

# State of Colorado



John W. Hickenlooper  
Governor

Rich Djokic  
Board Chair

Dana Shea-Reid  
Board Director

State Personnel Board  
633 17<sup>th</sup> Street, Suite 1320  
Denver, Colorado 80202-3604  
Phone (303) 866-3300  
Fax (303) 866-5038

## AMENDED AGENDA PUBLIC BOARD MEETING June 18, 2013

A public meeting of the State Personnel Board will be held on Tuesday, June 18, 2013, at the Colorado State Personnel Board, 633 17<sup>th</sup> 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 June 12, 2013.

### I. REPORT OF KATHY NESBITT, STATE PERSONNEL DIRECTOR (EXECUTIVE DIRECTOR, DEPARTMENT OF PERSONNEL AND ADMINISTRATION [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. Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089 (January 14, 2010; January 24, 2013).

Complainant appealed her separation from state service following the non-renewal of her Senior Executive Service (SES) contract. On June 7, 2007, the ALJ dismissed Complainant's appeal, finding that the Board had no jurisdiction over the case. The Board adopted that finding, and Complainant appealed to the Colorado Court of Appeals. The Court of Appeals found that the Board did have jurisdiction, reversed the Board's order, and remanded the case with directions on February 12, 2009. The Court of Appeals held, "Because we conclude that the Board had jurisdiction to determine whether complainant could compete for open classified jobs as a certified employee, we reverse and remand with directions." Complainant sought the following relief: an order that reverses the determination that the contract provision promising her return to a classified pay position is void; enforcement of that contract provision by order of the Board; an order that DOLA must offer her positions for which she qualifies when such positions become available; and an award of back pay, future pay, and attorney fees and costs. Respondent sought an order finding that it did not violate Board Rule 9-3 (which prohibits discrimination based on race, creed, color, gender, sexual orientation, national origin, age, retaliation, political affiliation, organizational membership, veteran's status, disability or other non-job related factors in all employment decisions) and that Complainant is not entitled to any relief.

After hearing, the ALJ found that Respondent's actions did not violate state statute or Board Rules, and are in compliance with the Court of Appeals decision in this case, there is no merit to the argument that Respondent was required under the contract to place Complainant in a position, and Complainant had only the privilege of competing for another position, and to date, has not done so, as she has not applied for any open positions at DOLA. The ALJ also found that Respondent did not discriminate against Complainant in violation of Board Rule 9-3, no illegal animus for Respondent's actions was proven, and as a result, Complainant has presented insufficient evidence to support a finding of pretext and of unlawful discrimination on the basis of her political affiliation. Affirming Respondent's action, the ALJ found that Complainant is not entitled to attorney fees and costs. (January 14, 2010 Initial Decision of the Administrative Law Judge)

The Board adopted the Initial Decision of the Administrative Law Judge on June 16, 2010. Following an Order of the Court of Appeals affirming the Board Order in part, vacating in part and remanding the case with directions, the ALJ ordered the parties to brief the issues. 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. (January 24, 2013 Initial Decision of the Administrative Law Judge)

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

A. Lisa Parker v. Department of Human Services, Division of Youth Corrections, Gilliam Youth Services Center, State Personnel Board case number 2013G066.

Complainant, a certified Correctional Safety and Security Officer I employed by the Department of Human Services, Division of Youth Corrections, Gilliam Youth Services Center, filed a petition for hearing on February 22, 2013, arguing that she was denied relief in the final grievance decision and that decision was arbitrary and capricious because it violated agency or Board grievance procedures.

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 has not demonstrated a valid dispute that merits a hearing; no final agency decision has been issued in this matter; and Complainant did not initiate the formal grievance process.

On June 5, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

B. Victor Meyers v. Department of Corrections, Trinidad Correctional Facility, State Personnel Board case number 2013G071.

Complainant, a certified Case Manager I employed by the Department of Corrections, Trinidad Correctional Facility, filed a petition for hearing on March 19, 2013, arguing that he was denied relief in the final grievance decision to uphold a corrective action and that decision was arbitrary and capricious because it violated his federal or state constitutional

rights.

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 establish his claim of retaliation; Complainant cannot establish his claim of a hostile work environment; and the Step 2 grievance decision was not arbitrary, capricious, or contrary to rule or law.

On June 5, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be denied.

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

- A. Kirk Firko v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2013B046 (May 31, 2013).

Complainant, a certified Corporal with the Colorado State Patrol, appeals the termination of his employment for his actions related to the entry of a home on July 20, 2010, on the grounds that the decisions to discipline him and to impose the corrective action were arbitrary, capricious, and contrary to rule or law. Complainant asks for rescission of the disciplinary action, reinstatement to his position, an award of back pay, and an award of front pay. CSP argues that the termination was properly imposed after Complainant improperly escalated an investigation of a possible DUI accident into a violent struggle over an attempted warrantless entry into a home, and which resulted in the shooting and death of an unarmed civilian. Respondent asks that the discipline be upheld. Affirming the disciplinary termination, the ALJ concluded that Complainant committed the acts for which he was disciplined; Respondent's action was not arbitrary, capricious, or contrary to rule or law; the discipline imposed was within the range of reasonable alternatives, and neither an award of back pay nor front pay is warranted in this case.

## **VI. REVIEW OF THE MINUTES FROM THE MARCH 19 AND MAY 21, 2013 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD**

## **VII. ACKNOWLEDGMENTS**

### **DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 21, 2013 PUBLIC MEETING:**

- A. Brett L. Williams v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2011G028.

The Board voted to deny Respondent's Motion for Personnel Board's Reconsideration of ALJ's Order Denying Respondent/Appellant's Motion for Stay Pending Appeal.

## **VIII. REPORT OF THE DIVISION OF HUMAN RESOURCES, DPA**

## **IX. ADMINISTRATIVE MATTERS & COMMENTS**

### **A. ADMINISTRATIVE MATTERS**

- Case Status Report
- Cases on Appeal to the Board and to Appellate Courts

### **B. OTHER BOARD BUSINESS**

- Board Vacancy – Elected position
- Board Appointment of Acting Chair and Vice Chair

- Introduce/announce new Administrative Law Judge

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

**X. PROPOSED LEGISLATION AND/OR RULEMAKING**

**XI. EXECUTIVE SESSION**

A. Executive Session Minutes of May 21, 2013

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

<b>July 16, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>August 20, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>September 17, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>October 15, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>November 19, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>December 17, 2013</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>