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VIA EMAIL: Doug.platt@state.co.us, rick.dindinger@state.co.us

Colorado State Personnel Board
1525 Sherman St., 4th floor
Denver, CO 80203

Re: Comments, Joint Rulemaking Hearing, Chapter 8

Dear Board members:

The comments below reflect my personal experiences and knowledge as counsel for Colorado WINS and private clients I have represented throughout my more than seven years in private practice and 20 years representing state employees for several employee organizations and interactions with administrations concerning the classified system. I have appeared before Boards with appointees from four different governors and more than 10 administrative law judges, as well as interacted with numerous appointees to the Department of Personnel and Administration. Further, my comments reflect participation in many hours of meetings with counsel from the Office of Attorney General, a DPA representative, Rick Dindinger, Board Director, and counsel for the Board, as well as numerous counsel who have represented employees before the Board. Most significantly, it reflects the experiences of hundreds of classified state employees who have sought my counsel over the past two decades. I am a member of the Colorado Plaintiff Employment Lawyers Association and the Faculty of Federal Advocates. I practice before state administrative bodies and have represented classified state employees in state courts, including the Colorado Supreme Court and Court of Appeals, and the United States District Court, District of Colorado.

I will preface my comments and proposed changes with my personal perspective of the process. While there was extensive engagement by Mr. Dindinger of which I was a part of, the rules proposed reflect very little of the input provided to him from employees' counsel and at times are directly contrary to input provided to him by myself and the state employee bar. Below I have tried to capture the conflicting positions, explain why they jeopardize state employees' constitutionally protected property interests, and propose changes that would equitably balance the process for state employees represented by counsel and appearing pro se, while providing for efficient and fair adjudication of these cases.

1. **The Rule 8 revisions fail to simplify the system for state employees, particularly those appearing pro se, and in some instances actually further complicate the process.**

I believe that a shared value of all persons engage in Board policy is making the judicial process accessible to all persons, regardless of their ability to afford counsel. This has been an important effort of my practice and profession. I have advised numerous state employees of their rights who have not become clients of mine through initial consultations, both union members and those seeking private counsel. I have provided unbundled, limited scope legal services through Colo.R.Civ.P. 11(b) and 121 § 1-1(5), as encouraged by the Colorado Supreme Court. I am an advisory board member of the federal U.S. District Court, District of Colorado, Pro Se Clinic. This innovative project initiated in 2018 provides free legal advice to persons representing themselves in federal court on a wide range of cases. I also have served on the federal court Pro Bono Panel of federal practitioners and have represented indigent litigants in civil rights matters in federal court. Prior to my practice as an employment lawyer, I served as a court appointed public defender in Denver County Court. My comments in this area come from years of experience in providing access to persons of limited financial resources to the justice system in state and federal court. This is an important matter for the Board to consider as most employees appear without the advice or representation by counsel and are left on their own to protect their constitutional rights.

While the proposed rule changes have been justified as a simplification of the process, I would categorically state that it would have the opposite effect, diminishing the ability of pro se employees to protect their constitutionally protected property interests in their positions. As a practical matter, Chapter 8, which covers all the same topics as before, has now increased by approximately 15 pages and is more than 50% longer. The prescriptive nature of the changes both confuses the process and limits employees ability to represent themselves. Below are the rules that are most problematic and proposed remedies:

Rule 8-6: Multiple filing methods create confusion around when an appeal is timely filed. Some filings are accepted until 11:59 PM, some are due by the close of normal business, and some require a post mark when mailed. While creating an email filing system has simplified the process, the Board is still behind the times as compared to the Office of Administrative Courts, state and federal courts, in failing to have a e-filing system. I would also note that the statutory 10-day window to file an appeal actually increases the number of appeals seen by the Board. Rarely can attorneys provide a competent initial consultation in the 10-day period and, accordingly, advise employees to preserve all of their rights by filing on any potential claim.

Recommend: Have one or two processes for filing, such as email and fax, with a single deadline of 11:59 PM. Allow in rule an extension of 30 days to file a notice of appeal by simple request, without a showing of good cause, to allow for consultation time. Promote early alternative dispute resolution (ADR) in this period with assistance from non-attorney representatives to seek early resolution. Statutorily change the filing deadline to 30 days.

Bifurcating mandatory versus discretionary hearings versus petitions for declaratory orders versus director reviews versus review of grievances: While all of these matters have substantive differences, they proceed in a same fashion – a simple filing of a notice of appeal. Breaking them up in the rules results in simplification of process taking a back seat to rules organized by substantive issues, which probably makes more sense to attorneys rather than employees. Further, employer obligations are mixed in with employee obligations which results in employees (and managers) having to hunt for their respective obligations.

Recommend: Re-write rules to have a streamlined, flowchart feel for the process of an appeal. Segregate employer obligations and employee obligations for ease of review.

Rule 8-12: The grievance process has become increasingly confusing and jeopardizes statutorily protected rights under the Colorado Anti-Discrimination Act (CADA) and the Colorado State Employee Protection Act (Whistleblower Act). This rule misinforms employees that simply filing a grievance with 10 days of a disputed act suspends the deadline. This is inaccurate. The jurisdictional requirements still exist given that failure to properly plead a grievance (which often occurs) may jeopardize such an appeal. Further, it does not suspend the deadline in the case of an action jeopardizing pay, tenure or status or, potentially, involving a promotional opportunity. As a practical matter, such matters are never resolved through the grievance process and result in wasted time and effort for all parties.

Recommend: Delete this provision and require appeal within the statutory period to the Board, while allowing the parties to suspend timelines for early ADR process governed by the Board. Second, expand early ADR for all cases and allow representatives, including non-attorneys, to assist employees in resolution.

Rule 8-13: Simplify timelines and require mandatory responses from managers. The timelines in the grievance process are particularly confusing given that there are a variety of exceptions that require evaluating whether requirements have been met for an extension. Further, the failure of management to respond in a timely fashion (a frequent complaint of employees) further confuses the matter and leads to increased frustrations. Rule 8-13.3., directing grievances to "the supervisor or other authorized person" is confusing as it fails to reflect the practicalities of step 1. Often the supervisor is does not have authority or is not the person responsible for the substance of the grievance. Second, rarely is there a designated "authorized person" to whom a step 1 may be addressed.

Recommend: Have mandatory response deadlines for each step. Have a grievance directed to the person who has the ability to resolve the matter at issue.

Rule 8-16.E.4.: The rule inaccurately characterizes existing Colorado case law concerning constructive discharge claims. A person threatened with termination or other discipline who resigns under that threat may have claims for constructive discharge or retaliation under the Whistleblower Act and the rule gives inaccurate information about their legal rights to pro se employees.

Recommendation: Eliminate the rule and allow for jurisdictional motions to dismiss should the facts so support.

Rule 8-38: This rule is an improvement over what existed previously but could be expanded further. In particular, it is difficult for pro se litigants to obtain the cooperation of witnesses still employed with the state and it is complicated and costly to serve them with subpoenas.

Recommendation: Expand the requirement that all state employees, including non-supervisory witnesses, be made available by the state with an order of the ALJ upon a showing of good cause.

Reform the Director Review process: As it stands now, the Director Review process is broken and summarily useless to employees. I have reviewed numerous responses by the office of the director of DPA, which repeated state the director lacks jurisdiction to review the matter, regardless of what it is. A director's review is largely viewed as a specious process. If the director will not conduct a good faith review of agency matters and offer a substantive response, no employee will view the process as credible.

Recommendation: Conduct a good faith review and render a substantive opinion.

2. Changes to discovery rules diminish the rights of state employees to seek relevant information from state agencies while allowing them to withhold relevant evidence and make access to relevant witnesses more difficult.

Rule 8-33 and 8-34: The proposed rules significantly undercut the ability of employees and their counsel to obtain relevant information in cases and relieves state agencies and the Office of Attorney General from producing relevant evidence otherwise required by the state rules of civil procedure. Historically, all discovery was governed by CRCP 26, 30, 31, 33, which provided for meaningful discovery of evidence in a case through written discovery and depositions. This was particularly important for employee counsel where state agencies routinely failed to produce relevant evidence as mandated under CRCP 26(a)(1). In part, this was caused by the relatively quick turnaround of 15 days from the date of the notice of appeal. However, even fundamental documentary evidence, such as email communications related to a disciplinary action, were not provided as part of mandatory disclosures, which in state district court would have constituted a discovery violation. This was tolerated by employee counsel because of the shortened timelines and the ability to seek documentary evidence through written discovery and depositions. The director's proposed rules upend this balanced approach, both through reduction of the number of requests for production and reduction in depositions. Despite repeated requests to the director to more equitably balance a discovery process along with the timing of hearings, the proposed version of the rules substantially favor state agencies and the Office of Attorney General and jeopardize the constitutionally protected due process rights of employees. Specifically, this happens in the following ways:

a. The Director selectively picked simplified rules out of CRCP 16.1, resulting in reductions in discovery that favor the agencies and hurt employees by reducing what is defined as relevant evidence to be disclosed initially at the beginning of the case. Rule 8-33 defines a narrow list of documents to be produced as part of initial mandatory disclosure rather than referencing the long existing, well-defined and complete relevancy requirement of CRCP 26(a). This is particularly important because the state agency is the holder of all information regarding the merits of the case, including email communications, memos, investigations, witness statements and related documentation. They also know which persons may have relevant information on the case, to be disclosed under CRCP 26(a)(1)(A). The Director disregarded this language and created a simplified list which overlooks potentially relevant evidence.

b. The Director then subjectively reduced the number of requests for production of documents and other tangible items from 20 to five. Again, this favors the state agency. An employee, especially one who may be terminated, rarely has significant documentary evidence relevant to the case as compared to the state agency. They may be cut off from their email system (which is in the custody and control of the employer) and often lack access to the most basic files in their offices or workplaces where they have been put on administrative leave. They do not have access to investigations, witness statements or other physical evidence. Their documentary evidence is often limited to the few emails they may have collected prior to discipline or evidence of their efforts to find other employment. Reducing production requests significantly favors the state agency.

c. Next, the Director effectively reduced the hours of deposition from 18 total for three people to a total of six hours. Again, this significantly favors the agency. By the time of hearing, the agency has had multiple opportunities to question the employee and seek mandatory statements from him or her. Employees routinely undergo more than one pre-disciplinary meeting, often with only the simplest statement of the grounds upon which the appointing authority is contemplating discipline. The agency has unfettered access to any potential witness in the workplace because they are the employer and can mandatorily force an

employee to engage in an investigation or questioning with the threat of corrective or disciplinary action for their failure to cooperate with the employer. Limiting the deposition time to six hours allows the Office of Attorney General to fully question the employee after already having access to questioning in the pre-disciplinary meeting. By comparison, the counsel for the employee is confined to six hours to question what may be multiple witnesses to an event, as well as the appointing authority. Further, counsel for the employee does not have unfettered access to employee witnesses who may have knowledge of the matters at issue. Managerial witnesses may only be questioned in a deposition and non-managerial employees are free to refuse informal requests from employee counsel to be interviewed. Non-managerial employees routinely express fear of retaliation by the employer should they cooperate with employee counsel by merely answering questions about matters at issue in the case. Further, counsel from the Office of Attorney General frequently direct employees not to cooperate with opposing counsel, contrary to ethics provisions. Depositions are often the only tool to question witnesses prior to hearing. Depositions actually make for more efficient hearings where counsel for the employee can determine the relevant knowledge a person may have without calling as a witness at hearing.

d. The Director left unchanged the most onerous and least effective elements of written discovery, that being requests for admission (20 total) and interrogatories (30 total). These written discovery tools, which are complicated and significantly worked on by counsel for the parties, are the most confusing element for pro se litigants. On numerous occasions, I have had pro se litigants come to me for consultation with 50 arcane questions from counsel with the Office of the Attorney General, overwhelmed by the minutia of questions asked which have no relevance to the case. This often leads to pro se litigants simply dropping their cases. Further, for employees represented by counsel the production and answering of such written discovery is time consuming and costly, often leading to limited meaningful discovery in the matter. It drives up the cost for employees who often have limited financial recourses as compared to state agencies which benefit from unlimited taxpayer dollars to litigate cases.

Recommendation: Reduced the number of interrogatories for each side to 20 total and restore requests for production to 20. Restore the hours for deposition to 15 total, which is still a reduction from the previously existing rule. Require all parties to meet the requirements of CRCP 26(a).

3. The proposed rules complicated litigation of state personnel board cases and conflict with the Administrative Procedure Act which defines the powers that can be delegated to administrative law judges empowered to hear cases.

The newly instituted practice of the Board to conduct evidentiary hearings within 90 days of the notice of appeal usurps the statutory authority of the ALJ to manage hearings pursuant to C.R.S. §24-4-105(4), jeopardizes the constitutionally protected procedural due process rights of employees and has resulted in increased discovery fights among parties to litigation. Further, in conjunction with the proposed rules, they make it nearly impossible to fully prepare a case for hearing. A timeline of the propose rule helps illustrate this problem:

a.	Mandatory disclosures after filing the notice of appeal:	21 days
b.	Written discovery requests due:	28 days
c.	Responses to written discovery due:	20 days after receipt
d.	Completion of depositions (taken after completion of written discovery)	20 days prior to hearing

Accordingly, if everything goes perfectly and all parties comply with the rules, the parties have 22 days to conduct depositions. Routinely, there are agency delays in production of discovery, there are conferrals for missing discovery, and the schedules of counsel for both parties and the deponents do not allow for depositions in such a short time period. Again, this favors the party who holds all the information, being the state agency, and jeopardizes the preparation of the case for the employee.

Finally, the rules largely usurp the authority of the administrative law judges to manage cases. There may be simple cases that only require the simplest written discovery with no depositions while other cases require extensive discovery and expansion of the preparation schedule to allow the parties to prepare their cases, exhaust settlement negotiations and litigate the cases in a fair manner to all parties, as provided for in C.R.S. §24-4-105. Overly prescriptive rules such as these with unwritten policies take away the ability of ALJs to manage their courtrooms. The General Assembly, under the Administrative Procedures Act, contemplated that administrative law judges and hearings officers should have the same authority as district court judges in managing cases before them, for the good of all parties.

Recommendation: Establish a base set of written discovery and deposition guidelines as stated above and authorize by rule that ALJs have the authority to manage cases for efficiency and protection of the rights of the parties by holding prehearing conferences and adjusting the timing of hearings and discovery pursuant to their powers under the Administrative Procedures Act.

On the whole, the rules favor the state agencies and their attorneys without providing the efficiency or simplification touted by the Director. Further, it jeopardizes the constitutional due process protections the Colorado Supreme Court has recently upheld in *DOC v. Stiles*. There is an increasing perception from employees and counsel that state agencies and the Office of the Attorney General perceives the Board as too lenient towards classified employees. This is best summarized by the words of Senior Assistant Attorney General Stacy Worthington in her *amicus curiae* brief on behalf of every department of the State of Colorado. She wrote the following:

> A review of six termination cases that the Board overturned since it decided *Stiles* shows that the agencies in those cases paid out more than $800,000 in settlements, back pay, and attorney fees, giving substance to those fears. . . . [an appointing authority] fears that if the Board is free to impose its opinion as to which option is correct, that "throws our world into chaos" . . ..

The Board's role should not be easing the perceived burden of state agencies to prevail in any decision of the Board. Rather, the primary role of the Board, as stated in constitution and provided for by the Supreme Court, should be protection of the state employees' constitutional protected property interests in their employment with the state.

Sincerely,

Mark A. Schwane