

ORDER Re: APPELLANT'S REQUEST FOR SUBPOENA'S DUCES TECUM

IN THE MATTER OF THE APPEAL OF:

EDWARD KELLER, Appellant,

vs.

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

On December 23, 2014, Appellant filed a request for four subpoenas *duces tecum* from the Denver Department of Safety, Denver Office of the Independent Monitor, Denver Sheriff's Department, and the Office of the City Attorney. The four requests asked for:

Any and all correspondence, notes, memorandums, emails, investigative reports, statements, exchanged between July 31, 2011 and November 8, 2013 by or on behalf of the (Agency identified in the request) or any of its employees, agents, relating in any way to the investigation the July 31, 2011 involving Jamal Hunter and Deputy Edward Keller (including but not limited to OIC No. 20358, Inmate Grievance No 10 81825, IAB Case No. 2011-07273, Civil action No. 2012CV2682 Hunter v. City and County of Denver, Et Al.)

In support of his request, Appellant reviewed the civil case against him by Inmate Hunter. Appellant argues his discipline was improper because the Independent Monitor requested a re-investigation into his actions only after the City paid a large settlement to Hunter. Appellant states the documents requested "will serve to explain the genesis, true factual basis, and true motivating factors substantiating this disciplinary action."

The Agency objected, stating Appellant had the opportunity to conduct discovery, that Appellant is attempting further discovery through the guise of subpoenas *duces tecum*, and that complying with his request could take "literally hundreds of individuals and a massive and extraordinarily time consuming and expensive search for such documentation." In addition, the Agency states Appellant is not entitled to a subpoena *duces tecum* from the Department of Safety or the Denver Sheriff's Department as they are not "non-parties" to the proceeding. Finally, the Agency requests Appellant be required to deposit \$25,000 toward projected costs of production.

In a December 29, 2014 reply, Appellant stated the material sought was previously requested through discovery, but the Agency objected on the basis that the Office of the Independent Monitor is an independent agency protected by the deliberative process privilege. In response, Appellant argues the District Court Judge in the underlying civil case ordered the production of communications requested via a subpoena *duces tecum* request on the basis that the deliberative process privilege was inapplicable.

The Agency's sur-reply on December 30, 2014 argued against producing documents because the Agency was not a party to the Federal civil case referenced and thus would not have the specific records indicated by Appellant. The Agency also stated Appellant appears to be seeking records exceeding those reviewed *in camera* and eventually disclosed in that

case. Finally, the Agency stated Appellant should already possess the records he seeks, as he was a party to the civil case.

Under Career Service Rule 19-45B., production of documents from non-parties to the appeal (including other City agencies) which are relevant and supported by good cause may be issued by the Hearing Officer upon the motion of either party. The Independent Monitor is a City agency and is not a party to this appeal. It is within the discretion of the Career Service Hearing Office to issue a subpoena to produce relevant documents that are not protected by privilege. Further, the Agency does not appear to object on the basis of the deliberative process privilege, but is requesting Appellant to pay the costs of production.

Appellant's request for documents from the City Attorney is granted for all documents not protected by privilege. The City Attorney, Office of the Independent Monitor, and counsel for the Agency shall create a privilege log identifying those documents so protected, a brief description of their contents, and the privilege being claimed. The Agency may condition the release of the documents requested upon the Appellant's payment of reasonable costs.

The Denver Sheriff's Department falls under the authority of the Department of Safety. Both are parties to this appeal. Appellant's request for a subpoena to produce documents from them is, therefore, denied. As outlined in the October 21, 2014 Discovery Order, discovery motions were required to be filed with the hearing office at that time.

DONE January 6, 2015.



Bruce Plotkin
Career Service Hearing Officer