

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 63-09

ORDER ON DISCOVERY

IN THE MATTER OF THE APPEAL OF:

VICKY GALLO, Appellant,

vs.

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

This is an appeal of the denial of Appellant's grievance in which she claimed she was transferred based upon: retaliation for her cooperation in an investigation of discrimination; the creation of a hostile work environment based upon specified incidents of adverse actions by her superiors; and based upon unlawful race and gender discrimination against Appellant's relationship, as a White woman, with an African-American male co-worker.

The Appellant filed a "Motion for Discovery" on November 20, 2009. The Agency filed its objection to all Appellant's discovery requests on November 25, 2009. Having considered the filings, the file and pertinent authority, I now find and order as follows.

Appellant has requested, and the Agency objects to the following discovery.

1. The personnel file of Deputy Sheriff Jimmy Gray. Appellant states the relevance of the request is (a) to provide "a baseline as to Gray's relationship with other deputies and sergeants;" (b) to provide "information on any other claims of discrimination made by DS Gray;" (3) to disclose "information on any prior incidents or disciplinary actions arising out of DS Gray's friendship with Appellant;" and (4) to provide "information on any prior incidents or disciplinary actions involving Sgt. Romero or the Classification Unit." The Appellant explained these disclosures would potentially reveal the pretextual nature of Agency's response to Appellant's relationship with Gray. Further, Appellant states Gray does not object to such disclosure of his personnel file and offers to sign a release to that effect.

The Agency objects that (1) Gray is not a party; (2) Appellant was re-assigned based upon the needs of the Agency and based upon her poor work performance; (3) Gray has not indicated to the Agency that he does not object to the release of his personnel file; the facts do not indicate the Appellant's relationship with Gray was the cause of her transfer.

This request is a relevant inquiry into the elements of Appellant's discrimination, retaliation and harassment claims. Nonetheless, any request for the release of a personnel file of a non-party Career Service employee must be weighed against the inherent expectations of privacy in a personnel file. In this case, the non-party employee has voluntarily allayed privacy concerns by apparently consenting to such release. The Agency's other responses do not usurp the relevance of the Appellant's request. This request is GRANTED on the conditions that Deputy Gray consents to such release and that such release be filed with the Hearings Office.

2. All information obtained during the Agency's investigation into insubordination by Deputy Gray, including video or audio recordings of interviews with non-witnesses to the alleged insubordination. It is difficult to see how the release of non-witness recorded interviews would reveal more than would a simple list of those interviewed. First, none of the non-witnesses would have personal knowledge about the alleged incident of insubordination. Second, any information from non-witnesses regarding one of the Appellant's claims would be equally, if not better served, by Appellant's counsel speaking directly with the non-witness interviewees. Consequently, the Agency shall disclose only the names of those employees it interviewed during its investigation of Deputy Gray's alleged insubordination.

3. All recordings of Agency's interview with the Appellant during Agency's investigation into alleged insubordination by Deputy Gray. As this request clearly relates to, or may reasonably relate to one or more of Appellant's claims, and the Agency did not address this request, this request for production is GRANTED.

4. Deposition of Sgt. Romero. The Appellant requests to depose Sgt. Romero. While the basis of the request is relevant as to Sgt. Romero's intent in his transfer of the Appellant, the dispute is over the extent to which Career Service Rule (CSR) 19-45, in particular 19-45 D. allows the deposition of witnesses in a Career Service hearing.

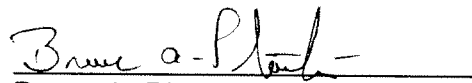
As a starting point, the parties acknowledge CSR 19-45 disfavors extensive discovery. The Appellant claims, however, the Agency's response (and traditional approach taken by the hearings office), that depositions under CSR 19-45 D., are allowed only when a witness is unavailable, is incorrect. The Appellant argues (1) the surprise component of a deposition is compromised by other discovery methods such as written interrogatories; (2) CSR 19-45 A. allows for discovery depositions as not within the presumptive limits of that rule, i.e., 5 written interrogatories and 10 requests for production.

I decline the Appellant's invitation to expand the scope of discovery within the plain meaning of CSR 19-45. First, CSR 19-45 A. relates only to written discovery, while section D. relates to depositions, thus his argument under CSR 19-45 A. is simply inapplicable. CSR 19-45 D. states "[t]he Hearing Officer may require

interrogatories or to appear at a deposition, if it is not feasible for them to be available for hearing..." The word "may" means the decision whether to allow a deposition is permissive and not mandatory. In addition, however, the conjunctive "if" places a restrictive condition on the option to allow a deposition. Appellant focuses on the phrase "who have been subpoenaed" as allowing discovery depositions, inferably before a witness has been subpoenaed, as well as in the absence of a subpoenaed witness. It is this point upon which I diverge from the Appellant's interpretation. First, the Appellant's interpretation would allow for unlimited depositions of potential witnesses in violation of the general rule to limit discovery. Also, rule 19-45 D. expressly limits, and does not expand, depositions in the manner asserted by the Appellant. Appellant asks to extrapolate the absence of language concerning non-subpoenaed and not-yet subpoenaed witnesses to include them in those subject to deposition. Instead, the absence of inclusive language in CSR 19-45 D. indicates those not specified by rule must be excluded, because the Hearings Officers have only such authority as specifically granted by the Career Service Rules. CSR 19-30 A. Since non-subpoenaed and not-yet subpoenaed witnesses are not included in the deposition rule, they must be excluded. Finally, the Appellant has not shown Sgt. Romero would be unavailable for hearing. For these reasons, the Appellant's request for a deposition of Sgt. Romero is **denied**.

The Agency shall comply with those discovery requests granted by this Order on or before January 19, 2010.

DONE November 30, 2009



Bruce A. Plotkin
Career Service Board Hearing Officer