

State of Colorado



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State Personnel Board
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AGENDA PUBLIC BOARD MEETING June 17, 2014

A public meeting of the State Personnel Board will be held on **Tuesday, June 17, 2014, at the Colorado State Personnel Board, 1525 Sherman Street, 1st Floor Conference Room 103, Denver, Colorado 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 June 12, 2014.

CALL TO ORDER

- Attendance.
- Disclosure of any potential conflicts of interest with regard to present Board business and notice of recusal, if applicable.

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

There are no pending matters before the Board this month.

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

- A. Doug Wanker v. Department of Transportation, State Personnel Board case number 2013B092 (December 27, 2013).

(Originally, there were two Complainants, Wanker and Gallegos; however, the appeal of the Initial Decision of the Administrative Law Judge was filed only by Complainant Wanker.)

Complainant, Transportation Maintenance III for the Department of Transportation, was permanently disciplinarily demoted to Transportation Maintenance II and appealed. Complainant had been disciplined for his failure to supervise some of his subordinate employees who admitted to drinking on DOT time and on DOT property. These same subordinates further admitted to working less than half their shifts. The ALJ found that Complainant committed the acts for which he was disciplined, but that the permanency of his demotion was excessively punitive. The ALJ ordered that Complainant be permitted to compete for TM III positions, or any DOT positions, in the future.

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

- A. Stephanie Sisneros v. Department of Corrections, Clinical Services, State Personnel Board case number 2014G055.

Complainant, a probationary Correctional Officer and Trainee III employed by the Department of Corrections, Clinical Services, filed a petition for hearing on December 21, 2013, arguing that she was improperly terminated during the probationary period and that decision was arbitrary and capricious because it was discriminatory based on disability, gender, including sexual harassment, and retaliation for her outcry against sexual harassment. As relief, Complainant requests rescission of the termination, reinstatement, back pay, and attorney fees.

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; Complainant provides no valid statutory basis for granting a hearing; Complainant has not demonstrated a *prima facie* case of discrimination; Complainant cannot establish a claim of retaliation; Complainant's arguments regarding performance reviews do not form a statutory basis upon which the Board may grant a hearing; and Complainant's claim that she was certified prior to her separation is unfounded. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On May 28, 2014, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

- B. Nancy Fey v. Department of Human Services, Colorado State Veteran's Nursing Home at Fitzsimons, State Personnel Board case number 2014G067.

Complainant, a certified Registered Nurse, employed by the Department of Human Services, Colorado State Veteran's Nursing Home at Fitzsimons, filed a petition for hearing on January 23, 2014, arguing that she was denied relief in the final grievance decision and that decision was arbitrary and capricious because it discriminated against her on the basis of organizational membership. As relief, Complainant requests that the matter be set for hearing on the merits.

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; Complainant's actions were not protected by the U.S. or Colorado Constitutions; Respondent did not retaliate against Complainant; and therefore, Complainant has not demonstrated a valid dispute that merits a hearing. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On May 28, 2014, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be granted.

- C. Joshua Powell v. Colorado School of Mines, Facilities Management, State Personnel Board case number 2014G075.

Complainant, a certified Structural Trades II, employed by the Colorado School of Mines, Facilities Management, filed a petition for hearing on February 28, 2014, arguing that he was denied relief in a final grievance decision and that decision was arbitrary and capricious because Respondent violated either the Board or agency grievance procedures. As relief, Complainant requests a series of reprimands be issued and that

the Board issue rulings concerning the designation of essential employees and the ability of Respondent to call in employees for snow removal tasks. Complainant requests that he be compensated appropriately in the future for any time he is expected to be on call. Complainant additionally requests that the retaliatory acts by his supervisor, including a corrective action issued to him by his supervisor after the grievance process had begun, be removed from his file.

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. As relief, Respondent requests that this petition for hearing be denied and dismissed.

On June 2, 2014, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

D. Richard Medina v. Office of Information Technology, State Personnel Board case number 2014G044.

Complainant, a certified Information Technology Director employed by the Governor's Office of Information Technology, filed a petition for hearing on March 12, 2014, arguing that he was denied relief in the final grievance decision and that decision was arbitrary and capricious because it was discriminatory, violated his federal or state constitutional rights and the grievance process. As relief, he requests that the corrective action be removed from his 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 demonstrated a valid dispute that merits a hearing; Complainant cannot establish his claim of retaliation; Respondent did not violate Complainant's due process; Complainant has not made a *prima facie* case of discrimination; and Complainant cannot establish his claim of hostile work environment/harassment. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On June 5, 2014, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be granted.

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

A. Joanne Brown v. Department of Human Services, Colorado Mental Health Institute at Pueblo, State Personnel Board case number 2012B128 (May 28, 2014).

Complainant worked at CMHIP as a Psychiatric Admissions staffer on graveyard shift. She became disabled and was no longer able to perform physical take-downs or CPR or train for these duties. She requested an accommodation by removing those duties from her position; request was denied and she was administratively separated after exhaustion of leave. She alleged disability discrimination. The ALJ ruled that performance of those duties was an essential function of her position because of the serious consequences that could result if the need for a take-down during her isolated shift occurred. Complainant appealed the Initial Decision of the Administrative Law Judge to the Board. The Board voted to adopt the findings of fact in the Initial Decision of the ALJ; reversed Conclusion of Law 1, "Respondent's action was not arbitrary, capricious or contrary to rule or law"; ordered that Complainant is to be reinstated to her position; awarded back pay and benefits such as to make her whole; remanded the matter ALJ for a determination of the amount of back pay and benefits; and denied attorney fees. The Order on Remand Awarding Back Pay and Benefits is the ALJ's decision on remand.

- B. Kimberly Hardesty v. Department of Human Services, Division of Youth Corrections, Zebulon Pike Youth Services Center, State Personnel Board case number 2013G080 (May 12, 2014).

Complainant appealed her termination as a probationary employee, claiming she was terminated in retaliation for filing a sexual harassment complaint against a co-worker. The ALJ found that Respondent did not retaliate against Complainant, but rather that Complainant's employment was terminated due to poor performance during her probationary year. The ALJ affirmed Respondent's termination of Complainant's employment.

- C. Rodney Smith v. Colorado State University, Police Department, State Personnel Board case number 2014B019 (May 27, 2014).

Complainant appeals Respondent's decision to terminate his employment as a police officer after Respondent determined that he had failed to qualify with his handgun. Complainant argued that he had performed successfully in at least one of his 13 attempts to qualify, and that Respondent had erred when it decided to terminate his employment prior to the time when the Colorado Peace Officer Standards and Training Board had taken action to revoke Complainant's certification as a peace officer. The ALJ found that Complainant had not qualified with his handgun on any attempt, and that the POST Board did not need to act before Respondent could discharge Complainant for failing to meet the requirements of its policies requiring periodic qualification with the officer's duty weapon. Additionally, given the importance of skillful handling of a firearm to the duties of a police officer, Complainant's inability to qualify with his handgun justified immediate discipline and required that Complainant at least be removed from the position of police officer. Under such circumstances, termination of employment was within the range of reasonable disciplinary alternatives available to Respondent. The termination was affirmed.

VI. REVIEW OF THE MINUTES FROM THE MAY 20, 2014 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 20, 2014 PUBLIC MEETING:

- A. Harvest Thomas III v. Department of Human Services, Office of Operations and Financial Services, State Personnel Board case number 2013G085.

The Board voted to deny Complainant's petition for hearing.

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

The Board voted to grant Complainant's petition for hearing.

- C. Phillip K. Rietz v. Colorado School of Mines, Facilities Management, State Personnel Board case number 2014G028.

The Board voted to deny Complainant's petition for hearing.

- D. Caitlin R. Monahan v. University of Colorado Denver, School of Dental Medicine, State Personnel Board case number 2014G044.

The Board voted to deny Complainant's petition for hearing.

VIII. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Arthur Robinson v. University of Colorado Denver, Information Technology Services, State Personnel Board case number 2012B131, Court of Appeals Number 2013CA1147, Order Reversed and Case Remanded with Directions, May 22, 2014.

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

IX. PROPOSED LEGISLATION AND/OR RULEMAKING

X. EXECUTIVE SESSION

- Attorney advice regarding Board options for Court of Appeals' remands.

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

*July 15, 2014	Colorado State Personnel Board Denver, CO 80203
*August 19, 2014	Colorado State Personnel Board Denver, CO 80203
*September 16, 2014	Colorado State Personnel Board Denver, CO 80203
October 21, 2014	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
November 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203
December 16, 2014	Colorado State Personnel Board 1525 Sherman Street, 1st Floor Conference Room 103 Denver, CO 80203

*The temporary relocation of the Board Meeting site is to be determined. This will affect meetings in July, August and September 2014.