

ORDER ON APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

SHERRY PURDY, Appellant,

vs.

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

On Jan. 25, 2012, Appellant filed a motion for discovery, seeking ten requests for the production of documents (RFPs). The Agency responded on Jan. 31, objecting to some requests and agreeing to produce others, as specified below.

This is the appeal of Deputy Manager Sherry Purdy's dismissal, also asserting a whistleblower claim based on her reports of misuse of grant funds and city assets, violations of overtime regulations and demotion rules, and her support of another employee's ethics complaint.

RFP #1: AIDS grant

Appellant requests all documents relating to the Ryan White HIV/AIDS federal grant, including a copy of the grant, the agency's application, and the grant contract. Appellant asserts the documents are relevant to her whistleblower claim that she was fired for reporting the Agency's use of grant funds for non-grant purposes, which violated the grant terms. The Agency objects that the request is overbroad, but agrees to produce a copy of the grant and the contract.

Although the request for all grant documents is overbroad, the grant terms are relevant to her whistleblower claim, and the application may provide additional details about those terms.

RFP #2: Grant employee's assignments

Appellant requests documents related to work performed by grant employee Michele Shimomura from Mar. to Sept. 2011, which may show that she performed work outside of the scope of the grant. The Agency objects that the request is overbroad, but will produce records of Ms. Shimomura's work assignments on the grant project.

Production of the employee's grant assignments will not evidence any work done outside the grant subject matter, and that alone is relevant and discoverable as to Appellant's

whistleblower claim. Specifically, Appellant asserts that Ms. Shimomura was assigned to work on the community health assessment project in July 2011, and that grant funds were used to pay her salary for that non-grant work. [Appellant's Pre-hearing Statement, p. 6, 1/17/2012.]

RFP #3: Appellant's supervisory files

Appellant requests production of her 2010 and 2011 supervisory files for three of her direct reports: Doug Kelley, Celia Vanderloop, and Bob McDonald. Appellant contends the files are relevant because her termination was based in part on complaints from those employees. The Agency objects to the request as irrelevant, overbroad, and not designed to lead to admissible evidence. The mere fact that an employee makes a complaint against another does not open that employee to exposure of his personnel records. Appellant has not tied her request for these confidential personnel records to any issue in the appeal.

RFP #4: Performance reports for Kelley, Vanderloop and McDonald

Appellant requests all 2010 and 2011 evaluations for the above Manager IIs who served under Appellant. She appears to argue that they may reveal that their complaints about her were caused by their resentment of her efforts to hold them to a certain standard of performance, and that her evaluations will demonstrate this motive. The Agency objects to these requests as overbroad, harassing, and not designed to lead to admissible evidence, but agrees to produce the requested information with respect to Ms. Vanderloop. The 2011 performance documents appear to be relevant to issues raised by Appellant, but evaluations from 2010 are too remote in time to be persuasive.

RFP #6: Employee Survey

Appellant requests the focus group results and communications, and the 2011 DEH employee survey, claiming it would reflect employees' perceptions about her and the rest of management. The Agency objects to the request as irrelevant and unconnected to any issue in this appeal. Employee survey and focus group results do not appear to bear any direct relationship to any theory or issue presented by either party.

RFP #7: Communications relating to Appellant

Appellant requests all communications relating to Appellant from Oct. 7 to Dec. 19, 2011, the period of the investigation. Appellant seeks this information to establish that all complaints regarding Appellant were obtained after the investigation began. The Agency objects as overbroad, overly burdensome, and not designed to lead to admissible evidence. If limited to complaints made by employees during the investigation and relied upon by the Agency as bases for the discipline, the request is relevant and not overbroad.

RFP # 9: CSA and Ethics Board investigation into fiscal misconduct

Appellant seeks all documents regarding the CSA and Board of Ethics investigation into Robin Valdez' allegation that Ms. Vanderloop' failed to report her staff's fiscal misconduct. Appellant states that the documents are discoverable on her whistleblower claim in that they may show that Director Nancy Severson and HR Professional Roxane Stuber colluded to protect Ms. Vanderloop , and thereafter retaliated against Appellant for furnishing additional

information to the Ethics Board in support of the investigation. The Agency objects to the request as overbroad, burdensome and not relevant to Appellant's own performance. The request appears to be narrowly tailored to produce documents relevant to Appellant's whistleblower claim

RFP # 10: Performance records for HR Professional

Finally, Appellant requests the 2011 performance records for CSA HR Professional Roxane Stuber in order to impeach testimony about Appellant's criticism of CSA and Stuber. Appellant seeks to discover evidence in the performance review that corroborates her critical comments. The Agency objects that the personnel documents are not discoverable, and are sought to harass Ms. Stuber for investigating Appellant's conduct leading to this termination. The performance issue is whether Appellant made the critical comments alleged by the Agency, and the relative seriousness of that conduct. Since it is the unprofessional nature of the comments rather than their accuracy, the employee's privacy interests outweigh the tenuous probative value of the requested evidence.

ORDER

Based on the foregoing findings and analysis, it is ordered that:

1. RFP #1 is granted, and the Agency is ordered to produce the HIV/AIDS grant application.
2. As to RFP # 2, the Agency is ordered to produce documents related to any non-grant assignments given to Michele Shimomura from Mar. to Sept. 2011.
3. RFPs 3 and 10 are denied.
3. RFP # 4 is granted in part. The Agency is ordered to produce the 2011 performance reports for Kelley, Vanderloop and McDonald.
4. RFPs 5 and 8 are mooted based on the Agency's agreement to produce the requested documents.
5. RFP # 6 is denied.
6. RFP #7 is granted in part. The Agency is ordered to produce any complaints about Appellant received by the investigators from Bob McDonald, Celia Vanderloop, Doug Kelley, Meghan Hughes, and Donna Girtin from Oct. 7 to Dec. 19, 2011.
7. RFP # 9 is granted.

DONE February 2, 2012.


Valerie McNaughton
Career Service Hearing Officer

I certify that on February 2, 2012, I delivered a correct copy of this Order to the following:

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