CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 042-19A (Interlocutory Appeal)

DECISION AND ORDER ON AGENCY'S MOTION TO DISMISS INTERLOCUTORY APPEAL

IN THE MATTER OF THE APPEAL OF:

DOUG GOMEZ, Appellant-Petitioner**,**

v.

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

Denver Deputy Sheriff Doug Gomez (Appellant) was dismissed by his employer, the Denver Department of Safety, Denver Sheriff Department (Agency). He appealed his discharge to a Career Service Hearing Officer.

Prior to hearing, Appellant requested from the Hearing Officer that he issue five subpoenas to obtain testimony from witnesses at his upcoming hearing. Eventually, Appellant withdrew his request regarding three of those witnesses.

The Hearing Officer then denied in its entirety the request to issue a subpoena to one proposed witness (Sergeant Mazzei) and granted a request to issue a subpoena to another witness (Deputy Sundrup) while limiting the scope of testimony which could be elicited from him.

Appellant filed an interlocutory appeal of these decisions. The Agency, in response, filed a motion to dismiss that interlocutory appeal.

Career Service Rule 21-10 provides:

> An interlocutory appeal is an interim appeal to the Career Service Board while an appeal to the Hearing Office is pending, to decide a particular issue or issues that may substantially affect the final result of the pending appeal before the Hearing Office or that implicates a privilege.
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> A. The following rulings by the Hearing Officer may be appealed immediately and reviewed de novo:
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> 1. A ruling regarding subject matter jurisdiction;

2. A ruling directing a party to produce evidence that the party asserts, in good faith, is privileged; or,

3. Any other ruling by a Hearing Officer that violates Rule 19 and/or Rule 20.

Appellant claims that the Hearing Officer, in his rulings regarding subpoenas and the limitation of testimony, violated Career Service Rule 20 generally and Rule 20-50 more specifically (concerning the Hearing Officer's discretion regarding the application of rules of evidence)[1], thereby giving us jurisdiction to hear the interlocutory appeal under CSR 21-10(A)(3).

The Agency, in its motion to dismiss, notes that the basis of Appellant's interlocutory appeal invokes only, at most, Career Service Rule 20-50 which deals with the conduct of the actual appeal Hearing, but that the Hearing has not yet started.[2]

The Agency then argues that what is truly being contested by Appellant is whether the Hearing Officer's rulings were in conformance with Career Service Rule 20-45 which deals with pre-hearing subject of the issuance of subpoenas. We agree.

We find the Petition for Interlocutory Review to be defective in that it fails to properly invoke a section of Rule 19 or 20 which the Hearing Officer violated in his rulings that could reasonably be said to adequately raise an issue for interlocutory appeal. Rule 20-45 which specifically deals with the issuance of subpoenas is not mentioned in Appellant's Petition or supporting brief.

And Appellant's reference (in his brief supporting his appeal) to Career Service Rule 20-50 fails to raise an issue for review since the Hearing Officer plainly did not violate that specific rule. As mentioned in note 1, *infra*, Rule 20-50 specifically allows the Hearing Officer to use his discretion regarding rules of evidence; and that is precisely what he did. On its face, the Hearing Officer complied with the rule. This is not to say that ultimately, the manner in which the Hearing Officer exercised that discretion cannot be reviewed, only that it will not be reviewed at this stage of proceedings.

In addition, we do not believe that the Hearing Officer's decision to deny a subpoena and limit testimony is the type of discretionary pre-trial decision to which our Rule on interlocutory appeals was ever intended to apply. Generally speaking, interlocutory appeals are intended to be the exception rather than the norm; they are

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[1] CSR 20, Purpose Statement: "The purpose of this rule is to provide a fair, efficient, and speedy administrative review of disciplinary actions… ."; CSR 20-50; "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."

[2] Relevant portions of Rule 20 plainly appear to be sequential, that is, rules dealing with pre-hearing matters appear in Rule 20 before those dealing with trial matters which, in turn, appear in the rule before those dealing with post-hearing matters.

relatively rare, and ours were never intended to be any different. We believe our rule on interlocutory appeals was meant to apply to Hearing Officer decisions in pending matters which have novel, extraordinary or outsized implications, and not issues that are, in essence, ordinary, expected or recurring, such as a hearing officer's exercise of discretion on the relevancy of documentary evidence or testimony.

The subject of Appellant's interlocutory appeal is, essentially a routine trial matter that was never intended to be subject to interlocutory appeals. *See, e.g., Rich v. Ball Ranch Partnership*, 345 P.3d 980, 982 (Colo.App. 2015)[3]; *Adams v. Corrections Corp. of America*, 264 P.3d 640, 644 (Colo.App. 2011).[4]

Were the subject matters raised here deemed to be proper grist for the interlocutory appeal mill, then every decision regarding the admissibility or non-admissibility of every word of testimony and every single document would be subject to interlocutory appeal. We do not think the rule was ever intended to be this broad and we do not interpret it as such now.

Finally, we note that had we been required to rule on the merits of the interlocutory appeal, we would have ruled against Appellant.

First, we find that the Hearing Officer, in deciding to refuse to issue the subpoena to Sgt. Mazzei, did not misinterpret interpret any rule of evidence. Appellant wishes to have Sgt. Mazzei testify as to Appellant's character for truthfulness. The Hearing Officer denied said request, citing Colorado Rules of Evidence (CRE) Rule 404(a) which provides evidence of a person's character is generally not admissible.

Appellant claims, however, that he should have been permitted to subpoena Sgt Mazzei and have him testify concerning Appellant's character for truthfulness pursuant to CRE 608(a) which allows for opinion and reputation evidence of one's character "after the character of the witness for truthfulness has been attacked." Appellant claims he is entitled to introduce this evidence because he has been charged with a rules violation that deals with his credibility, that is, he has been charged with committing a materially deceptive act by lying to investigators. According to Appellant, because he has been charged with telling lies, his character for truthfulness has been attacked.

We believe the Hearing Officer ruled correctly in rejecting this argument. Appellant conflates an attack on his credibility with an attack of his character for truthfulness. We do not believe the two things are the same.

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[3] "But we have not held that every legal issue which we would review de novo on direct appeal constitutes a 'question of law' for purposes of discretionary interlocutory appeal. Today we hold that not every such issue is a question of law within the meaning of section 13–4–102.1 and C.A.R. 4.2. More specifically, we hold that a garden-variety issue of contract interpretation is not such a question."

[4] "Where the appeal would address only whether the trial court had abused its discretion in a discovery matter, interlocutory review is generally not allowed." *See also* citations at note 4 of *Adams, supra.*

While the rules violation charged certainly does put Appellant's credibility at issue, that is simply not the same thing as attacking Appellant's character for truthfulness. *People v. Serra*, 361 P.3d 1122, 1135 (Colo.App. 2015) ("Merely questioning a witness's credibility does not necessarily constitute an attack on that witness's overall character for truthfulness. *People v. Miller,* 890 P.2d 84, 94 (Colo. 1995); *People v. Wheatley,* 805 P.2d 1148, 1149 (Colo. App. 1991).")

We see nothing in the record at this stage of proceedings indicating that the Agency has attacked Appellant's reputation or character for truthfulness. Accordingly, the Hearing Officer appears to have correctly exercised his discretion when he refused to issue a subpoena to Sgt. Mazzei for the purpose of having him testify as to the Appellant's character for truthfulness.

In sum, we hold, that at least at this stage of proceedings, the Hearing Officer has not erred in prohibiting Sgt. Mazzei from testifying as to Appellant's alleged reputation or character for truthfulness and that he did not misinterpret any rules of evidence.[5]

Appellant next argues that the Hearing Officer erred in limiting the testimony that could be adduced from Deputy Sundrup. The Hearing Officer did so because he concluded that the subjects on which the Deputy would testify would have minimal evidentiary value to the case. Appellant claims this is error.

We could only find that the Hearing Officer erred by engaging in a re-weighing of the evidence and concluding that the Hearing Officer should give weight to the proffered testimony he found to be inconsequential. We have stated repeatedly that the Board does not re-weigh evidence. The weight to be given any piece of evidence or any testimony is something for the Hearing Officer to decide.

We cannot say that the Hearing Officer has abused the significant discretion afforded him in the conducting of hearings, including matters concerning admissibility and weight of evidence and testimony. Accordingly, we hold that the current record of this case does not demonstrate that the Hearing Officer erred in limiting the subject matter of the testimony that could be offered by Deputy Sundup.

For all of the above reasons, the Agency's Motion to Dismiss Interlocutory Appeal is GRANTED and Appellant's interlocutory appeal is DENIED and DISMISSED.

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[5] At page 7 of his brief, Appellant claims that even if his character for truthfulness has not yet been attacked, the Hearing Officer erred in denying the subpoena for Sgt. Mazzei in its entirety because it is possible that the Agency will attack his character for truthfulness at hearing. Appellant's argument asks us to speculate regarding something that has not happened and may never happen, but to the extent we can do so, we would assume that should that eventuality occur, Appellant would ask the Hearing Officer for some sort of remedy or relief and that the Hearing Officer would give any such request due consideration.

SO ORDERED by the Board on February 20, 2020, and documented this 21st day of May 2020.

BY THE BOARD:

Neil Peck

Neil Peck, Co- Chair

Board Members Concurring: Karen DuWaldt, Patricia Barela Rivera, David Hayes, LaNee Reynolds

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **DECISION AND ORDER on AGENCY'S MOTION TO DISMISS INTERLOCUTORY APPEAL** on May 21, 2020, in the manner indicated below, to the following:

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For the Career Service Board