State of Colorado

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Governor

Sally Yerger
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Meeting Minutes
May 19, 2015

The State Personnel Board met in public session on Tuesday, May 19, 2015, 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 Neil Peck, Teresa Salerno, Vonda Hall, Michelle Palmquist, and Sally Yerger were present in person.

Dana Shea-Reid, Board Director; Assistant Attorney General Andrea Faley, Board Counsel; and Cindy Klyn, Legal Assistant, 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:

- June Taylor has been appointed by the Governor as the new Executive Director of DPA. Most recently she was the Senior Manager of Culture, Diversity and Equal Opportunity Programs for Lockheed Martin and prior to that was a federal litigator for ten years and chief of staff at the Federal Communications Commission. Ms. Taylor will attend a future Board meeting for a formal introduction.
- The Annual Total Compensation Survey has been issued. Meetings with employees were conducted in May to explain what total compensation means and respond to questions. A copy of the total comp survey will be furnished to the Board.
- Open Enrollment has concluded and 98% of eligible employees went on line to either elect or waive medical coverage. Staff at DHR made sure employees had the best and most comprehensive information available in order to make their medical plan choices.
- A request for proposal has been issued for a new HRIS and will close in mid-June, and a vendor will be selected. It is anticipated the project will

be on going for the next two years and will hopefully result in innovations for state government.

- Ms. Burgess said she committed to the Board that she would share information and communicate Board concerns to HR managers and has started monthly meetings with all HR Directors in order to do so. Board concerns regarding internal process issues in several cases have been discussed with HR Directors.

    - Ms. Salerno thanked Ms. Burgess and noted that she is especially interested in the interactive process with disabilities. Mr. Peck concurred and added that the Board has specific concerns about processes as defined in rules and procedures which should be followed.

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

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

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

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

Mr. Peck moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Ms. Palmquist seconded the motion. The motion passed on the affirmative

vote of the following Board members: Ms. Hall, Ms. Palmquist, Ms. Salerno, Mr. Peck and Ms. Yerger.

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

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

D. Michael R. Hiller v. Department of Corrections, State Personnel Board case number 2015S007.

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. Palmquist, Ms. Salerno, Mr. Peck and Ms. Yerger.

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

VI. REVIEW OF THE MINUTES FROM THE APRIL 21, 2015 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Peck moved to approve the Minutes from the April 21, 2015 meeting. Ms. Salerno seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Hall, Ms. Palmquist, Mr. Peck, Ms. Salerno, and Ms. Yerger.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS April 21, 2015 PUBLIC MEETING:

A. Tanya Sewell v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Services Center, State Personnel Board case number 2015G044.

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

B. Paul Barker v. Department of Transportation, State Personnel Board case number 2015G050.

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

C. Emmett Malone, Doris Frey(Jung), and Rosendo Majano v. Department of Public Health & Environment, Air Pollution Control Division, State Personnel Board case number 2015G062.

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

D. Constance M. Dalton v. Department of Human Services, Office of Behavioral Health, Colorado Mental Health Institute, State Personnel Board case number 2015G068.

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

E. David S. Turner v. Department of Revenue, Division of Motor Vehicles, State Personnel Board case number 2014B097.

The Board voted to issue an order modifying the Initial Decision of the Administrative Law Judge to include with the Initial Decision a Notice of Appeal Rights giving parties time to designate the record and appeal the Initial Decision from the date of the certificate of service on the order modifying the Initial Decision.

VIII. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

Board Counsel Faley briefed the Board on cases before the Court of Appeals. Regarding the Robinson appeal, Counsel indicated that at the next Board meeting, the Board may decide to file an answer, join the CU answer or take no action after reviewing the Opening Brief of Appellant.

B. OTHER BOARD BUSINESS

Director Shea-Reid reported that the selection process for the new ALJ has concluded and a conditional job offer has been extended to the finalist pending the successful completion of background and reference check.

She stated that she anticipates formalizing the job offer soon and the new ALJ would most likely begin by in mid-June 2015.

The Director reported that the 2015 Election process is underway and candidate information has been posted on the Board's web site. The term of Board Chair Yerger ends in June. Ms. Yerger announced that she had initially planned to run for re-election, but due to health reasons she will not do so. Next month will be her last Board meeting. Ms. Yerger added that she has enjoyed her past five years of service on the Board and the company of intelligent and hard working individuals. The Board expressed its heartfelt thanks to Ms. Yerger and disappointment at no longer having her on the Board.

The Director introduced the follow up discussion regarding the format of the preliminary recommendations. The Board determined it would go to Executive Session for legal advice before commencing with the discussion.

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

There were no comments.

IX. PROPOSED LEGISLATION AND/OR RULEMAKING

X. EXECUTIVE SESSION

At 9:39 a.m. Ms. Yerger made a motion to enter into Executive Session for the purpose of receiving legal advice on specific questions pursuant to Section 24-6-402(3)(a)(II), C.R.S. including the application of Open Meetings Law to Board member communications and regarding legal standards applicable to review of preliminary recommendations.

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

Executive Session ended by consensus at 10:11 a.m.

XI. BOARD DELIBERATION

Following Executive Session and having received advice from Board counsel, the Board re-entered public session. Board Chair Yerger started with some background on the changes to the preliminary review (PR) format and the

concerns that had been expressed about those changes. The Board had invited the ALJs to meet and discuss format issues and received a letter in reply from the ALJs respectfully declining to attend a Board meeting. Ms. Yerger stated that she wished to disclose that she drafted a letter of response to the ALJs letter declining to attend a Board meeting, and on May 11, 2015, she sent it to Mr. Peck requesting his review and feedback. Mr. Peck responded with his comments. Although the letter was never sent to the ALJs, Ms. Yerger said she is now aware that the exchange may have constituted a meeting under the Open Meetings Law and was apologetic.

Ms. Yerger continued to say that she drafted a memo to the full Board which she sent to them via email on May 13, 2015. This memo contained her thoughts on the May 19, 2015 agenda item titled "Follow up on format of preliminary recommendation". Ms. Yerger then read the content of the May 13 memo to the Board. She acknowledged that her desire to have the Board members read her memo prior to the Board meeting may have again been mistaken regarding Open Meetings Law and expressed her sincere regrets.

The Board commenced deliberating the issue regarding changes to the Preliminary Recommendation (PR) format.

Mr. Peck noted that the Board members had no problem making decisions with the recent cases it has reviewed. He added that the changes that have been made to the PRs are, in effect, the ALJs answer to the Board's question on what they feel the PR format should be. He noted the Board is a quasi-judicial body that makes decisions based on the recommendations of the ALJ and feels strongly the ALJs should be left to do their work.

Ms. Hall said she respects the ALJs and agrees with them, but the Board, as a quasi-judicial body, also has the right as decision makers to have the information that is needed.

Director Shea-Reid requested a moment to clarify to the Board that information sheets provided by parties are not just single sheets of paper but contain all manner of information, exhibits and witness lists that the ALJs review in the entirety. To provide an actual example, Legal Assistant Cindy Klyn showed the Board stacks of files containing the contents of the information sheet for an unidentified appeal that was several hundred pages long. The Director also referred to Board Rule 8-45(G) which gives ALJs the authority to review information presented by parties in their information sheets and determine whether a valid issue exists that would warrant a hearing.

Mr. Peck stated that content of the PR should be left to the discretion of the ALJs who he described as highly educated, highly qualified judicial officers. He added if the Board can't render a decision based inadequate information, it should

remand to the ALJ to provide the requested information, but it is a bad precedent to tell the ALJs how to do their job.

Ms. Salerno noted that the ALJs make thoughtful and well reasoned recommendations and in the past the Board could take a different path from a recommendation as it saw fit with information provided. But she does not feel there is enough information presently to do that and doesn't want to be relegated to rubberstamping. Ms. Salerno added that a format or structure that works for everyone would be ideal but did not feel the Board should unilaterally tell the ALJs what to do.

Ms. Palmquist added that she wanted to partner with the ALJs and was not questioning their judgment, but is looking for a process that works on both ends. She stated that she felt that in changing the format the objective was to make it easier for the Board to evaluate the PRs, but the change did the opposite by providing less information. She inquired whether returning to the old format would be an administrative burden for the ALJs or not.

Ms. Yerger asked if the ALJs should just go back to using the old format for PRs if that satisfies the needs of the Board.

Ms. Hall suggested it would be useful if the PRs included uncontroverted facts; the complainant's statement of alleged facts and legal argument as to why a hearing should be granted; the respondent's statement of alleged facts and legal argument as to why a hearing should be denied; and the ALJ's legal analysis.

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Mr. Peck stated the current PRs already contain all of the information that is necessary for a decision. He continued by saying if the view of the members of the Board is that PRs need additional information in order to satisfy their needs, he does not share that opinion and there is no consensus of the Board. Mr. Peck asked that his strong dissent be formally noted.

Ms. Yerger suggested that the guidance provided by Ms. Hall addresses the general areas of concern that have been discussed by the Board and it should be noted that, with the exception of Mr. Peck, this is the direction the Board would prefer to take.

The Board declined to make a motion regarding its deliberations, and asked that Ms. Hall's suggestions for the PR format be shared with the ALJs. Board Counsel reiterated Ms. Hall's suggestions as including uncontroverted facts; the complainant's statement of alleged facts and legal argument as to why a hearing should be granted; the respondent's statement of alleged facts and legal arguments as to why a hearing should be denied; and the ALJ's legal analysis.

Director Shea-Reid said the Board's feedback and suggestions will be shared with the ALJs, who have been working continuously to draft PRs that state the

basis for their recommendation and contain information the Board needs to make its decision to affirm or deny the recommendation.

The Board meeting ended by consensus at 10:53 A.M.

DATED THIS 16th DAY OF JUNE, 2015.

Sally Yerger, Board Chair

Vonda Hall, Member

Michelle Palmquist, Member

Teresa Salerno, Member

Neil Peck, Member