

ORDER ON APPELLANT'S MOTION FOR DISCOVERY

IN THE MATTER OF THE APPEAL OF:

KRISTI BURDETT, Appellant,

vs.

DEPARTMENT OF FINANCE, MOTOR VEHICLE DIVISION,
and the City and County of Denver, a municipal corporation, Agency.

Appellant has moved for discovery of discipline imposed on other employees for the same offenses charged in her suspension. The Agency objects to the requested discovery.

Factual background and parties' arguments

This is an appeal of a five-day suspension imposed by the Department of Finance-Motor Vehicles Division on Branch Manager Kristi Burdett (Appellant) on Sept. 3, 2014. The suspension was based on Appellant's alleged violation of an order to document and discipline late arrivals, as well as two violations of the Agency's deadline for processing refund requests.

Appellant seeks copies of discipline of other employees based on late arrivals and refund requests for the past year. [Requests 1, 2, and 4]. She also requests discipline of others for late inventory audits. [Request 3.]¹ Appellant claims she needs discipline imposed on others to prove that Appellant was being treated differently than similarly situated employees, citing Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012), and Bobo v. UPS, 665 F.3d 741 (6th Cir. 2012). Coleman held that "the similarly situated inquiry is flexible, common-sense and factual ... [T]he proposed comparator must be similar enough to permit a reasonable juror to infer" that discrimination motivated the decision. Coleman, at 841. Bobo requires a trial court to make an independent determination as to the relevancy of the commonalities, in contrast to inflexibly applying factors enunciated in other cases presenting different circumstances. Bobo, at 751. Appellant argues that the production should not be limited to the discipline imposed by her supervisor, Illya Scott, because Appellant was charged with violating Agency-wide policies.

The Agency opposes the requests based on the privacy concerns of the other employees disciplined. It also claims that the documents are not discoverable and the requests are overbroad and unduly burdensome. The Agency argues that comparative discipline has been held to be irrelevant in career service appeals, citing In re Napoli, CSB 74-10 (8/18/11).

Analysis

Appellant has not raised a discrimination claim, but instead asserts that the Agency unfairly imposed inconsistent discipline on her when compared to its treatment of other employees under similar circumstances, in violation of the Career Service Rules. Evidence of disparate treatment of other employees is admissible in a challenge to discipline. In re Diaz, CSB 72-06 (9/20/07).

¹ Appellant was not suspended for the latter offense, but had been reprimanded in July for being late on her inventory audit.

Contrary to the Agency's argument, Napoli did not rule that evidence of comparable discipline is inadmissible, but rather that it has "significant drawbacks". Id. at 4. Those disadvantages do not render information about other discipline non-discoverable.

Here, Appellant is charged not with violations of Agency-wide zero-tolerance policies but failure to perform two of her duties under established standards of performance. Under these circumstances, there is no apparent need for an Agency-wide search for discipline. In addition, Appellant cites no specific reason for her belief that production of discipline from thirty agents supervised by a different branch manager will yield evidence of disparate treatment. As noted by the Agency, this discipline was not imposed for failure to discipline for her agents' excessive tardies, but rather her failure to document tardies as instructed by her supervisor.

In any event, the existence or non-existence of discipline imposed by Appellant's supervisor is narrowly tailored to produce discoverable evidence. Privacy concerns must be balanced with Appellant's right to discover information in the Agency's possession that may assist her in challenging her discipline. Since the evidence in this appeal is already protected by an order prohibiting disclosure outside of this appeal, those concerns are minimal.

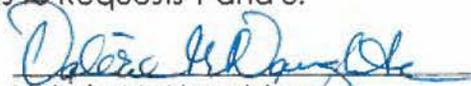
Order

Based on the foregoing findings and analysis,

1. Appellant's motion for discovery is granted as to Requests 2 and 4, but limited to discipline issued by Illya Scott in 2014.

2. Appellant's motion for discovery is denied as to Requests 1 and 3.

Dated this 29th day of October, 2014.


Valerie McNaughton
Career Service Hearing Officer