

State of Colorado



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Governor

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Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING January 15, 2008

A public meeting of the State Personnel Board will be held on **Tuesday, January 15, 2008, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by January 10, 2008.

I. REPORT OF RICH GONZALES, STATE PERSONNEL DIRECTOR (EXECUTIVE DIRECTOR, DEPARTMENT OF PERSONNEL AND ADMINISTRATION [DPA])

II. REQUESTS FOR RESIDENCY WAIVERS

January 1, 2008 Report on Residency Waivers

III. PENDING MATTERS

A. Cases on Remand

1. **Randy Pfaff v. Department of Corrections**, State Personnel Board case number 2004B112(C), Court of Appeals No. 05CA1937.

On February 28, 2005, the Initial Decision of the Administrative Law Judge was issued. Respondent filed its Notice of Appeal on March 30, 2005. On August 16, 2005, the Board voted to adopt the findings of fact and conclusion of law No. 1 ("The corrective action was not arbitrary, capricious or contrary to rule or law") in the Initial Decision of the Administrative Law Judge and to reverse conclusions of law Nos. 2 ("Complainant did not commit the acts upon which discipline was based"), 3 ("Respondent's demotion of Complainant was arbitrary and capricious and contrary to rule or law"), and 4 ("Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion").

On September 14, 2005, Complainant filed a Notice of Appeal at the Court of Appeals, and the Board filed the Certificate of Record of Administrative Proceedings before the State Personnel Board at the Court of Appeals on December 9, 2005.

On January 3, 2008, the Mandate of the Court of Appeals was issued, "Order Affirmed in Part, Reversed in Part, and Case Remanded with Directions," for the Board "to affirm the ALJ's order that Pfaff be reinstated to the rank of Lieutenant and receive back pay and benefits, and to reconsider the award of attorney fees and costs to DOC."

IV. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD

There are no Initial Decisions or other Final Orders of the Administrative Law Judges on Appeal to the Board this month.

V. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING

There are no Preliminary Recommendations of the Administrative Law Judges to grant or deny petitions for hearing before the Board this month.

VI. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES

- A. Norma Smith v. Department of Human Services, Disability Determination Services, State Personnel Board case number 2007B090 (December 7, 2007).

Complainant, a technician, appealed her termination seeking reinstatement. After hearing, the ALJ determined that Complainant did not present evidence of intentional discrimination or a *prima facie* showing of discrimination based on age or disability, as she alleged in her appeal. In addition, the ALJ found that, while Respondent established by a preponderance of the evidence that Complainant had failed to perform competently under the January 2007 Corrective Action and had only a Needs Improvement rating for the quality of her work in the 2006-2007 review period, Respondent did not demonstrate by a preponderance of the evidence that Complainant's overall performance for purposes of the 2006-2007 review period was at an overall "Needs Improvement" level. Furthermore, affirming the disciplinary termination, the ALJ concluded that Respondent's action was arbitrary or capricious as to the assignment of discipline for leave usage and an overall "Needs Improvement" rating for the 2006-2007 review period, but not arbitrary, capricious or contrary to rule or law for the remainder of the causes for discipline and the discipline imposed was within the range of reasonable alternatives.

- B. Daniel R. Doering v. Department of Natural Resources, State Personnel Board case number 2008B018 (December 28, 2007).

Complainant, a technician and fish culturist, appealed his termination seeking reinstatement, back pay and benefits, and attorney fees and costs. After hearing, the ALJ concluded that Respondent did not prove that Complainant committed an intentional fish kill during a fish plant at Tiago Lake or had spoken inappropriately to his work supervisor as alleged in the termination letter, but did prove that Complainant committed the other acts alleged; Complainant did not raise any persuasive argument as to why he should not have been subject to discipline for the fish kill or why his subsequent actions proven at hearing should not be viewed as failures to perform competently and willful misconduct; and Respondent's decision to discipline Complainant for his actions related to the Tiago Lake fish plant were not arbitrary, capricious or contrary to rule or law. Affirming Respondent's termination of Complainant's employment, the ALJ found that the discipline imposed was within the range of reasonable alternatives, given the facts of incident at Tiago Lake and Complainant's history. The ALJ declined to award attorney fees on the grounds that the general rule on fee awards does not permit attorney fee

awards to *pro se* litigants and that, even if the Board were to consider such an award, Complainant did not show that fees were appropriate in this case.

VII. REVIEW OF THE MINUTES FROM THE DECEMBER 18, 2007 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VIII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS DECEMBER 18, 2007 PUBLIC MEETING:

- A. Timothy A. Smelser v. Department of Corrections, State Personnel Board case number 2008G027.

The Board voted to adopt the Amended Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Gary Mason v. Department of Human Services, Colorado Mental Health Institute at Pueblo, State Personnel Board case number 2008G017.

The Board voted to grant Respondent's Motion to Recuse Board Member Robert Thompson, to adopt the Preliminary Recommendation of the Administrative Law Judge, and to grant the petition for hearing solely on the issue of whether the Memorandum of Expectation issued to Complainant was a violation of the Whistleblower Act.

IX. REPORT OF DAVID KAYE, DIRECTOR OF THE DIVISION OF HUMAN RESOURCES, DPA

X. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- Budget and Expense Report
- Website hits: October - 123,289; November - 85,090; December - 73,328

B. OTHER BOARD BUSINESS

- Staff Activities

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

XI. PROPOSED LEGISLATION AND/OR RULEMAKING

XII. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the December 18, 2007 Executive Session

C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

February 19, 2008	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 18, 2008	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 15, 2008	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 20, 2008	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 17, 2008	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604