

State of Colorado



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Meeting Minutes
March 15, 2016

The State Personnel Board met in public session on Tuesday, March 15, 2016, at the Colorado State Personnel Board, 1525 Sherman Street, First Floor Conference Room 103, Denver, Colorado 80203.

The meeting was called to order at 9:00 a.m. Board Members Vonda Hall, Nora Kelly, Michelle Palmquist, Neil Peck and Teresa Salerno were present in person.

Dana Shea-Reid, Board Director and Leanne DeVos, Board Counsel were present in person.

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

Kim Burgess, State Chief Human Resources Officer, reported to the Board on behalf of DPA/DHR as follows:

- The Legislative session is half way over and there are a variety of proposed bills but none that have any particular impact on DPA. A clean up bill for an employee payroll transition from a monthly payroll to semi-monthly is out of committee later this week and is an important issue for employees as well as the state controllers.

The budget bill is pending a March 16 economic forecast which will impact merit increases for employees.

- Regulations have been introduced to change the minimum salary exemptions under FLSA (Fair Labor Standards Act) and some changes to the "duty test". State designations for the salary test and duty test are underway. If there is a change in the duty test, the state could see a number of positions become eligible for overtime, which will be a big issue.
- Director's reviews are generally related to selection processes. Individuals are not sure how the process works and DHR will work with the HR community to discuss better ways of communicating with job applicants.

The performance management cycle is beginning and there will also be an upswing in Director's reviews which can only address the administration of the system not individual performance evaluations.

II. PENDING MATTERS AT THE COURT OF APPEALS

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

- A. Kathy Starling v. Department of Revenue, Tax Audit and Compliance Division, State Personnel Board case number 2014G013 (August 21, 2015).

Complainant appealed Respondent's Step II Grievance Decision holding that she would not be allowed to submit an application for the position of Tax Examiner II (TE II) in the Taxpayer Services Division after the application period had closed. Complainant argued that Respondent's decision was arbitrary or capricious or contrary to rule or law, and constituted unlawful gender discrimination in violation of the Colorado Anti-Discrimination Act (CADA). Complainant asked for an order providing all damages to make her whole, including but not limited to: placement in the TE II position; being given all training opportunities provided to the position; an award of back pay representing a 15% pay increase which Complainant would have earned in the position from the date of the incumbent's placement into the TE II position; front pay in the same amount from the date of judgment to placement in the position; an award of benefits from the date of hire into the position to the date of placement into the position; and an award of attorney fees and costs.

The Department of Revenue, Tax Audit and Compliance Division (Respondent) argued that the TE II selection process was performed fairly and without unlawful discrimination, that the position was properly posted as a reallocation without irregularities and that Complainant's failure to see that posting and apply for it during the application period was not the result of wrongdoing by Respondent. Respondent asked that the decision to deny Complainant's request to submit an application after the application period had closed be upheld; Complainant's claim of gender discrimination be denied; and Respondent's requests for attorney fees and costs to be granted.

The Administrative Law Judge affirmed Respondent's decision not to allow Complainant to submit an application for the position of Tax Examiner II after the application period had closed and affirmed the Respondent's Step II grievance decision. No attorney's fees were awarded and the case was dismissed with prejudice and referred to the State Personnel Director for further action if appropriate.

The Board tabled discussion on this item until after Executive Session in order to receive legal advice from Board Counsel. (See XI. Board Deliberation)

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

- A. Tamsen Kinkaid v. Department of Human Services, State Veteran's Community Center, State Personnel Board case number 2016G013.

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

- B. Scott Grover v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2016G034.

Ms. Salerno moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Ms. Kelly seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly, Ms. Palmquist and Ms. Salerno. Mr. Peck voted in opposition.

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

- A. Greg Goldman v. Department of Transportation, State Personnel Board case number 2015B108. (March 4, 2016)

The Board took no formal action in this matter.

VI. REVIEW OF THE MINUTES FROM THE FEBRUARY 16, 2015 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Ms. Palmquist moved to approve the minutes as submitted. Ms. Kelly seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly, Ms. Palmquist and Mr. Peck. Ms. Salerno abstained.

REVIEW OF THE MINUTES FROM THE FEBRUARY 26, 2015 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Peck moved to approve the minutes as submitted. Ms. Hall seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly, Ms. Palmquist and Mr. Peck. Ms. Salerno abstained.

VII. ACKNOWLEDGMENTS

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

- A. Kathy Starling v. Department of Revenue, Tax Audit and Compliance Division, State Personnel Board case number 2014G013.

The Board voted to table the discussion and schedule a special meeting to conclude the matter.

- B. Clarence Roberts v. University of Northern Colorado, Housing & Residential Education, State Personnel Board case number 2016G020.

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

C. Vicki Jaramillo v. Department of Corrections, State Personnel Board case number 2016G029.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing and refer the petition to the State Personnel Director for any action deemed appropriate concerning the Respondent's decision to transfer Complainant.

D. Veronica A. Garrett v. Department of Corrections, Sterling Correctional Facility, State Personnel case number 2014B118. (January 11, 2016).

No formal action was taken by the Board.

E. James Jimerson v. Department of Corrections, Buena Vista Correctional Facility, State Personnel case number 2015B003. (January 11, 2016).

No formal action was taken by the Board.

F. Richard Reinhardt v. Department of Human Services, Colorado Mental Health Institute at Pueblo, State Personnel case number 2014G088. (January 11, 2016).

No formal action was taken by the Board.

G. Justin Sturtevant v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel case number 2016B007. (January 29, 2016).

No formal action was taken by the Board.

VIII. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on appeal to the Board and to Appellate Court.

Board Counsel DeVos briefed the Board on cases on appeal. The request for Certiorari was denied by the Colorado Supreme Court in *Honest v. Department of Human Services*, and a mandate has just been issued. Counsel advised that *Honest* remains an unpublished decision of the Court of Appeals, and thus has no value as precedent. She also reported the Court of Appeals decision in *Brown v. Department of Human Services*, which upheld the final agency order of the State Personnel Board.

B. OTHER BOARD BUSINESS

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

There were no comments.

IX. PROPOSED LEGISLATION AND/OR RULEMAKING

Director Shea-Reid informed the Board that HB16-1086 regarding the Performance Audit of DPA and State Personnel Board passed the Senate on March 10 and was sent to the Governor for signature. The bill modified the dates which performance audits are conducted, and rather than an audit every four years, the legislation provides that an audit shall be completed at least seven months before July 1, 2020 and thereafter at the discretion of the State Auditor.

X. EXECUTIVE SESSION

At 9:40 a.m., Mr. Peck 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 the Initial Decision on appeal to the Board by Kathy Starling v. Department of Revenue, Tax Audit and Compliance, State Personnel Board case number 2014G013. Ms. Hall seconded the motion.

The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly, Ms. Palmquist, Mr. Peck and Ms. Salerno.

Executive Session ended by consensus at 9:56 a.m.

XI. BOARD DELIBERATION

A. Kathy Starling v. Department of Revenue, Tax Audit and Compliance Division, State Personnel Board case number 2014G013 (August 21, 2015).

Upon returning to open session, the Board considered language for the intended motion. Ms. Kelly read a draft motion for the Board including the basis in the record to reverse Conclusions of Law 1 and 2. There was no further discussion.

Ms. Kelly moved to adopt the Findings of Fact but reverse Conclusions of Law 1 and 2 in the Initial Decision of the Administrative Law Judge. The motion was seconded by Ms. Hall. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly and Ms. Palmquist. Mr. Peck and Ms. Salerno voted in opposition.

A second motion was made by Ms. Kelly to remand to the Administrative Law Judge to determine remedy. The motion was seconded by Ms. Palmquist. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Kelly and Ms. Palmquist. Mr. Peck and Ms. Salerno voted in opposition.

The Board meeting ended by consensus at 10:08 A.M.

DATED THIS 19th DAY OF APRIL, 2016.

SIGNATURES

Neil Peck, Board Chair

Vonda Hall, Vice Chair

Nora Kelly, Member

Michelle Palmquist, Member

Teresa Salerno, Member
