

Career Service Rule Section 2-20 B. - Adoption, Amendment or Repeal of Career Service Rules. When the Board or the OHR Executive Director considers that a change in the Rules is necessary or desirable, the procedure shall be as follows: ...

2) The proposed rule change shall be posted on bulletin boards and made available to appointing authorities, employees, and the general public for comments and suggestions. A short summary of the proposed rule changes shall be posted with the proposed rule change. 4) A public hearing on the proposed rule change shall be held by the Board."

**PLEASE POST ON ALL BULLETIN BOARDS AS SOON
AS POSSIBLE**

Public Hearing Notice - No. 519

A Career Service Board Public Hearing has been scheduled regarding proposed revisions to Career Service Rule 19-45 A Discovery and Subpoenas.

The scheduled time for the public hearing is **THURSDAY, MAY 5, 2016, at 5:00 P.M.**, in **Room, 4.G.2.**, Webb Municipal Building, 201 West Colfax Avenue.

If anyone wishes to submit written comments or talk to OHR staff regarding this notice, please contact:

Pete Garritt
HR Supervisor
Office of Human Resources
201 West Colfax, 4th Floor
Department 412
Denver, Colorado 80202

(720) 913-5671

Peter.Garritt@denvergov.org

Comments regarding this notice should be submitted no later than **12:00 noon on MONDAY, MAY 2, 2016**.

If anyone wishes to address the Board regarding this notice please contact Alisha Gronniger at (720) 913-5650 or at Alisha.Gronniger@denvergov.org no later than **12:00 noon on MONDAY, MAY 2, 2016** to get on the agenda. **You are encouraged to submit written comments regarding the subject matter of your testimony at this time so that the Board has time to adequately consider your input.**

PLEASE POST ON ALL BULLETIN BOARDS

AS SOON AS POSSIBLE

RULE PROPOSAL 446B

TO: Appointing Authorities, Managers, and Employees
FROM: Karen Niparko, OHR Executive Director
DATE: April 20, 2016
SUBJECT: Proposed revision of Career Service Rule 19-45 A Discovery and Subpoenas

THIS PROPOSED REVISION TO THE CAREER SERVICE RULES IS BEING POSTED FOR PUBLIC COMMENT AND HEARING TO BE HELD ON

**THURSDAY, May 5, 2016, at 5:00 P.M.
Webb Building Room 4.G.2**

This rule change proposal comes at the request of the Office of the Independent Monitor (“OIM”) and the Executive Director of the Department of Safety, and seeks to address problems that have arisen with discovery requests in appeals of discipline imposed on uniformed members of the Denver Sheriffs’ Department. This proposal is intended to clarify the applicability of certain evidentiary privileges to Career Service Hearings.

Rule 19-45 A <u>Discovery and Subpoenas</u>			
CURRENT RULE	REVISED RULE	NEW RULE NUMBER	REVISION INTENTION & IMPACT
No current rule	Bars discovery or admission of OIM documents, documents prepared by counsel, and notes taken at contemplation of discipline meetings in Career Service appeals.	19-45 A.2	Specifically recognizes certain evidentiary privileges in the rules to restrict discovery of protected documents and inconsistent hearing officer decisions.

A. DISCOVERY OF OIM DOCUMENTS

The OIM is responsible for actively monitoring internal investigations of uniformed personnel (including uniformed members of the Denver Sheriff's Department ("DSD")); making recommendations to the department regarding investigations; and making recommendations to the department and the Executive Director of Safety regarding disciplinary actions. However, the OIM does not have the authority to make disciplinary decisions or impose discipline on any DSD employee, a power that rests exclusively with the Executive Director of Safety by Charter.

Legal counsel for disciplined DSD employees have been routinely seeking to obtain records, reports, notes, recommendations, and emails prepared by the OIM in connection with the OIM's oversight duties with respect to investigations and discipline. These requests have been granted in some cases (and denied in others). The discovery requests concern what are in essence non-binding, pre-decisional recommendations by the OIM to the Executive Director of Safety, which the Executive Director of Safety is free to ignore. As a result, the OIM, which is not even a party to these appeals, is required go through the time consuming process of logging and producing these files.

These discovery requests have been granted even though the Denver Revised Municipal Code expressly provides that:

The monitor's office, the board, and all persons who participate in the police, sheriff, or fire department's investigative and disciplinary procedures are part of the city's deliberative process regarding investigative and disciplinary procedures for uniformed personnel. Furthermore, all information learned by any of those person or groups during the exercise of their duties shall be protected by the deliberative process privilege. DRMC 2-376(c).

This rule change proposal is intended to make sure that the Hearing Office's discovery orders consistently comply with the DRMC with regard to the admissibility or discovery in disciplinary appeals filed by uniformed members of the DSD of OIM records. This change will eliminate inconsistent rulings from the Hearings Office in this area; will streamline the discovery process; and will focus the hearing process on material and relevant issues.

B. DISCOVERY OF DOCUMENTS PREPARED BY ATTORNEYS AND OF NOTES TAKEN IN CONTEMPLATION OF DISCIPLINE OR DISQUALIFICATION MEETINGS

These two additional prohibitions codify the deliberative process privilege, the attorney client privilege, the work product doctrine, and the mental process privilege in the Career Service Rules. Attorneys for parties to an appeal regularly prepare documents in connection with the appeal even before there is an appeal. The attorney client privilege and the work product doctrine protects parties from being compelled to produce these documents.

It is a common practice for those attending contemplation of discipline or disqualification meetings to take notes of their mental impressions of the statements an appellant and his or her representative make. These notes are taken for the purpose of later reflection, recommendation, and decision in the decision-making process. Even though notes taken by those attending the contemplation of discipline meeting should not be subject to discovery under the deliberative process privilege and the mental process privilege, there have been instances where the Hearing Office has compelled an agency to produce notes prepared by attorneys and others during a contemplation of discipline meeting. If these notes are not protected from disclosure, it will inhibit attendees at contemplation of discipline meetings from writing their true thoughts and impressions and may inhibit them from taking notes at meetings all together, which may negatively impact their ability to reflect, make recommendations, and make sound decisions.

If you would like to schedule a meeting with a member of the OHR to discuss this proposal prior to the Public Hearing, please contact Pete Garritt at (720) 913-5671.

DELETIONS ARE INDICATED BY strike through AND ADDITIONS ARE INDICATED BY bold, italics, and underline.

19-45 Discovery and Subpoenas

A. **1.** The parties are encouraged to engage in informal discovery as soon as an appeal is filed. The parties may move for formal discovery by submission of the proposed requests to the Hearing Officer when informal discovery has failed. Discovery shall be narrowly limited to the issues on appeal, and shall not exceed ten (10) requests for production of documents, and five (5) interrogatories absent good cause for an exception to these limitations. The party producing discovery may condition their production on the payment of reasonable copying costs. The Hearing Officer may waive or reduce the payment of such costs for good cause shown.

2. *The following materials are not discoverable or admissible:*

a. *Documents prepared by or in the possession of the Office of the Independent Monitor when requested in a disciplinary appeal by an employee who holds a position in a classification in the Sheriff pay schedules;*

b. *Documents prepared by an attorney for one of the parties; and*

c. *Notes taken by anyone in attendance at a contemplation of discipline or contemplation of disqualification meeting.*