

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 86-09

DISCOVERY ORDER RE: APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

DONNA NORRIS, Appellant,

vs.

ENVIRONMENTAL HEALTH,
and the City and County of Denver, a municipal corporation, Agency.

The Appellant has requested discovery in this appeal. The Agency has filed a response objecting to all the requests. Upon review of the pleadings, file, and pertinent authority, the following findings and orders enter:

This is a direct appeal of Appellant's dismissal from employment as an Environmental Health Inspector with the Department of Environmental Health. The appeal alleges a Whistleblower violation and also alleges that the dismissal and Whistleblower violation involved discrimination and retaliation. Appellant requests the following discovery.

1. "All documents reviewed by the Agency in considering Ms. Norris' disciplinary action." This request is **GRANTED IN PART** and **DENIED IN PART**. The Agency must disclose all documents, books, papers, photographs, tangible objects, or computer-generated materials that formed the basis for discipline. The Agency is not required to disclose all documents reviewed, whether or not related to its ultimate decision to dismiss.

2. "All documents, notes, emails or other items generated in the process of considering and investigating any and all allegations against Ms. Norris during the three year period prior to her dismissal." This request is **DENIED** as overbroad or irrelevant. The relevant inquiry is covered by #1, above.

3. and 4. "The complete criminal file for any criminal proceeding against Brooke Steiner occurring in the past 3 years including, but not limited to, any City Code enforcement actions initiated by the City." "The complete personnel file for Lisa Straight, David Powell and Sally McGovern." These requests are **DENIED** as overly broad, irrelevant and, if for the purpose of impeachment, not narrowly tailored to that end. Personnel files maintained based on an employment

relationship are not public records, and employees are entitled to protection of their privacy interests. C.R.S. 24-72-202 (4.5). The appeal process for Career Service appeals provides only limited discovery, CSR 19-45. Appellant's supervisor was the subject of Appellant's alleged whistleblowing regarding her supervisor's secondary employment. However, Appellant has not supported the request for her supervisor's personnel file or for that of the other named non-parties by a showing that such information would tend to lead to the production of admissible evidence.

5. "The breakdown for all Agency employees by job classification, race, age, national origin, and sex over the past three years including, but not limited to all personnel action forms for each Agency employee during that period." Appellant has claimed improper motives for her dismissal, including discrimination based upon race, color, national origin, sex, and age. The Appellant's request is relevant to her discrimination claims; however her request must be balanced by the privacy rights of Agency employees. To the extent the Agency keeps tabulations of Agency employees during the last three years relating to race, age, national origin, and gender, the Agency SHALL PROVIDE such tabulations. The Agency is not required, however, to undertake a survey to create such tabulation.

6. "Any statement or communication upon which the Agency relied in taking adverse action against Ms. Norris." The term "adverse action" is a term of art, and as requested, would require the Agency to admit an element of the claim of discrimination. This request is therefore improper. The Agency SHALL PROVIDE such statements or documentation it relied on in assessing discipline against the Appellant, pursuant to #1, above.

7. "Any information or document in the Agency's possession that is exculpatory in nature or that tends to support the Appellant's position as articulated in her prehearing statement." This request is relevant and reasonable in nature but overbroad in scope. The Agency SHALL PROVIDE such information or document in its possession, which, in the exercise of reasonable diligence, would tend to disprove any element of its allegations against the Appellant, or tend to prove any element of the Appellant's claims.

8. "The names and addresses of any and all persons whom the city Attorney intends to call as witnesses at the hearings or trial, together with their proper spelling and current telephone number, and together with their relevant written or recorded statements and any memoranda or reports which purport to be capsules or summaries of all statements given by said witnesses." This request is DENIED, as the request is superfluous to the extant Notice of Hearing and Pre-Hearing Order, as well as pursuant to #6, above.

9. "Any written or recorded statements and the substance of any oral statements, together with any handwritten notes or memoranda of statements made by the Appellant or any witness which underlying [underlies?] the basis for

the above-captioned case." This request is DENIED as overly vague.

10. "Any reports or statements of experts, made in connection with this particular case, including the results of physical or mental examinations and/or scientific tests, experiments or comparisons, together with copies of letters of transmittal or any reports indicating nature and extent of chain or evidence prior to and subsequent to scientific testing." To the extent the Agency intends to, or may, call an expert witness, the request is relevant. Therefore, to the extent the Agency may, or intends to, call an expert witness, and to the extent the expert created any report, written statement, transmission, or subsequent testing related to his/her findings, this request for a subpoena duces tecum is GRANTED.

11. "Any books, papers, documents, photographs or tangible objects which the Agency has utilized in reaching its decision to discipline the Appellant." This request is DENIED as redundant to #1.

12. "Any record of prior criminal conviction of person whom the City Attorney intends to call as witnesses at the hearing or trial." This request may be nominally relevant to credibility but is overbroad and therefore DENIED.

13. "Any material, the disclosure of which would be made mandatory upon a criminal Prosecuting Attorney by Crim. P. Rule 16, Part 1(a), (2), (3), and (4)." This request is DENIED for reasons stated immediately above.

14. "Any material or information in the hands of the City, their agents, or assistants, which are relevant and material to the preparation of a defense, and the tenders of which is therefore reasonable and necessary." This request is DENIED as redundant to #1 and otherwise overbroad.

THE AGENCY SHALL PROVIDE DISCOVERY AS IS GRANTED PURSUANT TO THE DISCUSSION ABOVE, ON OR BEFORE DECEMBER 1, 2009.

DONE November 17, 2009.



Bruce A. Plotkin
Career Service Hearing Officer