

State of Colorado



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State Personnel Board
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AMENDED AGENDA PUBLIC BOARD MEETING January 21, 2014

A public meeting of the State Personnel Board will be held on **Tuesday, January 21, 2014, at the Colorado State Personnel Board, 1525 Sherman Street, 3rd Floor Conference Room, Denver, CO 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 16, 2014.

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

II. PENDING MATTERS

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

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).

Complainant was a 12-year employee who had been promoted to Captain at the time he resigned. His evaluations were excellent. Complainant was gay but had not disclosed it at the Patrol. During his tenure, Complainant witnessed anti-gay bias slurs and incidents at all staff levels and filed two complaints about anti-gay incidents, neither of which resulted in action by the Patrol to correct the conduct. Ten weeks after resignation, Complainant applied for reinstatement.

Respondent required Complainant to undergo the background investigation and polygraph exam. During the pre-test interview, Complainant made pre-test admissions that he had accidentally viewed a video of child pornography for a few seconds and had flagged it on the website, and that one time a massage had ended in his being masturbated by the masseuse. The polygraph examiner asked Complainant if the

masseuse was a male or female. Complainant responded truthfully that it was a male. Complainant was upset by the question and had a significant reaction to the polygraph test. The question violated the Patrol Polygraph policy prohibiting questions pertaining to sexual orientation.

Respondent denied reinstatement to Complainant on the basis of his failed polygraph test within two business days of the polygraph test without interviewing Complainant, consulting agency counsel, HR, or reviewing any written policies or standards. The Patrol had recently hired two new Trooper Cadets and one reinstatement Trooper who failed the polygraph.

In the Initial Decision of the Administrative Law Judge, the ALJ concluded that Respondent's decision to deny reinstatement was arbitrary and capricious and constituted discrimination based on sexual orientation. Front pay was awarded, based on the unfeasibility of reinstatement due to the evidence Complainant would likely be placed in danger as a Trooper. Attorney fees were awarded based on the Patrol's failure to genuinely consider reinstating Complainant and conducting a sham decision-making process.

Order Awarding Back Pay and Front Pay (August 16, 2013; Amended August 29, 2013).

After a hearing on appropriate remedy, ALJ ordered back pay from date of reinstatement denial through December 21, 2012, date of final board order affirming Initial Decision, and front pay through age 55, which is when he would have retired from the Patrol. Complainant's request for front pay until age 67 was rejected. Front pay consists of difference between what Complainant would have earned as a Trooper and what he will earn at an irrigation company.

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.

Complainant, a certified Health Professional IV employed by the Department of Public Health and Environment, filed a petition for hearing on August 12, 2013, arguing that she was denied relief in a final grievance decision challenging a corrective action and that decision was arbitrary and capricious because it was retaliation in response to disclosures Complainant had made about DPHE, in violation of the Whistleblower Act. As relief, Complainant requests the following: the corrective action be removed from her file immediately; any reference to violence, guns and counseling sessions in any records be removed; and Respondent pays Complainant for any attorney fees and costs incurred in responding to the corrective action and/or bringing this action.

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; and Complainant's assertions regarding the implementation of information systems and steps taken to prevent fraud and ensure the accurate reporting of HIV cases in Colorado by DPHE are incorrect. As a result of the lack of critical information and specificity in Complainant's Information Sheet supporting that her alleged disclosures were a substantial or motivating factor in the issuance of the June 6, 2013 corrective action, Complainant cannot meet her burden of persuasion under Board Rule 8-45(G). As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On January 8, 2014, the Administrative Law Judge issued a recommendation that Complainant's petition for hearing be denied.

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

Complainant, a probationary employee employed by the Auraria Higher Education Center, filed a petition for hearing on August 15, 2013, arguing that the decision to terminate his employment during the probationary period was due to discrimination on the basis of race/color. As relief, Complainant requests that his employment be reinstated with full back pay and benefits and that there be disciplinary action imposed on another employee, John Armijo.

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; and AHEC's action was not based on illegal racial discrimination. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On January 7, 2014, the Administrative Law Judge issued a recommendation that Complainant's petition for hearing be denied.

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

Complainant, a certified Case Manager III employed by the Department of Corrections filed a petition for hearing on October 3, 2013, arguing that she was denied relief in the final grievance decision and that decision was arbitrary and capricious because the agency failed to follow grievance procedures. As relief, Complainant requests full payment of the expenses she incurred as a result of her special assignment, full payment of the expenses she incurred as a result of her transfer from the Delta Correctional Center to DOC's HQ in Colorado Springs, reimbursement of her attorney fees pursuant to Board Rule 8-33 and C.R.S. § 24-50-125.5, and other relief as appropriate.

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; the Board lacks statutory authority to hear Complainant's claims; and assuming the Board determines it has jurisdiction, Complainant provides insufficient grounds to support the granting of her petition. As relief, Respondent requests that Complainant's petition be denied and dismissed.

On January 7, 2014, the Administrative Law Judge issued a recommendation that Complainant's petition for hearing be denied.

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).

Complainants, both Transportation Maintenance IIIs ("TM3s") for the Colorado Department of Transportation ("CDOT"), were permanently disciplinarily demoted to Transportation Maintenance IIs ("TM2s") and appealed. Complainants had been disciplined for their failure to supervise some of their subordinate employees who admitted to drinking on CDOT time and on CDOT property. These same subordinates further admitted to working less than half their shifts and "goofing off" for the remainder. The ALJ found that Mr. Wanker committed the acts for which he was disciplined, but that the permanency of his demotion was excessively punitive. The ALJ ordered that Mr.

Wanker be permitted to compete for TM3 positions, or any CDOT positions, in the future. The ALJ found that Mr. Gallegos committed some of the acts for which he was disciplined; namely, that he failed to supervise his employee who had been disappearing for portions of his shifts. The ALJ found that none of the employees who admitted to drinking on CDOT time and property were within the unit that Mr. Gallegos supervised, and that CDOT had not put on evidence showing that Mr. Gallegos had any duty to supervise them. The ALJ further found that Mr. Gallegos' actions were not so serious or flagrant as to exempt CDOT from using progressive discipline with him. Therefore, the ALJ ordered that Mr. Gallegos' demotion be rescinded and that he be reinstated to his previous TM3 position, that he receive back pay for the time he was paid a TM2 salary, and that he be issued a corrective action for his failure to properly supervise his employee who disappeared while on duty. Attorney fees were not awarded.

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

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

B. OTHER BOARD BUSINESS

- Location of Board Meetings

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

IX. PROPOSED LEGISLATION AND/OR RULEMAKING

- A. Potential Rulemaking for Board Rules

X. EXECUTIVE SESSION

- A. Executive Session Minutes of December 17, 2013

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

February 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
March 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
April 15, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
May 20, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
June 17, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
July 15, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
August 19, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
September 16, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
October 21, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
November 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
December 16, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203