

State of Colorado



John W. Hickenlooper
Governor

Sally Yerger
Board Chair

Dana Shea-Reid
Board Director

State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203
Phone (303) 866-3300
Fax (303) 866-5038

AGENDA PUBLIC BOARD MEETING February 17, 2015

A public meeting of the State Personnel Board will be held on Tuesday, February 17, 2015, at the Colorado State Personnel Board, 1525 Sherman Street, 1st Floor Conference Room 103, Denver, Colorado 80203. The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by January 14, 2015.

CALL TO ORDER

- Attendance.
- Disclosure of any potential conflicts of interest with regard to present Board business and notice of recusal, if applicable.

I. REPORT OF DEPARTMENT OF PERSONNEL AND ADMINISTRATION [DPA] AND REPORT OF THE DIVISION OF HUMAN RESOURCES [DHR]

II. PENDING MATTERS AT THE COURT OF APPEALS

There are no pending matters at the Court of Appeals before the Board this month.

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

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

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

- A. Natalie Van Note v. Department of Corrections, Denver Women's Correctional Facility, State Personnel Board case number 2015G018(C).

Complainant, a certified Social Work/Counselor III employed by the Department of Corrections, Denver Women's Correctional Facility, filed a petition for hearing on August 21, 2014, arguing that she was denied relief in the final grievance decision and that decision was arbitrary and capricious and a violation of the Whistleblower Act. As relief, Complainant is requesting a determination of whether she has been constructively discharged from employment and the environment is so toxic that returning to employment with the same supervisors is impossible. If it is determined that this environment is so toxic that she cannot effectively return to the environment and work in the environment, Complainant is requesting an award of front pay and any lost back pay

that has occurred. If it is determined that the environment is not toxic to the extent of constructive discharge, Complainant is requesting an order ending the toxic environment, removal of Ms. Howe and others at the Denver Complex who have been the administrators of the clinical program, notations in all files involved in her removal from the facility and placing her on forced leave, of improper wrongdoing with sanctions to each of the individuals. She is requesting other steps to remediate the abusive and hostile work environment, training for DOC administrators. She is also requesting an award of attorney fees and costs and other forms of compensation for her medically related bills caused by the actions of DOC. She is further requesting other appropriate relief that would be applicable at the time hearing is held, which will depend upon what is the status of her employment at that time. She is also requesting removal of all files and records of being forced out of the facility and negative actions taken against her.

Respondent argues that Complainant failed to meet her burden of showing that grounds exist under § 24-50-123(3), C.R.S. and/or Board Rule 8-46, 4 CCR 801, that merit a full hearing; she has not provided evidence of disability discrimination or retaliation; there was no violation of the Whistleblower Act or the grievance process; her allegations of constructive discharge are untimely; and she is not entitled to payment of her attorney fees.

On February 4, 2015, the Administrative Law Judge issued a preliminary recommendation that the hearing be granted.

B. Damian Macias v. University of Northern Colorado, State Personnel Board case number 2015G045.

Complainant is a certified Information Technology Professional II employed since August 2009 for the Academic Technology team, part of the Information Management & Technology department, at the University of Northern Colorado. Complainant filed a petition for hearing on October 27, 2014, arguing that he was denied relief in the final grievance decision and that decision was arbitrary and capricious because it violated grievance procedures of the Board and his federal or state constitutional rights. As relief, Complainant petitions the Board to grant a discretionary, evidentiary hearing to review the appointing authority's final grievance decision dated October 16, 2014.

Respondent argues that Complainant failed to meet his burden of showing that grounds exist under § 24-50-123(3), C.R.S. and/or Board Rule 8-46, 4 CCR 801, that merit a full hearing; Complainant cannot establish his claim of Hostile Work Environment/Harassment; Complainant cannot establish his claim under C.R.S. § 24-34-402.5, C.R.S § 42-4-1301(6)(a), or the Colorado Constitution; and the Step 2 Grievance Decision was not Arbitrary, Capricious, or Contrary to Rule or Law. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On January 22, 2015, the Administrative Law Judge issued a preliminary recommendation that the hearing be denied.

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

A. Yolanda York v. Department of Human Services, Division of Youth Corrections, Gilliam Youth Services Center, State Personnel Board case number 2014B049 (January 29, 2015).

Complainant appealed the decision to terminate her employment, and asked the discipline to be rescinded and to be returned to the position of Correctional Officer II for the Department of Youth Corrections. Complainant also argued that the termination of her employment was unlawful discrimination on the basis of Complainant's race.

Complainant's claim at the time of her appeal that she was subject to retaliation because she had used worker's compensation was not pursued by Complainant in her pre-hearing statement or at hearing, and has therefore been waived. Complainant did not present credible evidence at hearing that she had been treated any differently than any other employee in the manner in which her arrest was handled by Respondent, and she did not introduce evidence from which one could conclude that her race had influenced Respondent's decision. Complainant, therefore, did not carry her burden of proof on her discrimination claim.

Complainant's primary objection to the termination lay in the fact that Respondent had considered the underlying incident leading to Complainant's arrest in determining whether Complainant had violated performance standards. Respondent argued that state statutes and departmental policy permitted it to discharge an employee who had been arrested for an offense that showed a propensity for abuse. This broad reading is not supported by the law, however. State statute and departmental policy permits discharge for a disqualifying conviction rather than simply at the time of arrest. The performance standards for DYC employees in positions of direct contact with the youth at the facility, however, also require that employees self-report the types of arrests that could create disqualifying convictions. It was undisputed at hearing that Complainant was subject to these restrictions and did not properly self-report her arrest for assault and battery on a domestic partner. Under such circumstances, the facts of her arrest can be examined as aggravating or mitigating circumstances in determining the level of discipline to be imposed. In this case, the facts surrounding Complainant's arrest show that she was verbally and physically abusive to her domestic partner and during her arrest by threatening the officer and using racial slurs. These were aggravating circumstances that, combined with Complainant's work history of failing to correctly self-report a prior arrest and prior corrective and disciplinary actions because of statements made by Complainant while at work, meant that termination of employment was within the range of reasonable disciplinary responses. Respondent's decision to terminate Complainant's employment is, therefore, affirmed.

B. Liz Hageman v. Department of Corrections, Division of Adult Parole, State Personnel Board case number 2014B120 (January 22, 2015) - Order Granting Summary Judgement.

Complainant has filed an appeal alleging that the decision to administratively separate her from employment due to exhaustion of leave was a violation of DP 5-6 and the Americans with Disabilities Act (ADA). Respondent moved for summary judgment on the grounds that when Complainant was administratively separated from employment in June of 2014, she was unable to work because of her back problems and had requested no accommodation that would have permitted her to return to work.

The Administrative Law Judge examined the record of uncontested facts and agreed that summary judgment was appropriate because, by May of 2014, Complainant's own physician had found that there was no accommodation that would allow Complainant to return to work and Complainant herself did not propose any accommodation that she believed would permit her to work. These facts meant that Complainant could not be considered to be a qualified individual with a disability who could perform the essential functions of her job with or without accommodation at the time of her administrative separation in June of 2014. Complainant, therefore, could not prevail on her ADA claim as a matter of law. Additionally, the ALJ found that there was no dispute that all of the requirements in DP 5-6 had been met before Complainant was administratively separated from employment.

Accordingly, all of the the requirements for summary judgment had been met in this case. An evidentiary hearing was not necessary to determine the proper outcome under

the applicable laws because none of the material facts were in dispute. Respondent's motion for summary judgment was, therefore, granted.

VI. REVIEW OF THE MINUTES FROM THE JANUARY 20, 2015 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JANUARY 20, 2015 PUBLIC MEETING:

- A. Joanne Brown v. Department of Human Services, Colorado Mental Health Institute at Pueblo, State Personnel Board case number 2012B128 (May 28, 2014).

The Board voted to provide notice that it has declined to act upon or to address Respondent's Motion for Stay of Final Agency Order Pending Appeal as the Board no longer has jurisdiction over this matter.

- B. Tameka Austin v. Department of Human Services, Division of Youth Corrections, Lookout Mountain Youth Services Center, State Personnel Board case number 2014G066.

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

- C. Brett Ellis v. Department of Public Safety, Colorado Bureau of Investigation, State Personnel Board case number 2015G012.

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

- D. Matthew Bergstrom v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2015G020.

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

VIII. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- Mandate: Appeal Dismissed, Renee Ryan v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, State Personnel Board case number 2013G025, Court of Appeals No. 2014CA624.

B. OTHER BOARD BUSINESS

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

IX. PROPOSED LEGISLATION AND/OR RULEMAKING

X. EXECUTIVE SESSION

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

February 17, 2015	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
March 17, 2015	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
April 21, 2015	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
May 19, 2015	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
June 16, 2015	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203