

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 09-11

ORDER ON APPELLANT'S MOTIONS TO EXCLUDE AND COMPEL PRODUCTION

IN THE MATTER OF THE APPEAL OF:

RYAN MURPHY, Appellant,

vs.

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

On Sept. 30, 2011, Appellant filed two motions: a motion to exclude Agency Exhibits 7 and 8, and a motion to compel the production of Exhibit 6, the ADA coordinator's file. That same day, the Agency responded via email that it does not oppose the second motion, and would provide Exhibit 6 within a week. The Agency did not respond to Appellant's motion to exclude Exhibits 7 and 8.

This is the appeal of Appellant's disqualification from employment as a Deputy Sheriff with the Denver Sheriff's Department based on the Agency's determination that he was unable to perform the essential functions of his position or work in any capacity, and there was no reasonable accommodation it could provide him.

I. Appellant's Request to Exclude Exhibits

Appellant seeks to exclude from evidence Agency Exhibits 7 and 8 on the grounds that they were furnished to the Agency during their settlement efforts this summer, and only then added to the Agency's Exhibit Log on Sept. 29, 2011, the discovery deadline. Specifically, Appellant states that during the negotiations, the Agency offered to rehire him if he underwent a fitness for duty evaluation. Appellant responded by undertaking that evaluation and furnishing to the Agency the resulting Return to Work Certification and confidential pre-employment screening report. The settlement was never finalized. However, the certification and report were submitted by the Agency as Exhibits 7 and 8, respectively, in this appeal of the disqualification. Appellant moves to exclude them under CRE 408 as evidence of statements made in compromise negotiations. The Agency did not respond to these allegations of facts made in the motion. For purposes of the disposition of this motion only, I assume them to be true.

II. Analysis

Colorado Rule of Evidence 408 excludes evidence of offers of compromise and statements made during settlement negotiations as a matter of public policy in order to

encourage settlement. Leo Payne Pontiac, Inc. v. Ratliff, 486 P.2d 477 (Colo.App. 1971). Based on the facts not now in dispute, Appellant gave the Agency the original of Exhibits 7 and 8 as a part of settlement negotiations; in fact, they were a necessary condition in order to achieve settlement, under the terms stated by the Agency. As such, they constitute "statements made in compromise negotiations" excludable under the rules of evidence. See EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used for impeachment); and Vulcan Hart Corp. v. N.L.R.B., 718 F.2d 269, 14 Fed. R. Evid. Serv. 961 (8th Cir. 1983) (documents related to issues involved in the settlement are not admissible.) The Agency has not argued they are admissible under any exception to Rule 408. Therefore, the certification and report submitted by Appellant during settlement negotiations are not admissible in evidence.

Order

Based on the foregoing findings and conclusions,

1. Appellant's motion to exclude Exhibits 7 and 8 is GRANTED. Appellant's requests in the alternative that are related to this motion are mooted by this order.

2. Appellant's motion to compel production of Agency's Exhibit 6 is mooted by the Agency's agreement to produce the exhibit by **October 10, 2011**.

DONE October 7, 2011.


Valerie McNaughton
Career Service Hearing Officer

I certify that on October 7, 2011, I delivered a copy of this Order to the following in the manner indicated:

Ryan Murphy, c/o Nikea Bland
Nikea Bland, Esq., nbland@elkusandsisson.com (via email)
City Attorney's Office at Diefiling.litigation@denvergov.org (via email)
Lili Tran, HR Services, Lili.Tran@denvergov.org (via email)

