

State of Colorado



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State Personnel Board
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AGENDA PUBLIC BOARD MEETING February 19, 2013

A public meeting of the State Personnel Board will be held on **Tuesday, February 19, 2013, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, CO 80202-3604.** 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 February 19, 2013.

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

II. REQUESTS FOR RESIDENCY WAIVERS

- February 1, 2013 Residency Waiver Report

III. PENDING MATTERS

There are no Pending Matters before the Board this month.

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

- A. Edward W. Gietl v. Department of Public Safety, State Personnel Board case number 2011B066.

Complainant was the Director of Human Resources for the Department of Public Safety. He was disciplinarily terminated after three years in the position. The ALJ concluded that Respondent failed to prove that Complainant committed most of the acts upon which discipline was based. In addition, Respondent violated Board Rules 6-2 and 6-9 and acted in an arbitrary and capricious manner by failing consider the required criteria in 6-9, failing to consider his two-years of satisfactory performance and other mitigating information, and failing to impose corrective action prior to disciplinary action. The ALJ also concluded that Respondent did not engage in gender discrimination against Complainant, and that Complainant was not entitled to an award of attorney fees and costs.

On May 9, 2012, the ALJ issued an Order Regarding Back Pay; she reiterated this order in her September 19, 2012 Order Reaffirming May 9, 2012 Order Regarding Remedy. These are the orders which Respondent is appealing to the Board.

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

- A. Cory Cutting v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2013G015.

Complainant, a probationary Police Dispatch Supervisor employed by the Department of Public Safety, Colorado State Patrol, filed a petition for hearing on August 13, 2012, arguing that he was denied relief in the decision to terminate his employment during the probationary period and that decision was arbitrary and capricious because it was the result of discrimination based on sexual orientation. As relief, Complainant seeks a full evidentiary hearing on his claims; all legal and equitable remedies available to him based on his claims, including back pay, front pay in lieu of hiring, and attorney fees; and equitable relief in a form designed to address and remedy the systemic discrimination based on sexual orientation that pervades the CSP.

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 this Board has limited jurisdiction to hear appeals from the selection process. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 7, 2013, the Administrative Law Judge issued a preliminary recommendation that a hearing be granted.

- B. Rene Ryan v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, State Personnel Board case number 2013G025.

Complainant, a probationary Registered Nurse employed by the Department of Human Services, at the Colorado Mental Health Institute at Fort Logan, filed a petition for hearing on September 14, 2012, arguing that the agency's decision to terminate her employment during the probationary period violated the Whistleblower Act. As relief, Complainant seeks the opportunity to work with a state agency other than CMHIFL, back pay and benefits with interest, attorney fees and costs, discipline and/or remedial training for employees found to have committed misconduct.

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 that her allegations do not state a basis for the grant of a hearing. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation that a hearing be granted.

- C. Ray Miller v. Colorado School of Mines, State Personnel Board case number 2013G028.

Complainant, a certified Information Technology Professional II at the Colorado School of Mines, filed a petition for hearing on October 10, 2012, arguing that the final grievance decision regarding the exemption of a position from the state personnel system was in violation of § 24-50-135(1)(a) and (3), C.R.S., and the Colorado Civil Service Amendment. Complainant requests that the position be brought into the state personnel system.

Respondent argues that Complainant lacks standing to challenge the exemption decision, that his grievance was untimely filed, that the exemption decision comported with the law, and that Complainant has failed to meet his burden of showing that grounds

exist under § 24-50-123(3), C.R.S. and Board Rule 8-46, 4 CCR 801, that merit a full hearing. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation after remand that a hearing be granted.

D. Tom Orell v. Colorado Mesa University, State Personnel Board case number 2013G034.

Complainant, a certified Information Technology Professional - Tech II employed by Colorado Mesa University, Financial & Administrative Services, filed a petition for hearing on October 19, 2012, arguing that the final grievance decision upholding the exemption of seven positions from the state personnel system is a violation of the Civil Service Amendment and state law implementing that Amendment.

Respondent argues that Complainant lacks standing to assert the claim, that the exemptions are proper under the law, and that Complainant has 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. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation after remand that a hearing be granted.

E. Jacob Phillips v. Board of Directors for the Auraria Higher Education Center, State Personnel Board case number 2013G042.

Complainant, a certified Program Assistant II employed by the Board of Directors for the Auraria Higher Education Center, filed a petition for hearing on November 15, 2013, arguing that he was denied relief in the final grievance decision and that decision was arbitrary and capricious because AHEC dismissed his grievance as untimely. As relief, Complainant requests the following: an evaluation of position #650 by and independent third party or any similar action as deemed appropriate by the State Personnel Board/Director; accurate, and agreed upon by Complainant, allocation of position, if independent evaluation determines inaccurate allocation; and if independent evaluation shows AHEC produced an inaccurate evaluation to a lower grade, back pay to when duties were added.

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; the Board's review of AHEC's final grievance decision is limited; AHEC's final grievance decision was not arbitrary, capricious or contrary to rule or law, nor does it violate Complainant's federal or state constitutional rights, § 24-34-401, C.R.S. *et seq.*, § 24-50.5-101, C.R.S. *et seq.*; AHEC complied with Board Rule 8-8(A)(1); AHEC complied with Board Rule 8-8(A)(2) and Complainant failed to file his grievance in compliance with Rule 8-8(A)(2); AHEC's final grievance decision was not arbitrary, capricious or contrary to rule or law; and the Board lacks jurisdiction to consider any claim by Complainant that his position was wrongly reallocated. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 7, 2013, the Administrative Law Judge issued a preliminary recommendation that a hearing be denied and that the matter be referred to the State Personnel Director for further action, as appropriate.

F. Jeremy Goodson v. University of Colorado Boulder, Police Department, State Personnel Board case number 2013S006.

Complainant was a certified Police Officer I employed by the University of Colorado Boulder, Police Department, until his resignation in November 2012. Complainant filed a petition for a director's review on August 7, 2012, arguing that Respondent's selection decision violated the Whistleblower Act. As relief, in his petition for hearing, Complainant requested a promotion to sergeant and back pay. In his information sheet, Complainant has requested that the UCPD pay him the difference between his previous salary of \$51,000 to the newly appointed Sergeant pay of \$65,000 for the period of five years. Complainant is also requesting that the UCPD set a specific standard operating procedure for promotions to prevent this type of situation from occurring in the future.

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. Respondent requests that Complainant's petition be denied or dismissed with prejudice.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation that a hearing be granted.

- G. Alfritch D. Anderson v. Colorado Community College System, State Personnel Board case number 2013S010.

Complainant, a certified Security Officer I employed by the Colorado Community College System, filed a petition for hearing on September 6, 2012, arguing that he was denied a promotion in a selection process based upon race and organizational membership discrimination. As relief, Complainant requests that the Board investigate this matter and sanction the people involved; that he receive a \$50,000.00 monetary settlement; that the people involved in this incident be fired or demoted; and that he be made whole by placing him in a position with the state that is comparable to the position he was denied.

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 Complainant has not established an inference of race discrimination and, thus, cannot establish a *prima facie* case warranting a hearing. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation after remand that a hearing be granted.

- H. Misgana Tesfaye v. Department of Revenue, Taxation Division, State Personnel Board case number 2013S018.

Complainant, a certified Revenue Agent IV employed by the Department of Revenue, Taxation Division, filed a petition for hearing on October 22, 2012, arguing that he was denied relief in a selection decision; that the decision was arbitrary and capricious; that the decision was discriminatory based on national origin/ancestry and race/color; and that the cancellation of the job announcement was retaliatory. As relief, Complainant requests that an independent party administer the examination and selection for the position of Chief Auditor, using the qualified applicants from the initial position posting, in accordance with all Board rules and procedures. Additionally, Complainant requests reimbursement of his attorney fees.

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 cannot demonstrate he was subject to discrimination when Respondent cancelled the job announcement; Complainant cannot establish a *prima*

facie case of discrimination; the cancellation of the job announcement was based on a legitimate, nondiscriminatory reason completely unrelated to Complainant; and Complainant cannot demonstrate he was subject to retaliation when Respondent cancelled the job announcement. As relief, Respondent requests that the Board grant Respondent's Motion to Dismiss or, in the alternative, deny all relief requested by Complainant and deny Complainant's petition for hearing.

On February 6, 2013, the Administrative Law Judge issued a preliminary recommendation that a hearing be denied, and that the matter be referred to the State Personnel Director for further action, as appropriate.

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

- A. Cornelius Foxworth v. Department of Human Services, Division of Youth Corrections, State Personnel Board case number 2011B086 (January 11, 2013).

Complainant, Director of Gilliam Youth Service center, appealed his termination. After hearing, the ALJ concluded: Complainant committed the acts for which he was disciplined, including abdicating his role as Director of Gilliam, failing to improve his performance and address the audit deficiencies, implementing systems necessary to improve performance at Gilliam, failing to enforce the prohibition on group searches of youth, and driving under the influence of alcohol which is off duty conduct that adversely affects his ability to lead a youth corrections facility as a role model for youth, and his standing as a community leader. The ALJ also found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and Respondent did not discriminate against Complainant. Affirming Respondent's action, the ALJ dismissed Complainant's appeal with prejudice.

- B. Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089 (January 24, 2013).

Complainant was a certified Management class employee employed by Respondent, Department of Local Affairs, prior to her separation from state service on June 30, 2007. Complainant was in the Senior Executive Service pay plan for the last three years of her state employment; Complainant seeks to be returned to the traditional classified pay plan within the state personnel system. In particular, Complainant contends that Respondent unlawfully determined that Complainant did not have the right to move into a vacant position within the Management class when Respondent elected not to renew her SES contract following the 2006-07 fiscal year. Complainant bases this claim on her 2006-07 SES contract, and in particular, a "safe harbor clause" within the contract.

After briefing by the parties, the ALJ found that under the safe harbor clause of Complainant's 2006-07 SES contract, if the contract was not renewed, the parties intended to provide Complainant with the right to an unoccupied position in the traditional classified pay system in the Management class for which Complainant was qualified; Complainant's claims are not barred by the doctrines of waiver or estoppels; Director's Procedure 2-11(C) precludes enforcement of the SHC; Board Rule 2-13 does not preclude enforcement of the SHC; and the Board does not have jurisdiction to review the three issues raised by Complainant following the Order on Summary Judgment. The ALJ ordered that Respondent's action is affirmed; Director's Procedure 2-11(C) precludes enforcement of the SHC in Complainant's 2006-07 SES contract; accordingly, Complainant is not entitled to the requested relief, and the appeal is therefore dismissed with prejudice.

- C. Arthur Robinson v. University of Colorado at Denver, State Personnel Board case number 2012B131 (January 28, 2013).

Complainant, a certified employee, appealed his termination of employment from the Information Technology unit at the University of Colorado at Denver, arguing that it was arbitrary, capricious and contrary to rule or law and that his termination was the product of unlawful discrimination on the basis of his race and age, and a violation of the State Employee Protection Act. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including incorrectly using the tally code, submitting 8 of his 12 monthly timesheets late, and not following all of the rules and procedures that were applied to the technicians on the team. Even after repeated warnings, in the form of an action plan, coaching meetings, multiple corrective actions, and two years of failing reviews, Complainant still could not find a way to bring his performance up to par for the 2011 – 2012 review period. In addition, the ALJ held that Respondent's action was not arbitrary, capricious, or contrary to rule or law, and the discipline imposed was within the range of reasonable alternatives. Affirming Respondent's disciplinary action and the termination of Complainant's employment, the ALJ dismissed Complainant's appeal with prejudice.

- D. Ranger Geremaia v. Department of Transportation, State Personnel Board case number 2013B029 (February 4, 2013).

Complainant, a certified Transportation Maintenance II, appealed the termination of his employment on the grounds that the decision was arbitrary, capricious, and contrary to rule or law. After hearing, the ALJ determined that Complainant committed the acts for which he was disciplined, including improperly using state resources by filling the water tank on his personal vehicle to take water to his horses, not being truthful about the issue with his appointing authority, and using unsafe pothole filing procedures on several occasions. The ALJ also found that Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives; and an award of attorney fees and costs is not warranted in this case. Affirming Respondent's disciplinary termination of Complainant's employment, the ALJ dismissed Complainant's appeal with prejudice.

VII. REVIEW OF THE MINUTES FROM THE JANUARY 2, 15, and 30, 2013 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD

VIII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JANUARY 15, 2013 PUBLIC MEETING:

- A. Alvin Sais v. Department of Corrections, State Personnel Board case number 2013S002.

The Board voted to grant Respondent's Motion to Strike Complainant's Reply Brief based on the untimely filing of Complainant's Reply Brief and to adopt the findings of fact and conclusions of law in the Order Granting Respondent's Motion to Dismiss and Referral to State Personnel Director.

- B. Patrick Roybal v. Trustees of the State Colleges in Colorado, Adams State University, State Personnel Board case number 2013G027.

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

- C. Ray Miller v. Colorado School of Mines, State Personnel Board case number 2013G028.

The Board voted to remand the Preliminary Recommendation of the Administrative Law Judge for review by a non-issuing Administrative Law Judge, including the discussion and recommendation portions of the Preliminary Recommendation of the Administrative Law Judge, consistent with the Board's oversight and responsibility to determine requests for discretionary hearings in the state personnel system.

- D. Tom Orell v. Colorado Mesa University, State Personnel Board case number 2013G034.

The Board voted to remand the Preliminary Recommendation of the Administrative Law Judge for review by a non-issuing Administrative Law Judge, including the discussion and recommendation portions of the Preliminary Recommendation of the Administrative Law Judge, consistent with the Board's oversight and responsibility to determine requests for discretionary hearings in the state personnel system.

- E. Alfritch D. Anderson v. Colorado Community College System, State Personnel Board case number 2013S010.

The Board voted to remand the Preliminary Recommendation of the Administrative Law Judge for review by a non-issuing Administrative Law Judge, including the discussion and recommendation portions of the Preliminary Recommendation of the Administrative Law Judge, consistent with the Board's oversight and responsibility to determine requests for discretionary hearings in the state personnel system.

IX. REPORT OF THE DIVISION OF HUMAN RESOURCES, DPA

X. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Case Status Report
- Cases on Appeal to the Board and to Appellate Courts
- Mandate: Appeal Dismissed, William A. Buckley v. Front Range Community College, State Personnel Board case number 2012B016, Court of Appeals No. 2012CA2145

B. OTHER BOARD BUSINESS

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

XI. PROPOSED LEGISLATION AND/OR RULEMAKING

XII. EXECUTIVE SESSION

- A. Executive Session Minutes of January 15, 2013

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

March 19, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 16, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 21, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 18, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
July 16, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
August 20, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
September 17, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
October 15, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
November 19, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 17, 2013	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604