STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007G089**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA KIRKMEYER,
Complainant,

vs.

DEPARTMENT OF LOCAL AFFAIRS,
Respondent.

Administrative Law Judge (ALJ) Robert R. Gunning presided over this matter at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on June 7, 2012. Following the hearing commencement, the parties filed motions for summary judgment. The ALJ issued an Order on Summary Judgment on November 21, 2012. Following a status conference and additional briefing, the ALJ issued an Order Regarding Complainant's Memorandum Relating to Issues Following Order on Summary Judgment on January 4, 2013. This Order stated that the ALJ would promptly issue an Initial Decision incorporating the two Orders. The record was closed upon receipt of Respondent's response brief on December 19, 2012. Assistant Attorney Molly Allen Moats represented Respondent. William Finger, Esquire, represented Complainant.

MATTERS APPEALED

Complainant was a certified Management class employee employed by Respondent, Department of Local Affairs (Respondent or DOLA), prior to her separation from state service on June 30, 2007. Complainant was in the Senior Executive Service (SES) pay plan for the last three years of her state employment. Through this appeal, Complainant seeks to be returned to the traditional classified pay plan within the state personnel system. In particular, Complainant contends that Respondent unlawfully determined that Complainant did not have the right to move into a vacant position within the Management class when Respondent elected not to renew her SES contract following the 2006-07 fiscal year. Complainant bases this claim on her 2006-07 SES contract, and in particular, a "safe harbor clause" (SHC) within the contract.

As relief, Complainant seeks reinstatement as a certified Management class employee in the traditional classified pay plan; an award of back pay; an award of future pay; and an award of attorney fees and costs.

Respondent asserts that Complainant did not have the right to be placed into a vacant position within the state personnel system following the termination of her SES contract. In particular, Respondent argues that the SHC was contrary to law and should not be enforced. Respondent also asserts that Complainant's claims are barred by the doctrines of waiver and estoppel.

As relief, Respondent requests that Complainant's appeal be denied and dismissed.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

This matter is before the State Personnel Board (Board) on remand from the Colorado Court of Appeals. In an unpublished decision, the Court of Appeals affirmed in part and reversed in part a Board decision. The Court remanded the matter to the Board with specific instructions. The directions on remand require the Board to:

(1) Determine all rights the parties intended for Complainant to have under the SHC of her 2006-07 SES contract;

(2) If the Board determines that Complainant had more than reinstatement rights, determine whether Complainant's claims are barred by waiver or estoppel;

(3) If the Board rejects these affirmative defenses, determine whether Director's Procedure 2-11 or Board Rule 2-13 precludes enforcement of the SHC.

RELEVANT PROCEDURAL HISTORY

1. This appeal has a lengthy procedural history. In May 2007, Complainant appealed the non-renewal of her 2006-07 SES contract to the Board and the State Personnel Director. Complainant also filed a civil action in Denver District Court, claiming breach of contract.

2. In the State Personnel Director proceeding, the State Personnel Director denied Complainant's request to review her separation from state service.

3. Complainant appealed the State Personnel Director's decision to Denver District Court, and sought a writ of mandamus and writ of prohibition under C.R.C.P. 106. This action was consolidated with the breach of contract action Complainant had previously filed in District Court.

4. In February 2009, the Denver District Court issued an Order granting DOLA's motion for summary judgment and dismissing Complainant's complaint. The Order determined that the SHC was illegal and unenforceable. Complainant appealed this order to the Colorado Court of Appeals.

5. In the Board proceeding, in June 2007, ALJ Hollyce Farrell dismissed Complainant's appeal for lack of standing. The Board affirmed. Complainant appealed the Board's Order to the Colorado Court of Appeals.

6. In February 2009, the Colorado Court of Appeals issued an unpublished decision reversing the Board's Order and remanding the case to the Board for the determination of whether Complainant could compete for an open position (*Kirkmeyer I*).

7. On remand from the Colorado Court of Appeals in *Kirkmeyer I*, ALJ Farrell held an evidentiary hearing. In January 2010, ALJ Farrell issued an Initial Decision denying Complainant's claims that DOLA violated her right to compete for an open position and unlawfully discriminated against her based on political affiliation. Although Complainant sought to reverse DOLA's decision voiding the SHC, the Initial Decision did not address this issue

because Complainant raised this claim in the District Court action which was subject to the pending Court of Appeals' action.

8. The Board approved the Initial Decision in June 2010. Complainant then filed an appeal with the Colorado Court of Appeals.

9. On March 31, 2011, the Colorado Court of Appeals issued two decisions, both of which remanded this appeal to the Board for further proceedings. In a published decision (*Kirkmeyer III*), the Court of Appeals vacated the District Court's Order and stayed further proceedings before the District Court until Complainant's action before the Board was final, including any appeal. *Kirkmeyer III* held that § 24-50-104(5)(c) and (d), C.R.S. does not bar Complainant's claims and does not preclude Complainant from being returned to a traditional pay position within the state personnel system.

10. In an unpublished decision (*Kirkmeyer II*), the Court of Appeals concluded that that the Board did not err in approving the ALJ's decision that DOLA did not violate Complainant's reinstatement privileges as set forth in *Kirkmeyer I*. Further, the Court held that the Board did not err in approving the ALJ's decision that DOLA did not discriminate against Complainant based on her political affiliation. However, the Court concluded that the *Kirkmeyer I* Court made a factual error in stating that Complainant was not a certified employee when she was in the SES pay plan, and thus, may have either understood the SHC to grant more rights than mere reinstatement since Board Rule 2-13 already provided that right, or understood it to give Complainant additional rights because of its mistake concerning Complainant's loss of certified status. The Court therefore declined to apply the law of the case doctrine.

11. Based on these conclusions, the *Kirkmeyer II* Court determined that the SHC was ambiguous and that Complainant was entitled to a further Board hearing to interpret the SHC. The Court then provided the Board with the following framework for deciding the remaining issues pending before the Board (*Kirkmeyer II*, p. 28):

a. If the Board determines that the SHC provides Kirkmeyer only reinstatement in terms of competing for open positions, as described in *Kirkmeyer I*, then its previous findings and conclusion on this issue preclude any relief for Complainant, subject to her appeal of the Board's interpretation;
b. If the Board decides that Complainant has additional rights under the SHC then it must address DOLA's argument that waiver (including Board Rule 1-19), estoppel, or both prevent broader enforcement of the SHC;
c. If the Board rejects both waiver and estoppel, then it must address DOLA's argument that Board Rules 2-11 and 2-13 also preclude such enforcement of the SHC. However, the Court's interpretation of section 24-50-104(5)(c) in *Kirkmeyer III* removes the statute from the Board's further consideration.

12. The Board sought certiorari on the Court of Appeals' decisions. On December 12, 2011, the Colorado Supreme Court issued an Order denying certiorari. The Court of Appeals issued its Mandate on January 13, 2012.

13. On February 28, 2012, the Board issued a Notice of Hearing and Prehearing Order on Remand. The ALJ granted an unopposed motion to continue the hearing date. The hearing commenced on June 7, 2012. At the hearing commencement, the evidentiary portion of

the hearing was set for September 25-26, 2012. The parties were provided with deadlines to file motions for summary judgment.

14. In August and September 2012, the parties filed motions for summary judgment, including affidavits and exhibits. The parties also filed several motions in limine and motions to strike.

15. In particular, Complainant filed three motions for summary judgment. The first motion sought summary judgment on SES contract interpretation and Complainant's rights under the SHC. Complainant's second motion sought summary judgment regarding the issue of waiver and estoppel. The third motion sought summary judgment relating to Director's Procedure 2-11 and Board Rule 2-13.

16. Respondent filed a single motion for summary judgment, seeking judgment in its favor as a matter of law.

17. On September 13, 2012, following a telephonic status conference, the ALJ issued an Order vacating the September 25-26 hearing, and setting oral argument on the pending motions for September 26, 2012.

18. A three-hour oral argument on the pending motions was held September 26, 2012. Following the oral argument, with permission from the ALJ, the parties filed supplemental briefing on Director's Procedure 2-11 and Board Rule 2-13.

19. An evidentiary hearing was set for December 4, 2012, to resolve any remaining issues.

20. On November 21, 2012, the ALJ issued an Order on Summary Judgment (attached hereto as Attachment A). The Order on Summary Judgment granted two of Complainant's motions for summary judgment, and partially granted Complainant's third motion for summary judgment. Additionally, the Order partially granted Respondent's motion for summary judgment.

21. In particular, the Order on Summary Judgment concluded that (1) the SHC provided Complainant with more than reinstatement rights – it provided her with the right to a vacant non-SES position for which she was qualified, (2) Complainant did not waive her rights under Board Rule 1-19, (3) Complainant's claims were not barred by the doctrine of estoppel, (4) Director's Procedure 2-11(C) precluded enforcement of the SHC, and (5) Board Rule 2-13 does not conflict with the SHC. Because the SHC violated Director's Procedure 2-11(C), the Order on Summary Judgment concluded that the SHC was unenforceable.

22. The ALJ conducted a status conference on November 29, 2012, to determine whether an evidentiary hearing or additional briefing would be required for the Board to fully resolve the three issues on remand. Immediately prior to the status conference, Complainant filed a document entitled "Issues for Consideration in Status Conference." This pleading identified three issues which Complainant contended the Board needed to resolve in this proceeding.

23. At the conclusion of the status conference, the ALJ vacated the December 4, 2012 evidentiary hearing, and set a briefing schedule on the three issues identified by Complainant. A conforming Notice was issued on November 30, 2012.

24. Complainant timely filed its Memorandum Relating to Issues Following Order on Summary Judgment on December 10, 2012. Respondent timely filed its Objection and Response on December 19, 2012. On December 21, 2012, Complainant filed a motion to permit a reply, along with the proposed reply. Respondent objected to the motion, and filed an objection and motion to strike reply argument on December 24, 2012. Complainant filed a response to Respondent's motion to strike on December 27, 2012. The ALJ denied Complainant's motion to permit a reply on January 2, 2013. The arguments raised in Complainant's December 21, 2012 and December 27, 2012 pleadings were not considered in ruling on the three issues. In accordance with § 24-50-125.4(3), C.R.S., the record was therefore closed on December 19, 2012, upon receipt of the final brief.

25. On January 4, 2013, the ALJ issued an Order Regarding Complainant's Memorandum Relating to Issues Following Order on Summary Judgment (attached hereto as Attachment B). In this Order, the ALJ concluded that the Board does not have jurisdiction over the three issues raised by Complainant on November 29, 2012.

26. Due to the resolution of the three issues within the scope of the Court of Appeals' remand order in the Order on Summary Judgment, the issuance of the Order concluding that the Board does not have jurisdiction over the three issues raised by Complainant on November 29, 2012, and the fact that neither party has contended that an evidentiary hearing is necessary to resolve the issues on remand, the January 4, 2013 Order stated that the ALJ intended to promptly issue an Initial Decision incorporating the Order on Summary Judgment and the January 4, 2013 Order.

UNDISPUTED MATERIAL FACTS

The following undisputed material facts were set forth in the Order on Summary Judgment. The undisputed material facts are based on the motions for summary judgment, and the affidavits, exhibits, and deposition transcripts attached to the motions for summary judgment. Except where necessary to identify the source of the fact, the record citations have been omitted below. The record citations are set forth in the Order on Summary Judgment.

Complainant's employment history and SES contracts

1. Complainant began her state employment in January 2001. She entered the state classified personnel system as a General Professional (GP) VI. Her initial position[1] was the Director of Community and Neighborhood Development within DOLA. Complainant went through the application and competitive examination process to obtain the position.

2. Complainant was certified[2] to the GP VI position after one year of service.

3. In June 2002, Complainant's position was reallocated to a GP VII classification. Complainant was selected for the position.

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[1] The term "position" is defined as "an individual job ... within the state personnel system." Board Rule 1-62, 4 CCR 801.

[2] The term "certified" "applies to employees who successfully complete a probationary or trial service period." Board Rule 4-29, 4 CCR 801.

4. In November 2002, Complainant applied for and was appointed to a position of Division Director within the Management class.[3] She was certified into this position one year later.

5. Complainant was then promoted to be Director of the Division of Local Government within DOLA.

6. The Division Director position was nominated to move into the SES pay plan[4] by DOLA Executive Director Michael Beasley. In July 2004, Jeffrey M. Wells,[5] the Director of the Department of Personnel & Administration (State Personnel Director), accepted the nomination.

7. The SES is an alternative performance-based pay plan for senior managers who are responsible for directly controlling large or important segments of a state agency. Director's Procedure 2-11. According to the November 2005 Technical Assistance Guideline, the program was created "to strike a more appropriate balance between the continuity of a stable workforce and allowing the flexibility to effectively implement new policy direction in executive policy matters." According to Mr. Wells, the SES was created in response to a perception that the classified service made it difficult for new governors to immediately implement their goals and plans. Two goals of SES were for Administrations to be able to change high level managers without cause and to attract individuals from the private sector who would be willing to take a small, but not large, reduction in pay.

8. Complainant executed her first SES contract with DOLA in calendar year 2004. The contract covered the period of time July 1, 2004 – June 30, 2005. Mr. Beasley executed the contract on behalf of DOLA.

9. Complainant remained a certified state employee while in the SES pay plan. Her position remained within the Management class, even though it was in a different pay plan.

10. Complainant entered into a second SES contract covering the period July 1, 2005 – June 30, 2006. Mr. Beasley executed the contract on behalf of DOLA.

11. Both the 2004-05 and the 2005-06 SES contracts contained reverter provisions that specified a reverter to the traditional pay plan. The reverter provisions stated: "Notwithstanding State Personnel Board Rule R-8-68, the parties to this contract agree to the following: During the term of this contract Michael Beasley, the Executive Director of the Department of Local Affairs, agrees to offer Ms. Kirkmeyer retention rights to a vacant Management level position in the department for which she meets the minimum qualifications should either of the following occur: (1) Ms. Kirkmeyer's position as Director of the Division of Local Government is abolished because of lack of funds or a statutory change; (2) Ms. Kirkmeyer's position is abolished due to reorganization."

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[3] The term "class" is defined as "a group of positions whose essential character...warrants the same pay grade, title, and similar qualifications." Board Rule 1-33, 4 CCR 801.

[4] The term "pay plan" is defined as a "listing of all pay grades and their corresponding ranges for occupational groups." Board Rule 1-59, 4 CCR 801. Pay plans establish "classes, positions, and grades of pay." *Dempsey v. Romer*, 825 P.2d 44, 52 (Colo. 1992).

[5] Mr. Wells has a law degree and previously served as the Executive Director of the Department of Labor and Employment and as the Assistant Director of the Department of Labor and Employment. Mr. Wells also had served in the Colorado Senate for 16 years, and held the position of Senate Majority Leader for 12 years.

12. The Department of Personnel & Administration (DPA) issued Technical Assistance guidelines and procedures relating to SES appointments. These guidelines were issued under the direction of the State Personnel Director. In November 2005, DPA issued a revision to the Technical Assistance, SES guideline, which had been previously issued. The 2005 revised Technical Assistance guideline remained in place until August 31, 2007.[6] The revised guideline stated in relevant part (page 3):

> In exchange for the higher potential salaries, employees under SES performance contracts are not afforded any of the following rights: retention or reemployment; appeal of the State Personnel Director's decision to move a position into or out of the SES; any pay adjustments such as survey and performance salary adjustments; and appeal of the salary from one contract year to the next.
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> Additionally as provided by Rule 2-11(C), as part of the performance contract negotiation process and in consideration for a salary that exceeds the maximum of the Management class, an employee is required to waive certain appeal, disciplinary, grievance, and other rights and privileges of the state personnel system. The waiver of these rights will be specified in the annual contract as shown in the contract cover sheet attached to this document. Department heads may permit specific exceptions to the waiver of rights and will ensure each SES employee is reasonably informed of the waiver in the contract.

13. In December 2005, after Mr. Beasley resigned as DOLA Executive Director, Complainant was appointed by Governor Owens as Acting Director of DOLA. Complainant continued to occupy the position of Director of the Division of Local Government. She also oversaw homeland security programs as the Acting Director of the Division of Emergency Management. As Acting Director of DOLA, Complainant had appointing authority for all Division Directors.

<u>The 2006-07 SES contract and SHC</u>

14. Complainant's 2006-07 SES contract included the following terms:

> 4) If the Executive Director gives the employee written notice of non-renewal by May 1, the employee shall either be separated from state service upon expiration of the contract on June 30 or appointed to a vacant non-senior executive service position at either the contract salary or the statutory salary lid, whichever is lower;
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> 5) If the Executive Director has not given timely written notice of non-renewal and no contract is provided by July 1, the employee shall

[6] An August 31, 2007 revision to the Technical Assistance guideline deleted the authority of the department heads to permit specific exemptions of the waiver of rights and the assurance that SES employees are reasonably informed of the waivers in the contract. This revision was made after Complainant's employment ended in June 2007.

be returned to the traditional classified pay plan at either the contract salary or the statutory salary lid, whichever is lower;

7) Employees in the senior executive service have no retention or reemployment rights with respect to any other position in the state personnel system.

15. In spring 2006, Mr. Wells became aware that employees in the SES pay plan positions had concerns about the continuity of state employment in light of the upcoming November 2006 election. Mr. Wells engaged in a series of meetings and discussions with his aides, including Assistant Director Paul Farley. Based on these discussions, Mr. Wells decided that it would be in the state's best interest to allow executive directors of departments in the annual SES negotiation process to allow SES employees to return to the traditional classified pay plan at the end of the 2006-2007 contract year at either the contract salary or the statutory salary lid, whichever was lower. Mr. Wells drafted, with Mr. Farley's aid, an additional term to the SES draft contract. As drafted, the SHC stated:

> With respect to any separation from state service as a result of the expiration or non-renewal of this contract, the employee further voluntarily waives all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system, except for the following rights specifically agreed to by the Executive Director.
>
> If the employee is not offered a contract for the 07-08 fiscal year, regardless of whether notice was timely given pursuant to State Personnel Board Rule 2-11(c) and without regard to paragraph 4 above, the employee shall be returned to the traditional classified plan at the contract salary or the statutory salary lid, whichever is lower.

16. The SHC language had not been included in any prior SES contracts.

17. Mr. Wells drafted the SHC and the 2006-07 SES contract to "ensure that there would not be a wholesale change of career employees with the technical expertise to run some of these divisions and units." Mr. Wells believed that he had the authority to create and authorize the SHC as part of the negotiation process between departments and employees. In his opinion, the negotiation process was authorized by statute, and extended beyond the negotiation of salary.

18. Mr. Wells believed that the SES negotiation process allowed for a promise to return the employee to the traditional classified pay class. His intent in drafting the SHC was to ensure that there was a term that provided mandatory return to a traditional pay plan position. He believed that the SHC was not inconsistent with the purpose of an SES contract, and sought to allow the state to retain employees with expertise in their area.

19. In Mr. Wells' opinion, the SES contract with the SHC gave Complainant a right to return to the traditional classified pay plan. A right to return is a right to return to a position, not necessarily the same position occupied within SES. He intended to create the right to return to a vacant position or unoccupied position, achieved through the creation of a new position in the Management class, if necessary.

20. Mr. Wells believed that the required waiver in SES contracts was to give up retention rights, or the right to displace another employee in the event of a layoff.

21. Mr. Wells presented the contract form, including the SHC, to the Executive Directors at a Governor's cabinet meeting in May or June 2006. The meeting was attended by the Governor and the Governor's Chief of Staff. Mr. Wells advised the Executive Directors that they could decide whether to use the form of contract containing the SHC. The use was not mandatory and was left to the discretion of the Executive Directors. Complainant attended this meeting and received a form of the contract including the SHC. Mr. Wells discussed the SHC language at the cabinet meeting and said that the language was created to assure continued employment, and that there should be an absolute right to return to the traditional pay class in the event that a person's SES contract was not renewed.

22. Complainant thereafter provided a copy of the SES contract to the Human Resources (HR) Director for DOLA, and had a brief conversation with her regarding Mr. Wells' presentation. The HR Director did not indicate that the SHC language posed a problem. Shortly before July 1, 2006, Complainant instructed the HR Director to prepare a 2006-07 SES contract for herself and another employee based on the form provided by Mr. Wells to the Executive Directors at the cabinet meeting. Complainant drafted her 2006-07 SES contract with the maximum salary allowable for an SES employee, approximately $132,000 per year.

23. Complainant did not want to sign the contract as both the employee and the Executive Director. She inquired with Mr. Wells, who instructed her to have the Governor's Chief of Staff execute the contract on behalf of the Governor and state.

24. Complainant sent the contract to Bob Lee, the Governor's Chief of Staff. Mr. Lee approved and executed the contract on behalf of DOLA. Complainant did not have any discussions with Mr. Lee in which she negotiated any specific terms in the contract. Complainant also signed the contract.

25. At the time of executing the contract, Complainant believed that the contract and the SHC gave her a right to return to the traditional classified pay system. She believed that she had not waived her right to continued employment. Complainant further believed that termination "for cause" was required. If the SHC had not been included, Complainant would not have executed the 2006-07 SES contract. Rather, she would have returned to the traditional pay class and remained a Division Director under the Management profile class. This rationale was based on the fact that there was going to be a change in Administrations, leading to uncertainty in the position.

26. In fiscal year 2006-07, the majority of Executive Directors declined to use the SHC in the SES contracts. Of the 13 state agencies which used the SES program, 5 agencies included the SHC in their contracts.[7]

Termination of Complainant's state employment

27. On August 22, 2006, Complainant resigned her position as Acting Director of DOLA, but continued in the position as Division Director for the Division of Local Government.

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[7] The five departments were the Department of Transportation, DPA, Department of Revenue, Department of Human Services, and DOLA.

28. In the November 2006 election, Bill Ritter was elected to the position of Governor.

29. Governor Ritter selected Susan E. Kirkpatrick for the position of DOLA Executive Director.

30. Governor Ritter selected Richard Gonzales for the position of State Personnel Director.

31. When Governor Ritter assumed office in early 2007, his Administration became aware that some SES contracts for 2006-07 contained the SHC. The Governor's legal counsel provided legal advice to Executive Directors about the legality of the SHC.

32. On February 20, 2007, Ms. Kirkpatrick issued Complainant a letter stating that the Ritter Administration would not honor the SHC, and as a result, she should not rely on it. The letter stated that the SHC was contrary to state statute, administrative rules, and the overall purpose of the SES program. Additionally, the letter stated that decisions about the renewal of her SES contract would be made at a later date. Similar letters were sent to SES employees in other agencies whose contracts included the SHC.

33. Complainant requested a meeting with Ms. Kirkpatrick to discuss her job performance and obtain a personnel evaluation under the DPA guidelines concerning evaluation of SES employees. At the meeting, Ms. Kirkpatrick told Complainant that she would not give her a written evaluation, but informed her that her work was of good quality. Complainant asked Ms. Kirkpatrick whether her SES contract would be renewed. Ms. Kirkpatrick responded that Complainant was a political appointee, and that the Governor had not yet made a decision.

34. In considering whether to renew Complainant's SES contact, Ms. Kirkpatrick considered Complainant's leadership at DOLA and her administration of homeland security grant funds. During Complainant's tenure, the federal and state governments conducted audits of homeland security grant practices and found serious lapses, requiring the state to repay millions of dollars in grant funds. Ms. Kirkpatrick concluded that renewing Complainant's SES contract would not be in the best interest of the state.

35. On April 30, 2007, Ms. Kirkpatrick presented Complainant with a letter stating that Complainant's SES contract would not be renewed, and that at the expiration of the SES contract, she would be separated from state service. Complainant was not offered reinstatement to another position in DOLA.

36. Ms. Kirkpatrick indicated to Complainant that she could take administrative leave with pay through the end of her employment on June 30, 2007. Complainant declined this offer.

37. Complainant filed a timely appeal with the Board and the State Personnel Director.

38. Prior to the conclusion of Complainant's employment, there existed a vacant position in the Management class entitled DOLA Chief of Operations. Complainant met the minimum qualifications for the position, and had been certified to the Management class. The job was announced on June 26, 2007. Complainant did not apply for the Chief of Operations position.

39. On September 28, 2007, Complainant's position as Director of Division of Local Government was announced. Complainant did not apply for the position.

40. Complainant was offered no employment with DOLA in 2007 or thereafter.

41. The separation paperwork completed by Ms. Kirkpatrick stated that Complainant was not eligible for reemployment.

42. Complainant currently serves as a County Commissioner for Weld County.

DISCUSSION

I. ISSUES ON REMAND

The Order on Summary Judgment resolved the three issues within the scope of the Court of Appeals' remand order. The Discussion below is substantially similar to the legal analysis section of the Order on Summary Judgment.

A. The SHC of the 2006-07 SES contract sought to provide Complainant with more than reinstatement rights – it was intended to provide her with the right to a vacant non-SES position for which she was qualified.

1. The Colorado Court of Appeals held that the SHC was ambiguous as to what it meant to return Complainant to the "traditional classified pay plan." *Kirkmeyer II*, at 24-27. The Court held that the parties could have intended one of three things: (1) that upon timely notice and expiration of her SES contract, Complainant would be returned to the position she held before joining the SES, if it was vacant; (2) she would be returned to any vacant position in which she had been certified; or (3) her return to any position would be based on the right to compete, but subject to the appointing authority's discretion (reinstatement rights only).[8] *Id.* at 27.

2. The Court of Appeals has directed the Board to first ascertain all rights the parties intended for Complainant to have under the SHC. *Id.* The Court observed that the intent inquiry may be complicated by the fact that Complainant was Acting DOLA Executive Director at the time of the subject contract, and that no arms-length negotiation of the SHC occurred. *Id.* Extrinsic or parol evidence is necessary to discern the meaning of the SHC because it is ambiguous. *Id.; Dorman v. Petrol Aspen, Inc.,* 914 P.2d 909, 911-12 (Colo. 1996).

3. The primary goal of contract interpretation is to determine and give effect to the intent of the parties. *Moland v. Industrial Claim Appeals Office*, 111 P.3d 507, 511 (Colo. App. 2004); *Ad Two, Inc. v. City and County of Denver*, 9 P.3d 373, 376 (Colo. 2000). In the face of contract ambiguity, Colorado courts have consistently looked to the intent of the parties as the primary means of resolving the ambiguity. *Moland*, 111 P.3d at 511. Thus, if the parties' intent cannot be derived from the plain language of the contract, then parol or extrinsic evidence should be considered from which the intent may be inferred. *Id.* Only absent such evidence or

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[8] The term "reinstatement" is defined as the "discretionary appointment of a former or current employee to a class in which the person was certified." Board Rule 4-11, 4 CCR 801. By its terms, reinstatement is subject to the discretion of the appointing authority. *Kirkmeyer II*, p. 6; Board Rule 4-11.

intent may a court, as a last resort, apply the principle of construing the ambiguous language against the drafter. *Id.*

4. Extrinsic evidence was provided through the form of affidavits, exhibits, discovery responses, and deposition transcripts attached to the motions for summary judgment. Neither party contended that an evidentiary hearing was required to determine this first issue.

5. Critically, in its summary judgment briefing, Respondent conceded that the SHC was intended to provide Complainant with more than reinstatement rights. In particular, Respondent stated:

> [t]he discovery responses, admissions, and deposition testimony indicate that the SHC was intended to provide Complainant and other SES employees **an absolute right to a position in the traditional classified system**. Respondent can not dispute the intended meaning of the SHC since Respondent, despite being the other party to the SES Contract, was not involved in contract formation. That is Complainant prepared her own SES Contract and did not negotiate any of the terms with a representative of Respondent. Thus, **any question of fact as to the meaning of the SHC is easily resolved**. (Respondent's Motion for Summary Judgment, pp. 16-17) (internal references omitted) (emphasis added).

6. Consistent with Respondent's position, Complainant stated that the SHC was intended to provide Complainant with a right to any vacant position in the Management class for which she was qualified. If no such vacant position existed at the time her contract was not renewed, Complainant believed she was entitled to any newly created position in the Management class. The right to a position was conditioned on the existence of an available vacant position or sufficient funds to create a vacant position. (Complainant's Response, p. 4). Complainant does not believe that the SHC provided her with retention rights, or "bumping" rights, to displace another employee in the event of layoff. *See Kirkmeyer III*, p. 14, n.4, (at oral argument before the Court of Appeals, Complainant "conceded that under the SHC she does not assert any right to bump an incumbent employee, but only to be placed into a vacant position"); *see also* pp. 19-20 ("Kirkmeyer does not assert bumping rights"). Therefore, despite the SHC, Complainant "assumed the risk that her state employment would end if no traditional pay plan position in a class to which she had been certified was vacant when her third SES contract expired." *Id.* at 20.

7. Based on Respondent's concession as to the intent of the SHC,[9] the undisputed facts, including the extrinsic evidence regarding the parties' intent, and *Kirkmeyer I - III*, the ALJ finds that the intent of the SHC was to guarantee Complainant a return to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified, if the contract was not renewed. The position would be compensated at a salary range which would be the highest level of the class, or the salary being paid Complainant under the SES contract, whichever was lower. Further, as of June 30, 2007, the undisputed facts demonstrate that there was a vacant position in the Management class for which Complainant met the minimum qualifications. This position was DOLA Chief of Operations.

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[9] At the September 26, 2012 oral argument, Respondent also acknowledged that it could not dispute the intent of the SHC because it was not involved in the provision's drafting or negotiation.

1. The other provisions of Complainant's 2006-07 SES contract did not negate this intent.

8. Respondent asserts that the SHC contradicted other terms in Complainant's 2006-07 SES contract. (Respondent's Motion for Summary Judgment, p. 26). Respondent argues that the contract contained various paragraphs that mirrored the Board Rules and Director's Procedures governing SES contracts, and that any absolute right to a job in the traditional classified system directly contravened these terms.

9. In particular, paragraph 4 mirrored Director's Procedure 2-11(C); paragraph 5 mirrored Director's Procedure 2-11(D); and paragraph 7 mirrored Board Rule 2-13. (Respondent's Motion for Summary Judgment, pp. 26-27).

10. Resolution of this issue may therefore be resolved by determining whether the SHC violates Director's Procedure 2-11 or Board Rule 2-13, 4 CCR 801. This issue is discussed in section C herein.

11. Complainant deliberately chose the version of the SES contract that Mr. Wells distributed at the spring 2006 cabinet meeting containing the SHC. She testified that due to the upcoming change in Administration, she would not have entered into the SES for 2006-07 without the assurances she believed that the SHC provided.

12. Additionally, to the extent the SHC conflicts with paragraph 4 of the 2006-07 SES contract, the SHC controls because the SHC states that it applies "without regard to paragraph 4 above." This language evinces the intent that to the extent the SHC conflicted with paragraph 4, the SHC controlled. *See Holland v. Board of County Commr's of Douglas County*, 883 P.2d 500, 505 (Colo. App. 1994) (specific contract clauses control over general clauses).

13. Mr. Wells, who drafted the SHC, also testified that the SHC version of the 2006-07 SES contract was intended to provide Complainant with such rights. In particular, Mr. Wells testified that "there is no way this provision would allow the returning person to violate the rights and property rights in a job that someone else already had." Respondent did not dispute this interpretation because it was not actively involved in the contract formation or negotiation process.[10]

14. In its response brief, Respondent argued that Mr. Wells' intent is not controlling because he was not a party to the contract. (Respondent's Response, p. 3). Respondent relies on *Moland v. Industrial Claim Appeals Office*, 111 P.3d 507, 511 (Colo. App. 2004), which expresses the general rule that in the face of ambiguity, courts look to the intent of the parties as the primary means of resolving ambiguity. Generally, however, the parties draft the contract. Here, there is no dispute that Mr. Wells, as the State Personnel Director, drafted the SHC. As the drafter of the subject provision, Mr. Wells' intent is relevant, particularly when Complainant's interpretation and understanding of the contract were based on Mr. Wells' intent. Moreover, Respondent has not disputed that this was the intent of the parties. Accordingly, although Mr. Wells' intent is not binding, it is relevant and probative evidence.

15. Therefore, the ALJ finds that as a whole, Complainant's 2006-07 SES contract was intended to provide Complainant with the right to an unoccupied position in the traditional

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[10] It should be noted that the Governor's Chief of Staff executed the contract on behalf of the state, however.

classified pay system in the Management class for which Complainant was qualified, if the contract was not renewed.

2. Respondent's public policy argument is subsumed in its argument that the SHC violates Director's Procedures and Board Rules.

16. In its motion for summary judgment, Respondent argued that the SHC violates public policy because it is contrary to law. Contract provisions that violate public policy may be declared void and unenforceable. *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999). Sources of public policy include constitutions, statutes, and administrative regulations. *Rocky Mt. Hosp. & Medical Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996).

17. The Court of Appeals has held that on remand, the Board may not determine whether the SHC conflicts with § 24-50-104(5), C.R.S., the SES statute. *Kirkmeyer III*, pp. 15, 21-22 (holding that the statute prohibited an employee's return to the traditional classified pay plan only while the employee served in the SES, and that the statute therefore did not void the SHC); *Kirkmeyer II*, p. 28. This limitation does not permit the Board to determine whether the SHC violated the statute or the legislative intent of the SES program, because the intent behind the SES was embodied in the statute.

18. However, the SHC could still be found to violate public policy if it is contrary to the Director's Procedures or Board Rule. *Mariani*, 916 P.2d at 525. This issue is discussed in section C herein. Given that the Board may not consider whether the SHC violates the SES statute, Respondent's argument that the SHC violates public policy necessarily hinges on whether the SHC violates Director's Procedure 2-11 or Board Rule 2-13. Accordingly, the public policy argument is subsumed within section C below.

B. Complainant did not waive her rights under the SHC, and Complainant's claims are not barred by the doctrine of estoppel.

1. Waiver

19. The Colorado Court of Appeals held that if the Board decides that Complainant has additional rights under the SHC, then it must address Respondent's argument that waiver (including Board Rule 1-19), estoppel, or both prevent broader enforcement of the SHC. *Kirkmeyer II*, p. 28. Based on the conclusion above regarding additional rights provided under the SHC, this decision addresses Respondent's waiver and estoppel affirmative defenses.

20. In general, waiver involves factual determinations. *Kirkmeyer II*, p. 21. In determining waiver, the Board must consider Board Rule 1-19. *Id.* Board Rule 1-19 provides that "[a]n employee may voluntarily and knowingly waive, in writing, all rights under the state personnel system, except where prohibited by state or federal law."

21. In determining waiver, the Board is also governed by common law waiver principles. Waiver is the intentional relinquishment of a known right or privilege. *Dept. of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). A waiver generally requires an unequivocal act on the part of the party against whom waiver is asserted. *Id.* Therefore, a waiver should be free from ambiguity. *Id.*; *Venard v. Dep't of Corrections*, 72 P.3d 446, 450 (Colo. App. 2003); *Barker v. Jeremiasen*, 676 P.2d, 1259, 1262 (Colo. App. 1984).

22. Thus, under judicial precedent and Board Rule 1-19, Complainant waived rights under the state personnel system only if she voluntarily, knowingly, and intentionally relinquished such rights in writing.

23. Respondent asserts that Complainant waived any rights the SHC afforded by executing the 2006-07 SES contract. In particular, Respondent contends that paragraphs 4, 5 & 7 reveal Complainant's intent to waive her rights to return to the traditional pay plan in the event the SES contract was not renewed.

24. The presence of the SHC in the 2006-07 SES contract defeats Respondent's argument that Complainant intended to waive the right to return to the traditional classified pay system in the event the contract was not renewed. The SHC expressed the intent for Complainant to return to the traditional pay plan if the contract was not renewed. In *Kirkmeyer II* and *Kirkmeyer III*, the Court of Appeals held that the SES contract was ambiguous. Under these holdings, Respondent may not rely solely on the SES contract as a basis for waiver.

25. Moreover, the extrinsic evidence produced by the parties in the form of affidavits, exhibits, discovery responses, and deposition testimony demonstrates that the purpose of the SHC was to provide Complainant with a right to return to the traditional classified pay plan provided a vacant Management class position existed or was created through additional funding. This evidence of intent also defeats Respondent's contention that Complainant waived her right to return to the traditional classified pay plan when she entered into the 2006-07 SES contract.

26. In contrast, Complainant concedes that she waived the right to displace other employees from occupied positions. (Complainant's Second Motion for Summary Judgment, p. 4). *See also Kirkmeyer III*, p. 20 ("Thus, despite the SHC, Kirkmeyer assumed the risk that her state employment would end if no traditional pay plan position in a class to which she had been certified was vacant when her third SES contract expired"). Additionally, under the terms of the SES contract, Complainant waived the right to any salary increase, the right to appeal a reduction in salary from one year to the next, and the right to appeal removal of the position from the SES. These limited waivers do not amount to a knowing, voluntary full waiver of all rights under the state personnel system.

27. Respondent urges that Complainant waived her rights because knowledge of the Board Rules and Director's Procedures is imputed to Complainant as an appointing authority, and she should have known that the SHC was illegal and unenforceable. Director's Procedure 1-11, 4 CCR 801 (all appointing authorities are accountable for compliance with the rules and state and federal law).

28. This argument is unavailing. First, the issue of whether the SHC is lawful is the crux of this appeal, and there has not been a final decision as to the legality of the SHC. Second, Respondent did not produce any evidence indicating that at the time Complainant executed the 2006-07 SES contract, she had been told or informed that the SHC may not be lawful. Board Rule 1-19 requires a written, voluntary, knowing, and intentional relinquishment of rights.

29. In summary, Complainant argued that the undisputed material facts demonstrate that she is entitled to summary judgment in her favor on the waiver issue. Respondent did not produce facts through affidavit, exhibit, discovery responses, deposition testimony, or otherwise to demonstrate the existence of any material facts precluding relief for Complainant on this

issue. Accordingly, the ALJ concludes Complainant's claims are not barred by Board Rule 1-19 or the doctrine of waiver.

2. Estoppel.

30. Under Colorado law, there are four basic elements to a claim of estoppel: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must detrimentally rely on the other party's conduct. *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).

31. Contract estoppel exists when a person seeking to enforce the contract by words or conduct had a duty to speak and protect the other party and represented to the other party that the party's breach of contract would not be enforced and that the other party reasonably relied upon that representation and the other party materially changed his or her position and the change was to the other party's disadvantage. *Barker v. Jeremiasen*, 676 P.2d, 1259, 1262 (Colo. App. 1984).

32. In *Kirkmeyer II*, the Court of Appeals observed that in determining estoppel, the Board may consider what Complainant knew or should have known about the state personnel system based on her position with DOLA.

33. Respondent contended that Complainant was not entitled to summary judgment in her favor on this issue because Complainant was an appointing authority, and therefore was deemed to be aware of the applicable law under Director's Procedure 1-11. However, as set forth above in section (B)(1), there has to date been no final determination that the SHC was illegal and unenforceable. Second, there is no evidence that Complainant personally believed that the SHC was contrary to law. Indeed, she provided deposition testimony stating that she would not have agreed to the 2006-07 SES contract without the SHC.

34. In her second motion for summary judgment, Complainant produced facts demonstrating that she had relatively limited exposure to personnel matters and relied on Mr. Wells, the DOLA HR Director, and the Attorney General's Office to advise her. Further, prior to executing the 2006-07 SES contract, Complainant did not receive information from anyone indicating that the SHC was illegal or unenforceable. Complainant therefore did not know relevant facts that were not known by Respondent.

35. Respondent did not produce evidence that Complainant knew that the SHC was legally infirm and sought to so deceive Respondent. Complainant relied on Mr. Wells, who invited department heads to use the SHC in their departments' 2006-07 SES contracts. She provided the contract to the Governor's Chief of Staff, who had also attended the cabinet meeting in which Mr. Wells presented the SHC. The Chief of Staff, as the agent of the Governor, executed the contract on behalf of the state and DOLA. *See Cordillera Corp. v. Heard*, 592 P.2d 12, 14 (Colo. App. 1978) (a party is presumed to know the contents of a contract signed by it). No evidence was presented to indicate that Complainant misled or deceived the Chief of Staff.

36. Additionally, Respondent did not produce evidence indicating that it was ignorant of the true facts. Respondent asserts that it did not know Complainant guaranteed herself a right to return to the classified system because she did not engage in contract negotiations

regarding the SHC with DOLA. However, the undisputed facts demonstrate that the Governor's Chief of Staff executed the agreement on behalf of the state. Mr. Lee had the right and ability to read the SES contract before executing it, and ratified and approved it by signing the agreement.

37. Therefore, Complainant's claims are not barred by the doctrine of estoppel.

C. The SHC conflicts with Director's Procedure 2-11, but does not conflict with Board Rule 2-13.

38. In *Kirkmeyer II*, the Court of Appeals held that if the Board rejects Respondent's waiver and estoppel defenses, then it must address DOLA's argument that Board Rules 2-11[11] and 2-13 also preclude enforcement of the SHC.

1. The SHC conflicts with Director's Procedure 2-11.

<u>The Board has jurisdiction to interpret Director's Procedure 2-11.</u>

39. As a threshold matter, in her response to Respondent's motion for summary judgment, Complainant challenged the Board's jurisdiction to examine Mr. Wells' determination that the SHC was consistent with Director's Procedure 2-11 (Response, p. 16). Complainant argues that the power of the State Personnel Director is distinct from the Board's power, and that the State Personnel Director had the constitutional and legal authority to interpret his own directives. *See* § 24-50-104(5), C.R.S. (the State Personnel Director is charged with overseeing pay class matters). In essence, Complainant challenges the Board's jurisdiction to interpret Director's Procedure 2-11 or to rule on Mr. Wells' interpretation of the Director's Procedure.

40. The Board has jurisdiction and the authority to interpret Director's Procedures and rule on a department's interpretation of the Director's Procedures in a personnel action. In *Spahn v. State Dep't of Personnel*, 615 P.2d 66, 68 (Colo. App. 1980), the Colorado Court of Appeals held that the Board is responsible for reviewing the actions of the State Personnel Director. *See also* Colo. Const. art. XII, § 14(4) (in administering the state personnel system, the State Personnel Director is charged with complying with all applicable Board Rules and Director's Procedures); Board Rule 1-1, 4 CCR 801 (the purpose of the Board Rules and Director's Procedures is to provide a sound, comprehensive system of human resources management for the employees in the state personnel system).

41. If the Board did not have the authority to interpret Director's Procedures, the Board would be unable to effectively review the actions of the State Personnel Director, as authorized in *Spahn*. Further, the State Personnel Director would have virtually unfettered authority to interpret and apply Director's Procedures, contrary to the purpose of the Board Rules and Director's Procedures to provide a comprehensive system of human resources management. *See also Koinis v. Colorado Dep't of Public Safety*, 97 P.3d 193, 195 (Colo. App. 2003) (the Board "is a constitutionally created state agency with considerable expertise in personnel matters").

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[11]The Court of Appeals erroneously referred to Director's Procedure 2-11 as Board Rule 2-11. Director's Procedure 2-11 was enacted through formal rulemaking by the State Personnel Director. The Procedure was in place prior to Mr. Wells' tenure as State Personnel Director.

42. Lastly, although it characterized Director's Procedure 2-11 as a Board Rule, the *Kirkmeyer II* Court has directed the Board to apply the provision to the SHC. *Kirkmeyer II*, p. 28.

Application of Director's Procedure 2-11 to the SHC.

43. Both parties moved for summary judgment in their favor on the application of Director's Procedure 2-11 to the SHC. In her third motion for summary judgment, Complainant argued that the SHC is consistent with Director's Procedure 2-11, and that she was entitled to summary judgment on that issue. Conversely, Respondent asserted that the SHC conflicts with Director's Procedure 2-11, and that Respondent should be awarded summary judgment on this issue. In addition to response briefs, the parties were permitted to file supplemental briefing on the application of Director's Procedure 2-11 and Board Rule 2-13 following the oral argument.

44. Principles of statutory construction should be applied in construing the Director's Procedures and Board Rules. *Schlapp v. Colorado Dep't of Health Care Policy and Financing*, 2012 COA 105, ¶ 9 (Colo. App. 2012); *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657 (Colo. App. 1995). The words and phrases of the rules are to be construed according to their familiar and generally accepted meaning. *Halverstadt*, 911 P.2d at 657; § 2-4-101, C.R.S.

45. Director's Procedure 2-11(C) states:

> As part of the negotiation process and in consideration for a salary that exceeds the maximum of the management class, an employee entering into a senior executive service contract may be required to waive all appeal, disciplinary, grievance, and other rights and privileges, of the state personnel system with respect to the expiration of the non-renewed contract. If the department head gives the employee written notice of the non-renewed contract by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which qualified.

Director's Procedure 2-11 (D) states:

> If the department head has not given the employee timely written notice of non-renewal and no new contract is provided to the employee by July 1, the employee is removed from the senior executive service pay plan and returned to the traditional classified pay plan. The employee's salary shall be set at either the contract salary or statutory salary lid, whichever is lower. If a contract is provided and the employee fails or refuses to sign by July 1, the employee shall be deemed to have resigned effective June 30.

46. The applicable Technical Assistance Bulletin published by DPA to assist HR professionals in administering the SES Board Rules and Director's Procedure provided:

> In exchange for the higher potential salaries, employees under SES performance contracts are not afforded any of the following rights: retention or reemployment; appeal of the State Personnel Director's decision to move a position into or out of the SES; any pay adjustments

> such as survey and performance salary adjustments; and appeal of the salary from one contract year to the next.
>
> Additionally as provided by Rule 2-11(C), as part of the performance contract negotiation process and in consideration for a salary that exceeds the maximum of the Management class, an employee is required to waive certain appeal, disciplinary, grievance, and other rights and privileges of the state personnel system. The waiver of these rights will be specified in the annual contract as shown in the contract cover sheet attached to this document. Department heads may permit specific exceptions to the waiver of rights and will ensure each SES employee is reasonably informed of the waiver in the contract.
>
> Nov. 2005 Technical Assistance Bulletin, p. 3.

47. The first sentence of Director's Procedure 2-11(C) provides that "as part of the negotiation process" an employee entering an SES contract may be required to waive all appeal and other rights of the state personnel system with respect to the expiration of the non-renewed contract. The first clause provides that the waiver of rights be part of the negotiation process, e.g., before the parties execute the SES contract. This interpretation is consistent with the 2005 version of the Technical Assistance Bulletin, which provided that the waiver of the rights "will be specified in the annual contract."

48. The first sentence of subpart (C) also states that the employee "may" be required to waive all appeal and other rights of the state personnel system with respect to the expiration of the non-renewed contract. The term "may" is generally permissive, rather than mandatory. *Schlapp v. Colorado Dep't of Health Care Policy and Financing*, 2012 COA 105, ¶ 23 (Colo. App. 2012); *Colorado Dep't of Transportation v. First Place, LLC*, 148 P.3d 261, 264 (Colo. App. 2006); *see also Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may" first and second as "[t]o be permitted to" and "[t]o be a possibility," respectively). Had the waiver of all rights under the state personnel system been a prerequisite for an SES contract, the Director's Procedure would have used the term "shall." *Id.* Further, this interpretation does not conflict with the 2005 Technical Assistance Bulletin,[12] which provided that an "employee is required to waive "certain" rights under the state personnel system in consideration for a salary that exceeds the maximum of the Management class. The Bulletin indicates that an employee was not required to waive all rights, but only certain rights that would be specified in the contract.

49. In short, the first sentence of Director's Procedure 2-11(C) does not mandate the waiver of all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system with respect to the expiration of a non-renewed contract.

50. Complainant's 2006-07 SES contact, which contained the SHC, included a partial waiver of rights. As set forth above in section (B)(1), under the SES contract and the SHC, Complainant waived the right to displace other employees and certain other rights.[13]

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[12] If there is a conflict between the Director's Procedure and the Technical Assistance Bulletin, the terms of the Director's Procedure apply.

[13] Based on Complainant's waiver of certain rights, the Court of Appeals found that there was adequate consideration given in the contract. *Kirkmeyer III*, pp. 19-20.

51. The first sentence of Director's Procedure 2-11(C) does not in and of itself prohibit the SHC because it does not mandate the waiver of all rights under the state personnel system. This does not, however, end the inquiry on whether the SHC conflicts with Director's Procedure 2-11.

52. Critically, the second sentence of subpart (C) states that if the department head gives the employee written notice of the non-renewed contract by May 1, the department head "shall" either separate the employee from state service upon expiration of the contract on June 30, or appoint the employee to a vacant non-senior executive service position for which the employee is qualified.

53. Likewise, under Director's Procedure 2-11(D), in the event the department head did not give the employee timely written notice (by May 1), if no new contract was executed, the employee is removed from the SES pay plan and returned to the traditional classified pay plan.

54. Thus, under Director's Procedure 2-11, if timely written notice was not provided and no new SES contract was executed, the employee was to be returned to the traditional classified pay plan. The appointing authority would have no discretion. On the other hand, if timely written notice was provided and no new SES contract was executed, the department head would have the discretion to return the employee to the traditional classified pay plan, or to separate the employee from state service.

55. There is no dispute that Respondent provided timely written notice to Complainant that her SES contract would not be renewed when it expired on June 30, 2007. Further, no new SES contract was executed.

56. Under the second sentence of subpart (C), because timely written notice was given, the DOLA Executive Director had the discretion to either separate Complainant from state service, as occurred here, or to appoint Complainant to a vacant non-SES position for which she was qualified. Under this plain language, the choice was Ms. Kirkpatrick's, as the DOLA Executive Director.

57. The SHC therefore conflicts with the second sentence of Director's Procedure 2-11(C). As set forth above, the SHC was intended to provide Complainant with the right to a vacant non-SES position in the Management class even if timely notice was provided, and even if the Executive Director did not elect to offer Complainant such a position. The SHC sought to remove the discretion of the Executive Director, and mandate Complainant's placement in an unoccupied non-SES Management class position. This clause directly conflicts with the final sentence of Director's Procedure 2-11(C).

58. In its briefing and at oral argument, Complainant argued that the decision to reinstate Complainant was made when the SHC was included by Complainant in the contract and approved and ratified by the Governor's Chief of Staff. Therefore, Complainant reasons that the SHC was consistent with Director's Procedure 2-11(C). The second sentence of subpart (C), however, states that "[i]f the department head gives the employee written notice of the non-renewed contract by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which qualified." Under the more reasonable reading of this provision, the term "department head" refers to the same individual. If that individual gives timely written notice of non-renewal, that individual has the discretion to either separate the employee from state service or appoint the employee to a vacant position.

Construing the second "department head" term to be the department head at the time the SES contract was entered into, before any decision was made as to renewal, is a strained interpretation contrary to the language of the regulation.

59. In interpreting a statute or rule, all parts shall be considered, and courts should harmonize the provisions. *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657-58 (Colo. App. 1995). Here, under this interpretation, there is no conflict within Director's Procedure 2-11(C). The first sentence of subpart (C) does not mandate the waiver of all state personnel system rights. This clause permits the appointing authority and the SES employee to negotiate regarding certain rights. The second sentence provides an express qualification – in the event timely notice of non-renewal is provided, the Executive Director has the discretion to reinstate the employee or to separate the employee from state service.

60. Accordingly, the ALJ concludes the SHC conflicted with Director's Procedure 2-11, and was therefore unlawful.

2. The SHC does not conflict with Board Rule 2-13.

61. Board Rule 2-13 provides:

> Any employee entering or remaining in the senior executive service pay plan on or after July 1, 2003, waives retention and reemployment rights with respect to any other position in the personnel system pursuant to Board Rule 1-19, but shall have reinstatement privileges with respect to any vacant position in the employee's current or previously certified class.

62. The terms "retention," "reemployment," "reinstatement," and "layoff" are terms of art in the state personnel system.

63. "Retention rights" are the rights afforded employees following a layoff. In *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657-58 (Colo. App. 1995), the Colorado Court of Appeals held that the rules addressing retention rights are intertwined with the layoff process. In particular, the Court interpreted the term "retention" to refer to employees bumping into positions after a previous position has been abolished and also keeping positions within a class during a downsizing. The rights therefore apply when positions are abolished through layoff. *See also* Board Rule 1-66, 4 CCR 801 (defining "retention credit" as "total time credited to an employee in determining retention rights for a layoff situation"); Respondent's Motion for Summary Judgment, p. 23.

64. "Reemployment rights" are the preference rights to be rehired following a layoff. Director's Procedure 1-63, 4 CCR 801; Board Rule 4-17, 4 CCR 801; Respondent's Motion for Summary Judgment, p. 23.

65. "Reinstatement is a discretionary appointment of a former or current employee to a class in which the person was certified and either resigned or voluntarily demoted in good standing. The person may be reinstated to a related class with the same or lower grade maximum than the previously certified class." Director's Procedure 4-11; Respondent's Motion for Summary Judgment, p. 23.

66. "Layoff" refers to involuntary separation from a state classified position due to the abolishment of the position for lack of work, lack of funds, or reorganization, or displacement of

another employee exercising retention rights. Board Rule 1-55, 4 CCR 801; Respondent's Motion for Summary Judgment, p. 23.

67. Complainant argues that the terms "retention" and "reemployment" apply only to layoff situations. When an employee is in the SES system, he or she gives up the right to displace other employees or to exercise the protections afforded by Chapter 7 of the Board Rules. Complainant asserts that Board Rule 2-13 does not address vacant positions or movement from the SES pay plan into the traditional pay plan. Rather, she contends it only applies where an SES employee is subjected to a layoff during the term of the SES contract. In other words, Complainant asserts that while the SES employee may not displace other employees through the exercise of bumping rights, the employee may be returned to a traditional classified pay system position that is vacant upon agreement between the Executive Director and the employee in the SES contract.

68. In short, Complainant argues that Board Rule 2-13 applies only to layoff situations governed by Chapter 7 of the Board Rules, and therefore does not preclude the SHC. In contrast, Director's Procedure 2-11 applies to non-layoff situations, such as when an SES contract is not renewed.

69. Respondent asserts that Board Rule 2-13 is intended so if there is a layoff and SES positions were eliminated, the SES employee would not have retention rights and reemployment rights, but would have reinstatement privileges. (Respondent's Response, p. 30). Retention rights not only include the right to bump other employees, but also include the rights to vacant position in the current certified class. Board Rule 7-18(A)(1), 4 CCR 801. Respondent contends that the SHC abrogated Rule 2-13 by expanding the circumstances beyond a layoff under which an employee may be retained or reemployed. (Respondent's Response, p. 30).

70. In essence, Respondent argues that Board Rule 2-13 conflicts with the SHC because retention rights include the right to move into a vacant position.

71. There is no dispute that a "layoff" did not occur in this case. Complainant's position was not eliminated for lack of work, funds, or reorganization. Rather, Complainant's SES contract was not renewed, and the position was ultimately filled by another individual.

72. Against this backdrop, the ALJ concludes that Board Rule 2-13 applies only to layoff situations. The terms "retention" and "reemployment" are terms of art that apply to and are triggered by layoff situations. The terms are employed in Chapter 7 of the Board Rules, applicable to layoffs. Board Rule 2-13 applied to a layoff affecting an SES position. In contrast, Director's Procedure 2-11 addressed SES contract non-renewal. *See also* Nov. 2005 version of Technical Assistance Bulletin, p. 4 (SES employees do not have rights under the layoff and reemployment provisions of the State Personnel Board Rules).

73. The fact that retention rights include the right to move into a vacant position (Board Rule 7-18) does not indicate that retention rights apply in non-layoff situations. While the movement to a vacant position is the preferred option when a certified employee is laid off from another position, the ability of a laid off employee to move into a vacant position does not broaden the scope of retention rights beyond layoffs. Therefore, Board Rule 2-13's prohibition against SES employees possessing retention rights and reemployment rights does not apply here, because no layoff occurred.

74. Accordingly, the ALJ concludes that the SHC does not conflict with Board Rule 2-13.

II. ISSUES RAISED BY COMPLAINANT FOLLOWING ORDER ON SUMMARY JUDGMENT.

The ALJ conducted a status conference on November 29, 2012, to determine whether an evidentiary hearing or additional briefing would be required for the Board to fully resolve the three issues on remand. Complainant filed a document entitled "Issues for Consideration in Status Conference" prior to the status conference. This pleading identified three issues which Complainant contended the Board needed to resolve in this proceeding.

At the conclusion of the status conference, the ALJ vacated the December 4, 2012 evidentiary hearing, and set a briefing schedule on the three issues identified by Complainant. As set forth in more detail in the Procedural Background section above, the parties timely filed memorandum briefs addressing the three issues. The ALJ issued an Order Regarding Complainant's Memorandum Relating to Issues Following Order on Summary Judgment on January 4, 2013. The discussion below is substantially similar to the January 4, 2013 Order.

A. The Board does not have jurisdiction over Complainant's constitutional claims. Those claims have been preserved for the Denver District Court.

Complainant contends that her separation from state service was unconstitutional under Colo. Const. art. XII, § 13(8). The Colorado Supreme Court has interpreted this provision as creating a property interest in continued employment for certified state employees. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707, n.13 (Colo. 1994); *Colorado Dep't of Human Services v. Maggard*, 248 P.3d 708, 712 (Colo. 2011). The Order on Summary Judgment found that Complainant's claims are not barred by Board Rule 1-19 or the doctrine of waiver. Complainant argues that Respondent's action in not placing her into a vacant Management position at the conclusion of her 2006-07 SES contract is unconstitutional.

Respondent asserts that Complainant's constitutional claims are outside the scope of the Court of Appeals' remand order and the Board's jurisdiction. In particular, Respondent argues that the Court of Appeals assigned resolution of Complainant's constitutional argument regarding the unified merit-based personnel system and protected property interest in the Denver District Court, and that the constitutional claims are therefore outside Board jurisdiction.

Along with the Board appeal, Complainant instituted a Denver District Court action in 2007. In this lawsuit, Complainant argued that the SHC in her 2006-07 SES contract implemented her rights to continued employment under the Colorado Constitution, and that the SHC must be honored. Following the District Court's grant of DOLA's motion for summary judgment, on appeal, Complainant argued that if § 24-50-104(5)(c), C.R.S., Director's Procedure 2-11(C), or Board Rule 2-13 defeat the SHC, they are contrary to the unified, merit-based state personnel system, in which certified employees serve during efficient service, established by article XII, § 13 of the Colorado Constitution. *Kirkmeyer III*, at 11.

In *Kirkmeyer III*, the Court of Appeals expressly reserved Complainant's constitutional argument to the Denver District Court. The Court declined to interpret the applicable rules or decide the constitutional argument on ripeness principles, stating that "these rules will be interpreted, if necessary, in proceedings before the Board on remand from *Kirkmeyer II*, **and their constitutionality can be addressed in further proceedings before the district court**."

Id. at 22-23 (emphasis added); *see also Kirkmeyer II*, at 29 (*Kirkmeyer III* did not address Complainant's constitutional challenge concluding that it was not ripe until the Board on remand interpreted the SHC, and if necessary, whether waiver, estoppel, or the Board Rules defeated the SHC).

Similarly, in *Kirkmeyer II*, the Court of Appeals held that "if the Board concludes that Board Rules 1-19, 2-11, or 2-13, alone or in combination, defeat enforcement of the SHC, and that ruling is upheld on appeal to this court, **then Kirkmeyer may present a constitutional challenge to these rules based on her unified personnel system argument in the district court**." *Kirkmeyer II*, at 28 (emphasis added). If the Board were to decide Complainant's constitutional challenge, the order would conflict with the Court of Appeals' express mandate on remand. *See also Kirkmeyer II*, at 29-30 (once the Board's decision is final and all appeals have been exhausted, the District Court may resolve the constitutional issues raised by a Board ruling adverse to Complainant, in addition to any claims and damages that could not be obtained from the Board but are available in District Court).

Moreover, aside from the existence of the parallel District Court action, the Board does not have the authority to resolve Complainant's entire constitutional challenge. Although the Board has the authority to address the constitutionality of statutes and rules as applied to a particular personnel action, the Board lacks the authority to determine the facial constitutionality of statutes and rules it administers, or of executive conduct in administering statutes. *Horrell v. Dep't of Administration*, 861 P.2d 1194, 1198-99 & 1198, n.4 (Colo. 1993); *see also Lucchesi v. State*, 807 P.2d 1185, 1191 (Colo. App. 1990) (although there may be occasions when the record of an administrative hearing may provide a sufficient factual basis to allow a *court* to pass upon the constitutionality of a statute, based on the facts within that record, an administrative agency itself has no jurisdiction to pass upon a claim that a statute which it administers is unconstitutional) (emphasis in original); *Colorado Dep't of Public Health & Environment v. Bethell*, 60 P.3d 779, 785 (Colo. App. 2002) (administrative agencies lack jurisdiction to determine constitutionality of regulations).

The Order on Summary Judgment determined that Director's Procedure 2-11(C) precluded enforcement of the SHC. Complainant has preserved her argument that if any statute, Director's Procedure, or Board Rule defeats the SHC and Complainant's ability to remain in the state personnel system, the provision and/or the personnel action is unconstitutional. Based on the ruling in the Order on Summary Judgment that the SHC conflicted with Director's Procedure 2-11(C), and was therefore unenforceable, Complainant's constitutional claims may include an argument that Director's Procedure 2-11(C) is facially unconstitutional. Aside from the pending District Court action, the Board lacks the authority to decide the issue of whether Director's Procedure 2-11(C) is unconstitutional on its face. The Board thus lacks the authority to resolve Complainant's entire constitutional claim.

Lastly, in her May 2012 prehearing statement (pp. 2-3), Complainant acknowledged that the Board does not have the authority to decide the constitutional issue:

> Complainant does not abandon any of her arguments concerning the unconstitutionality of the SES system and potential Board rules concerning the SES system and rights of employees. Those theories are preserved, however, the Board does not have authority to decide the constitutional question.

In short, the Court of Appeals charged the Board with interpreting the SHC and, if necessary, the applicable Director's Procedures and Board Rules. Based on the undisputed

material facts, the Order on Summary Judgment interpreted the SHC, Board Rules 1-19 (waiver) and 2-13, and Director's Procedure 2-11. This Initial Decision concludes that Director's Procedure 2-11(C) defeats enforcement of the SHC. If this ruling is upheld on appeal to the Board and appellate courts, the Court of Appeals has held that Complainant may present her constitutional challenges in the Denver District Court proceeding. Further, the Denver District Court, unlike the Board, has the authority to address the full range of Complainant's constitutional claims.

B. The Board does not have jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake.

In November 2012, for the first time in this proceeding, Complainant argued that if the SHC conflicted with Director's Procedure 2-11(C) and was unenforceable, Complainant's entire 2006-07 SES contract was void due to mutual mistake. In particular, the SHC was a material term to the contract, and there is no dispute that Complainant would not have entered into the SES contract were it not for the SHC. Presumably, if Complainant's 2006-07 SES contract was declared null and void, Complainant would assert an entitlement to return to the traditional classified pay plan in the Management class.

The Board does not have jurisdiction over this claim for three reasons. First, Complainant has not demonstrated that she previously made this argument or preserved it in this appeal. This appeal has been pending for more than five years. Although there was no determination that Director's Procedure 2-11 precluded enforcement of the SHC until the November 2012 Order on Summary Judgment issued, Respondent has asserted since the outset that the SHC was not enforceable under state statute, Board Rules, and Director's Procedures. Complainant was aware of Respondent's position regarding the enforceability of the SHC since at least February 2007 (letter from Ms. Kirkpatrick to Ms. Kirkmeyer). Yet Complainant did not argue until November 2012, in the alternative or otherwise, that if the SHC was not enforceable, the entire SES contract was void. Accordingly, Complainant has not preserved this argument.

Second, the claim that the SES contract was void in its entirety is outside the scope of the Court of Appeals' remand order in *Kirkmeyer II*. The Court of Appeals expressly ordered the Board to interpret the SHC. If the SHC afforded Complainant more than reinstatement rights, the Court instructed the Board to determine if waiver or estoppel barred the SHC. If not, the Court further required the Board to apply Director's Procedure 2-11 and Board Rule 2-13 to the SHC. In these specific and detailed instructions, the Court of Appeals did not authorize the Board to determine whether the entire SES contract was void if the Board determined that the SHC was unenforceable under Board Rule or Director's Procedures. Instead, if the Board decision is upheld on appeal, Complainant may pursue her constitutional claims in District Court. *Kirkmeyer II*, p. 28.

Third, the Board does not have the authority to invalidate an entire SES contract. The Board's authority is limited to consideration of actions taken by state agencies and appointing authorities pursuant to legislation or executive rules governing such actions. *Horrell*, 861 P.2d at 1199. The Board is not a court of general jurisdiction with the authority to declare an entire contract void for mutual mistake. *See Renteria v. Colorado State Dep't of Personnel*, 811 P.2d 797, 801 (Colo. 1991) (the Board's authority is limited to reviewing actions taken by appointing authorities); Colo. Const. art. XII, § 14(3) (authorizes Board to enact rules regarding appeals from actions by appointing authorities).

In summary, the Board lacks jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake because (1) the argument was not previously made and has not been preserved, (2) the issue is outside the scope of the Court of Appeals' remand, and (3) the Board lacks the authority to invalidate an entire contract.

C. The Board does not have jurisdiction over Complainant's Supreme Executive claim.

In November 2012, for the first time in this appeal, Complainant argued that her separation from state service was unlawful regardless of the validity of the SHC because the Governor, as Chief Executive, through his Chief of Staff, executed the 2006-07 SES contract, thereby binding the State. More specifically, Complainant asserts that under Colo. Const. art. IV, § 2, the Governor is the Supreme Executive, "who shall take care that the laws be faithfully executed." According to this argument, Complainant's 2006-07 SES contract was executed by the Governor's Chief of Staff, who signed the contract on behalf of the Supreme Executive, who thereby bound the State to all of the contract's provisions, regardless of their legal validity.

The Board does not have jurisdiction over this argument for two reasons. First, Complainant has not demonstrated that she previously made this argument or preserved it in this appeal. Respondent has alleged that the SHC conflicted with state law since at least February 2007. Until November 2012, Complainant did not argue in this proceeding that the legal invalidity of the SHC did not matter because the SES contract was signed by the Governor's Chief of Staff. Accordingly, Complainant has not properly preserved this argument. Second, the Supreme Executive claim is outside the scope of the Court of Appeals' remand order in *Kirkmeyer II*.

D. Conclusions in Order Regarding Complainant's Memorandum Relating to Issues Following Order on Summary Judgment.

The Board does not have jurisdiction over the three issues raised by Complainant on November 29, 2012. First, the Board does not have jurisdiction over Complainant's constitutional claims. The Board does not have the authority to rule on the facial constitutionality of Director's Procedures. Moreover, Complainant's constitutional claims are pending before the Denver District Court. According to the Court of Appeals' opinions, Complainant's constitutional claims are to be resolved by the Denver District Court. Second, the Board does not have jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake. The Board does not have the authority to invalidate contracts due to mutual mistake. The issue is outside the scope of the Court of Appeals' remand order. Moreover, Complainant did not preserve this argument before the Board because she did not previously argue, in the alternative or otherwise, that the SES contract was void and unenforceable in the event the SHC was declared invalid. Third, the Board does not have jurisdiction over Complainant's Supreme Executive claim. This issue is outside the scope of the Court of Appeals' remand order. Further, Complainant did not preserve this argument before the Board as it was not previously made in the Board proceedings.

CONCLUSIONS OF LAW

1. Under the SHC of Complainant's 2006-07 SES contract, if the contract was not renewed, the parties intended to provide Complainant with the right to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified.

2. Complainant's claims are not barred by the doctrines of waiver or estoppel.

3. Director's Procedure 2-11(C) precludes enforcement of the SHC.

4. Board Rule 2-13 does not preclude enforcement of the SHC.

5. The Board does not have jurisdiction to review the three issues raised by Complainant following the Order on Summary Judgment.

ORDER

Respondent's action is **affirmed.** Director's Procedure 2-11(C) precludes enforcement of the SHC in Complainant's 2006-07 SES contract. Accordingly, Complainant is not entitled to the requested relief, and the appeal is therefore dismissed with prejudice.

Dated this 24th day
of January, 2013 at
Denver, Colorado.

Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 25th day of January, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

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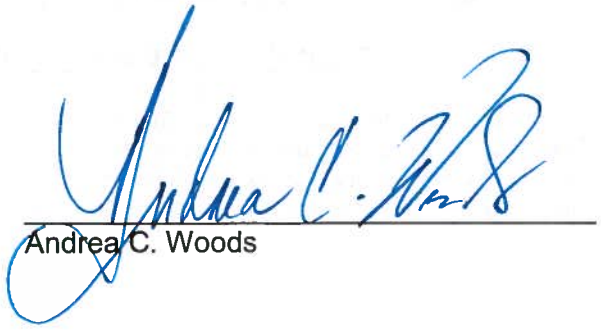


Andrea C. Woods

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007G089**

ORDER ON SUMMARY JUDGMENT

BARBARA KIRKMEYER,
Complainant,

vs.

DEPARTMENT OF LOCAL AFFAIRS,
Respondent.

This matter is before the Administrative Law Judge (ALJ) pursuant to the parties' C.R.C.P. 56 motions and briefs. Being advised, the ALJ finds and orders as follows:

INTRODUCTION

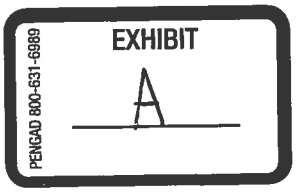
Through this appeal, Complainant seeks to be returned to the traditional classified pay plan within the state personnel system. In particular, Complainant contends that Respondent Department of Local Affairs (Respondent or DOLA) unlawfully determined that Complainant did not have the right to move into a vacant position within the Management class when Respondent elected not to renew her Senior Executive Service (SES) contract following the 2006-07 fiscal year. Complainant bases this claim on her 2006-07 SES contract, and in particular, a "safe harbor clause" (SHC) within the contract.

Respondent asserts that Complainant did not have the right to be placed into a vacant position within the traditional classified pay plan following the non-renewal of her SES contract. In particular, Respondent argues that the SHC was contrary to law and should not be enforced. Respondent also asserts that Complainant's claims are barred by the doctrines of waiver and estoppel.

This matter is before the State Personnel Board (Board) on remand from the Colorado Court of Appeals. In an unpublished decision, the Court of Appeals affirmed in part and reversed in part a Board decision. The Court remanded the matter to the Board with specific instructions. The directions on remand require the Board to:

(1) Determine all rights the parties intended for Complainant to have under the SHC of her 2006-07 SES contract;
(2) If the Board determines that Complainant had more than reinstatement rights, determine whether Complainant's claims are barred by waiver or estoppel;
(3) If the Board rejects these affirmative defenses, determine whether Director's Procedure 2-11 or Board Rule 2-13 precludes enforcement of the SHC.

The parties have filed motions for summary judgment regarding the three issues the Board may consider on remand.



RELEVANT PROCEDURAL HISTORY

1. This appeal has a lengthy procedural history. In May 2007, Complainant appealed the non-renewal of her 2006-07 SES contract to the Board and the State Personnel Director. Complainant also filed a civil action in Denver District Court, claiming breach of contract. (Respondent's Motion for Summary Judgment, Exhibit 17).

2. In the State Personnel Director proceeding, the State Personnel Director denied Complainant's request to review her separation from state service. (Respondent's Motion for Summary Judgment, Exhibit 19).

3. Complainant appealed the State Personnel Director's decision to Denver District Court, and sought a writ of mandamus and writ of prohibition under C.R.C.P. 106. This action was consolidated with the breach of contract action Complainant had previously filed in District Court. (Respondent's Motion for Summary Judgment, p. 10).

4. In February 2009, the Denver District Court issued an Order granting DOLA's motion for summary judgment and dismissing Complainant's complaint. The Order determined that the SHC was illegal and unenforceable. Complainant appealed this order to the Colorado Court of Appeals. (Respondent's Motion for Summary Judgment, Exhibit 21).

5. In the Board proceeding, in June 2007, ALJ Hollyce Farrell dismissed Complainant's appeal for lack of standing. (Respondent's Motion for Summary Judgment, Exhibit 17). The Board affirmed. (Respondent's Motion for Summary Judgment, Exhibit 18). Complainant appealed the Board's Order to the Colorado Court of Appeals. (Respondent's Motion for Summary Judgment, Exhibit 20).

6. In February 2009, the Colorado Court of Appeals issued an unpublished decision reversing the Board's Order and remanding the case to the Board for the determination of whether Complainant could compete for an open position (*Kirkmeyer I*). (Respondent's Motion for Summary Judgment, Exhibit 20).

7. On remand from the Colorado Court of Appeals in *Kirkmeyer I*, ALJ Farrell held an evidentiary hearing. In January 2010, ALJ Farrell issued an Initial Decision denying Complainant's claims that DOLA violated her right to compete for an open position and unlawfully discriminated against her based on political affiliation. Although Complainant sought to reverse DOLA's decision voiding the SHC, the Initial Decision did not address this issue because Complainant raised this claim in the District Court action which was subject to the pending Court of Appeals' action. (Respondent's Motion for Summary Judgment, Exhibit 22). The Board approved the Initial Decision in June 2010. (Respondent's Motion for Summary Judgment, Exhibit 23). Complainant then filed an appeal with the Colorado Court of Appeals.

8. On March 31, 2011, the Colorado Court of Appeals issued two decisions, both of which remanded this appeal to the Board for further proceedings. In a published decision (*Kirkmeyer III*), the Court of Appeals vacated the District Court's Order and stayed further proceedings before the District Court until Complainant's action before the Board was final, including any appeal. *Kirkmeyer III* held that § 24-50-104(5)(c) and (d), C.R.S. does not bar Complainant's claims and does not preclude Complainant from being returned to a traditional pay position within the state personnel system. (Complainant's Motion for Summary Judgment # 1, Attachment B).

9. In an unpublished decision (*Kirkmeyer II*), the Court of Appeals concluded that that the Board did not err in approving the ALJ's decision that DOLA did not violate Complainant's reinstatement privileges as set forth in *Kirkmeyer I*. Further, the Court held that the Board did not err in approving the ALJ's decision that DOLA did not discriminate against Complainant based on her political affiliation. However, the Court concluded that the *Kirkmeyer I* Court made a factual error in stating that Complainant was not a certified employee when she was in the SES pay plan, and thus, may have either understood the SHC to grant more rights than mere reinstatement since Board Rule 2-13 already provided that right, or understood it to give Complainant additional rights because of its mistake concerning Complainant's loss of certified status. The Court therefore declined to apply the law of the case doctrine. (Complainant's Motion for Summary Judgment # 1, Attachment A; Respondent's Motion for Summary Judgment, Exhibit 24).

10. Based on these conclusions, the *Kirkmeyer II* Court determined that the SHC was ambiguous and that Complainant was entitled to a further Board hearing to interpret the SHC. The Court then provided the Board with the following framework for deciding the remaining issues pending before the Board (*Kirkmeyer II*, p. 28):

a. If the Board determines that the SHC provides Kirkmeyer only reinstatement in terms of competing for open positions, as described in *Kirkmeyer I*, then its previous findings and conclusion on this issue preclude any relief for Complainant, subject to her appeal of the Board's interpretation;
b. If the Board decides that Complainant has additional rights under the SHC then it must address DOLA's argument that waiver (including Board Rule 1-19), estoppel, or both prevent broader enforcement of the SHC;
c. If the Board rejects both waiver and estoppel, then it must address DOLA's argument that Board Rules 2-11 and 2-13 also preclude such enforcement of the SHC. However, the Court's interpretation of section 24-50-104(5)(c) in *Kirkmeyer III* removes the statute from the Board's further consideration.

11. The Board sought certiorari on the Court of Appeals' decisions. On December 12, 2011, the Colorado Supreme Court issued an Order denying certiorari. The Court of Appeals issued its Mandate on January 13, 2012.

12. On February 28, 2012, the Board issued a Notice of Hearing and Prehearing Order on Remand. The ALJ granted an unopposed motion to continue the hearing date. The hearing commenced on June 7, 2012. At the hearing commencement, the evidentiary portion of the hearing was set for September 25-26, 2012. The parties were provided with deadlines to file motions for summary judgment.

13. In August and September 2012, the parties filed motions for summary judgment, including affidavits and exhibits. The parties also filed several motions in limine and motions to strike.

14. In particular, Complainant filed three motions for summary judgment. The first motion seeks summary judgment on SES contract interpretation and Complainant's rights under the SHC. Complainant's second motion seeks summary judgment regarding the issue of waiver

and estoppel. The third motion seeks summary judgment relating to Director's Procedure 2-11 and Board Rule 2-13.

15. Respondent filed a single motion for summary judgment, seeking judgment in its favor as a matter of law.

16. On September 13, 2012, following a telephonic status conference, the ALJ issued an Order vacating the September 25-26 hearing, and setting oral argument on the pending motions for September 26, 2012.

17. A three-hour oral argument on the pending motions was held September 26, 2012. Following the oral argument, with permission from the ALJ, the parties filed supplemental briefing on Director's Procedure 2-11 and Board Rule 2-13.

18. An evidentiary hearing has been set for December 4, 2012, to resolve any remaining issues.

STANDARD OF REVIEW

19. Summary judgment is appropriate "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988). A material fact is a fact that will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Id.* at 376.

20. The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Id.* at 375; *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984). Once the moving party "has made a convincing showing that genuine issues of fact are lacking, the nonmoving party must demonstrate by admissible facts that a real controversy exists." *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.2d 598, 603 (Colo. App. 2004).

UNDISPUTED FACTS

Complainant's employment history and SES contracts

21. Complainant began her state employment in January 2001. She entered the state classified personnel system as a General Professional (GP) VI. Her initial position[1] was the Director of Community and Neighborhood Development within DOLA. Complainant went through the application and competitive examination process to obtain the position. (Complainant's Motion for Summary Judgment # 1, Attachment C; Respondent's Motion for Summary Judgment, Exhibit 5).

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[1] The term "position" is defined as "an individual job ... within the state personnel system." Board Rule 1-62, 4 CCR 801.

22. Complainant was certified[2] to the GP VI position after one year of service. (Complainant's Motion for Summary Judgment # 1, Attachment E).

23. In June 2002, Complainant's position was reallocated to a GP VII classification. Complainant was selected for the position. (Complainant's Motion for Summary Judgment # 1, Attachments H & I; Respondent's Motion for Summary Judgment, Exhibit 5).

24. In November 2002, Complainant applied for and was appointed to a position of Division Director within the Management class.[3] She was certified into this position one year later. (Complainant's Motion for Summary Judgment # 1, Attachments J, K, & L; Respondent's Motion for Summary Judgment, Exhibit 5).

25. Complainant was then promoted to be Director of the Division of Local Government within DOLA. (Respondent's Motion for Summary Judgment, Exhibit 6).

26. The Division Director position was nominated to move into the SES pay plan[4] by DOLA Executive Director Michael Beasley. In July 2004, Jeffrey M. Wells,[5] the Director of the Department of Personnel & Administration (State Personnel Director), accepted the nomination. (Complainant's Motion for Summary Judgment # 1, Attachments N & O; Respondent's Motion for Summary Judgment, Exhibits 5 & 6).

27. The SES is an alternative performance-based pay plan for senior managers who are responsible for directly controlling large or important segments of a state agency. (Respondent's Motion for Summary Judgment, Exhibit 1 (Director's Procedure 2-11)). The program was created "to strike a more appropriate balance between the continuity of a stable workforce and allowing the flexibility to effectively implement new policy direction in executive policy matters." (Respondent's Motion for Summary Judgment, Exhibit 2 (Nov. 2005 Technical Assistance Guideline)). The SES was created in response to a perception that the classified service made it difficult for new governors to immediately implement their goals and plans. Two goals of SES were for Administrations to be able to change high level managers without cause and to attract individuals from the private sector who would be willing to take a small, but not large, reduction in pay. (Respondent's Motion for Summary Judgment, Exhibit 3).

28. Complainant executed her first SES contract with DOLA in calendar year 2004. The contract covered the period of time July 1, 2004 – June 30, 2005. Mr. Beasley executed the contract on behalf of DOLA. (Complainant's Motion for Summary Judgment # 1, Attachment Q; Respondent's Motion for Summary Judgment, Exhibit 7).

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[2] The term "certified" "applies to employees who successfully complete a probationary or trial service period." Board Rule 4-29, 4 CCR 801.

[3] The term "class" is defined as "a group of positions whose essential character...warrants the same pay grade, title, and similar qualifications." Board Rule 1-33, 4 CCR 801.

[4] The term "pay plan" is defined as a "listing of all pay grades and their corresponding ranges for occupational groups." Board Rule 1-59, 4 CCR 801. Pay plans establish "classes, positions, and grades of pay." *Dempsey v. Romer*, 825 P.2d 44, 52 (Colo. 1992).

[5] Mr. Wells has a law degree and previously served as the Executive Director of the Department of Labor and Employment and as the Assistant Director of the Department of Labor and Employment. Mr. Wells also had served in the Colorado Senate for 16 years, and held the position of Senate Majority Leader for 12 years. (Complainant's Motion for Summary Judgment # 1, Exhibit O).

29. Complainant remained a certified state employee while in the SES pay plan. Her position remained within the Management class, even though it was in a different pay plan. (*Kirkmeyer II*, p. 17).

30. Complainant entered into a second SES contract covering the period July 1, 2005 – June 30, 2006. Mr. Beasley executed the contract on behalf of DOLA. (Complainant's Motion for Summary Judgment # 1, Attachment Q; Respondent's Motion for Summary Judgment, Exhibit 7).

31. Both the 2004-05 and the 2005-06 SES contracts contained reverter provisions that specified a reverter to the traditional pay plan. The reverter provisions stated: "Notwithstanding State Personnel Board Rule R-8-68, the parties to this contract agree to the following: During the term of this contract Michael Beasley, the Executive Director of the Department of Local Affairs, agrees to offer Ms. Kirkmeyer retention rights to a vacant Management level position in the department for which she meets the minimum qualifications should either of the following occur: (1) Ms. Kirkmeyer's position as Director of the Division of Local Government is abolished because of lack of funds or a statutory change; (2) Ms. Kirkmeyer's position is abolished due to reorganization." (Complainant's Motion for Summary Judgment # 1, Attachments P & R).

32. The Department of Personnel & Administration (DPA) issued Technical Assistance guidelines and procedures relating to SES appointments. These guidelines were issued under the direction of the State Personnel Director. In November 2005, DPA issued a revision to the Technical Assistance, SES guideline, which had been previously issued. The 2005 revised Technical Assistance guideline remained in place until August 31, 2007.[6] The revised guideline stated in relevant part (page 3):

> In exchange for the higher potential salaries, employees under SES performance contracts are not afforded any of the following rights: retention or reemployment; appeal of the State Personnel Director's decision to move a position into or out of the SES; any pay adjustments such as survey and performance salary adjustments; and appeal of the salary from one contract year to the next.
>
> Additionally as provided by Rule 2-11(C), as part of the performance contract negotiation process and in consideration for a salary that exceeds the maximum of the Management class, an employee is required to waive certain appeal, disciplinary, grievance, and other rights and privileges of the state personnel system. The waiver of these rights will be specified in the annual contract as shown in the contract cover sheet attached to this document. Department heads may permit specific exceptions to the waiver of rights and will ensure each SES employee is reasonably informed of the waiver in the contract. (Complainant's Motion for Summary Judgment # 1, Attachment T).

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[6] An August 31, 2007 revision to the Technical Assistance guideline deleted the authority of the department heads to permit specific exemptions of the waiver of rights and the assurance that SES employees are reasonably informed of the waivers in the contract. This revision was made after Complainant's employment ended in June 2007. (Complainant's Motion for Summary Judgment # 1, Attachment U).

33. In December 2005, after Mr. Beasley resigned as DOLA Executive Director, Complainant was appointed by Governor Owens as Acting Director of DOLA. Complainant continued to occupy the position of Director of the Division of Local Government. She also oversaw homeland security programs as the Acting Director of the Division of Emergency Management. As Acting Director of DOLA, Complainant had appointing authority for all Division Directors. (Complainant's Motion for Summary Judgment # 1, Attachments D & S; Respondent's Motion for Summary Judgment, Exhibit 6).

The 2006-07 SES contract and SHC

34. Complainant's 2006-07 SES contract included the following terms:

> 4) If the Executive Director gives the employee written notice of non-renewal by May 1, the employee shall either be separated from state service upon expiration of the contract on June 30 or appointed to a vacant non-senior executive service position at either the contract salary or the statutory salary lid, whichever is lower;
>
> 5) If the Executive Director has not given timely written notice of non-renewal and no contract is provided by July 1, the employee shall be returned to the traditional classified pay plan at either the contract salary or the statutory salary lid, whichever is lower;
>
> 7) Employees in the senior executive service have no retention or reemployment rights with respect to any other position in the state personnel system. (Respondent's Motion for Summary Judgment, Exhibit 8).

35. In spring 2006, Mr. Wells became aware that employees in the SES pay plan positions had concerns about the continuity of state employment in light of the upcoming November 2006 election. Mr. Wells engaged in a series of meetings and discussions with his aides, including Assistant Director Paul Farley. Based on these discussions, Mr. Wells decided that it would be in the state's best interest to allow executive directors of departments in the annual SES negotiation process to allow SES employees to return to the traditional classified pay plan at the end of the 2006-2007 contract year at either the contract salary or the statutory salary lid, whichever was lower. Mr. Wells drafted, with Mr. Farley's aid, an additional term to the SES draft contract. (Complainant's Motion for Summary Judgment # 1, Attachment O). As drafted, the SHC stated:

> With respect to any separation from state service as a result of the expiration or non-renewal of this contract, the employee further voluntarily waives all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system, except for the following rights specifically agreed to by the Executive Director.
>
> If the employee is not offered a contract for the 07-08 fiscal year, regardless of whether notice was timely given pursuant to State Personnel Board Rule 2-11(c) and without regard to paragraph 4 above, the employee shall be returned to the traditional classified plan at the

contract salary or the statutory salary lid, whichever is lower. (Respondent's Motion for Summary Judgment, Exhibit 8).

36. The SHC language had not been included in any prior SES contracts. (Respondent's Motion for Summary Judgment, Exhibit 9).

37. Mr. Wells drafted the SHC and the 2006-07 SES contract to "ensure that there would not be a wholesale change of career employees with the technical expertise to run some of these divisions and units." Mr. Wells believed that he had the authority to create and authorize the SHC as part of the negotiation process between departments and employees. In his opinion, the negotiation process was authorized by statute, and extended beyond the negotiation of salary. (Complainant's Motion for Summary Judgment # 1, Attachment O).

38. Mr. Wells believed that the SES negotiation process allowed for a promise to return the employee to the traditional classified pay class. His intent in drafting the SHC was to ensure that there was a term that provided mandatory return to a traditional pay plan position. He believed that the SHC was not inconsistent with the purpose of an SES contract, and sought to allow the state to retain employees with expertise in their area. (Complainant's Motion for Summary Judgment # 1, Attachment O).

39. In Mr. Wells' opinion, the SES contract with the SHC gave Complainant a right to return to the traditional classified pay plan. A right to return is a right to return to a position, not necessarily the same position occupied within SES. He intended to create the right to return to a vacant position or unoccupied position, achieved through the creation of a new position in the Management class, if necessary. (Complainant's Motion for Summary Judgment # 1, Attachment O).

40. Mr. Wells believed that the required waiver in SES contracts was to give up retention rights, or the right to displace another employee in the event of a layoff. (Complainant's Motion for Summary Judgment # 1, Attachment O).

41. Mr. Wells presented the contract form, including the SHC, to the Executive Directors at a Governor's cabinet meeting in May or June 2006. The meeting was attended by the Governor and the Governor's Chief of Staff. Mr. Wells advised the Executive Directors that they could decide whether to use the form of contract containing the SHC. The use was not mandatory and was left to the discretion of the Executive Directors. Complainant attended this meeting and received a form of the contract including the SHC. Mr. Wells discussed the SHC language at the cabinet meeting and said that the language was created to assure continued employment, and that there should be an absolute right to return to the traditional pay class in the event that a person's SES contract was not renewed. (Complainant's Motion for Summary Judgment # 1, Attachments O & BB; Respondent's Motion for Summary Judgment, Exhibits 3 & 6).

42. Complainant thereafter provided a copy of the SES contract to the Human Resources (HR) Director for DOLA, and had a brief conversation with her regarding Mr. Wells' presentation. The HR Director did not indicate that the SHC language posed a problem. Shortly before July 1, 2006, Complainant instructed the HR Director to prepare a 2006-07 SES contract for herself and another employee based on the form provided by Mr. Wells to the Executive Directors at the cabinet meeting. (Complainant's Motion for Summary Judgment # 1, Attachment BB). Complainant drafted her 2006-07 SES contract with the maximum salary

allowable for an SES employee, approximately $132,000 per year. (Respondent's Motion for Summary Judgment, Exhibits 6 & 11).

43. Complainant did not want to sign the contract as both the employee and the Executive Director. She inquired with Mr. Wells, who instructed her to have the Governor's Chief of Staff execute the contract on behalf of the Governor and state. (Complainant's Motion for Summary Judgment # 1, Attachments D, X, & BB).

44. Complainant sent the contract to Bob Lee, the Governor's Chief of Staff. Mr. Lee approved and executed the contract on behalf of DOLA. Complainant did not have any discussions with Mr. Lee in which she negotiated any specific terms in the contract. Complainant also signed the contract. (Complainant's Motion for Summary Judgment # 1, Attachments D & BB; Respondent's Motion for Summary Judgment, Exhibit 6).

45. At the time of executing the contract, Complainant believed that the contract and the SHC gave her a right to return to the traditional classified pay system. She believed that she had not waived her right to continued employment. Complainant further believed that termination "for cause" was required. If the SHC had not been included, Complainant would not have executed the 2006-07 SES contract. Rather, she would have returned to the traditional pay class and remained a Division Director under the Management profile class. This rationale was based on the fact that there was going to be a change in Administrations, leading to uncertainty in the position. (Complainant's Motion for Summary Judgment # 1, Attachments D & BB).

46. In fiscal year 2006-07, the majority of Executive Directors declined to use the SHC in the SES contracts. Of the 13 state agencies which used the SES program, 5 agencies included the SHC in their contracts.[7] (Respondent's Motion for Summary Judgment, Exhibit 10).

Termination of Complainant's state employment

47. On August 22, 2006, Complainant resigned her position as Acting Director of DOLA, but continued in the position as Division Director for the Division of Local Government. (Complainant's Motion for Summary Judgment # 1, Attachment D; Respondent's Motion for Summary Judgment, Exhibit 6).

48. In the November 2006 election, Bill Ritter was elected to the position of Governor.

49. Governor Ritter selected Susan E. Kirkpatrick for the position of DOLA Executive Director. (Complainant's Motion for Summary Judgment # 1, Attachment Y).

50. Governor Ritter selected Richard Gonzales for the position of State Personnel Director. (Complainant's Motion for Summary Judgment # 1, Attachment Z).

51. When Governor Ritter assumed office in early 2007, his Administration became aware that some SES contracts for 2006-07 contained the SHC. The Governor's legal counsel provided legal advice to Executive Directors about the legality of the SHC. (Respondent's Motion for Summary Judgment, Exhibit 12).

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[7] The five departments were the Department of Transportation, DPA, Department of Revenue, Department of Human Services, and DOLA.

52. On February 20, 2007, Ms. Kirkpatrick issued Complainant a letter stating that the Ritter Administration would not honor the SHC, and as a result, she should not rely on it. The letter stated that the SHC was contrary to state statute, administrative rules, and the overall purpose of the SES program. Additionally, the letter stated that decisions about the renewal of her SES contract would be made at a later date. Similar letters were sent to SES employees in other agencies whose contracts included the SHC. (Complainant's Motion for Summary Judgment # 1, Attachment AA; Respondent's Motion for Summary Judgment, Exhibit 13).

53. Complainant requested a meeting with Ms. Kirkpatrick to discuss her job performance and obtain a personnel evaluation under the DPA guidelines concerning evaluation of SES employees. At the meeting, Ms. Kirkpatrick told Complainant that she would not give her a written evaluation, but informed her that her work was of good quality. Complainant asked Ms. Kirkpatrick whether her SES contract would be renewed. Ms. Kirkpatrick responded that Complainant was a political appointee, and that the Governor had not yet made a decision. (Complainant's Motion for Summary Judgment # 1, Attachment D).

54. In considering whether to renew Complainant's SES contact, Ms. Kirkpatrick considered Complainant's leadership at DOLA and her administration of homeland security grant funds. During Complainant's tenure, the federal and state governments conducted audits of homeland security grant practices and found serious lapses, requiring the state to repay millions of dollars in grant funds. Ms. Kirkpatrick concluded that renewing Complainant's SES contract would not be in the best interest of the state. (Respondent's Motion for Summary Judgment, Exhibit 15).

55. On April 30, 2007, Ms. Kirkpatrick presented Complainant with a letter stating that Complainant's SES contract would not be renewed, and that at the expiration of the SES contract, she would be separated from state service. Complainant was not offered reinstatement to another position in DOLA. (Complainant's Motion for Summary Judgment # 1, Attachment DD; Respondent's Motion for Summary Judgment, Exhibit 16).

56. Ms. Kirkpatrick indicated to Complainant that she could take administrative leave with pay through the end of her employment on June 30, 2007. Complainant declined this offer. (Complainant's Motion for Summary Judgment # 1, Attachments EE & FF).

57. Complainant filed a timely appeal with the Board and the State Personnel Director.

58. Prior to the conclusion of Complainant's employment, there existed a vacant position in the Management class entitled DOLA Chief of Operations. Complainant met the minimum qualifications for the position, and had been certified to the Management class. The job was announced on June 26, 2007. Complainant did not apply for the Chief of Operations position. (Complainant's Motion for Summary Judgment # 1, Attachments D & GG).

59. On September 28, 2007, Complainant's position as Director of Division of Local Government was announced. Complainant did not apply for the position. (Complainant's Motion for Summary Judgment # 1, Attachment HH).

60. Complainant was offered no employment with DOLA in 2007 or thereafter. (Complainant's Motion for Summary Judgment # 1, Attachment FF; Respondent's Motion for Summary Judgment, Exhibit 5).

61. The separation paperwork completed by Ms. Kirkpatrick stated that Complainant was not eligible for reemployment. (Complainant's Motion for Summary Judgment # 1, Attachment II).

62. Complainant currently serves as a County Commissioner for Weld County. (Complainant's Motion for Summary Judgment # 1, p. 17).

CONCLUSIONS OF LAW

I. The SHC sought to provide Complainant with more than reinstatement rights – it was intended to provide her with the right to a vacant non-SES position for which she was qualified.

63. The Colorado Court of Appeals held that the SHC was ambiguous as to what it meant to return Complainant to the "traditional classified pay plan." *Kirkmeyer II*, at 24-27. The Court held that the parties could have intended one of three things: (1) that upon timely notice and expiration of her SES contract, Complainant would be returned to the position she held before joining the SES, if it was vacant; (2) she would be returned to any vacant position in which she had been certified; or (3) her return to any position would be based on the right to compete, but subject to the appointing authority's discretion (reinstatement rights only).[8] *Id.* at 27.

64. The Court of Appeals has directed the Board to first ascertain all rights the parties intended for Complainant to have under the SHC. *Id.* The Court observed that the intent inquiry may be complicated by the fact that Complainant was Acting DOLA Executive Director at the time of the subject contract, and that no arms-length negotiation of the SHC occurred. *Id.* Extrinsic or parol evidence is necessary to discern the meaning of the SHC because it is ambiguous. *Id.; Dorman v. Petrol Aspen, Inc.,* 914 P.2d 909, 911-12 (Colo. 1996).

65. The primary goal of contract interpretation is to determine and give effect to the intent of the parties. *Moland v. Industrial Claim Appeals Office*, 111 P.3d 507, 511 (Colo. App. 2004); *Ad Two, Inc. v. City and County of Denver*, 9 P.3d 373, 376 (Colo. 2000). In the face of contract ambiguity, Colorado courts have consistently looked to the intent of the parties as the primary means of resolving the ambiguity. *Moland*, 111 P.3d at 511. Thus, if the parties' intent cannot be derived from the plain language of the contract, then parol or extrinsic evidence should be considered from which the intent may be inferred. *Id.* Only absent such evidence or intent may a court, as a last resort, apply the principle of construing the ambiguous language against the drafter. *Id.*

66. Here, extrinsic evidence has been provided through the form of affidavits, exhibits, discovery responses, and deposition transcripts attached to the motions for summary judgment. Neither party believes that an evidentiary hearing is required to determine this first issue.

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[8] The term "reinstatement" is defined as the "discretionary appointment of a former or current employee to a class in which the person was certified." Board Rule 4-11, 4 CCR 801. By its terms, reinstatement is subject to the discretion of the appointing authority. *Kirkmeyer II*, p. 6; Board Rule 4-11.

67. Critically, in its summary judgment briefing, Respondent has conceded that the SHC was intended to provide Complainant with more than reinstatement rights. In particular, Respondent states:

> [t]he discovery responses, admissions, and deposition testimony indicate that the SHC was intended to provide Complainant and other SES employees **an absolute right to a position in the traditional classified system**. Respondent can not dispute the intended meaning of the SHC since Respondent, despite being the other party to the SES Contract, was not involved in contract formation. That is Complainant prepared her own SES Contract and did not negotiate any of the terms with a representative of Respondent. Thus, **any question of fact as to the meaning of the SHC is easily resolved**. (Respondent's Motion for Summary Judgment, pp. 16-17) (internal references omitted) (emphasis added).

68. Rather than contesting the intent and meaning of the SHC, Respondent argues that the SHC "is in direct contravention to State Personnel Board Rules and Director's Procedures, the subject SES Contract itself, and public policy such that it is void as a matter of law." (Respondent's Motion for Summary Judgment, p. 17).

69. Consistent with Respondent's position, Complainant states that the SHC was intended to provide Complainant with a right to any vacant position in the Management class for which she was qualified. If no such vacant position existed at the time her contract was not renewed, Complainant believed she was entitled to any newly created position in the Management class. The right to a position was conditioned on the existence of an available vacant position or sufficient funds to create a vacant position. (Complainant's Response, p. 4). Complainant does not believe that the SHC provided her with retention rights, or "bumping" rights, to displace another employee in the event of layoff. *See Kirkmeyer III*, p. 14, n.4, (at oral argument before the Court of Appeals, Complainant "conceded that under the SHC she does not assert any right to bump an incumbent employee, but only to be placed into a vacant position"); *see also* pp. 19-20 ("Kirkmeyer does not assert bumping rights"). Therefore, despite the SHC, Complainant "assumed the risk that her state employment would end if no traditional pay plan position in a class to which she had been certified was vacant when her third SES contract expired." *Id.* at 20.

70. Based on Respondent's concession as to the intent of the SHC,[9] the undisputed facts, including the extrinsic evidence regarding the parties' intent, and *Kirkmeyer I - III*, the ALJ finds that the intent of the SHC was to guarantee Complainant a return to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified. The position would be compensated at a salary range which would be the highest level of the class, or the salary being paid Complainant under the SES contract, whichever was lower. Further, as of June 30, 2007, the undisputed facts demonstrate that there was a vacant position in the Management class for which Complainant met the minimum qualifications. This position was DOLA Chief of Operations.

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[9] At the September 26, 2012 oral argument, Respondent also acknowledged that it could not dispute the intent of the SHC because it was not involved in the provision's drafting or negotiation.

II. Complainant's 2006-07 SES contract, as a whole, sought to provide Complainant with the right to a vacant non-SES position for which she was qualified.

71. Respondent asserts that the SHC contradicted other terms in Complainant's 2006-07 SES Contract. (Respondent's Motion for Summary Judgment, p. 26). Respondent argues that the contract contained various paragraphs that mirrored the Board Rules and Director's Procedures governing SES contracts, and that any absolute right to a job in the traditional classified system directly contravened these terms.

72. In particular, paragraph 4 mirrored Director's Procedure 2-11(C); paragraph 5 mirrored Director's Procedure 2-11(D); and paragraph 7 mirrored Board Rule 2-13. (Respondent's Motion for Summary Judgment, pp. 26-27).

73. Resolution of this issue may therefore be resolved by determining whether the SHC violates Director's Procedure 2-11 or Board Rule 2-13, 4 CCR 801. This issue is discussed in sections VI and VII herein.

74. The undisputed facts demonstrate that Complainant intended the 2006-07 SES contract to provide her with the right to return to an unoccupied position in the traditional classified pay plan. Complainant deliberately chose the version of the SES contract that Mr. Wells distributed at the spring 2006 cabinet meeting containing the SHC. She has testified that due to the upcoming change in Administration, she would not have entered into the SES for 2006-07 without the assurances she believed that the SHC provided.

75. Additionally, to the extent the SHC conflicts with paragraph 4 of the 2006-07 SES contract, the SHC controls because the SHC states that it applies "without regard to paragraph 4 above." This language evinces the intent that to the extent the SHC conflicted with paragraph 4, the SHC controlled. *See Holland v. Board of County Commr's of Douglas County*, 883 P.2d 500, 505 (Colo. App. 1994) (specific contract clauses control over general clauses).

76. Mr. Wells, who drafted the SHC, also testified that the SHC version of the 2006-07 SES contract was intended to provide Complainant with such rights. In particular, Mr. Wells testified that "there is no way this provision would allow the returning person to violate the rights and property rights in a job that someone else already had." Respondent has not disputed this interpretation because it was not actively involved in the contract formation or negotiation process.[10]

77. In its response brief, Respondent argues that Mr. Wells' intent is not controlling because he was not a party to the contract. (Respondent's Response, p. 3) Respondent relies on *Moland v. Industrial Claim Appeals Office*, 111 P.3d 507, 511 (Colo. App. 2004), which expresses the general rule that in the face of ambiguity, courts look to the intent of the parties as the primary means of resolving ambiguity. Generally, however, the parties draft the contract. Here, there is no dispute that Mr. Wells, as the State Personnel Director, drafted the SHC. As the drafter of the subject provision, Mr. Wells' intent is relevant, particularly when Complainant's interpretation and understanding of the contract was based on Mr. Wells' intent. Moreover, Respondent has not disputed that this was the intent of the parties. Accordingly, although Mr. Wells' intent is not binding, it is relevant and probative evidence.

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[10] It should be noted that the Governor's Chief of Staff executed the contract on behalf of the state, however.

78. Therefore, the ALJ finds that as a whole, Complainant's 2006-07 SES contract was intended to provide Complainant with the right to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified, if the contract was not renewed.

III. Respondent's public policy argument is subsumed in its argument that the SHC violates Director's Procedures and Board Rules.

79. In its Motion for Summary Judgment, Respondent argues that the SHC violates public policy because it is contrary to law. Contract provisions that violate public policy may be declared void and unenforceable. *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999). Sources of public policy include constitutions, statutes, and administrative regulations. *Rocky Mt. Hosp. & Medical Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996).

80. The Court of Appeals has held that on remand, the Board may not determine whether the SHC conflicts with § 24-50-104(5), C.R.S., the SES statute. *Kirkmeyer III*, pp. 15, 21-22 (holding that the statute prohibited an employee's return to the traditional classified pay plan only while the employee served in the SES, and that the statute therefore did not void the SHC); *Kirkmeyer II*, p. 28. As set forth in the Order Denying Complainant's Motion in Limine, this limitation does not permit the Board to determine whether the SHC violated the statute or the legislative intent of the SES program, because the intent behind the SES was embodied in the statute.

81. However, the SHC could still be found to violate public policy if it is contrary to the Director's Procedures or Board Rule. *Mariani*, 916 P.2d at 525. This issue is discussed in sections VI and VII herein. As acknowledged by Respondent at oral argument, given that the Board may not consider whether the SHC violates the SES statute, Respondent's argument that the SHC violates public policy necessarily hinges on whether the SHC violates Director's Procedure 2-11 or Board Rule 2-13. Accordingly, the public policy argument is subsumed within sections VI and VII below.

IV. Complainant did not waive her rights under the SHC.

82. The Colorado Court of Appeals held that if the Board decides that Complainant has additional rights under the SHC, then it must address Respondent's argument that waiver (including Board Rule 1-19), estoppel, or both prevent broader enforcement of the SHC. *Kirkmeyer II*, p. 28. Based on the conclusion above regarding additional rights provided under the SHC, this decision addresses Respondent's waiver and estoppel affirmative defenses.

83. Complainant's second motion for summary judgment argues she is entitled to summary judgment in her favor on these issues.

84. In general, waiver involves factual determinations. *Kirkmeyer II*, p. 21. In determining waiver, the Board must consider Board Rule 1-19. *Id.* Board Rule 1-19 provides that "[a]n employee may voluntarily and knowingly waive, in writing, all rights under the state personnel system, except where prohibited by state or federal law."

85. In determining waiver, the Board is also governed by common law waiver principles. Waiver is the intentional relinquishment of a known right or privilege. *Dept. of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). A waiver generally requires an unequivocal act on the part of the party against whom waiver is asserted. *Id.* Therefore, a waiver should be free

from ambiguity. *Id.*; *Venard v. Dep't of Corrections*, 72 P.3d 446, 450 (Colo. App. 2003); *Barker v. Jeremiasen*, 676 P.2d, 1259, 1262 (Colo. App. 1984).

86. Thus, under judicial precedent and Board Rule 1-19, Complainant waived rights under the state personnel system only if she voluntarily, knowingly, and intentionally relinquished such rights in writing.

87. Respondent asserts that Complainant waived any rights the SHC afforded by executing the 2006-07 SES contract. In particular, Respondent contends that paragraphs 4, 5 & 7 reveal Complainant's intent to waive her rights to return to the traditional pay plan in the event the SES contract was not renewed.

88. The presence of the SHC in the 2006-07 SES contract defeats Respondent's argument that Complainant intended to waive the right to return to the traditional classified pay system in the event the contract was not renewed. The SHC expressed the intent for Complainant to return to the traditional pay plan if the contract was not renewed. In *Kirkmeyer II* and *Kirkmeyer III*, the Court of Appeals held that the SES contract was ambiguous. Under these holdings, Respondent may not rely solely on the SES contract as a basis for waiver.

89. Moreover, the extrinsic evidence produced by the parties in the form of affidavits, exhibits, discovery responses, and deposition testimony demonstrates that the purpose of the SHC was to provide Complainant with a right to return to the traditional classified pay plan provided a vacant Management class position existed or was created through additional funding. This evidence of intent also defeats Respondent's contention that Complainant waived her right to return to the traditional classified pay plan when she entered into the 2006-07 SES contract.

90. In contrast, Complainant concedes that she waived the right to displace other employees from occupied positions. (Complainant's Second Motion for Summary Judgment, p. 4). *See also Kirkmeyer III*, p. 20 ("Thus, despite the SHC, Kirkmeyer assumed the risk that her state employment would end if no traditional pay plan position in a class to which she had been certified was vacant when her third SES contract expired"). Additionally, under the terms of the SES contract, Complainant waived the right to any salary increase, the right to appeal a reduction in salary from one year to the next, and the right to appeal removal of the position from the SES. These limited waivers do not amount to a knowing, voluntary full waiver of all rights under the state personnel system.

91. Respondent urges that Complainant waived her rights because knowledge of the Board Rules and Director's Procedures are imputed to Complainant as an appointing authority, and she should have known that the SHC was illegal and unenforceable. Director's Procedure 1-11, 4 CCR 801 (all appointing authorities are accountable for compliance with the rules and state and federal law).

92. This argument is unavailing. First, the issue of whether the SHC is lawful is the crux of this appeal, and there has not been a final decision as to the legality of the SHC. Second, Respondent has not produced any evidence indicating that at the time Complainant executed the 2006-07 SES contract, she had been told or informed that the SHC may not be lawful. Board Rule 1-19 requires a written, voluntary, knowing, and intentional relinquishment of rights.

93. In summary, Complainant has argued that the undisputed material facts demonstrate that she is entitled to summary judgment in her favor on the waiver issue. Respondent has not produced facts through affidavit, exhibit, discovery responses, deposition testimony, or otherwise to demonstrate the existence of any material facts precluding relief for Complainant on this issue. Accordingly, the ALJ concludes Complainant's claims are not barred by Board Rule 1-19 or the doctrine of waiver.

V. Complainant's claims are not barred by estoppel.

94. Under Colorado law, there are four basic elements to a claim of estoppel: (1) the party to be estopped must know the relevant facts, (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must detrimentally rely on the other party's conduct. *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984).

95. Contract estoppel exists when a person seeking to enforce the contract by words or conduct had a duty to speak and protect the other party and represented to the other party that the party's breach of contract would not be enforced and that the other party reasonably relied upon that representation and the other party materially changed his or her position and the change was to the other party's disadvantage. *Barker v. Jeremiasen*, 676 P.2d, 1259, 1262 (Colo. App. 1984).

96. In *Kirkmeyer II*, the Court of Appeals observed that in determining estoppel, the Board may consider what Complainant knew or should have known about the state personnel system based on her position with DOLA.

97. Respondent contends that Complainant is not entitled to summary judgment in her favor on this issue because Complainant was an appointing authority, and therefore was deemed to be aware of the applicable law under Director's Procedure 1-11. However, as set forth above in section IV, there has to date been no final determination that the SHC was illegal and unenforceable. Second, there is no evidence that Complainant personally believed that the SHC was contrary to law. Indeed, she provided deposition testimony stating that she would not have agreed to the 2006-07 SES contract without the SHC.

98. In her second motion for summary judgment, Complainant produced facts demonstrating that she had relatively limited exposure to personnel matters and relied on Mr. Wells, the DOLA HR Director, and the Attorney General's Office to advise her. Further, prior to executing the 2006-07 SES contract, Complainant did not receive information from anyone indicating that the SHC was illegal or unenforceable. Complainant therefore did not know relevant facts that were not known by Respondent.

99. Respondent has not produced evidence that Complainant knew that the SHC was legally infirm and sought to so deceive Respondent. Complainant relied on Mr. Wells, who invited department heads to use the SHC in their departments' 2006-07 SES contracts. She provided the contract to the Governor's Chief of Staff, who had also attended the cabinet meeting in which Mr. Wells presented the SHC. The Chief of Staff, as the agent of the Governor, executed the contract on behalf of the state and DOLA. *See Cordillera Corp. v. Heard*, 592 P.2d 12, 14 (Colo. App. 1978) (a party is presumed to know the contents of a contract signed by it). No evidence has been presented to indicate that Complainant misled or deceived the Chief of Staff.

100. Additionally, Respondent has not produced evidence indicating that it was ignorant of the true facts. Respondent asserts that it did not know Complainant guaranteed herself a right to return to the classified system because she did not engage in contract negotiations regarding the SHC with DOLA. However, the undisputed facts demonstrate that the Governor's Chief of Staff executed the agreement on behalf of the state. Mr. Lee had the right and ability to read the SES contract before executing it, and ratified and approved it by signing the agreement.

101. Therefore, Complainant's claims are not barred by the doctrine of estoppel.

102. Due to the conclusions regarding waiver and estoppel, it is unnecessary to address Complainant's argument regarding an unconstitutional retroactive taking. Complainant's second motion for summary judgment is granted.

VI. The SHC conflicts with Director's Procedure 2-11.

103. In *Kirkmeyer II*, the Court of Appeals held that if the Board rejects Respondent's waiver and estoppel defenses, then it must address DOLA's argument that Board Rules 2-11[11] and 2-13 also preclude enforcement of the SHC.

The Board has jurisdiction to interpret Director's Procedure 2-11.

104. As a threshold matter, in her response to Respondent's Motion for Summary Judgment, Complainant challenges the Board's jurisdiction to examine Mr. Wells' determination that the SHC was consistent with Director's Procedure 2-11 (Response, p. 16). Complainant argues that the power of the State Personnel Director is distinct from the Board's power, and that the State Personnel Director had the constitutional and legal authority to interpret his own directives. *See* § 24-50-104(5), C.R.S. (the State Personnel Director is charged with overseeing pay class matters). In essence, Complainant challenges the Board's jurisdiction to interpret Director's Procedure 2-11 or to rule on Mr. Wells' interpretation of the Director's Procedure.

105. The Board has jurisdiction and the authority to interpret Director's Procedures and rule on a department's interpretation of the Director's Procedures in a personnel action. In *Spahn v. State Dep't of Personnel*, 615 P.2d 66, 68 (Colo. App. 1980), the Colorado Court of Appeals held that the Board is responsible for reviewing the actions of the State Personnel Director. *See also* Colo. Const. art. XII, § 14(4) (in administering the state personnel system, the State Personnel Director is charged with complying with all applicable Board Rules and Director's Procedures); Board Rule 1-1, 4 CCR 801 (the purpose of the Board Rules and Director's Procedures is to provide a sound, comprehensive system of human resources management for the employees in the state personnel system).

106. If the Board did not have the authority to interpret Director's Procedures, the Board would be unable to effectively review the actions of the State Personnel Director, as authorized in *Spahn.* Further, the State Personnel Director would have virtually unfettered authority to interpret and apply Director's Procedures, contrary to the purpose of the Board Rules and Director's Procedures to provide a comprehensive system of human resources

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[11]The Court of Appeals erroneously referred to Director's Procedure 2-11 as Board Rule 2-11. Director's Procedure 2-11 was enacted through formal rulemaking by the State Personnel Director. The Procedure was in place prior to Mr. Wells' tenure as State Personnel Director.

management. *See also Koinis v. Colorado Dep't of Public Safety*, 97 P.3d 193, 195 (Colo. App. 2003) (the Board "is a constitutionally created state agency with considerable expertise in personnel matters").

107. Lastly, although it characterized Director's Procedure 2-11 as a Board Rule, the *Kirkmeyer II* Court has directed the Board to apply the rule to the SHC. *Kirkmeyer II*, p. 28.

Application of Director's Procedure 2-11 to SHC.

108. Both parties have moved for summary judgment in their favor on the application of Director's Procedure 2-11 to the SHC. In her third motion for summary judgment, Complainant argues that the SHC is consistent with Director's Procedure 2-11, and that she is entitled to summary judgment on that issue. Conversely, Respondent asserts that the SHC conflicts with Director's Procedure 2-11, and that Respondent should be awarded summary judgment on this issue. In addition to response briefs, the parties were permitted to file supplemental briefing on the application of Director's Procedure 2-11 and Board Rule 2-13 following the oral argument.

109. Principles of statutory construction should be applied in construing the Director's Procedures and Board Rules. *Schlapp v. Colorado Dep't of Health Care Policy and Financing*, 2012 COA 105, ¶ 9 (Colo. App. 2012); *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657 (Colo. App. 1995). The words and phrases of the rules are to be construed according to their familiar and generally accepted meaning. *Halverstadt*, 911 P.2d at 657; § 2-4-101, C.R.S.

110. Director's Procedure 2-11(C) states:

> As part of the negotiation process and in consideration for a salary that exceeds the maximum of the management class, an employee entering into a senior executive service contract may be required to waive all appeal, disciplinary, grievance, and other rights and privileges, of the state personnel system with respect to the expiration of the non-renewed contract. If the department head gives the employee written notice of the non-renewed contract by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which qualified.

Director's Procedure 2-11 (D) states:

> If the department head has not given the employee timely written notice of non-renewal and no new contract is provided to the employee by July 1, the employee is removed from the senior executive service pay plan and returned to the traditional classified pay plan. The employee's salary shall be set at either the contract salary or statutory salary lid, whichever is lower. If a contract is provided and the employee fails or refuses to sign by July 1, the employee shall be deemed to have resigned effective June 30.

111. The applicable Technical Assistance Bulletin published by DPA to assist HR professionals in administering the SES Board Rules and Director's Procedure provided:

> In exchange for the higher potential salaries, employees under SES performance contracts are not afforded any of the following rights: retention or reemployment; appeal of the State Personnel Director's decision to move a position into or out of the SES; any pay adjustments such as survey and performance salary adjustments; and appeal of the salary from one contract year to the next.
>
> Additionally as provided by Rule 2-11(C), as part of the performance contract negotiation process and in consideration for a salary that exceeds the maximum of the Management class, an employee is required to waive certain appeal, disciplinary, grievance, and other rights and privileges of the state personnel system. The waiver of these rights will be specified in the annual contract as shown in the contract cover sheet attached to this document. Department heads may permit specific exceptions to the waiver of rights and will ensure each SES employee is reasonably informed of the waiver in the contract.
>
> Nov. 2005 Technical Assistance Bulletin, p. 3.

112. The first sentence of Director's Procedure 2-11(C) provides that "as part of the negotiation process" an employee entering an SES contract may be required to waive all appeal and other rights of the state personnel system with respect to the expiration of the non-renewed contract. The first clause provides that the waiver of rights be part of the negotiation process, e.g., before the parties execute the SES contract. This interpretation is consistent with the 2005 version of the Technical Assistance Bulletin, which provided that the waiver of the rights "will be specified in the annual contract."

113. The first sentence of subpart (C) also states that the employee "may" be required to waive all appeal and other rights of the state personnel system with respect to the expiration of the non-renewed contract. The term "may" is generally permissive, rather than mandatory. *Schlapp v. Colorado Dep't of Health Care Policy and Financing*, 2012 COA 105, ¶ 23 (Colo. App. 2012); *Colorado Dep't of Transportation v. First Place, LLC*, 148 P.3d 261, 264 (Colo. App. 2006); *see also Black's Law Dictionary* 1068 (9th ed. 2009) (defining "may" first and second as "[t]o be permitted to" and "[t]o be a possibility," respectively). Had the waiver of all rights under the state personnel system been a prerequisite for an SES contract, the Director's Procedure would have used the term "shall." *Id.* Further, this interpretation does not conflict with the 2005 Technical Assistance Bulletin,[12] which provided that an "employee is required to waive "certain" rights under the state personnel system in consideration for a salary that exceeds the maximum of the Management class. The Bulletin indicates that an employee was not required to waive all rights, but only certain rights that would be specified in the contract.

114. In short, the first sentence of Director's Procedure 2-11(C) does not mandate the waiver of all appeal, disciplinary, grievance, and other rights and privileges of the state personnel system with respect to the expiration of a non-renewed contract.

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[12] Of course, if there is a conflict between the Director's Procedure and the Technical Assistance Bulletin, the terms of the Director's Procedure applies.

115. Complainant's 2006-07 SES contact, which contained the SHC, included a partial waiver of rights. As set forth above in section IV, under the SES contract and the SHC, Complainant waived the right to displace other employees and certain other rights.[13]

116. The first sentence of Director's Procedure 2-11(C) does not in and of itself prohibit the SHC because it does not mandate the waiver of all rights under the state personnel system. This does not, however, end the inquiry on whether the SHC conflicts with Director's Procedure 2-11.

117. Critically, the second sentence of subpart (C) states that if the department head gives the employee written notice of the non-renewed contract by May 1, the department head "shall" either separate the employee from state service upon expiration of the contract on June 30, or appoint the employee to a vacant non-senior executive service position for which the employee is qualified.

118. Likewise, under Director's Procedure 2-11(D), in the event the department head did not give the employee timely written notice (by May 1), if no new contract was executed, the employee is removed from the SES pay plan and returned to the traditional classified pay plan.

119. Thus, under Director's Procedure 2-11, if timely written notice was not provided and no new SES contract was executed, the employee was to be returned to the traditional classified pay plan. The appointing authority would have no discretion. On the other hand, if timely written notice was provided and no new SES contract was executed, the department head would have the discretion to return the employee to the traditional classified pay plan, or to separate the employee from state service.

120. There is no dispute that Respondent provided timely written notice to Complainant that her SES contract would not be renewed when it expired on June 30, 2007. Further, no new SES contract was executed.

121. Under the second sentence of subpart (C), because timely written notice was given, the DOLA Executive Director had the discretion to either separate Complainant from state service, as occurred here, or to appoint Complainant to a vacant non-SES position for which she was qualified. Under this plain language, the choice was Ms. Kirkpatrick's, as the DOLA Executive Director.

122. The SHC therefore conflicts with the second sentence of Director's Procedure 2-11(C). As set forth above, the SHC was intended to provide Complainant with the right to a vacant non-SES position in the Management class even if timely notice was provided, and even if the Executive Director did not elect to offer Complainant such a position. The SHC sought to remove the discretion of the Executive Director, and mandate Complainant's placement in an unoccupied non-SES Management class position. This clause directly conflicts with the final sentence of Director's Procedure 2-11(C).

123. In its briefing and at oral argument, Complainant argued that the decision to reinstate Complainant was made when the SHC was included by Complainant in the contract and approved and ratified by the Governor's Chief of Staff. Therefore, Complainant reasons that the SHC was consistent with Director's Procedure 2-11(C). The second sentence of

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[13] Based on Complainant's waiver of certain rights, the Court of Appeals found that there was adequate consideration given in the contract. *Kirkmeyer III*, pp. 19-20.

subpart (C), however, states that "[i]f the department head gives the employee written notice of the non-renewed contract by May 1, the department head shall either separate the employee from state service upon expiration of the contract on June 30 or appoint the employee to a vacant non-senior executive service position for which qualified." Under the more reasonable reading of this provision, the term "department head" refers to the same individual. If that individual gives timely written notice of non-renewal, that individual has the discretion to either separate the employee from state service or appoint the employee to a vacant position. Construing the second "department head" term to be the department head at the time the SES contract was entered into, before any decision was made as to renewal, is a strained interpretation contrary to the language of the regulation.

124. In interpreting a statute or rule, all parts shall be considered, and courts should harmonize the provisions. *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657-58 (Colo. App. 1995). Here, under this interpretation, there is no conflict within Director's Procedure 2-11(C). The first sentence of subpart (C) does not mandate the waiver of all state personnel system rights. This clause permits the appointing authority and the SES employee to negotiate regarding certain rights. The second sentence provides an express qualification – in the event timely notice of non-renewal is provided, the Executive Director has the discretion to reinstate the employee or to separate the employee from state service.

125. Accordingly, the ALJ concludes the SHC conflicted with Director's Procedure 2-11, and was therefore unlawful.

VII. The SHC does not conflict with Board Rule 2-13.

126. Board Rule 2-13 provides:

> Any employee entering or remaining in the senior executive service pay plan on or after July 1, 2003, waives retention and reemployment rights with respect to any other position in the personnel system pursuant to Board Rule 1-19, but shall have reinstatement privileges with respect to any vacant position in the employee's current or previously certified class.

127. The terms "retention," "reemployment," "reinstatement," and "layoff" are terms of art in the state personnel system.

128. "Retention rights" are the rights afforded employees following a layoff. In *Halverstadt v. Dep't of Corrections*, 911 P.2d 654, 657-58 (Colo. App. 1995), the Colorado Court of Appeals held that the rules addressing retention rights are intertwined with the layoff process. In particular, the Court interpreted the term "retention" to refer to employees bumping into positions after a previous position has been abolished and also keeping positions within a class during a downsizing. The rights therefore apply when positions are abolished through layoff. *See also* Board Rule 1-66, 4 CCR 801 (defining "retention credit" as "total time credited to an employee in determining retention rights for a layoff situation"); Respondent's Motion for Summary Judgment, p. 23.

129. "Reemployment rights" are the preference rights to be rehired following a layoff. Director's Procedure 1-63, 4 CCR 801; Board Rule 4-17, 4 CCR 801; Respondent's Motion for Summary Judgment, p. 23.

130. "Reinstatement is a discretionary appointment of a former or current employee to a class in which the person was certified and either resigned or voluntarily demoted in good standing. The person may be reinstated to a related class with the same or lower grade maximum than the previously certified class." Director's Procedure 4-11; Respondent's Motion for Summary Judgment, p. 23.

131. "Layoff" refers to involuntary separation from a state classified position due to the abolishment of the position for lack of work, lack of funds, or reorganization, or displacement of another employee exercising retention rights. Board Rule 1-55; Respondent's Motion for Summary Judgment, p. 23.

132. Complainant argues that the terms "retention" and "reemployment" apply only to layoff situations. When an employee is in the SES system, he or she gives up the right to displace other employees or to exercise the protections afforded by Chapter 7 of the Board Rules. Complainant asserts that Board Rule 2-13 does not address vacant positions or movement from the SES pay plan into the traditional pay plan. Rather, she contends it only applies where an SES employee is subjected to a layoff during the term of the SES contract. In other words, Complainant asserts that while the SES employee may not displace other employees through the exercise of bumping rights, the employee may be returned to a traditional classified pay system position that is vacant upon agreement between the Executive Director and the employee in the SES contract.

133. In short, Complainant argues that Board Rule 2-13 applies only to layoff situations governed by Chapter 7 of the Board Rules, and therefore does not preclude the SHC. In contrast, Director's Procedure 2-11 applies to non-layoff situations, such as when an SES contract is not renewed.

134. Respondent asserts that Board Rule 2-13 is intended so if there is a layoff and SES positions were eliminated, the SES employee would not have retention rights and reemployment rights, but would have reinstatement privileges. Respondent's Response, p. 30. Retention rights not only include the right to bump other employees, but also include the rights to vacant position in the current certified class. Board Rule 7-18(A)(1), 4 CCR 801. Respondent contends that the SHC abrogated Rule 2-13 by expanding the circumstances beyond a layoff under which an employee may be retained or reemployed. (Respondent's Response, p. 30).

135. In essence, Respondent argues that (1) Board Rule 2-13 conflicts with the SHC because retention rights include the right to move into a vacant position.

136. There is no dispute that a "layoff" did not occur in this case. Complainant's position was not eliminated for lack of work, funds, or reorganization. Rather, Complainant's SES contract was not renewed, and the position was ultimately filled by another individual.

137. Against this backdrop, the ALJ concludes that Board Rule 2-13 applies only to layoff situations. As recognized by Respondent in its Motion for Summary Judgment, the terms "retention" and "reemployment" are terms of art that apply to and are triggered by layoff situations. The terms are employed in Chapter 7 of the Board Rules, applicable to layoffs. Board Rule 2-13 applied to a layoff affecting an SES position. In contrast, Director's Procedure 2-11 addressed SES contract non-renewal. *See also* Nov. 2005 version of Technical Assistance Bulletin, p. 4 (SES employees do not have rights under the layoff and reemployment provisions of the State Personnel Board Rules).

138. The fact that retention rights include the right to move into a vacant position (Board Rule 7-18) does not indicate that retention rights apply in non-layoff situations. While the movement to a vacant position is the preferred option when a certified employee is laid off from another position, the ability of a laid off employee to move into a vacant position does not broaden the scope of retention rights beyond layoffs. Therefore, Board Rule 2-13's prohibition against SES employees possessing retention rights and reemployment rights does not apply here, because no layoff occurred.

139. Accordingly, the ALJ concludes that the SHC does not conflict with Board Rule 2-13.

CONCLUSION

Complainant's first motion for summary judgment is granted. The undisputed material facts demonstrate, and indeed Respondent has conceded, that the SHC provided Complainant with more than reinstatement rights. In particular, the SHC and the 2006-07 SES contract provided Complainant a purported right to return to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified in the event her 2006-07 SES contract was not renewed.

Complainant's second motion for summary judgment is granted. The undisputed material facts do not support Respondent's arguments regarding waiver and estoppel. Respondent has not produced facts which would demonstrate that there is any factual basis supporting these affirmative defenses. In particular, through the inclusion of the SHC in the 2006-07 SES contract, under Board Rule 1-19, Complainant did not intend to waive a right to return to the traditional classified pay plan in the event of contract non-renewal. No factual basis supporting a theory that Complainant is estopped from enforcing the terms of the SHC has been presented.

Complainant's third motion for summary judgment is partially granted. Board Rule 2-13 does not preclude enforcement of the SHC because the rule applies only in the event of a layoff. The undisputed facts demonstrate, and both parties agree, that there was no layoff in this case.

Respondent's motion for summary judgment is partially granted. Director's Procedure 2-11 conflicts with the SHC, and therefore precludes enforcement of the SHC. The second sentence of Director's Procedure 2-11(C) plainly provided that in the event timely notice of non-renewal was provided, as occurred here, the Executive Director had the discretion to either appoint Complainant to a position in the traditional classified pay plan in the Management class, or to separate Complainant from state service. The SHC unlawfully removed this discretion from the Executive Director at the time she made the decision to not renew Complainant's 2006-07 SES contract.

A pre-hearing status conference will be held to determine what, if any, issues need to be determined at the December 4, 2012 evidentiary hearing.

WHEREFORE, Complainant's first and second motions for summary judgment are granted, and her third motion for summary judgment is partially granted. Respondent's motion for summary judgment is partially granted.

DATED this 21st day
of November, 2012, at
Denver, Colorado.

Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202

CERTIFICATE OF MAILING

This is to certify that on the 21st day of November, 2012, I electronically served true copies of the foregoing **ORDER ON SUMMARY JUDGMENT** as follows:

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STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2007G089**

ORDER REGARDING COMPLAINANT'S MEMORANDUM RELATING TO ISSUES FOLLOWING ORDER ON SUMMARY JUDGMENT

BARBARA KIRKMEYER,
Complainant,

vs.

DEPARTMENT OF LOCAL AFFAIRS,
Respondent.

This matter is before the Administrative Law Judge (ALJ) pursuant to Complainant's Memorandum Relating to Issues Following Order on Summary Judgment, filed on December 10, 2012, and Respondent's response thereto, filed on December 19, 2012. Being advised, the ALJ finds and orders as follows:

INTRODUCTION

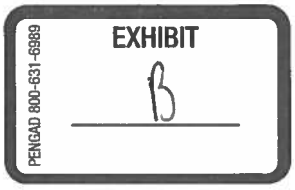
This matter is before the State Personnel Board (Board) on remand from the Colorado Court of Appeals. In an unpublished decision, the Court of Appeals affirmed in part and reversed in part a Board decision. The Court remanded the matter to the Board with specific instructions. The directions on remand require the Board to:

(1) Determine all rights the parties intended for Complainant to have under the safe harbor clause (SHC) of her 2006-07 SES contract;
(2) If the Board determines that Complainant had more than reinstatement rights, determine whether Complainant's claims are barred by waiver or estoppel;
(3) If the Board rejects these affirmative defenses, determine whether Director's Procedure 2-11 or Board Rule 2-13 precludes enforcement of the SHC.

RELEVANT PROCEDURAL HISTORY

Following remand and hearing commencement, both parties filed motions for summary judgment. On November 21, 2012, the ALJ issued an Order on Summary Judgment. The Order on Summary Judgment granted two of Complainant's Motions for Summary Judgment, and partially granted Complainant's third Motion for Summary Judgment. Additionally, the Order partially granted Respondent's Motion for Summary Judgment.

The ALJ conducted a status conference on November 29, 2012, to determine whether an evidentiary hearing or additional briefing would be required for the Board to fully resolve the three issues on remand. Immediately prior to the status conference, Complainant filed a document entitled "Issues for Consideration in Status Conference." This pleading identified three issues which Complainant contended the Board needed to resolve in this proceeding.



At the conclusion of the status conference, the ALJ vacated the December 4, 2012 evidentiary hearing, and set a briefing schedule on the three issues identified by Complainant. A conforming Notice was issued on November 30, 2012.

Complainant timely filed its Memorandum Relating to Issues Following Order on Summary Judgment on December 10, 2012. Respondent timely filed its Objection and Response on December 19, 2012. On December 21, 2012, Complainant filed a motion to permit a reply, along with the proposed reply. Respondent objected to the motion, and filed an objection and motion to strike reply argument on December 24, 2012. Complainant filed a response to Respondent's motion to strike on December 27, 2012. The ALJ denied Complainant's motion to permit a reply on January 2, 2013. The arguments raised in Complainant's December 21, 2012 and December 27, 2012 pleadings have not been considered in ruling on the issues addressed herein.

ANALYSIS

I. The Board does not have jurisdiction over Complainant's constitutional claims. Those claims have been preserved for the Denver District Court.

Complainant contends that her separation from state service was unconstitutional under Colo. Const. art. XII, § 13(8). The Colorado Supreme Court has interpreted this provision as creating a property interest in continued employment for certified state employees. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 707, n.13 (Colo. 1994); *Colorado Dep't of Human Services v. Maggard*, 248 P.3d 708, 712 (Colo. 2011). The Order on Summary Judgment found that Complainant's claims are not barred by Board Rule 1-19 or the doctrine of waiver. Complainant argues that Respondent's action in not placing her into a vacant management position at the conclusion of her 2006-07 SES contract is unconstitutional.

Respondent asserts that Complainant's constitutional claims are outside the scope of the Court of Appeals' remand order and the Board's jurisdiction. In particular, Respondent argues that the Court of Appeals assigned resolution of Complainant's constitutional argument regarding the unified merit-based personnel system and protected property interest in the Denver District Court, and that the constitutional claims are therefore outside Board jurisdiction.

Along with the Board appeal, Complainant instituted a Denver District Court action in 2007. In this lawsuit, Complainant argued that the SHC in her 2006-07 SES contract implemented her rights to continued employment under the Colorado Constitution, and that the SHC must be honored. Following the District Court's grant of DOLA's motion for summary judgment, on appeal, Complainant argued that if § 24-50-104(5)(c), C.R.S., Director's Procedure 2-11(C), or Board Rule 2-13 defeat the SHC, they are contrary to the unified, merit-based state personnel system, in which certified employees serve during efficient service, established by article XII, § 13 of the Colorado Constitution. *Kirkmeyer III*, at 11.

In *Kirkmeyer III*, the Court of Appeals expressly reserved Complainant's constitutional argument to the Denver District Court. The Court declined to interpret the applicable rules or decide the constitutional argument on ripeness principles, stating that "these rules will be interpreted, if necessary, in proceedings before the Board on remand from *Kirkmeyer II*, **and their constitutionality can be addressed in further proceedings before the district court**." *Id.* at 22-23 (emphasis added); *see also Kirkmeyer II*, at 29 (*Kirkmeyer III* did not address Complainant's constitutional challenge concluding that it was not ripe until the Board on remand

interpreted the SHC, and if necessary, whether waiver, estoppel, or the Board Rules defeated the SHC).

Similarly, in *Kirkmeyer II*, the Court of Appeals held that "if the Board concludes that Board Rules 1-19, 2-11, or 2-13, alone or in combination, defeat enforcement of the SHC, and that ruling is upheld on appeal to this court, **then Kirkmeyer may present a constitutional challenge to these rules based on her unified personnel system argument in the district court**." *Kirkmeyer II*, at 28 (emphasis added). If the Board were to decide Complainant's constitutional challenge, the order would conflict with the Court of Appeals' express mandate on remand. *See also Kirkmeyer II*, at 29-30 (once the Board's decision is final and all appeals have been exhausted, the District Court may resolve the constitutional issues raised by a Board ruling adverse to Complainant, in addition to any claims and damages that could not be obtained from the Board but are available in District Court).

Moreover, aside from the existence of the parallel District Court action, the Board does not have the authority to resolve Complainant's entire constitutional challenge. Although the Board has the authority to address the constitutionality of statutes and rules as applied to a particular personnel action, the Board lacks the authority to determine the facial constitutionality of statutes and rules it administers, or of executive conduct in administering statutes. *Horrell v. Dep't of Administration*, 861 P.2d 1194, 1198-99 & 1198, n.4 (Colo. 1993); *see also Luccehsi v. State*, 807 P.2d 1185, 1191 (Colo. App. 1990) (although there may be occasions when the record of an administrative hearing may provide a sufficient factual basis to allow a *court* to pass upon the constitutionality of a statute, based on the facts within that record, an administrative agency itself has no jurisdiction to pass upon a claim that a statute which it administers is unconstitutional) (emphasis in original); *Colorado Dep't of Public Health & Environment v. Bethell*, 60 P.3d 779, 785 (Colo. App. 2002) (administrative agencies lack jurisdiction to determine constitutionality of regulations).

The Order on Summary Judgment determined that Director's Procedure 2-11(C) precluded enforcement of the SHC. Complainant has preserved her argument that if any statute, Director's Procedure, or Board Rule defeats the SHC and Complainant's ability to remain in the state personnel system, the provision and/or the personnel action is unconstitutional. Based on the ruling in the Order on Summary Judgment that the SHC conflicted with Director's Procedure 2-11(C), and was therefore unenforceable, Complainant's constitutional claims may include an argument that Director's Procedure 2-11(C) is facially unconstitutional. Aside from the pending District Court action, the Board lacks the authority to decide the issue of whether Director's Procedure 2-11(C) is unconstitutional on its face. The Board thus lacks the authority to resolve Complainant's entire constitutional claim.

Lastly, in her May 2012 prehearing statement (pp. 2-3), Complainant acknowledged that the Board does not have the authority to decide the constitutional issue:

> Complainant does not abandon any of her arguments concerning the unconstitutionality of the SES system and potential Board rules concerning the SES system and rights of employees. Those theories are preserved, however, the Board does not have authority to decide the constitutional question.

In short, the Court of Appeals charged the Board with interpreting the SHC and, if necessary, the applicable Director's Procedures and Board Rules. Based on the undisputed material facts, the Order on Summary Judgment interpreted the SHC, Board Rules 1-19 (waiver) and 2-13, and Director's Procedure 2-11. The Order concludes that Director's

Procedure 2-11(C) defeats enforcement of the SHC. If that ruling is upheld on appeal to the Board and appellate courts, the Court of Appeals has held that Complainant may present her constitutional challenges in the Denver District Court proceeding. Further, the Denver District Court, unlike the Board, has the authority to address the full range of Complainant's constitutional claims.

II. The Board does not have jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake.

For the first time in this proceeding, Complainant argues that if the SHC conflicted with Director's Procedure 2-11(C) and was unenforceable, Complainant's entire 2006-07 SES contract was void due to mutual mistake. In particular, the SHC was a material term to the contract, and there is no dispute that Complainant would not have entered into the SES contract were it not for the SHC. Presumably, if Complainant's 2006-07 SES contract was declared null and void, Complainant would assert an entitlement to return to the traditional classified pay plan in the management class.

The Board does not have jurisdiction over this claim for three reasons. First, Complainant has not demonstrated that she previously made this argument or preserved it in this appeal. This appeal has been pending for more than five years. Although there was no determination that Director's Procedure 2-11 precluded enforcement of the SHC until the November 2012 Order on Summary Judgment issued, Respondent has asserted since the outset that the SHC was not enforceable under state statute, Board Rules, and Director's Procedures. Complainant was aware of Respondent's position regarding the enforceability of the SHC since at least February 2007 (letter from Ms. Kirkpatrick to Ms. Kirkmeyer). Yet Complainant did not argue until November 2012, in the alternative or otherwise, that if the SHC was not enforceable, the entire SES contract was void. Accordingly, Complainant has not preserved this argument.

Second, the claim that the SES contract was void in its entirety is outside the scope of the Court of Appeals' remand order in *Kirkmeyer II*. The Court of Appeals expressly ordered the Board to interpret the SHC. If the SHC afforded Complainant more than reinstatement rights, the Court instructed the Board to determine if waiver or estoppel barred the SHC. If not, the Court further required the Board to apply Director's Procedure 2-11 and Board Rule 2-13 to the SHC. In these specific and detailed instructions, the Court of Appeals did not authorize the Board to determine whether the entire SES contract was void if the Board determined that the SHC was unenforceable under Board Rule or Director's Procedures. Instead, if the Board decision is upheld on appeal, Complainant may pursue her constitutional claims in District Court. *Kirkmeyer II*, p. 28.

Third, the Board does not have the authority to invalidate an entire SES contract. The Board's authority is limited to consideration of actions taken by state agencies and appointing authorities pursuant to legislation or executive rules governing such actions. *Horrell*, 861 P.2d at 1199. The Board is not a court of general jurisdiction with the authority to declare an entire contract void for mutual mistake. *See Renteria v. Colorado State Dep't of Personnel*, 811 P.2d 797, 801 (Colo. 1991) (the Board's authority is limited to reviewing actions taken by appointing authorities); Colo. Const. art. XII, § 14(3) (authorizes Board to enact rules regarding appeals from actions by appointing authorities).

In summary, the Board lacks jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake because (1) the argument was not previously made

and has not been preserved, (2) the issue is outside the scope of the Court of Appeals' remand, and (3) the Board lacks the authority to invalidate an entire contract.

III. The Board does not have jurisdiction over Complainant's Supreme Executive claim.

For the first time in this appeal, Complainant argues that her separation from state service was unlawful regardless of the validity of the SHC because the Governor, as Chief Executive, through his Chief of Staff, executed the 2006-07 SES contract, thereby binding the State. More specifically, Complainant asserts that under Colo. Const. art. IV, § 2, the Governor is the Supreme Executive, "who shall take care that the laws be faithfully executed." According to this argument, Complainant's 2006-07 SES contract was executed by the Governor's Chief of Staff, who signed the contract on behalf of the Supreme Executive, who thereby bound the State to all of the contract's provisions, regardless of their legal validity.

The Board does not have jurisdiction over this argument for two reasons. First, Complainant has not demonstrated that she previously made this argument or preserved it in this appeal. Respondent has alleged that the SHC conflicted with state law since at least February 2007. Until November 2012, Complainant did not argue in this proceeding that the legal invalidity of the SHC did not matter because the SES contract was signed by the Governor's Chief of Staff. Accordingly, Complainant has not properly preserved this argument. Second, the Supreme Executive claim is outside the scope of the Court of Appeals' remand order in *Kirkmeyer II.*

CONCLUSION

The Board does not have jurisdiction over the three issues raised by Complainant on November 29, 2012. First, the Board does not have jurisdiction over Complainant's constitutional claims. The Board does not have the authority to rule on the facial constitutionality of Director's Procedures. Moreover, Complainant's constitutional claims are pending before the Denver District Court. According to the Court of Appeals' opinions, Complainant's constitutional claims are to be resolved by the Denver District Court. Second, the Board does not have jurisdiction over Complainant's claim that the 2006-07 SES contract was void due to mutual mistake. The Board does not have the authority to invalidate contracts due to mutual mistake. The issue is outside the scope of the Court of Appeals' remand order. Moreover, Complainant did not preserve this argument before the Board because she did not previously argue, in the alternative or otherwise, that the SES contract was void and unenforceable in the event the SHC was declared invalid. Third, the Board does not have jurisdiction over Complainant's Supreme Executive claim. This issue is outside the scope of the Court of Appeals' remand order. Further, Complainant did not preserve this argument before the Board as it was not previously made in the Board proceedings.

The Order on Summary Judgment resolved the three issues within the scope of the Court of Appeals' remand order. The Board does not have jurisdiction over the three issues raised by Complainant on November 29, 2012. Neither party has contended that an evidentiary hearing is necessary to resolve the issues on remand. Accordingly, the ALJ intends to promptly issue an Initial Decision incorporating the Order on Summary Judgment and the Order herein.

DATED this 3rd day
of January, 2013, at
Denver, Colorado.

Robert R. Gunning
Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202

CERTIFICATE OF MAILING

This is to certify that on the 4th day of January, 2013, I electronically served true copies of the foregoing **ORDER REGARDING COMPLAINANT'S MEMORANDUM RELATING TO ISSUES FOLLOWING ORDER ON SUMMARY JUDGMENT** as follows:

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