

ORDER ON APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

STEVEN KOEHLER, Appellant,

vs.

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

On Jan. 20, 2010, Appellant moved for discovery in the above appeal, and attached interrogatories and requests for production dated Jan. 14. The Agency has filed a response, noting that it provided some of the information requested shortly after the motion was filed, and objecting to the remaining requests.

This is an appeal of Deputy Sheriff Steven Koehler's dismissal from the Denver Sheriff Department for violations of specified Career Service Rules alleging use of excessive force against an inmate and dishonesty during the investigation.

Appellant's interrogatories requests the following information:

1. A narrative statement of the reasons for the discipline,
2. The reasons for Director Lovingier's statement to a Denver Post reporter that departure from the truth has generally carried a penalty of a 25-day suspension,
3. All employees terminated since either Dec. 12, 2004 or 2006,¹
4. All cases the Agency considered as comparable to this discipline, and
5. All employee training on HIV and the handling of HIV-positive inmates.

Appellant also requested the following documents:

1. The Internal Affairs investigative file,

¹ The motion for discovery states 2004, while the attached interrogatories state 2006.

2. All other documents which played a part in the investigation,
3. Disciplinary recommendations and orders regarding employees charged with violations of the same CSR and departmental rules since Dec. 12, 2005,
4. Disciplinary recommendations and orders regarding employees terminated since Dec. 12, 2005,
5. Appellant's CSA and Agency personnel files,
6. Agency training materials regarding HIV and the handling of inmates with HIV,
7. Video recordings of the subject incident, and
8. All statements regarding the incident.

The Agency stated that it has already produced the investigative file, including all videos and statements. [RFPs 1, 7, and 8; Exh. 4.] It points out that Appellant's personnel file is available to him upon request. [RFP 5.] For that reason, it is not separately discoverable.

Analysis

1. Discoverability of Discipline on Other Employees

Appellant seeks information about discipline of other employees charged with the same violations and those terminated for the past five years [Int. 3; RFP 3, 4], as well as the details of discipline the Agency considered comparable to this matter. [Int. 4.] The Agency objects to the requests as not discoverable because Appellant does not allege discrimination, and the disciplinary system now in place does not require the imposition of the same penalties for comparable violations.

First, an appellant is not foreclosed from requesting discovery of other discipline by the lack of a discrimination claim in the appeal. The jurisdiction of the Hearing Office includes the authority to hear and decide all evidence relevant to that dismissal, including a claim that the dismissal was unfair under the Career Service Rules. See In re Stone, CSA 70-07 (Order 11/20/07); In re Diaz, CSA 72-06 (CSB 9/20/07). An appellant may challenge the level of discipline based on its dissimilarity to penalties imposed on other employees for similar violations.

However, the Agency correctly points out that discovery of disciplinary records of non-party co-workers is limited to discipline that bears a high degree of similarity to the circumstances presented in this discipline; e.g., that the same supervisor using the same standards of conduct took substantially different action. See St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 237 (Colo. App. 2007). Appellant does not support its request with any showing that such disciplinary records are

sufficiently similar to be relevant to the issue of the fairness of this discipline. For the same reason, a request of this type must not be remote in time from the incident at issue. In re Stone, supra. Since the departmental regulation being enforced is dated June 12, 2008, it is reasonable to limit requests for highly similar discipline to two years before the challenged action. [Exh. G.]

2. The basis for Director Lovingier's statement quoted in the Denver Post

Appellant seeks a statement of Director Lovingier's reasoning behind his March 2009 statement to the press regarding the Agency's usual penalty for lying. Information from a non-decisionmaker may not be obtained by discovery request. In re Weeks, CSA 26-09 (5/6/09); CSR § 19-45 C. Director Lovingier has been listed as a "will call" witness at hearing, obviating the necessity of a subpoena.

3. Information and training provided to DSD employees on HIV

Appellant requests that the Agency identify and provide copies of all training materials and information it provides to its employees concerning HIV, its risks, and the handling of HIV-positive inmates. [Int. 5; RFP 6] The Agency objects to the request as not relevant. Insofar as it pertains to an issue raised by Appellant's theory of the case, and the Agency's notice of its policies, it calls for information reasonably calculated to lead to admissible evidence. C.R.C.P 26 (b); Kerwin v. District Court, 649 P.2d 1086, 1088 (Colo. 1982).

4. Information directly related to the disciplinary action

The remaining discovery requests seek 1) a narrative statement of the reasons for the discipline, and 2) all documents that played any part in the investigation. [Int. 1; RFP 2.] To the extent there are reasons for the discipline and documents not included in the information already produced, they are discoverable.

ORDER

Based on the foregoing findings and conclusions, the following order is entered:

1. Appellant's request for information about other discipline is denied. [Ints. 3, 4; RFPs 3, 4.]

2. The request for a statement from Mr. Lovingier is denied. [Int. 2.]

3. The request for information on training and training materials is granted. [Int. 5; RFP 6].

4. The Agency is ordered to produce the information requested in Int. 1 and RFP 2 if they are not already included in the documents produced.

5. All discovery responses shall be provided by Feb. 8, 2010.

DONE this 27th day of January, 2010.


Valerie McNaughton
Career Service Hearing Officer

I certify that I delivered a correct copy of this Discovery Order on January 27, 2010, to the following in the manner indicated:

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