

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Consolidated Appeal Nos. 60-10

ORDER DENYING APPELLANT'S CONFRONTATION CLAUSE REQUEST

IN THE MATTER OF THE APPEAL OF:

SAMUEL BURKE, Appellant,

vs.

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

On November 29, 2010, the Appellant filed his "Hearing Brief on the Confrontation Clause." He asserts his [REDACTED], [REDACTED], must be required to attend hearing in this case and be subject to cross-examination, pursuant to the Confrontation Clause. He also claims the same requirements apply as a matter of due process. Finally, the Appellant argues that, if [REDACTED] is not compelled to testify at hearing, the police reports containing her statements must be excluded. The Agency opposes the motion, contending that the Confrontation Clause is not applicable to administrative hearings, and that Appellant's due process rights will not be violated at this post-deprivation administrative hearing, where the hearing complies with the Career Service Rules regarding appeals. The Agency also asserts that if Appellant wants [REDACTED] to provide testimony, Appellant may subpoena her.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Generally, that constitutional right does not apply to civil administrative matters. Bennett v. National Transportation Safety Board, 66 F.3d 1130, 1136 (10th Cir. 1995) (citing Hannah v. Larche, 363 U.S. 420, 440 n. 16 (1960)).

Regarding due process, "[t]he fundamental requisites of due process are notice and the opportunity to be heard." Jefferson v. Colorado Dept. of Social Services, 874 P.2d 408, 409 (Colo.App. 1993). Also, administrative hearings are not subject to strict compliance with the civil rules of evidence in order to promote the fact finding process. Fish v. Charnes, 652 P.2d 598, 602 (Colo. 1982). However, where an administrative adjudication turns on questions of fact, due process requires that the parties be apprised of all the evidence to be

considered and that they be afforded a reasonable opportunity to confront and cross examine adverse witnesses and to present evidence and argument in furtherance of their position. Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Jefferson, 874 P.2d at 409. Thus, an agency may not penalize an employee without first providing an opportunity for rebuttal, including cross-examination. Bennett, 66 F.3d at 1136.

[W]here government action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

Id. at 1136-37.

However, where an appellant has notice of the documents that contain a witness' statements that will be produced at the administrative hearing, he and his counsel had an opportunity to inspect them, and the proponent of the statements in the documents is known and subject to subpoena, but the appellant failed to utilize these options, the appellant cannot complain he did not have the opportunity to cross-examine the witness. Id. at 1137. Further, where an appellant fails to request a legitimate continuance to allow for the presence of the witnesses at the hearing, he cannot ascribe error for having failed an available opportunity for cross-examination. Bennett, 66 F.3d at 1137.

Here, the administrative determination turn on questions of fact, i.e., whether the alleged domestic violence occurred. Hence, [REDACTED] credibility is at issue. Because the Agency dismissed Appellant based, apparently, in substantial part, upon [REDACTED] allegations, he is entitled to notice and an opportunity to confront [REDACTED]. However, Appellant must avail himself of the opportunities to cross-examine her, or he will be precluded from asserting error after the hearing.

Career Service Rule section 19-45 C. provides that either party may motion the Hearing Officer for subpoenas to compel the attendance of witnesses at hearings whose testimony is relevant to the appeal, and supported by good cause. Where a witness who has been subpoenaed to appear is not able to appear, the Hearing Officer may require her to answer written interrogatories or to appear at a deposition. CSR § 19-45 D.

The Appellant has many opportunities to cross-examine the witness, none of which he has availed himself, including by subpoena, motion for continuance until service is perfected, and motion for interrogatories or deposition of the witness. Additionally, Appellant may review the pertinent police reports and witness statements in preparation for the hearing.

ORDER

The Appellant's motion is DENIED.

DONE December 8, 2010.



Bruce A. Plotkin
Career Service Hearing Officer

Certificate of Delivery

I certify that, on December 8, 2010, I delivered a correct copy of this Order to the following, in the manner indicated:

Mr. Samuel Burke, c/o Michael O'Malley	
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);
Ashley Kilroy, Deputy Manager of Safety, Ashley.Kilroy@denvergov.org	(via email).

