

State of Colorado



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State Personnel Board
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AGENDA PUBLIC BOARD MEETING June 16, 2015

A public meeting of the State Personnel Board will be held on **Tuesday, June 16, 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 June 12, 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

Rodney Smith v. Colorado State University, State Personnel Board case number 2014B019 COA 2014CA2350.

This case is now before the Court of Appeals. Appellant's Opening Brief was filed May 28, 2015.

Arthur Robinson v. University of Colorado Denver, Information Technology Services, State Personnel Board case number 2012B131 COA 2014CA2108.

This case is before the Court of Appeals. An Amended Opening Brief Submitted April 10, 2015.

Joanne Brown v. Department of Human Services, Colorado Mental Health Institute at Pueblo, State Personnel Board case number 2012B128 COA 2014CA2383.

This case is before the Court of Appeals. On June 2, 2015, an Opening Brief was filed.

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. Cassie Aymami v Department of Transportation, State Personnel Board case number 2014G092.

Complainant, a certified employee with the Colorado Department of Transportation (CDOT), filed a petition for hearing on May 5, 2014, regarding a grievance she filed on November 7, 2013, alleging the following: she had been promised her position would be reallocated to General Professional (GP) class and the reallocation had not occurred; she was working outside her current classification; unfair treatment between her and other employees, and unethical practices by her supervisor, Micki Perez-Thompson, Civil Rights Manager; retaliation; bullying in the workplace; favoritism; unfair hiring/promotion practices; an intimidating environment; no training; an environment to fail; unclear and conflicting expectations of work assignments; and lack of direction of region/department or work duties. As relief, Complainant requested that she be granted the reallocation and pay that she asserts she was promised by the Director; reassignment from the Civil Rights Office (CRO), while maintaining the same WS;¹ training needed for new area [to which she would be assigned]; reassurance of no retaliation; reassurance of confidentiality; reassurance that she would not be subjected to backlash or committing 'career suicide' for reporting. Complainant filed this petition before Respondent had issued a final written decision regarding her grievance.

The May 5 petition for hearing also appealed an additional grievance that Complainant filed on January 8, 2014, which incorporated and expanded the claims and request for relief set out in the November 7, 2013 grievance. In the January 8 grievance, Complainant alleged retaliation for filing the November 7 grievance and contested the denial of her request to be placed on Administrative Leave until the investigation of complaints regarding Micki Perez-Thompson, could be completed. The relief requested in the January 8 grievance included that leave she had taken while the investigation was being conducted be credited back to her leave bank; someone from Employee Relations/Legal review the requests by Ms. Perez-Thompson to review and edit an affidavit that was to be signed by Complainant; and, Ms. Perez-Thompson be required to undergo training in "supervisory and people skills." Complainant filed the May 5 petition before Respondent had issued a final written decision regarding her grievance.

Complainant filed a second petition for hearing on July 14, 2014, regarding the Step II final written decision dated June 30, 2014, addressing Complainant's November 7 and January 8 grievance issued by Heidi Humphreys, Division of Administrative Services Director, Colorado Department of Transportation. On November 12, 2014, Complainant filed a third petition for hearing regarding her downgrade from Office Manager I to Technician III, which occurred when her position was moved from Region I Civil Rights Office to Region I Planning and Environmental. The downgrade of Complainant's position to Technician III constitutes a demotion. Complainant contends that the demotion was in retaliation for lawful communications she had with appointing authorities and supervisors concerning actions by Respondent and its agents which were contrary to the State Employee Protection Act (Whistleblower Act). As relief, Complainant asks the Board to "make her whole, including but not limited to rescission of the demotion, reinstatement of base pay wages lost as a result of the demotion" and an award of attorney fees and costs.

Respondent asserts that Complainant's position as an Office Manager I for Region 6 was abolished in April 2013 as the result of a reorganization and Complainant was offered a position in the Civil Rights Office in a position that would be reallocated in the General Professional (GP) series; the Step II written decision regarding Complainant's November 7, 2013, and January 8, 2014 grievances was timely issued as Complainant agreed to waive the grievance timelines to allow completion of the investigation of complaints similar to those alleged by Complainant; Complainant was not reallocated to a GP II position because she is not qualified for such a position and because any reallocation or pay needed to be determined by the appointing authority and CDOT's Strategic Workforce Solutions (SWS), in accordance with rules and guidelines promulgated by the State Personnel Board, the Director, and DPA's Division of Human Services; any training required of Ms. Perez-Thompson was a personnel matter that could not be addressed with Complainant; upon Complainant's transfer from Civil Rights to Planning & Environmental, as requested by Complainant, it was determined by SWS that Complainant's job duties and responsibilities fell within the Technician III classification.

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; Complainant's petition for hearing filed on July 14, 2014, was untimely under the State Employee's Protection (Whistleblower) Act and, therefore, the Board lacks jurisdiction to hear it; Complainant's downgrade from the Office Manager I class was voluntary, was due to reorganization and was not a disciplinary action; Respondent had no reason to retaliate against Complainant for her disclosure of information as her disclosures were included in an ongoing investigation which resulted in personnel actions against other CDOT employees, including the supervisor who was the subject of Complainant's complaints; and Complainant has not identified any relief in her appeals which has not already been granted or that the Board is able to provide.

On June 8, 2015 the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be denied.

B. Rhonda Johnson v Department of Public Safety, State Personnel Board case number 2014G093.

Complainant, a GP III employed by the Department of Public Safety (DPS), filed a petition for hearing on May 5, 2014, arguing that Respondent's denial of her request for a promotion from a GP III position to a GP IV position was motivated by discrimination on the basis of race. In the information sheet submitted as part of the preliminary review process, Complainant also alleges that the Respondent subjected her to retaliation as a result of participating in a hearing on behalf of a co-worker. As relief, Complainant requests that her Position Description be revised to reflect the duties of a GP IV position; that she be given the same opportunities as her peers in Human Resources; that there be an end to the retaliatory conduct against her; and that she receive clear communication from her supervisor and HR Director. Complainant also requests an award of attorney fees and costs.

Respondent argues that this matter should not be set for hearing due to Complainant's failure to establish grounds that merit a hearing under Board Rule 8-41. Complainant has failed to demonstrate all elements of a prima facie case of race discrimination; even assuming she has, Respondent has proffered a legitimate, non-discriminatory reason for its decision not to reallocate Complainant's GP's III position to a GP IV position. Further, Complainant has failed to establish that Complainant engaged in protected activity and was retaliated against because of that activity. For these reasons, Respondent requests that Complainant's petition for hearing and request for relief be denied.

On June 3, 2015 the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be granted.

C. Micki Perez-Thompson v. Department of Transportation, State Personnel Board case number 2014G095(c).

Complainant, a certified employee of the Department of Transportation (DOT), filed her initial petition for hearing on May 12, 2014, appealing Respondent's May 6, 2014 denial of her grievance related to a series of investigative actions that led to her placement on administrative leave and alleging a hostile work environment, as well as age and national origin/ancestry discrimination. Complainant's second petition for hearing, filed June 13, 2014, appeals a reassignment and corrective action issued on June 5, 2014, and alleges that these actions were retaliatory and motivated by discrimination on the basis of age, sex and national origin/ancestry. On July 18, 2014, Complainant filed a third petition for hearing, alleging that Respondent failed to respond to Complainant's June 13, 2014 grievance concerning her June 5, 2014 reassignment and corrective action within the required thirty days. On August 5, 2014, Complainant filed a fourth petition for hearing, alleging that Respondent's August 1, 2014 Step 2 grievance decision by Executive Director Don Hunt was untimely and that Mr. Hunt failed to have any interaction with Complainant before issuing this decision. These four petitions have been consolidated under Case No. 2014G095(C). Complainant seeks removal of the written documentation, an end to her targeting and the creation of a hostile work environment, a return to her former position with her former duties, and an award of attorney fees and costs.

Respondent argues that Complainant has failed to establish a *prima facie* case of age, national origin and gender discrimination, and has failed to establish the existence of a hostile work environment. Respondent further argues that Complainant failed to establish that she suffered a loss of pay as a result of the June 5, 2014 corrective action, and that she has failed to establish the required elements of a retaliation claim. Respondent states that Complainant was properly subject to corrective action based on employee complaints and grievances concerning her management practices. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed with prejudice.

On June 2, 2015, the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be denied.

D. Kelley Kessler v. Department of Transportation. State Personnel Board case number 2014G104

Complainant, a certified employee, filed a petition for hearing on June 12, 2014, disputing the score received on her performance review, called a Performance Management Program, for the period of April 1, 2013, through March 31, 2014. Complainant asserts that she was discriminated against based on gender. Complainant maintains that she has worked very hard and deserves a "3" rating rather than the "2+" which she was given. A "3" rating is defined as "Exceptional - consistently exceptional performance/achievement(s) or consistently superior achievements(s)." A score of "2" is defined as "Successful - Expected Performance." As relief, Complainant requests a "3" rating and the back pay for any increase she would have received if she had been awarded a "3" rating and a promotion to Office Manager, or Program Assistant II.

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; Complainant's review of her performance is accurate; and the issuance of a 2+ rating does not give rise to an inference of illegal discrimination. As relief, Respondent

requests that Complainant's petition for hearing be denied and Complainant's appeal be dismissed.

On June 2, 2015, the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be denied.

E. Kathi Dean-Lee v. Department of Corrections, State Personnel Board case number 2015G031.

Complainant, a certified Accounting Technician III employed by the Department of Corrections (DOC), filed a petition for hearing on October 2, 2014, appealing Respondent's refusal to investigate and respond to her grievance concerning performance management documentation, and alleging discrimination, the creation of a hostile work environment and a violation of the FMLA. As relief, Complainant seeks removal of the written documentation, an end to her targeting and creation of a hostile work environment by Respondent, and an award of attorney fees and costs.

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. Respondent states that, under Director's Procedure 8-37, matters concerning the FMLA shall be filed with the Director pursuant to the provisions governing "Director's Dispute Resolution Processes," Board Rule 8-73 *et seq.* As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On June 3, 2015, the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be denied.

F. Bernard Whitney v. Department of Human Services, Division of Employment Affairs, Office of Administrative Solutions, State Personnel Board case number 2015G061.

Complainant was hired on December 30, 2013 as a Technician III for the Colorado Department of Human Services (CDHS), Southern District Human Resources office (HR). Complainant, a probationary employee, was separated from service on December 17, 2014 and filed a petition for hearing on December 27, 2014. Complainant asserts that he made disclosures which would be protected under the State Employee Protection Act (Whistleblower Act) that led to his termination from employment. In particular, Complainant asserts that he informed the Human Resources Manager, Bob Troutd, that Human Resources staff for Respondent were failing to place applicants, including veterans, on eligible lists correctly; failing to implement practices to make sure eligible lists are active for a 30 day period only; and arbitrarily generating referral lists used for filling vacancies of positions in the state personnel system. In addition, Complainant asserts that he publicly raised these issues at a meeting on November 6, 2014, after which he was harassed by Mr. Troutd and ultimately discharged.

As relief, Complainant requests: reinstatement to a HR Technician III position; certification as a Technician III effective 12/30/14; removal of termination letter and all negative correspondence/communication from his personnel file; Removal of termination letter and all negative correspondence/communication from his supervisory file; and payment of his attorney fees and costs.

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 fails to establish a prima facie claim under the Whistleblower Act, Section 24-50.5-101, C.R.S., *et seq.*; Complainant's disclosures do not fall within the protection of the Whistleblower Act; and Complainant cannot meet his burden of

demonstrating that the alleged disclosure was a motivation or substantial factor in the decision to terminate him; and Complainant was discharged due to poor performance. As relief, Respondent requests that Complainant's petition for hearing be denied and Complainant's appeal be dismissed.

On June 3 2015, the Administrative Law Judge issued an amended preliminary recommendation that the petition for hearing be granted.

G. Susan Ure v. Department of Human Services, Colorado Mental Health Institute at Pueblo State Personnel Board case number 2015G080.

Complainant, a certified employee, filed a petition for hearing on March 5, 2015. This petition appeals a second step grievance decision upholding the issuance of a Corrective Action for failing to file required reports concerning critical incidents. Complainant argues that she properly handled these incidents and that the whole Rule 6-10 process instigated by her appointing authority, Admissions Program Chief Nurse Linda Serracino, was retaliatory. Complainant states that she has a great therapeutic relationship with her patients, who have created poems and birthday cards for her, as well as drawings and paintings. As relief, Complainant requests that the corrective action be removed.

Respondent argues that Complainant does not allege any of the factors required in § 24-50-123(3), C.R.S. to obtain a discretionary hearing. Complainant failed to report three critical incidents when she was serving either as a Lead Nurse or as a Charge Nurse; the Corrective Action was the proper response to Complainant's failure to report these incidents. Respondent requests that hearing be denied and that Complainant's petition for hearing be dismissed.

On May 29, 2015, the Administrative Law Judge issued a preliminary recommendation that the petition for hearing be denied.

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

VI. REVIEW OF THE MINUTES FROM THE MAY 19, 2015 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

- **Review of the May 11, 2015 Meeting Minutes.**
- **Review of the May 13, 2015 Meeting Minutes.**

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 19, 2015 PUBLIC MEETING:

A. Anthony S. Montoya v. Department of Human Services, Office of Children, Youth & Families, Division of Youth Corrections, Marvin W. Foote Youth Services Center, State Personnel Board case number 2015G063.

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

- B. Joe Ward v. Department of Corrections, Director of Prisons, State Personnel Board case number 2015G064.

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

- C. Teresa Lister v. Department of Human Services, Office of Children, Youth & Families, Division of Youth Corrections, Lookout Mountain Youth Services Center, State Personnel Board case number 2015G070.

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

- D. Michael R. Hiler v. Department of Corrections, Division of Adult Parole, State Personnel Board case number 2015S007.

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

VIII. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Update on SPB staffing
- Board vacancy announcement and upcoming election

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.

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| June 16, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| July 21, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| August 18, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| September 15, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| October 20, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| November 17, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |
| December 15, 2015 | Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203 |