

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



IN RE: Cleo Subido,

Respondent

CASE No. 26-0004-F

MEMORANDUM OPINION

I. Introduction

This matter is pending before the Board of Ethics and Government Accountability (“Board” or “BEGA”) on appeal of an Order by the Director of Government Ethics imposing a \$300 ministerial fine pursuant to D.C. Official Code § 1-1162.21(a)(3) and 3 DCMR §5535.

The Director of Government Ethics issued the ministerial fine order in this matter on March 19, 2026, and the Respondent submitted the appeal to the Board on March 30, 2026. The Board initially scheduled a hearing on this matter on July 9, 2026. Respondent served initial discovery requests to OGE on May 20, 2026, and the parties engaged in a pre-hearing conference on May 21, 2026. On June 4, 2026, the Board postponed the hearing in this matter to September 3, 2026, and directed OGE and Respondent to meet and confer to resolve discovery issues. The parties were unable to resolve the issues and OGE submitted its responses to Respondent’s discovery requests on July 20, 2026.

Respondent Subido filed a Motion to Compel Discovery on July 30, 2026. The Office of Government Ethics (“OGE”) submitted OGE’s Response to Respondent’s Motion to Compel Discovery on August 12, 2026. This matter is now scheduled for a hearing on October 1, 2026.

After considering the issues raised in Respondent’s Motion to Compel and OGE’s Opposition to the Motion to Compel, for the following reasons, the Board approves in part and denies in part the motion.

II. Discussion

A. Discovery in administrative proceedings

Proceedings before BEGA are conducted in accordance with the District of Columbia Administrative Procedure Act’s (“DCAPA”) procedures for contested cases, D.C. Official Code

§2-509, and the Board’s regulations at 3 D.C.M.R. §5500, *et seq.*¹ Although Respondent argues for adoption of the Federal Rules of Civil Procedure to govern discovery disputes in adversarial proceedings before the Board, the Board has not adopted, and therefore is not governed by, the federal rules in the conduct of adversarial hearings.

Parties in administrative proceedings are generally not entitled to pre-hearing discovery. *See In re Herndon*, 596 A.2d 592, 595 (D.C. 1991) (citing *Silverman v. Commodity Futures Trading Com.*, 549 F.2d 28 (7th Cir. 1977) (“[t]here is no basic constitutional right to pretrial discovery in administrative proceedings”)); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir. 1970) (“parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right”). Neither the DCAPA nor the federal Administrative Procedures Act provide for discovery. *See In re Artis*, 883 A.2d 85, 100 (D.C. 2005); *Herndon*, 596 A.2d at 595. Instead, discovery in administrative proceedings is governed by an agency’s own rules provided the procedures meet due process requirements. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir.1979) (citing *Withrow v. Larkin*, 421 U.S. 35 (1975)).

Administrative agencies are afforded latitude to establish their own rules of procedure sufficient to permit them to discharge their duties. *See Silverman* at 33 (citing *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). The courts have recognized, however, that there may be situations where the ability to obtain information is so essential to a meaningful opportunity to participate that failure to provide discovery would violate due process. *See Herndon*, 596 A.2d at 595 (internal citation omitted). In those cases, due process would be satisfied by “according discovery that was reasonable under the circumstances.” *See id.* Furthermore, a claim the denial of discovery resulted in a violation of a party’s due process rights would need to establish that the party was “clearly prejudiced” from the denial of discovery. *N.L.R. B. v Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976).

Even in the context of civil litigation proceedings, courts have substantial discretion when considering whether discovery is reasonable. *See Artis*, 883 A.2d at 102 (D.C. 2005) (citing *Mampe v. Ayerst Labs.*, 548 A.2d 798, 803-04 (D.C. 1988)). The court may limit discovery when “upon its own initiative or pursuant to a protective order such as when ‘the discovery is unduly burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources and the importance of the issues at stake in the litigation.’” *Herndon*, 596 A.2d at 595 (citing Super. Ct. Civ. R. 26 (b)(1)).

B. Respondent’s Pending Discovery Requests

The Board’s regulations at 3 DCMR §5511.3 provide for limited discovery for adversarial hearings as follows:

¹ *See* D.C. Official Code §1-1162.12(b) (“[a]ny hearing under this section shall be of record and shall be held in accordance with Chapter 5 of Title 2” of the Code of the District of Columbia); *see also Price v. D.C. Bd. of Ethics & Gov’t Accountability*, 212 A.3d 841, 845 fn.1 (D.C. 2019) (“in order for the Ethics Board to determine a violation and order a penalty, the Ethics Act requires an ‘open and adversarial hearing’ in accordance with the DCAPA’s procedures for contested cases”).

Upon the request of the respondent, the Director must disclose and make available for inspection, copying, or photographing any relevant written or recorded statements made by the respondent and any books papers, documents, photographs, tangible objects, or other evidence which is in the possession of the Director and which:

- (a) The Director intends to introduce at the hearing; or
- (b) Are material to the preparation of the respondent's defense.

In addition to responding to Respondent's discovery requests, on June 16, 2026, OGE identified the evidence that it intends to introduce at the hearing as required under 3 DCMR § 5511.3(a). In the Joint Pre-Hearing Statement submitted to the Board on June 3, 2026, the parties stipulated to the authenticity of the exhibits presented at the January 23 and 29, 2025 show cause hearing and agreed that the exhibits may be admitted into the record by the Board at the adversarial hearing. Respondent argues that the pending discovery requests are material to the preparation of her defense and thus required to be produced pursuant to 3 DCMR § 5511.3(b).

At issue are five requests where Respondent seeks to compel production:²

- Request 1 - All recordings and transcripts of the Show Cause hearing conducted on or about January 23 and 29, 2025;
- Request 2 - All communications after 1/1/2020 that include any employee or BEGA and "any employee or representative of any other office of the District of Columbia" and that "[r]eference the Respondent, her claims against the District, or BEGA's proceedings against this Respondent, or otherwise arise from BEGA's proceedings against this Respondent;
- Request 4 - All reports and other records of investigations into this Respondent;
- Request 5 - All records of complaints to OGE "alleging that anyone has used District email for personal use since January 1, 2020; and
- Request 6 - All records of OGE's investigations of "other employees alleged to have used District email for personal use since January 1, 2020, and all records of the outcomes of such investigation."

The question before the Board is whether Respondent's requests fit within the limited discovery allowed under BEGA's regulations. In considering whether to compel production from OGE, the Board is mindful that this matter stems from Respondent's appeal of a \$300 ministerial fine imposed by the Director of Government Ethics after a finding that Respondent violated 6B DCMR §1808.1 by using her government email to send and receive 41 emails on personal and private business. The Board also takes into consideration the fact that Respondent has stipulated to the authenticity of the evidence considered at the Show Cause Hearing, which OGE intends to present at the adversarial hearing before the Board. At issue in the adversarial hearing is whether OGE can establish by substantial evidence³ that Respondent violated the Code of Conduct. To the extent that

² OGE has already produced all evidence the Director intends to introduce at the hearing (Request #3) and responded to the request for all records of OGE policies "addressing person use of District email" (Request #7).

³ 3 DCMR § 5518.1 provides that "the Director has the burden of persuading the Board that a violation has occurred by substantial evidence."

Respondent asserts an affirmative defense, the burden is on Respondent to produce “sufficient evidence to establish the affirmative defense.”⁴

C. Respondent’s Whistleblower Protection Act Affirmative Defense

The D.C. Whistleblower Protection Act (“DCWPA”) prohibits a supervisor from taking or threatening to take “a prohibited personnel action or otherwise retaliate against an employee because of the employee’s protected disclosure or because of an employee’s refusal to comply with an illegal order.” D.C. Official Code §1-615.53(a). Respondent argues that DCWPA prohibits the Board from imposing any penalty that would violate the act’s protections.

In her Motion to Compel, Respondent acknowledges that OGE initiated its investigation after receiving a complaint from District employee Kelly Brown, who she characterizes as “an antagonist who could feel criticized by Respondent’s whistleblower disclosures.”⁵ OGE argues that the DCWPA is not applicable to the Board’s adversarial hearing and noting that OGE is not a party to Respondent’s ongoing civil action against the District arguing that her termination violated the DCWPA.⁶ Although BEGA is not a party to the civil litigation, Respondent is seeking to compel discovery from BEGA in that matter arguing that “the complaints to BEGA were a result of her whistleblowing activities and therefore the basis of the complaints and investigation and adjudication by BEGA.”⁷

Three of the pending requests (Requests 2, 5, and 6) at issue here stem from Respondent’s argument that the DCWPA precludes BEGA from taking action against her. All three requests seek communications and records after January 1, 2020. With respect to Request 2, which seeks communications between BEGA and other District employees, the six-year time-period requested extends far beyond any temporal proximity to the alleged personnel actions underlying Respondent’s DCWPA retaliation claim. *See Booth v. District of Columbia*, 701 F. Supp. 2d 73, 79 (D.D.C. 2010) (“action which occurs more than three or four months after protected activity is not likely to qualify for such a causal inference”) (internal citation omitted).

To the extent that Respondent is seeking discovery on comparator cases arguing that they “could be strong evidence that [her] whistleblower activities made a difference in the decision to investigate the complaint against her,”⁸ OGE directed Respondent to its Quarterly Complaint Reports and public dispositions, as well as identifying six negotiated dispositions and one

⁴ *Id* at §5581.2.

⁵ *See* Mot. to Compel at 3.

⁶ OGE Opp. to Mot. to Compel at 2-3.

⁷ Plaintiff’s Reply to Third-Party Board of Ethics and Government Accountability’s Mot. in Opp. to Plaintiff’s Mot. to Compel at 7, *Subido v. D.C.*, No. 2023-CAB-001335 (D.C. Super. Ct. Aug. 27, 2026). In the civil action, Respondent is seeking to compel BEGA to produce “[a]ll documents and communications prepared, drafted, or maintained by any Employee of BEGA including investigation records, hearing transcripts, and draft and final reports re BEGA Case Number 22-0079-P, and those materials sent to you by local/state/federal agencies re Cleo Subido.”

⁸ Respondent’s Mot. to Compel at 19.

Director's Order the dealt directly with the misuse of government email.⁹ The Quarterly Complaint Reports detail the dates of all complaints made to BEGA, provides a summary of the allegations, and includes the interim and final dispositions of each matter. The specific cases identified by OGE provide additional information on those matters resolved by the Board in a negotiated disposition or the Director after a Show Cause Hearing. The information produced by OGE provides comparator information that Respondent suggests is relevant to its case without requiring OGE to disclose the identity of other Respondents. The Board's regulations are clear that OGE is only authorized to disclose the identity of the subjects of preliminary or formal investigations under certain conditions not present here.¹⁰

The Board has already provided Respondent an opportunity to meet and confer with OGE to resolve the discovery issues, including rescheduling the hearing date. The limited scope of the charges against Respondent, along with the potential amount in violation, does not support additional discovery outside what is required in the Board's regulations, particularly when it would involve a search through over six years of agency records.

D. Request for Investigatory Records

This leaves two requests – Request 1 for recordings and transcripts of the Show Cause hearing in this matter held on January 23 and 29, 2025 and Request 4, which seeks “[a]ll reports and records of investigations into this Respondent.” To the extent that request 4 seeks records not covered by 3 DCMR § 5511.3, the request is denied.

The last request is for the recording or transcript of the Show Cause Hearing conducted on January 23 and 29, 2025. Respondent argues that that she intends to use excerpts from the Show Cause hearing as “direct evidence” in the adversarial hearing and therefore the recording is relevant to her defense.¹¹ OGE argues that 3 DCMR § 5511.3 does not require production of the hearing recording as Respondent did not make any statements at the hearing, the Director has already produced the evidence she intends to introduce at the hearing, and the DCWPA is not applicable to Respondent's proceeding before the Board.¹²

The Show Cause Hearing in this matter is the basis of the Director's Ministerial Fine Order that Respondent is appealing. Respondent, as a party to the proceeding, is entitled to record material in a contested case. *See Rodriguez v. D.C. Dep't of Emp't Servs.*, 452 A.2d 1170, 1171 (D.C. 1982) (“Record material must be made available to parties to the case upon request.” (citing

⁹ OGE Opp. to Mot. to Compel at 9.

¹⁰ D.C. Official Code §1-1162.12(d) provides that “[t]he identity of an individual who is the subject of [a] preliminary investigation shall not be disclosed without the individual's consent unless or until the Board has found reason to believe that the individual has committed a violation and the Board finds that disclosure would not harm the investigation.” The counterpart regulation at 3 DCMR § 5301.5 includes almost identical language. *See also* 3 DCMR § 5302.7, which provides that in the case of formal investigations, “[t]he identity of an individual who is the subject of a written complaint transmitted to the Board...shall not be disclosed without the individual's consent unless or until the Board finds reason to believe that the individual has committed a violation and the Board finds that disclosure would not harm the investigation.”

¹¹ Respondent's Mot. to Compel at 8-10.

¹² OGE Opp. To Mot. to Compel at 7.

Quick v. Dep't of Motor Vehicles, 331 A.2d 319, 322 (D.C. 1975) (finding failure to provide transcript of hearing on appeal necessitated reversal of Director's decision))). Accordingly, OGE should provide Respondent with a copy of the Show Cause Hearing.

III. Conclusion

Based on the foregoing reasons, it is the decision of the Board to APPROVE in part and DENY in part Respondent's Motion to Compel Discovery as demonstrated by the signature of the Chairperson below. An appropriate Order accompanies this Memorandum Opinion.



Norma B. Hutcheson
Chairperson, Board of Ethics and Government Accountability

September 3, 2026

Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



IN RE: Cleo Subido,

Respondent

CASE No. 26-0004-F

ORDER

Upon consideration of Respondent's Motion to Compel Discovery, the Office of Government Ethics' Response to Respondent's Motion to Compel Discovery, and the entire record, it is

ORDERED that the Motion to Compel Discovery is GRANTED as to Request 1, the production of recordings or transcripts of the Show Cause Hearing held on January 23 and 29, 2025;

ORDERED that the Motion to Compel Discovery is DENIED as to the remaining requests; and

FURTHER ORDERED that the Office of Government Ethics shall produce the requested discovery no later than September 14, 2026.

This Order is effective after approval by the Board of Ethics and Government Accountability, as demonstrated by the signature of the Chairperson below.

Norma B. Hutcheson
Chairperson

September 3, 2026

Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 3rd day of September 2026, a true and correct copy of the foregoing was furnished to the following persons via email:

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