

State of Colorado



John W. Hickenlooper
Governor

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Dana Shea-Reid
Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING September 17, 2013

A public meeting of the State Personnel Board will be held on **Tuesday, September 17, 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 September 12, 2013

INTRODUCTION OF NEWLY ELECTED BOARD MEMBER

ANNUAL ELECTION OF BOARD CHAIR AND VICE-CHAIR FOR FISCAL YEAR 2013 – 2014

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

II. PENDING MATTERS

- A, Petition for Declaratory Order of “Pro Se” Sgt. Sheldon Reneau, Sgt. Mary Martinez, C/O Kristina Grubb, C/O Mary Moore, and Sgt. Brian Thomas, State Personnel Board case number 2014D001.

Petitioners seek a Declaratory Order regarding the way the Department of Corrections and LaVista Correctional Facility Administration are handling the “call backs,” “call out” or “on-call” overtime requirements for staff without pay or compensation.

III. 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.

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

- A. Karen McGrane v. Department of Human Services, Colorado State Veterans’ Nursing Home at Fitzsimons, State Personnel Board case number 2013G076.

Complainant, a probationary Marketing Coordinator, General Professional III, employed by the Department of Human Services, Colorado State Veterans Nursing Home at Fitzsimons, filed a petition for hearing on April 1, 2013, arguing that she was wrongfully

terminated during the probationary period and that the decision to terminate her employment was arbitrary and capricious and retaliatory, due to disclosures she had made to supervisors, in violation of the Whistleblower Act. In addition to a hearing, as relief Complainant seeks reinstatement or front-pay; lost back pay and benefits; interest; removal of all derogatory information from personnel file; expenses and costs; 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 did not meet her burden to establish that she was terminated for anything other than her unsatisfactory performance; Complainant was separated from DHS for unsatisfactory performance during her probationary period; Complainant failed to demonstrate that her appeal was timely; Complainant has not demonstrated a violation of the Whistleblower Act; Complainant has not demonstrated a disclosure of whistleblower information under the Act; Complainant's alleged "disclosure of information" is not a matter of public concern because it is an individual personal dispute; Complainant failed to demonstrate a "disciplinary action"; and Complainant failed to demonstrate a good faith effort to provide her supervisor the information to be disclosed prior to disclosure. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed. Pursuant to Board Rule 8-33, Respondent also requests attorney fees and costs upon final resolution of this proceeding and a finding that Complainant's appeal was instituted frivolously, in bad faith, or was otherwise groundless.

On September 4, 2013, the Administrative Law Judge issued a preliminary recommendation that the petition for hearing be granted on Complainant's Whistleblower claims.

B. Kimberly Hardesty v. Department of Human Services, Division of Youth Corrections, Zebulon Pike Youth Services Center, State Personnel Board case number 2013G080.

Complainant, a probationary Social Worker II, employed by the Department of Human Services, Division of Youth Corrections, Zebulon Pike Youth Services Center, filed a petition for hearing on April 15, 2013, arguing that she was wrongly terminated during the probationary period and that the decision to terminate her was arbitrary and capricious because it was due to discrimination based on gender, including sexual harassment, and retaliation based on disclosures she made concerning other employees, in violation of the Whistleblower Act. As relief, Complainant requests reinstatement and certification of Complainant's employment with the State of Colorado with all associated rights and service credit; referral to a comparable position; back pay award including wages and benefits; front wages until a comparable position becomes available; and expunction from Complainant's personnel file of the termination letter, final review of performance, and all other documents created after January 31, 2013, by ZPYSC specifically to justify its termination of her employment during the probationary period.

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; Respondent did not violate the Whistleblower Act; Complainant's termination was for unsatisfactory performance; Complainant cannot establish her claim of retaliation; and Complainant cannot establish her claim of hostile work environment/harassment. As relief, Respondent requests that Complainant's petition for hearing be denied and dismissed.

On September 4, 2013, the Administrative Law Judge issued a preliminary recommendation that the petition for hearing be granted on Complainant's claims of Colorado Anti-Discrimination Act (CADA) retaliation and State Employee Protection Act

(Whistleblower Act) violation.

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

- A. Brett Williams v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2011G028, Order Awarding Back Pay and Front Pay (August 16, 2013; Amended August 29, 2013).

After a hearing on appropriate remedy, ALJ ordered back pay from date of reinstatement denial through December 21, 2012, date of final board order affirming Initial Decision, and front pay through age 55, which is when he would have retired from the Patrol. Complainant's request for front pay until age 67 was rejected. Front pay consists of difference between what Complainant would have earned as a Trooper and what he will earn at an irrigation company.

- B. Karine Chosvig v. Department of Revenue, Division of Motor Vehicles, State Personnel Board case number 2013B026 (August 16, 2013).

Complainant was administratively discharged under Director's Procedure 5-10 (2012) after leave was exhausted. She claimed FMLA and ADA violations. The ALJ held that Respondent violated FMLA by failing to designate her surgery and recovery as FMLA-qualifying, and failing to provide her the required 15-day notice of need to re-certify a qualifying medical condition to remain on leave; and Respondent violated ADA by failing to engage in interactive process with Complainant regarding a reasonable accommodation for her fibromyalgia. Rescinding the discharge, the ALJ ordered that Complainant be reinstated with all attendant FMLA and ADA rights, including to engage in the interactive process.

- C. Timothy J. Larsen v. Department of Agriculture, Markets Division, State Personnel Board case number 2013B120 (August 29, 2013).

Complainant, a Senior International Marketing Specialist, appealed a disciplinary action requiring him to repay \$162.83 in labor costs incurred by the State, in connection with his hiring an intern without prior authorization and sought rescission of the action. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including hiring an intern without prior authorization and thus incurring liability for the State without prior authorization by the Controller; 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 the disciplinary action, the ALJ dismissed the appeal.

VI. REVIEW OF THE MINUTES FROM THE AUGUST 20, 2013 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS AUGUST 20, 2013 PUBLIC MEETING:

- A. Richard L. Homann v. Department of Public Safety, Division of Fire Prevention & Control, State Personnel Board case number 2013B004 (March 21, 2013).

The Board voted to deny Respondent's Request for Oral Argument and to adopt the findings of fact and conclusions of law in the Order Granting Complainant's Motion for Summary Judgment.

- B. Jill Gunderson v. Department of Human Services, Office of Enterprise Partnerships, State Personnel Board case number 2013G073.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing. Complainant shall have ten days from issuance of this decision to grieve Respondent's rescission of flex time.

- C. Mark E. Southerland v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Services Center, State Personnel Board case number 2013S013.

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.

- D. Randolph Reyes v. Department of Transportation, State Personnel Board case number 2013S039.

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.

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
- Mandate: Order Reversed, Noma Miller v. Department of Public Safety, State Personnel Board case number 2009G085, Court of Appeals No. 2011CA918 (Issued December 5, 2012; Received by the Board August 8, 2013)
- Mandate: Appeal Dismissed, John Schutte v. Department of Corrections, State Personnel Board case number 2010G082, Court of Appeals No. 2012CA1413

B. OTHER BOARD BUSINESS

- Revised Conflict of Interest Policy and Conflict of Interest Training Following Board Meeting

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

X. PROPOSED LEGISLATION AND/OR RULEMAKING

- Rulemaking initiated by DPA recommends Board Rules 4-27 and 4-32 be amended

XI. EXECUTIVE SESSION

- #### **A. Executive Session Minutes of July 16, 2013**

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

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 1525 Sherman Street, 4th Floor Denver, CO 80203
December 17, 2013	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
January 21, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
February 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
March 18, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
April 15, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
May 20, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203
June 17, 2014	Colorado State Personnel Board 1525 Sherman Street, 4th Floor Denver, CO 80203