

DISCOVERY ORDER 2/27/13

IN THE MATTER OF THE APPEAL OF:

HELEN ROBINSON a/k/a KEMP, Appellant,

vs.

DEPARTMENT OF AVIATION,

and the City and County of Denver, a municipal corporation, Agency.

On February 25, 2013, the Appellant filed an "Unopposed Motion for leave to File Request for Discovery," and a "Request for Discovery." Appellant's request for leave to file her discovery motion is supported by good cause, unopposed, and is, therefore, GRANTED. The Agency filed its motion in opposition to the Appellant's discovery request February 26, 2013. With respect to the substantive motion for discovery, the following findings and orders enter.

The issue underlying this case is the basis for Appellant's dismissal. The Agency claims Appellant had a history of wrongful behavior and violated six Career Service Rules in a new serious of misbehaviors. Appellant claims her behavior did not rise to a level which justified discipline, and inferred her termination was motivated by unlawful discrimination based on her gender.

In her discovery motion, Appellant asked the Agency to respond to the following interrogatories:

1. Whether Ken Greene, Dave LaPorte, or Diana Smith was involved in the selection of an applicant to the position for which Appellant applied, but was not hired in 2010, and the nature of the involvement of those individuals in the hiring decision. The Agency objected that (1) the Appellant never filed a grievance over the 2010 hiring decision, (2) the request is irrelevant to her termination, or is outweighed by undue delay and confusion of the issues, the hearing officer lacks jurisdiction, and the Appellant failed to exhaust her administrative remedies.

The Career Service Board addressed Agency's objections in In re Diaz, CSB 72-06 (9/20/07). "Implicit in this jurisdiction [over a dismissal appeal] is the authority to hear and decide all evidence relevant to that dismissal, including a claim that the dismissal was motivated by unlawful discrimination."

In addition, the Career Service Rules do not require an appellant to file a grievance of a discrimination claim prior to filing a direct appeal in which the appellant claims the appealed action was motivated by unlawful discrimination. CSR

19-10 A. 1. The Appellant's request here appears designed to elicit whether the hiring authority was the same in the 2010 hiring decision as an authority who decided or had a hand in deciding Appellant's termination and, consequently, is related to Appellant's discrimination claim. Therefore, the request is relevant, no grievance was necessary based on Diaz, it is not unduly prejudicial, and it is unclear how the request might cause undue delay or confusion.

2. Identify specific assignments, projects, and other tasks assigned or delegated to Appellant between 1/1/11 and her termination which relate to duties listed in her PEPR and her job description. While the Agency's response did not specifically address this request, I find the request is overly broad and unduly burdensome. Not every project, assignment and task is susceptible to recordation. Appellant may inquire as to specific assignments, projects or tasks at hearing which may be relevant to a claim in the appeal.

Notwithstanding the foregoing, it is a relevant inquiry to determine what duties the Agency believes Appellant neglected in assessing discipline in this case. The Agency's notice of discipline narrative does not provide an evident response, nor does the Agency's Pre-hearing statement. "The evidence described below will demonstrate that Appellant engaged in a pattern of insubordination and aggressive and hostile behavior toward supervisor personnel, violating CSA Rules 16-60 A, J, K, M, and O." [Agency's Pre-hearing Statement, filed 2/19/13]. This information does not comport with the pre-hearing order requirement to "identify the specific conduct supporting each rule violation alleged in the disciplinary letter." [Notice of Hearing and Pre-hearing Order, p. 1, dated January 18, 2013. Consequently it is a pertinent request here.

3. All policies, procedures and practices in place at any time since 2010 relating to the generation of PEPRs and identify any relevant documents. While not specifically objected to by the Agency, it is not apparent how the request is relevant. The issues relate to series of alleged behavioral problems in November 2012, thus Appellant's work performance appears to be irrelevant. If it is relevant, it is unduly burdensome and not narrowly tailored to a claim in the case. Appellant may inquire as to any relevant aspect of the request at hearing.

4. Identify how Appellant's performance for the period 1/1/12 through 7/29/12 was evaluated and, if not evaluated, why not. The same comments, immediately above, apply here as well.

In addition, Appellant requests the following documents.

1. Job application, resume and documents evidencing discipline and/or change of duties for James Karstetter. Agency responded only that it objects to this request, without stating why. [Agency's Response p.1]. This request appears to be relevant to Appellant's discrimination claim; however third parties are entitled to protection of confidential information.

2. Any record of discipline for Diana Smith relating specifically to her processing human resources or employee relations issues. Agency generally objected to providing any information about other employees not similarly situated, which suggests an argument concerning Appellant's discrimination claim; however the request appears to be relevant for a somewhat different reason: the credibility of Ms. Smith. In that regard the request is relevant. If the request led to the discovery of prior discrimination by Ms. Smith (and none is assumed here), it would become relevant to Appellant's discrimination claim as well. The request should be limited to a relevant period.

3. Documents regarding Agency's attempts to hire a replacement of the position Appellant held "or otherwise reassign her duties to other employees." While the Agency did not directly respond to this request, the relevance of the request as stated in the first phrase (request relates to Agency's neglect of duty claim) is not apparent. The meaning of the second phrase and its relationship of the to the first is unclear.

4. Any documents, including policies procedures, guidelines and memoranda that apply to the use of a personal computer at work by a City or Agency employee. The Agency did not respond to this request.. The request is relevant but broad. Insofar as the Agency disciplined Appellant for improper use of her personal computer, it should disclose what policies, procedures, regulations, rules or other authority it relied on in making such determination, without having to provide all such policies etc.

The discovery of conflicting policies would be a relevant inquiry, however the Agency would be unduly burdened by reviewing every policy, rule, regulation, etc which might reveal such information; however it should make available for Appellant's review all written authority concerning the use of personal computers at the Agency, since one of the Agency's claims is Appellant's alleged violation of CSR 16-60 D., regarding the unauthorized use of City equipment, including the internet and email.

5. Any handwritten note left by Appellant in her office. This request was not addressed by Agency. It is relevant only to the extent that the Agency considered such a document in assessing discipline.

6. All documents relating to interrogatory #3, above. The same comments as above apply here as well.

7. Any other document identified in any of the other interrogatories. The same comments as above apply here as well.

In light of the discussion, above, the following orders enter regarding Appellant's discovery requests.

A. Interrogatories.

1. Granted.

2. Granted insofar as the Agency must specify what duties it believes the Appellant violated under CSR 16-60 A.

3. Denied.

4. Denied.

B. Requests for Production of Documents

1. Granted to the extent that all confidential information regarding James Karstetter is redacted. Should an issue arise regarding the redacted portion(s), either party may request an *in camera* review of the un-redacted document(s).
2. Granted, but limited to the two years preceding the issuance of the present discipline.
3. Denied.
4. Granted, but subject to those limitations described above.
5. Granted as limited above.
6. Denied.
7. Moot.

DONE February 27, 2013.



Bruce A. Plotkin
Career Service Hearing Officer

I certify that on February 27, 2013, I delivered a correct copy of this Order to the following, in the manner indicated:

Ms. Helen Robinson, P.O. Box 7582, Denver, CO 80207	(via U.S. mail);
Ariel DeFazio, Esq., ariel@lichtensteinlaw.com	(via email);
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