

State of Colorado



John W. Hickenlooper
Governor

Rich Djokic
Board Chair

Dana Shea-Reid
Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING March 19, 2013

A public meeting of the State Personnel Board will be held on Tuesday, March 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 March 12, 2013.

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

II. REQUESTS FOR RESIDENCY WAIVERS

- March 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

There are no Initial Decisions or other Final Orders of the Administrative Law Judges on appeal to the Board this month.

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

- A. James Beard v. Community Colleges of Colorado, Front Range Community College, State Personnel Board case number 2013B043.

Complainant, a probationary Security I Officer employed by Community Colleges of Colorado, Front Range Community College, filed a petition for hearing on October 1, 2012, arguing that he was unjustly terminated during his probationary period; and that the decision to terminate him was arbitrary, capricious and discriminatory on the basis of gender, including sexual harassment. As relief, Complainant requests reinstatement to his position, back pay from his termination date, and expungement of the charge from his personnel record.

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 has not made a *prima facie* case of gender discrimination; and Complainant also has not established a case for sexual harassment. As relief, FRCC respectfully requests that this Board dismiss Complainant's petition for hearing, dismiss the petition with prejudice, and deny all relief requested by Complainant.

On March 4, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

B. John Carrigan v. Department of Corrections, State Personnel Board case number 2013G049.

Complainant, a certified Correctional Support Trades Supervisor employed by the Department of Corrections, filed a petition for hearing on December 13, 2012, arguing that he was denied relief in the final grievance decision and that decision was arbitrary and capricious because his Appointing Authority found that DOC followed Board Rules and DOC policies when it made its selections of three CSTS II positions. In his information sheet, Complainant also alleged that DOC violated the 30 day grievance response rule. As relief, Complainant requests that the arbitrary actions of DOC "should be fashioned to make the plaintiff whole or return him as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct." *Carr v. Fort Morgan School District*, 4 F.Supp.2d 989 (D. Colo 1998). The only acceptable remedy is for Complainant to be reinstated to the CSTS II position at CCC as originally requested; an alternative to this would be an award of an upward adjustment in salary to that which he would have received. In addition, Complainant would like to request that DOC pay attorney fees and court costs, should they be incurred, during the course of the hearing; and change its method of filling positions, as outlined in his information sheet.

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 lacks statutory authority to hear Complainant's claims because Complainant has not alleged a violation of the federal or state constitution; and the timing of Respondent's final agency decision is harmless error. As relief, Respondent requests that the Board grant Respondent's Motion to Dismiss or, in the alternative, deny all relief requested by Complainant, deny Complainant's petition for hearing, and dismiss the case with prejudice.

On March 4, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

C. Mark Walton v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board case number 2013S019.

Complainant, a certified Hearings Officer II employed by the Department of Labor and Employment, Unemployment Insurance, filed a petition for hearing on October 25, 2012, arguing that he was denied relief in a selection decision and that decision was arbitrary and capricious because it discriminated against him on the basis of race and gender. As relief, Complainant requests that the Board declare the acts and practices complained of are violations of the Colorado Anti-Discrimination Act and the Board Rules; direct Respondent to reinstitute the test for the position of General Professional VII (Chief of Appeals) as announced in September 2012; direct Respondent to adopt and implement rules and regulations which carry out the intent of the general assembly to encourage the implementation of equal employment opportunities and affirmative action corrective remedies within the state personnel system which preserves the merit principles contained in section 13 of article XII of the state constitution; take such action as will

assure that such practice is satisfactorily eliminated and prevented; and grant such other and further relief as the Board deems just and proper.

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; DLE's decision to hire Alice Johnson for the GP VII Chief of Appeals pursuant to Board Rule 4-20 is not arbitrary, capricious or contrary to rule or law; DLE is not required to use a formal hiring process for qualified applicants who are eligible for reemployment from a reemployment list; Complainant has not demonstrated a *prima facie* case of race discrimination in DLE's hiring decision; and Complainant has not demonstrated a *prima facie* case of sex discrimination in DLE's hiring decision. As relief, Respondent requests that Complainant petition for hearing be denied and dismissed.

On March 6, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for 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. Sarah Rounds v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2011G099 (February 21, 2013).

Complainant, a certified employee, appeals the issuance of a corrective action on April 19, 2011, the grounds that the corrective action was issued in retaliation for Complainant's complaints of racial discrimination. After hearing, the ALJ concluded that Respondent's action in issuing the April 19, 2011 corrective action violated CADA and Title VII; and Complainant is not entitled to an award of attorney fees and costs. The ALJ ordered that the April 19, 2011 corrective action is rescinded and is to be removed from Complainant's personnel file; Respondent is to adopt a detailed policy on the handling of discrimination complaints; and training is to be provided by the Department of Human Services or other qualified provider on the conduct of discrimination complaint investigations by facility management.

B. Robert P. Blume v. Department of Public Safety, Division of Fire Prevention and Control, State Personnel Board case number 2013B006 (February 21, 2013).

Complainant served as an exempt Administrative Professional with the Colorado State Forest Service for approximately nine years. As of July 1, 2012, certain functions, positions, and employees of the CSFS were legislatively transferred to Respondent Department of Public Safety, Division of Fire Prevention and Control, as part of a larger reorganization and consolidation of agencies. DPS requested that CSFS employees submit applications, background packets, and take polygraph examinations prior to being considered for employment. Complainant did not do so, and the position was filled by another individual. On July 2, 2012, DPS issued Complainant a letter terminating his employment. Complainant appealed, arguing that his position as Deputy Chief for Wildland Fire Field Operations transferred as a matter of law, and that he was not lawfully required to complete the application process to retain his position. He asserts that he became a classified employee on July 1, 2012, and that DPS' action in terminating his employment on July 2, 2012, was contrary to law. As relief, Complainant seeks reinstatement as a state employee in Fort Collins, at a level commensurate with the position he previously held, back pay, and benefits. After oral argument, the ALJ ordered that the Board lacks jurisdiction over Complainant and his appeal because Complainant was not a classified state employee at the time of his termination; the Board lacks the authority to overturn or rescind the action of Respondent; and because the Board lacks jurisdiction over this appeal, Complainant's appeal is dismissed with prejudice.

VII. REVIEW OF THE MINUTES FROM THE FEBRUARY 19, 2013 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VIII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS FEBRUARY 19, 2013 PUBLIC MEETING:

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

The Board voted to adopt the findings of fact and conclusions of law in the Administrative Law Judge's May 9, 2012 Order Regarding Back Pay Award; and to vacate the Administrative Law Judge's September 19, 2012 Order Reaffirming May 9, 2012 Order Regarding Remedy. The Board found that the September 19, 2012 Order Reaffirming May 9, 2012 Order Regarding Remedy did not extend the time to appeal the May 9, 2012 Order Regarding Back Pay Award; any appeal of the May 9, 2012 Order was to be filed within 30 days of that Order; and the issues raised in Respondent's appeal were addressed in the May 9, 2012 Order and therefore were not timely appealed to the Board.

Pursuant to § 24-50-125.5, C.R.S., and Board Rule 8-38, the Board also voted to award Complainant his attorney fees incurred for proceedings before the Board after issuance of the September 19, 2012 Order, because: 1) Respondent's appeal was groundless, as it did not appeal the issues addressed by the ALJ in her September 19, 2012 Order but rather sought untimely to appeal the issues addressed in the May 9, 2012 Order; and 2) Respondent's filing of an untimely appeal was stubbornly litigious, as it justified failing to fully comply with the ALJ's May 9, 2012 Order Regarding Back Pay Award.

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

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

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

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

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

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

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

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

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

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

- G. Jeromy Goodson v. University of Colorado Boulder, Police Department, State Personnel Board case number 2013S006.

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

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

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

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

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

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

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 February 19, 2013

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

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