

RULE 19
APPEALS TO THE CAREER SERVICE HEARING OFFICE
(Effective January 10, 2018; Rule Revision Memo 33D)

Purpose Statement:

The purpose of this rule is to provide a fair, efficient, and speedy administrative review of actions of appointing authorities or an appointing authority's designee by the Career Service Hearing Office, except for disciplinary appeals filed by deputy sheriffs which are governed by Rule 20 **DISCIPLINARY APPEALS TO THE CAREER SERVICE HEARING OFFICE FILED BY DEPUTY SHERIFFS**.

Section 19-5 Hearing Office Hours

The Hearing Office shall be open for business from 8:00 a.m. to 5:00 p.m., Monday through Friday, except for holidays and days when the City offices are closed or on modified hours due to inclement weather, a declared state of emergency, or for other good cause. The Hearing Office accepts electronic filings at any time, but filings made outside the Hearing Office's business hours will be deemed filed the following business day.

Section 19-10 Good Cause Defined

Except as otherwise stated in this Rule 19, good cause may be shown by circumstances beyond a party's control and does not generally include inadvertence, mistake, neglect or carelessness of the moving party. The lack of prejudice to the non-moving party does not constitute good cause.

Section 19-15 Alternative Dispute Resolution Available

A party may request mediation pursuant to Rule 18 **DISPUTE RESOLUTION** at any time during the appeal process. Parties are encouraged, but not required, to participate in mediation. Mediation will only be held if all parties agree to participate. Requesting mediation shall not suspend the time limitation for filing an appeal.

Section 19-20 Actions Subject to Appeal

- A.
1. A current employee who holds career status or a former employee who held career status in the Career Service must file an appeal directly with the Hearing Office in order to challenge the following action(s) of an appointing authority:
 - a. Dismissal;
 - b. Suspension or temporary reduction in pay;
 - c. Involuntary demotion with an attendant loss of pay;
 - d. Disqualification;

- e. Lay-off, or failure to re-instate (as may be required by Rule 3 **RECRUITMENT**); or
- f. A retaliatory adverse employment action, as defined by the City's "Whistleblower Protection" ordinance (attached as an appendix).
 - i. For any appeal filed pursuant to the "Whistleblower Protection" ordinance, the employee must identify in the Notice of Appeal the official misconduct reported, when and to whom the report was made, the retaliatory action, and when it occurred. The appeal may be dismissed with prejudice if the employee fails to comply with these requirements.
- g. No other action may be directly appealed.

It is not necessary that a grievance be filed, or an investigation be conducted before filing a direct appeal where it is alleged that the action being appealed involved discrimination, harassment or retaliation, or violation of the City's "Whistleblower Protection" ordinance. Discrimination, harassment, or retaliation can only be included as a part of a direct appeal.

- 2. Career Service employees who do not hold career status or former employees who did not hold career status may only file direct appeals when they allege a violation of the "Whistleblower Protection" ordinance.

B. Appeals of Grievances:

- 1. An employee who holds career status may only appeal a grievance response to the Hearing Office:
 - a. That alleges a violation of the Career Service Rules ("Rules"), the City Charter, ordinances relating to the Career Service, executive orders, or written agency policies which negatively impacted the employee's pay, benefits or status;
 - b.
 - i. Of a performance review with an overall rating of "Unacceptable."
 - ii. The only basis for reversal of an "Unacceptable" rating shall be an express finding that the rating was arbitrary, capricious or without rational basis or foundation. The employee bears the burden of proof on this issue.
- 2. An employee who holds career status may also appeal a grievance:
 - a. In which the department or agency failed to implement the remedy granted and the grievant has notified the department or agency of the intent to file an appeal in accordance with Rule 18 **DISPUTE RESOLUTION**; or
 - b. In which the department or agency failed to respond as required by Rule 18 **DISPUTE RESOLUTION**.

3. The grievance must have been in conformance with and processed pursuant to the requirements of Rule 18 **DISPUTE RESOLUTION**.
4. Notwithstanding the above provisions, an employee in the Career Service cannot appeal a grievance of:
 - a. Any performance review rating besides an “Unacceptable,” or any other aspect of the performance review program;
 - b. A written reprimand;
 - c. An action that could have been the subject of a direct appeal;
 - d. Bonus or incentive payments, or any other aspect of the bonus or incentive program;
 - e. The mediation process;
 - f. A contemplation of discipline or disqualification notice or meeting;
 - g. The assignment to or removal from an acting role or working out of class assignment;
 - h. Alleged discrimination, retaliation, harassment, or violence in the workplace; or
 - i. Any action in which the remedy requested or available is outside the authority expressly granted to the Career Service Hearing Officer.

Section 19-30 Form of Appeal

Every appeal shall be on the form prescribed by the Hearing Office and shall include:

- A. The full name, mailing address, e-mail address, and telephone number of the employee (“appellant”) filing the appeal;
 1. If a representative files the appeal on behalf of an employee, the appeal shall also contain the full name, mailing address (if filing by mail), e-mail address (if filing by email), and telephone number of the representative; and bar registration number if the representative is an attorney.
- B. The action which is the subject of the appeal;
- C. The reason for the appeal including, but not limited to, why the employee disagrees with the action which is the subject of the appeal;
- D. A statement of the remedy sought; and

- E. For all grievance appeals, the employee must identify in the Notice of Appeal the alleged violation of the Rules, the City Charter, ordinances, executive orders or written agency policies, and how the employee's pay, benefits or status were impacted.

The appeal may be dismissed with prejudice if the appellant fails to comply with these requirements.

19-31 Filing Deadlines

- A. 1. Appeals claiming violation of the City's "Whistleblower Protection" ordinance shall be filed with the Hearing Office within thirty (30) calendar days of the alleged retaliatory adverse employment action.
2. All other appeals shall be filed with the Hearing Office within fourteen (14) calendar days after the date of notice of the action being appealed.
- B. The period of time for filing the appeal starts on the day after the date of:
1. The alleged retaliatory adverse employment action in the case of an appeal brought under the "Whistleblower Protection" ordinance; or
2. The notice of the action or date of inaction in all other cases. When an action is evidenced by a written notice, the date of notice of the action shall be the date of the certificate of delivery or service.
- C. Compliance with these initial appeal filing deadlines is required to confer jurisdiction over the appeal to the Hearing Office.

19-32 Filing and Service Requirements

- A. Except for the appeal form, all documents that are required by this Rule 19 to be filed with the Hearing Office shall also be served on all parties to the appeal, or, if represented, to their representative(s). Such service shall be made on the same date and by the same method the document is filed with the Hearing Office.
- B. If the final date of the period allowed for filing a document required by this Rule 19 falls on a day the Hearing Office is not open for business, the due date is the next business day. The period for filing ends at 5:00 p.m. on the due date. In the event a document is received after normal business hours, it will be considered to have been filed on the next business day.
- C. The filing of documents required by this Rule 19 shall be made by:
1. Hand delivery;
2. First class or more restrictive U.S. mail or other commercial delivery service;
3. Electronic mail ("e-mail"). If documents are filed by e-mail, the party filing by e-mail shall retain both an electronic and a hard copy of the e-mail

including sender, date, subject, and the address to which the e-mail was sent; or

4. Facsimile.

D. Filing and service shall be made to the address or e-mail address provided:

1. By the party (or the party's representative); and
2. By the Hearing Office on its website.

19-33 Representation of Parties

A. All parties wishing to be represented shall promptly file a designation of representative signed by the representative.

B. Appellants may:

1. Represent themselves;
2. Be represented by an attorney; or
3. Be represented by a non-attorney as authorized by the Hearing Officer.

Section 19-40 Prehearing Procedures

All parties must adhere to the deadlines set forth in this Rule 19 and in the Notice of Hearing and Prehearing Order, as well as any other deadlines ordered by the Hearing Office.

19-41 Setting the Hearing Date, Length of Hearing, Continuances, and Stays

A. After an appeal is filed, the Hearing Officer shall:

1. Review the appeal for jurisdiction. If the Hearing Officer does not have jurisdiction, the Hearing Officer shall dismiss the appeal with prejudice. If jurisdiction is in dispute, the Hearing Officer may issue a show cause order to determine whether jurisdiction exists.
2. Set a hearing date that is no more than seventy-seven (77) calendar days after the date the Notice of Hearing and Pre-Hearing Order is issued. Within fourteen (14) calendar days of the Prehearing Order, either party may request that a new hearing date be set to accommodate the availability of a party, a party's representative, or a key witness.

B. Length of hearing:

1. The presumptive length of a hearing shall be no more than two days for the appeal of a dismissal, and one day for all other appeals. Longer hearings may be granted by the Hearing Officer only by the agreement of all parties or for good cause shown.

- a. Any party requesting that the hearing be scheduled for longer than the presumptive length must state with specificity how much additional time is needed to present evidence that is material and relevant, and is not duplicative of other evidence.
 - b. Good cause, for purposes of extending the length of the hearing, requires a specific showing that the presumptive length of the hearing will be insufficient to present evidence that is material and relevant to the issues presented, and not cumulative. The Hearing Officer may delay a ruling on whether good cause exists to extend the length of the hearing until the parties have made good faith efforts to stipulate to uncontested facts, the admissibility of exhibits, and the issues presented, and may deny such a request if the requesting party has not made such efforts in good faith.
 - c. The fact that the discipline being appealed is based on several events or types of alleged misconduct or that an appeal involves several issues or claims does not in and of itself establish good cause for extending the length of a hearing.
2. If two or more appeals are consolidated for hearing, the length of the hearing may be extended proportionately.

C. Continuances

1. Upon motion by either party, the Hearing Officer may grant a continuance of the hearing for good cause shown. Motions for a continuance filed less than fourteen (14) calendar days prior to the hearing are discouraged.
2. Good cause for a continuance generally means any cause not attributable to a party or a party's representative's act or omission. Good cause for a continuance will normally include a pending settlement or the sudden unavailability of a party, a party's representative, or a key witness due to his or her own or an immediate family member's illness, injury or death.
3. Good cause for a continuance will normally not include unavailability of a key witness if the witness's testimony can be taken by telephone or deposition; a party obtaining representation less than two (2) weeks prior to the hearing; or failure of a party or a party's representative to timely prepare for the hearing.

D. Stays

A Hearing Officer may stay a matter for good cause shown including, but not limited to, mutual agreement by the parties, a pending dispositive motion, or a pending settlement. When an interlocutory petition based on jurisdiction has been filed, the appeal before the Hearing Officer shall be automatically stayed.

19-42 Motions

The filing of motions shall be governed by the following:

- A. Before filing a motion, a party or his representative shall attempt to confer with the opposing party or his representative. The moving party shall include a certification that he either conferred with the opposing party or attempted to confer with the opposing party in good faith. If the motion is unopposed, the motion shall so state.
- B. Except as otherwise stated in this Rule 19, the responding party shall have seven (7) calendar days from the date of the motion to file a response. If there are less than seven (7) calendar days before the hearing, the responding party may provide a written or oral response at the hearing. No reply from the moving party shall be permitted unless requested by the Hearing Officer. Motions exceeding ten (10) pages are not permitted.
- C. Motions shall be determined promptly after the filing of the response, if any. However, the Hearing Officer may order expedited responses, oral argument or a hearing at his or her discretion or upon request of a party. The Hearing Officer shall not issue an order on an opposed motion until a response is filed or the response deadline has passed.

19-43 Discovery

Discovery is the process whereby parties share relevant documents, names of witnesses, and other information they may use during the hearing.

- A. Discovery shall be narrowly limited to issues of fact that are in dispute and relevant to the appeal.
- B. Initial Disclosures

Within fourteen (14) calendar days of the date the Notice of Hearing/Pre-Hearing Order was issued, each party shall, without awaiting a discovery request, provide to the other party:

- 1. The name and, if known, the address and telephone number of each individual the party may call to testify regarding the material issues of fact in dispute, identifying who the individual is and the subjects of the information;
- 2. A listing, together with a copy of, all documents, data compilations, and tangible things in the possession, custody, or control of the party which may be used by the party at hearing that are relevant to the material issues of fact in dispute and are not privileged or protected from disclosure.

C. Expert Disclosures

1. In most CSA appeals, expert witnesses are not helpful or required. It is within the Hearing Officer's discretion whether to allow expert testimony in a particular appeal. If the Hearing Officer does allow expert testimony, and certifies a witness as an expert on a particular subject matter, the Hearing Officer may give the expert testimony any weight it is due or no weight as appropriate.
2. Within thirty-five (35) calendar days of the date the Notice of Hearing/Pre-Hearing Order was issued, a party shall disclose to the other parties the identity of any person who may provide expert testimony at hearing.
3. The opposing party shall disclose to the other parties, no later than fourteen (14) calendar days prior to hearing, the identity of any person who may provide rebuttal expert testimony at hearing.
4. Expert disclosures shall be accompanied by a written report or summary containing a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

D. Written Discovery Requests

1. Written discovery requests shall be served no later than twenty-one (21) calendar days of the date the Notice of Hearing/Pre-Hearing Order was issued. Extensions of time to submit written discovery requests may be granted only on a showing of good cause.
 - a. Each party may submit up to five (5) requests for production of documents and five (5) interrogatories, including all discrete subparts.
 - b. Each written discovery request must be narrowly tailored to seek specific information or documents. Overbroad requests such as requests for "all e-mails exchanged between the employee, the employee's supervisor, and the decision maker for the last six months" shall not be permitted or enforced.
2. Responses to discovery requests must be provided within fourteen (14) calendar days after the certificate of mailing of the requests.
3. A party that disputes the sufficiency of discovery responses or the validity of objections asserted in responses to discovery may file a Motion to Compel no later than seven (7) calendar days after the date the discovery responses are received. The responding party has seven (7) calendar

days thereafter to file a response to the motion. As soon as practicable thereafter, the Hearing Officer shall issue a written order or an oral ruling in a telephone conference which shall be recorded.

- E. The party producing discovery may condition its production on the payment of reproduction costs at the rate of 25 cents per page. The Hearing Officer may waive or reduce the payment of such costs if the appellant demonstrates financial hardship.
- F. Parties and Hearing Officers shall not request or compel the production of documents by a non-party to the appeal.
- G. Parties shall not be permitted to take depositions unless an order is entered by the Hearing Officer.
- H. All discovery shall be completed at least fourteen (14) calendar days prior to hearing.

19-44 Prehearing Statements

- A. The parties shall file their prehearing statements at least fourteen (14) calendar days before the hearing date listing final witnesses (including a detailed summary of their offered testimony and the estimated time required for direct examination), final exhibits relevant to the issues being appealed, and any agreed upon stipulations of the parties.
- B. Failure to file a Prehearing Statement:
 - 1. Except in the case of extraordinary circumstances, if an appellant fails to timely file a prehearing statement, the appeal shall be considered abandoned and shall be dismissed with prejudice.
 - 2. Except in the case of extraordinary circumstances, if the department or agency fails to timely file a prehearing statement, the Hearing Officer shall impose appropriate non-monetary sanctions which may include reversal of the action being appealed.
- C. Evidence that was not disclosed timely by a party in a prehearing statement shall not be admissible at hearing absent a showing of good cause.

19-45 Subpoenas

Subpoenas to compel the attendance of witnesses at hearing, whose testimony is determined by the Hearing Officer to be relevant and necessary to the appeal, may be issued only by the Hearing Officer upon the motion of either party and supported by an offer of proof as to the material facts that will be provided by the witness.

- A. Such motions shall be filed within fifty-six (56) calendar days of the date the Notice of Hearing/Pre-Hearing Order was issued and shall describe with particularity the substance of the anticipated testimony sought from the non-party witness. The responding party has seven (7) calendar days thereafter to file a

response to the motion. The Hearing Officer shall, if practicable, issue an order regarding the motion within seven (7) calendar days of the date the responding party files a response to the motion, if any.

- B. Subpoenas shall be served on the witness to whom it is directed in the same manner as subpoenas served in proceedings in the district courts for the State of Colorado pursuant to Colorado Rule of Civil Procedure (C.R.C.P.) 45. A subpoena for testimony at a hearing shall be served at least forty-eight (48) hours before the first day of hearing. Immediately following service of a subpoena, the party who requested the subpoena shall serve a copy of the return of service on all parties.
- C. Any non-party or a representative thereof may move to quash or modify a subpoena.
- D. Appointing authorities shall make available for attendance at the hearing employees who have been properly and timely served with a subpoena issued by the Hearing Officer or at the request of the City Attorney's Office.
- E. Subpoenas properly and timely served on an individual may be enforced in accordance with the Denver City Charter.
- F. If it is not feasible for a subpoenaed witness to appear at the hearing in person, upon motion the Hearing Officer may require the witness to answer written interrogatories, to appear at a deposition, or to testify remotely by telephone or other means. The Hearing Officer shall require that the costs of such a deposition be paid by the party requesting the witness' testimony.

19-46 Pre-hearing Conference

The Hearing Officer may, at the request of the parties or on the Hearing Officer's own initiative, schedule a pre-hearing conference to define the issues for hearing, encourage alternate dispute resolution, resolve pending motions, or otherwise assist the parties in obtaining a fair and efficient resolution of the appeal.

Section 19-50 Hearing Process

The Hearing Officer shall conduct the hearing in as informal a manner as is consistent with a fair, efficient, and speedy presentation of the appeal.

Whether and how the Colorado Rules of Evidence shall be applied lies within the discretion of the Hearing Officer.

19-51 Exhibits

- A. Number of exhibits:
 - 1. Each party may introduce up to fifty (50) exhibits at hearing. If a party identifies more than fifty (50) exhibits in its prehearing statement, only the first fifty (50) exhibits may be introduced, with the remainder excluded.

2. Except for purposes of impeachment and/or rebuttal, a party may only introduce exhibits at hearing which have been identified in the party's prehearing statement.
- B. Each party to the appeal is responsible for deciding what exhibits to use and admit into evidence in support of its case.
 - C. Except for purposes of impeachment and/or rebuttal, a party may only introduce exhibits at hearing which have been identified in the party's prehearing statement. Any exhibit listed in a prehearing statement is considered as offered for admission at the hearing, and the opposing party may stipulate to its admission. In such situations, the exhibit shall be admitted into evidence. In consolidated appeals, stipulated exhibits are only deemed admitted by the stipulating parties.
 - D. An exhibit shall typically consist of one document, such as a manual, an e-mail string, or a memorandum. Multiple documents shall not be combined or identified as a single exhibit except as agreed by the parties.
 - E. Each party must provide a copy of its exhibits to the opposing party no later than the deadline for the filing of prehearing statements. If a party fails to provide a copy of an exhibit to the opposing party by this deadline, that party shall not be permitted to introduce the exhibit at hearing absent a showing of good cause. However, the parties may stipulate to the admissibility of an exhibit after this deadline.

19-52 Witnesses

- A. Number of Witnesses:
 1. Each party may call up to fifteen (15) witnesses at hearing, including parties and rebuttal witnesses. If a party identifies more than fifteen (15) witnesses in its prehearing statement, the first fifteen (15) witnesses listed may be called to testify, and the remainder shall not be permitted to testify.
 2. Except for purposes of impeachment and/or rebuttal, a party may only call witnesses to testify at hearing who have been identified in that party's prehearing statement.
- B. Each party to the appeal is responsible for deciding which witnesses to call in support of its case.
- C. A rebuttal witness may only be called to rebut specific material testimony or evidence admitted in the opposing party's case-in-chief that could not be reasonably anticipated based on the opposing party's prehearing statement.

19-53 Submission on Briefs

In cases where the material facts are undisputed, and the appellant only disputes the level of discipline imposed and not the facts underlying the disciplinary action, the

Hearing Officer may, with the agreement of the parties, order the matter to be resolved by written briefs in lieu of conducting an appeal hearing. In that case, the Hearing Officer and the parties shall establish a briefing schedule and the Hearing Officer shall decide the appeal based exclusively on the facts (including exhibits) stipulated by the parties and arguments contained in the briefs submitted by the parties.

19-54 Conduct of Hearing

- A. Any stipulated exhibits and facts shall be admitted into evidence at the beginning of hearing.
- B. Any recommendations made during the investigative/disciplinary process are presumptively inadmissible.
- C. The party with the burden of proof shall proceed first and may call witnesses and seek the admission of evidence. The opposing party shall proceed second and may call witnesses and seek the admission of additional evidence. Witnesses may be called out of order as determined by the Hearing Officer. The party with the burden of proof may present rebuttal evidence at the close of the opposing party's case.
- D. The parties may present evidence and witnesses, and may cross-examine the other party's witnesses.
 - 1. Testimony shall be given under oath or affirmation.
 - 2. At the request of the opposing party, the Hearing Officer may require an offer of proof before beginning the testimony of any witness to establish the witness's testimony is necessary to resolve the issues on appeal.
 - 3. A party may examine any hostile witness with leading questions.
 - 4. No witness shall be badgered, abused, insulted, or berated. The Hearing Officer may cut short any examination being conducted in an unproductive or unprofessional manner. The Hearing Officer may examine that witness or direct the examiner to inquire only about topics germane to the resolution of the appeal.

19-55 Burden of Proof

In any appeal, the following burdens of proof apply:

- A. Disciplinary appeals are reviewed de novo and the department or agency has the burden of proof by a preponderance of the evidence to establish that the appellant engaged in the misconduct as alleged in the Notice of Discipline and the discipline imposed was within a reasonable range of alternatives.
- B. If an appellant raises the issue of violation of the "Whistleblower Protection" ordinance, the appellant has the burden of proof by a preponderance of the evidence on that issue.

- C. For an appeal of a grievance or layoff, the appellant has the burden of proof to show the department or agency acted arbitrarily, capriciously, or contrary to rule or law.
- D. For an appeal of a disqualification, the agency has the burden of proof based on a preponderance of the evidence.
- E. For burden of proof issues not specifically addressed herein, the appellant has the burden of proof by a preponderance of the evidence.

19-56 Record of Hearing

Only one record of the hearing shall be made. The record may be made by court reporter or any reliable recording device approved by the Hearing Officer. Parties, their representatives, and observers are prohibited from recording the hearing. Parties and their representatives may obtain a copy of the record through the Hearing Office at the requesting party's expense.

19-57 Public or Private Hearing

- A. The hearing shall be open to the public except that the Hearing Officer may, upon the motion of an interested party, conduct the hearing or some part of the hearing in private if doing so serves the interests of the parties and the public.
- B. All witnesses, except the department or agency's advisory witness, shall be sequestered until completion of the hearing. Attorneys for the City may consult with their client regarding the testimony presented by other witnesses even if these clients may also be called as witnesses.

19-58 Decision of Hearing Officer

The Hearing Officer shall issue a written decision which includes findings of fact and conclusions of law affirming, modifying, or reversing the action which gave rise to the appeal within forty-nine (49) calendar days after the date on which the record is closed, or as soon as practicable thereafter. This decision shall be binding upon all parties, although subject to appeal, and shall contain findings on each issue necessary to resolve the appeal. The Hearing Officer's decision shall include a Notice of Appeal Rights advising the parties of the right of appeal to the Career Service Board in accordance with Rule 21 **APPEALS TO THE CAREER SERVICE BOARD**.