

ORDER RE APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

RICHARD FERNANDEZ, Appellant,

vs.

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

The Appellant has moved for discovery in the above appeal and asks for acceleration of discovery deadlines. The Agency has filed a response objecting to several of the requests and referencing the Hearing Officer's pre-hearing order discovery deadline date as controlling.

This is a direct appeal of Appellant's dismissal from employment with the Department of Aviation as an IT Communications Technician, for alleged violations arising from his failure to obtain a valid driver's license within a timeframe set out by the Agency. The Agency has objected to the following discovery requests: Interrogatory (Int.) 1, requesting identification of other Agency employees who have worked in their positions from 2003 to the present despite the lack of a driver's license, and Request for Production (RFP) 4. b. - e., which seeks the personnel files of four named employees.

1. Identification of employees who lacked driver's licenses

The Appellant argues that information obtained in discovery going back six years would support his challenge to the legitimacy of the discipline imposed by the Agency. The Agency objects to the discovery request as vague, overbroad, irrelevant, burdensome, and a violation of the employees' privacy rights.

A request for information from personnel records of non-party co-workers must be justified by a showing that it is reasonably expected to produce information that tends to prove that the discipline was unfair under the rules; i.e. that under closely similar circumstances, including the same supervisor using the same standards of conduct, the appointing authority took substantially different action. In re Martinez, CSA 18-09 (Order 4/22/09).

“Implicit in [the jurisdiction of the hearing office] is the authority to hear and decide all evidence relevant to the dismissal, including ...any other evidence relevant to determining whether the dismissal was fair and appropriate.” In re Simpleman, CSA 31-06, 2 (CSB 8/2/07). However, discovery becomes less relevant the farther removed in time from the facts of the case under appeal. See In re Stone, CSA 70-07 (11/20/07). A span of six years from the date of this action is far too remote in time to be sufficiently probative regarding this disciplinary action, absent a showing of direct ties to this termination.

To the extent this interrogatory seeks identification of co-workers from 2007 to the present who performed the duties of IT Technician without driving privileges under the same supervisor, the information sought is reasonably calculated to lead to the discovery of admissible evidence, i.e. the fairness and appropriateness of dismissal. C.R.C.P. 26(b)(1).

2. Personnel files of four named employees

Appellant has not shown what relationship, if any, these individuals have to the issues in this appeal. Appellant has not supported this request by a showing that such information would tend to lead to the production of admissible evidence.

3. Other discovery requests

The Agency has not objected to the remaining discovery requests, and states its pre-hearing statement and exhibits have already substantially provided the information sought. RFP # 4 a, requesting Appellant's personnel file, is denied, as Appellant may obtain his personnel file upon request made to the Career Service Authority. The Agency also states that any other documentation responsive to the requests will be provided by May 13, 2009, the due date for completion of discovery and amended prehearing statements set out in the prehearing order for this appeal. [See April 6, 2009 letter re Agency discovery response, Exhibit B attached to Appellant's motion for discovery]. Appellant requests an order directing the Agency to respond to discovery prior to the deadline date set out in the prehearing order.

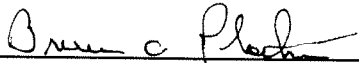
The prehearing order directs the Agency to provide its prehearing statement twenty days from the filing of the appeal. The order also requires the Agency to provide a copy of all documents considered by the Agency in arriving at its decision and copies of each exhibit it intends to present at hearing. The Appellant has provided no reason to accelerate the discovery deadlines contained in the pre-hearing order.

Order

Based on the foregoing findings and conclusions, the following orders are entered:

1. On or before May 13, 2009, the Agency is ordered to identify all employees holding the position of IT Technician under Appellant's supervisor from 2007 to the present who performed the duties of that position without possessing a valid driver's license.
2. Appellant's motion to compel a response to RFP 4 b - e is denied.
3. Appellant's request for acceleration of discovery deadlines is denied.

Dated this May 5, 2009.



Bruce A. Plotkin
Career Service Hearing Officer