

# State of Colorado



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State Personnel Board  
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## AGENDA PUBLIC BOARD MEETING July 16, 2013

A public meeting of the State Personnel Board will be held on Tuesday, July 16, 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 July 11, 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. Ranger Geremaia v. Department of Transportation, State Personnel Board case number 2013B029 (February 4, 2013).

Complainant, a certified Transportation Maintenance II employee, appeals the termination of his employment, arguing that Respondent's action was arbitrary and capricious, contrary to Board rules, and not within the range of reasonable alternatives. The ALJ found that Respondent had proven that that Complainant had been using an unsafe and prohibited "throw and go" method of filling potholes, that he had been instructing the TM I employees at his patrol to use the same unsafe procedure, and had filled his personal 325 gallon water tank at a CDOT facility and then not told the truth about his actions during the Rule 6-10 meeting and at hearing. The ALJ found that the incidents which prompted the discipline were sufficiently serious and flagrant to warrant the immediate imposition of discipline, particularly given Complainant's reaction to the issues in not being truthful about taking the water and arguing that the "throw and go" procedure that he was using was not unsafe. The ALJ found that Board Rule 6-10 was not violated in this case when Complainant was told only about David Haley reporting that Complainant had confessed to the taking of the water. Given that Respondent's case concerning the taking of state property was built entirely upon Complainant's admission to David Haley, referring to only David Haley during the 6-10 was an appropriate identification of the source of the information against Complainant. Additionally, the ALJ found that there was no violation of Rule 6-10 when David Haley conducted an investigation into the allegations of Complainant taking water without first issuing a notice or implementing the Rule 6-10 procedures because Rule 6-10 does not

apply to, or limit, investigations conducted by supervisors such as David Haley. Finally, the ALJ also found that, given Complainant's disciplinary, corrective action, and performance history, it was not unreasonable for Respondent to conclude that Complainant's performance would not improve with a lesser sanction. The ALJ therefore found that the termination of employment should be affirmed, declined to award attorney fees and costs to Complainant, and dismissed Complainant's appeal.

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

A. Tina M. Burnette v. University of Colorado at Colorado Springs, Department of Public Safety, State Personnel Board case number 2013G059.

Complainant, a probationary Police Officer I employed by the University of Colorado at Colorado Springs, Department of Public Safety, filed a petition for hearing on January 29, 2013, arguing that she was denied relief in the decision to terminate her employment and that decision was arbitrary and capricious because it was based upon retaliation for her disclosures, in violation of the Whistleblower Act. As relief, Complainant requests to be returned to full-time duty as a PO I and allowed to complete the remaining probationary employment period; after the remaining probationary period is completed, her employment status will be transferred to a full-time permanent classified staff position, with UCCS PD as a PO I; full compensation of all salary and benefits for the period beginning January 16, 2013, until the time she returns to full-time employment with UCCS PD.

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 allegations that Corporal Dewey's provided "false information" regarding her job performance is a private grievance that only applies to Complainant and therefore is not a matter of public concern and is not protected by the Whistleblower Act; Complainant's disclosure that Corporal Dewey violated a female suspect's Miranda rights, could not have been, and was not, a substantial or motivating factor in the disciplinary action; Complainant cannot establish a *prima facie* case for her third disclosure because she cannot demonstrate that she made a good faith effort to communicate the contents of this disclosure to her supervisors; and Complainant has not produced any competent evidence that UCCS's decision to terminate her from her position as PO I was pretextual. As relief, UCCS requests that this Board deny Complainant's request for a discretionary hearing and dismiss the case with prejudice.

On July 3, 2013, the Administrative Law Judge issued a preliminary recommendation that Complainant's petition for hearing be granted as to the Whistleblower Act claim and denied as to the discrimination claim.

B. Stephen D. Harrison v. Department of Human Services, Division of Facilities Management, State Personnel Board case number 2013S031.

Complainant applied for Heavy Equipment Operator III position and provided relevant experience. Respondent did not give him any credit for relevant experience. Complainant appealed, asserting age discrimination. The petition for hearing is granted because Complainant demonstrated that age may have been a factor in the unexplained failure to credit his relevant experience, some of which was not recent. Recency of experience was not a criterion.

On July 3, 2013, 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. Isis Rich v. Department of Revenue, Division of Motor Vehicles, Driver's License Section, State Personnel Board case number 2013B049 (June 27, 2013).

Complainant, a certified Driver's License Examiner I, appeals the termination of her employment, and alleges a violation of the State Employee Protection Act (Whistleblower Act). After hearing, the ALJ found that Respondent had proven that Complainant had engaged in the intentional overcharging of customers during the months of July and August 2012. The ALJ found that Respondent had not proven by a preponderance of the evidence that Complainant had kept money she had collected for herself or that there had been theft of state monies. The ALJ concluded that Board Rule 6-9 permitted Respondent to take the findings from a prior disciplinary action into account when determining whether discipline should be imposed in this matter. Additionally, the ALJ did not permit Complainant to challenge the factual determinations made in that earlier matter because Complainant had not filed a timely appeal of the matter, and C.R.S. § 24-50-125(3) makes the action of the appointing authority final under such circumstances. The ALJ also dismissed Complainant's Whistleblower Act claim under C.R.C.P. Rule 50 because Complainant had presented no evidence in her case-in-chief addressing any protected disclosures of information, or that Complainant had alerted her supervisor or other appropriate person of information to be disclosed, or that there was any reason to believe that a disclosure had caused the termination of her employment. The ALJ found that Respondent had failed to provide Complainant with a copy of the termination letter by certified mail sent to Complainant's last known address, or by hand delivery, as required by C.R.S. § 24-50-125(2) and Board Rule 6-15, and in the time frame required by the statute. The ALJ ordered Respondent to follow the statutory requirements and to provide Complainant with compensation in full for the seven days between the point when the termination went into effect and the first date that Respondent provided Complainant with a copy of a letter which met the substantive requirements of C.R.S. § 24-50-125(2). Finally, the ALJ found that termination of employment was within the range of reasonable alternatives in this case because Complainant's overcharging of customers constituted willful misconduct and violated the basic trust that customers should be able to expect from a state agency, and because Complainant's actions meant that Complainant could not be trusted to handle money for the agency. Accordingly, the termination of employment was affirmed, but the disciplinary letter was to be modified to remove references to theft of state property, and the agency was to provide compensation in full to Complainant for a period of seven days.

## VI. REVIEW OF THE MINUTES FROM THE JUNE 18, 2013 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

## VII. ACKNOWLEDGMENTS

### DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JUNE 18, 2013 PUBLIC MEETING:

- A. Barbara Kirkmeyer v. Department of Local Affairs, State Personnel Board case number 2007G089 (January 14, 2010; January 24, 2013).

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision of the Administrative Law Judge dated January 24, 2013, an Order of the Board.

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

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

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

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

**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
- Order of Court (denying Petition for Writ of Certiorari) and Mandate: Order Affirmed In Part and Reversed in Part - Maria Berumen and Dawn Adams v. Department of Human Services, Wheat Ridge Regional Center, State Personnel Board case number 2010B087(C), Court of Appeals No. 11CA0640

B. OTHER BOARD BUSINESS

- Board member election update
- Discussion of election of Board officers
- Recognition of Rich Djokic's service

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 June 18, 2013

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

<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>
<b>January 21, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>February 18, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>March 18, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>April 15, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>May 20, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>
<b>June 17, 2014</b>	<b>Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604</b>