

# State of Colorado



**John W. Hickenlooper**  
*Governor*

**Garth Lucero**  
*Board Chair*

**Dana Shea-Reid**  
*Board Director*

**State Personnel Board**  
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## Meeting Minutes January 21, 2014

The State Personnel Board met in public session on Tuesday, January 21, 2014, at the Colorado State Personnel Board, 1525 Sherman Street, 3rd Floor Conference Room, Denver, Colorado 80203.

The meeting was called to order at 9:02 a.m. Board Members Vonda Hall, Garth Lucero, Neil Peck, Teresa Salerno, and Sally Yerger were present in person.

Dana Shea-Reid, Board Director; Assistant Attorney General Andrea Faley, Board Counsel; and Jane Sprague, Legal Assistant, were present in person.

### **I. REPORT OF KATHY NESBITT, STATE PERSONNEL DIRECTOR (EXECUTIVE DIRECTOR, DEPARTMENT OF PERSONNEL AND ADMINISTRATION [DPA])**

#### **REPORT OF THE DIVISION OF HUMAN RESOURCES [DHR], DPA**

Deborah Layton Root, State Chief HR Officer, reported to the Board on behalf of Ms. Nesbitt, as follows:

- The Employee Engagement Survey Results showed improvement at almost all agency levels. Kathy Nesbitt will report survey results to the Governor's cabinet on January 27, 2014. Results will go to state HR Directors after the cabinet presentation has been made.
- Ms. Layton-Root announced that she is resigning from her position as of January 31, 2014, but will remain with the state until March 1 in order to finalize several priority projects. Those projects were noted on a handout she shared with the Board. Ken Johnson will provide the Division of Human Resources report to the Board until a new Chief HR Officer is on board.
- Ms. Layton Root stated that there has been a decline in the number of Director's appeals filed. The process has been streamlined to reduce the response time from 90 days to 30 days or less.

### **II. PENDING MATTERS**

- A. Request for Limitation of Retention Areas by the Department of Human Services, State Personnel Board case number 2014A001.

During this public session, the Board considered the request of the Department of Human Services for limitation of retention areas, as follows: "laid off or displaced employees may 'bump' to any vacant position for which the employee qualifies as usual, but 'bumping' of occupied positions would be limited to the Office of Economic Security." The Board considered the letters written in opposition to the request submitted by employees Vicki Akers, Susan Kern, and Michelle Sykes, as well as oral testimony from Daryn Ridenour (on behalf of the Department of Human Services), Susan Kern (employee), Jane Davis (employee), and Michelle Brissette Miller (First Assistant Attorney General with the Employment/Personnel Unit).

Mr. Peck moved to deny the request to limit retention areas of the Department of Human Services. Ms. Salerno seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger.

- B. Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089, Court of Appeals Case No. 2013 CA 1278 (Board Response to Appellant's Opening Brief to Court of Appeals).

Board Counsel Andrea Faley explained that the Answer Brief in this matter will be filed by Counsel for Respondent Molly Moats. She said that the Board may join in this brief, issue its own brief or choose not to respond. Board Counsel Faley stated that she could provide specific advice to the Board in Executive Session. The Board agreed to table this matter for discussion until after conferring with Board Counsel in Executive Session.

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

- A. Brett L. Williams v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2011G028 (July 16, 2012).

Board Counsel Faley provided background information on the case and that the Board affirmed the Initial Decision of the Administrative Law Judge which included the award of front pay. Mr. Lucero stated that the award of front pay is appropriate since it was affirmed previously by the Board. Mr. Peck concurred and stated that he was not in favor of re-opening the question of appropriateness of a front pay award, but instead whether the calculated retirement age should be age 55 or 67. The Board

discussed the calculation of the front pay including use of actuarial information, cost of living data and the fact that there was no contrary data provided by the respondent agency. The ALJ's rationale and recommendation regarding front pay were deemed reasonable

Mr. Peck moved to adopt the findings of fact and conclusions of law in the Order Awarding Back Pay and Front Pay. Ms. Hall seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger.

At this point in the meeting, Ms. Salerno excused herself from the meeting room in order to be driven to DIA but continued her participation via teleconferencing on her cell phone.

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

- A. Elaine Daniloff v. Department of Public Health and Environment, State Personnel Board case number 2014G008.

Mr. Peck moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny Complainant's petition for hearing. Ms. Yerger seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger.

- B. Bruce Marshall v. Auraria Higher Education Center, State Personnel Board case number 2014G012.

Mr. Peck moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny Complainant's petition for hearing. Ms. Salerno seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger.

- C. Donna Webster v. Department of Corrections, State Personnel Board case number 2014G029.

Mr. Peck recused himself on this matter and left the meeting room.

Mr. Lucero moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny Complainant's petition for hearing. Ms. Hall seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Ms. Salerno, and Ms. Yerger. Mr. Peck abstained from voting due to his recusal.

Following discussion of this case, Mr. Peck returned to the meeting.

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

- A. Doug Wanker and Mark Gallegos v. Department of Transportation, State Personnel Board case number 2013B092(C) (December 27, 2013).

Director Shea-Reid advised the Board that an unopposed motion requesting that the Complainants' joint case be separated into two cases has been filed and a ruling will be made by ALJ Light.

**VI. REVIEW OF THE MINUTES FROM THE DECEMBER 17, 2013 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

On page 5; XI. Executive Session-correction of date from December 17, 2013 to November 19, 2013. Ms. Hall moved to approve the Minutes from the December 17, 2013 meeting as amended. Mr. Lucero seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger.

**VII. ACKNOWLEDGMENTS**

**DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS DECEMBER 17, 2013 PUBLIC MEETING:**

- A. Misgana Tesfaye v. Department of Revenue, Taxation Division, State Personnel Board case number 2013G026.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge, deny Complainant's petition for hearing, and refer the matter to the Personnel Director for further action, as appropriate.

- B. Steven Cowles v. University of Colorado Boulder, University Police Department, State Personnel Board case number 2013S041.

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

**VIII. ADMINISTRATIVE MATTERS & COMMENTS**

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- Arthur Robinson v. University of Colorado Denver, Information Technology Services, State Personnel Board case number

2012B131, Court of Appeals Case No. 2013CA1147 – Brief of the State Personnel Board has been filed

**B. OTHER BOARD BUSINESS**

- Location of Board Meetings – Director Shea-Reid recommended that the Board move its monthly meeting location from the 3<sup>rd</sup> floor conference room to the 4<sup>th</sup> Floor, State Personnel Board Courtroom 6, which will provide a little more space for the Board and individuals in attendance as well as an adjacent waiting room and restrooms. The Board agreed.
- Mr. Lucero inquired about any resolution to the security issues the Board brought up in November regarding the offices at 1525 Sherman Street. Director Shea-Reid said her meeting with Ms. Nesbitt had been rescheduled and she hoped to meet with her tomorrow, January 22, to discuss security concerns and remedies.

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

There were no comments.

**IX. PROPOSED LEGISLATION AND/OR RULEMAKING**

Director Shea-Reid reported that she and Board Counsel Faley were reviewing Board Rules that may need corrections, updating or clarification and do not otherwise require joint rule making. The Board will be provided a memo with the rules and justification for any changes to consider before any formal rulemaking is scheduled.

**X. EXECUTIVE SESSION**

**A. Executive Session – Consideration of the Minutes of December 17, 2013.**

At 10:40 A.M., Mr. Lucero made a motion to enter into Executive Session for the purpose of receiving legal advice on specific legal questions pursuant to § 24-6-402(3)(a)(II), C.R.S., regarding Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089, Court of Appeals Case No. 2013 CA 1278; and regarding Board deliberation of cases in open meetings; and for review, approval, and/or amendment of minutes from the Board's executive session on December 17, 2013. The motion was seconded by Mr. Peck. The motion passed on the affirmative vote of the following Board members: Ms. Hall,

Mr. Lucero, Mr. Peck, Ms. Salerno, and Ms. Yerger. Executive Session ended by consensus at 11:23 A.M.

**XI. BOARD DELIBERATION**

Returning to open session, the Board deliberated on its options regarding the Board's involvement in Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089, Court of Appeals Case No. 2013 CA 1278. With regards to claims about the Board's authority to interpret Director's procedures, Mr. Lucero stated that he felt the State Personnel Board was within its authority to interpret those rules and would be surprised if the Court of Appeals disagreed. Mr. Lucero added the Attorney General's Office was doing a very able job with the Court of Appeals and District Court and that he was not convinced the Board needed to get involved in the litigation. Board Counsel Faley noted that there was one issue where the Board was not in accord with Respondent DOLA and this was regarding the waiver and estoppel claims. The Board affirmed the ALJ opinion that there was no waiver of rights; DOLA alleged that there was a waiver of rights by Complainant.

The Board ultimately agreed that it would not participate in this appeal and directed Board Counsel Faley not to file a brief.

The Board meeting ended by consensus at 11:45 A.M.

**DATED THIS 18th DAY OF FEBRUARY, 2014.**

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Garth Lucero, Board Chair

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Vonda Hall, Member

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Neil Peck, Member

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Teresa Salerno, Member

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Sally Yerger, Vice Chair