did not commit deceptive acts concerning possession of the bullets. The testimony of Ms. Copeland and Ms. Tafoya provide substantial record evidence supporting the Hearing Officer's decision. As such, the decision is not clearly erroneous.

The Agency's argument is, essentially, that the Hearing Officer should have credited the testimony of Nguyen and Olivas-Ordonez. The Hearing Officer, however, assessed the credibility of the witnesses and found Ms. Tafoya and Ms. Copeland to be more credible than Mr. Nguyen and Mr. Olivas-Ordonez. This was his right.

It is axiomatic that we do not assess credibility. Similarly, we do not re-weigh evidence and we do not resolve conflicts in evidence. These things, of course, lie squarely within the province of the Hearing Officer. This Board does not assess credibility, re-weigh evidence, or resolve conflicts in record evidence, yet to reach the decision urged by the Agency, we must do all these things

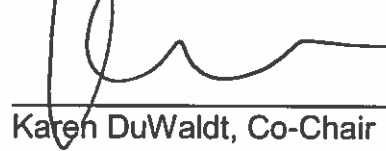
Because this Board will not invade the province of the Hearing Officer, and because all the Hearing Officer's findings are supported by record evidence, there exists no justification for our overturning the Hearing Officer's decision.

Accordingly, the Hearing Officer's decision is AFFIRMED in its entirety.³

³ If Appellant did not have possession of the bullets, how did they find their way back into the vehicle? We cannot and need not answer this question with any certainty but note that the record indicates that after first visiting the VIF, where Mr. Olivas-Ordonez or Mr. Nguyen had the bullets before leaving the facility, Mr. Olivas-Ordonez was at the VIF on two more occasions before the bullets were found.

SO ORDERED by the Board on October 18, 2018, and documented this 16th day of May, 2019.

BY THE BOARD:



A handwritten signature in black ink, appearing to read 'Karen DuWaldt', is written over a solid horizontal line.

Karen DuWaldt, Co-Chair

Board Members Concurring: Patricia Barela Rivera, Tracy Winchester

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER** on May 16, 2019, in the manner indicated below, to the following:

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For the Career Service Board