

ORDER ON MOTION TO COMPEL

IN THE MATTER OF THE APPEAL OF:

FRANK KEMP II, Appellant,

vs.

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

Appellant moves to compel the production of two documents in this appeal of his termination from the position of Deputy Sheriff. The Agency objects to the motion, claiming that the documents are protected as part of the deliberative process.

Background and Arguments of Parties

Appellant seeks copies of the Denver Sheriff Department Discipline Investigation Memorandum (DSW-1) and Disciplinary Sanction Worksheet (DSW-2), parts of the Internal Affairs Bureau file in Case #S201106211, the investigation done by the Agency which ultimately led to Appellant's dismissal. Appellant alleges that these documents contain details about Appellant's asserted conduct, and detail the process used to arrive at the disciplinary recommendation made to the Manager of Safety.

The Agency states that the documents contain only the recommendation made by the chain of command to the Manager of Safety, who is not required to give them any deference. It argues that they are a part of the Agency's deliberative process and are not discoverable. In addition, the Agency argues that their probative value is outweighed by their potential for confusion and waste of time because they are not binding on the decision-maker. Finally, the Agency asserts that chain of command witnesses will not be called by the Agency at hearing, and therefore the documents are irrelevant.

Legal Analysis

The deliberative process privilege is recognized in Colorado "to protect the frank exchange of ideas and opinions in governmental decision-making." Colorado Rules of Evidence Annotated, 2007 Ed.; Rule 501 at 213, citing City of Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998). The governmental entity claiming the deliberative process privilege bears the initial burden of asserting it by submitting a Vaughn index, named for the decision that first imposed the requirement. Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973). The Vaughn index must identify the documents covered by the claimed privilege, explain why each qualifies based on its role in the described deliberative process, and include an affidavit

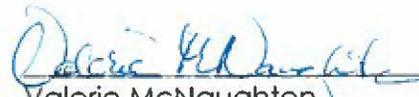
detailing why disclosure would be harmful to the Agency's future deliberations. White, supra, at 1054.

Here, the Agency asserts generally that the requested documents are deliberative. Conclusory allegations are insufficient to satisfy the burden of a claimant to raise a claim of privilege. White, at 1053. Moreover, the privilege has been found inapplicable to shield documents from an internal personnel investigation, in contrast with those related to deliberations on a generally applicable policy, since their value to the employee was held to "easily [trump] all other pertinent considerations". Waters v. U. S. Capitol Police Board, 216 F.R.D. 153 (D.D.C. 2003). The Agency's decision not to call the authors of the recommendations does not render the documents irrelevant to any issue in the appeal, since Appellant claims he needs the documents to adequately prepare his defense to the termination action.

Order

Based on the foregoing findings and conclusions, Appellant's motion to compel production is GRANTED. The Agency is ordered to produce copies of the DSW-1 and DSW-2 in Case #S201106211 by **July 30, 2013**.

DONE July 23, 2013.


Valerie McNaughton
Career Service Hearing Officer

I certify that on July 23, 2013, I delivered a copy of this Order to the following:

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