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VIA EMAIL: rick.dindinger@state.co.us

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

Re: Comments of Colorado WINS regarding changes to Rule 1-19

Dear State Personnel Board:

Colorado WINS hereby provides the following written comments concerning the proposed changes to Rule 1-19. Colorado WINS was invited to a March 28, 2022 meeting concerning the changes to this rule. In that meeting, WINS asked several questions concerning the rule change. Mr. Dindinger and his legal team provided little information in response to those questions. Further, despite suggesting follow up, no such follow up occurred by him or counsel to the Board. Accordingly, these comments reflect the opinions of Colorado WINS based on its interpretation of the plain language of the rule and application of state constitution and statute.

The Colorado Partnership for Quality Jobs and Services Act ("Act"), § 24-50-1100 *et seq.*, C.R.S., is intended to create a formal labor-management partnership between state employees and the executive branch of the state. This Act exists in parallel with the duties and responsibilities of the Board, providing that nothing in the Act or a partnership agreement may

restrict, duplicate or usurp any responsibility or power granted to the State Personnel Board ("Board"), § 24-50-1110(2), C.R.S. Accordingly, it is necessary to understand what responsibilities and powers have been granted to the Board.

The authority of the Board, both mandatory and discretionary, is derived from state constitution, Colo. Const. Art. XII, §14(3), and from state statute, generally including §§ 24-50-123, 124, 125, 125.3, and 24-50.5-101, *et seq.,* C.R.S. However, the Board's authority does not span all matters within the state personnel system and is limited by statute and case law. *See generally, Renteria v. Colo. State Dep't of Pers.,* 811 P.2d 797, 800 (Colo. 1991) (finding that the authority of the state personnel director is "distinctly separate from that of the Board"); *Colo. Asso. of Pub. Emps. v. Lamm*, 677 P.2d 1350, 1355 (Colo. 1984) (finding nothing in constitutional authority of the board limiting the state personnel director's ability to promulgate procedure). Likewise, the Board may not limit or intrude on the Partnership Act and partnership agreements under the authority of the Act where agreements do not restrict, duplicate or usurp powers of the Board. The spectrum of the Board's authority ranges from the mandatory (i.e. the authority of the Board to review disciplinary decisions of the appointing authorities) and adoption of uniform procedures to be used by departments in developing their own grievance procedures, to the discretionary, (e.g. petitions for review of state or federal constitutional violations), to no jurisdiction at all (matters related to the administration of the state personnel system delegated to the state personnel director).

Colorado WINS contends that the proposed Rule 1-19 is the constitutional equivalent of using an axe rather than a paring knife to slice vegetables, unconstitutionally and unnecessarily usurping the power of Colorado WINS and the State Personnel Director to abide by the terms of fully executed partnership agreements in areas not within the jurisdiction of the Board. First, as

stated to Board Director Dindinger, Colorado WINS does not contest, nor does the current partnership agreement restrict, duplicate or usurp, the powers of the Board to hear disciplinary action matters. However, Colorado WINS contends that the language of proposed Rule 1-19 is ambiguous as it relates to "actions that adversely affect an employee's pay, status or tenure" to the extent that this provision is different that disciplinary actions, and claims under the State Employee Protection Act (again to the extent they do not concern disciplinary actions). The Board's jurisdiction to hear these matters, as is well known to the Board, is limited and, as Colorado WINS contends, is not exclusive as compared to the review of disciplinary actions of appointing authorities. Pursuant to § 24-50-123, C.R.S., the Board may hear such matters "only when it appears" that a decision of the appointing authority falls within a limited list of issues as set forth in § 24-50-123(3), C.R.S. Where the Board's jurisdiction is thus limited by statute, a partnership agreement's jurisdiction to regulate such actions does not restrict, duplicate or usurp the powers of the Board. Proposed Rule 1-19 articulates an implied premise contrary to statue – that the Board must hear all such matters. Pursuant to the Act, the state personnel director and Colorado WINS may engage, without interference from the Board, in any matter that is outside of the Board's mandatory jurisdiction. The possibility that WINS and the state personnel director execute a partnership agreement related to administrative procedures is not grounds for claiming that the Board's jurisdiction has been unconstitutionally fettered, as proposed Rule 1-19 impliedly claims. *See generally Colo. Asso. of Pub. Emps. v. Lamm*, 677 P.2d 1350, 1356 (Colo. 1984) (finding nothing in § 24-50-101(3)(d), C.R.S. for the delegation of administrative authority that contravened the Constitution powers of the Board where the legislative plan was designed to preserve constitutional areas of authority and responsibility inviolate while accomplishing the degree of delegation necessary for the efficient administration of the personnel system).

Proposed Rule 1-19 is even more egregious where it clearly usurps the constitutional power of the state personnel director and Colorado WINS to enter into a partnership agreement, as stated in the Act, by articulating what is clearly an administrative matter – the establishment of a waiver system. Articulating the specific terms of a valid waiver clearly falls within the purview of the state personnel director to administer the state personnel system, pursuant to a partnership agreement with Colorado WINS, and far exceeds the jurisdiction of the Board to regulate in Board rule. Proposed Rule 1-19 infers that the General Assembly has somehow implicitly provide the Board with the power to now administer the state personnel system, contrary to a partnership agreement and the state personnel director's constitutional authority. *See Williams v. Dep't of Pub. Safety*, 369 P.3d 760, 769 (Colo. 2015) (finding that the General Assembly did not merge the Director's authority into that of the Board). Allowing the Board to dictate with such specificity what constitutes a valid waiver is the legal equivalent of dictating to the state personnel director administrative matters such as what constitutes a valid classification in the personnel system or the calculation of shift differentials. So myopic is proposed Rule 1-19 that it mandates a waiver direct an employee to a website with otherwise unknown information that at any time may be changed. Such a demand far exceeds the central role of the Board, specifically hearing matters related to the actions of the appointing authorities pursuant to Colo. Const. art. XII, §13(8).

Besides a lack of jurisdiction to promulgate such a rule, the Board has no authority or even ability to enforce it. As was asked of Mr. Dindinger and the Board's legal counsel, how does the

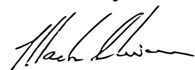
Board have jurisdiction or the ability to review every grievance waiver and determine if it is valid? Who has standing to appeal an allegedly invalid waiver? Would it be:

- an employee signing the waiver;
- an agency to whom the grievance is filed against;
- the state personnel director;
- Colorado WINS, whose representative may have advised the employee?

More importantly, what remedies or damages should a prevailing party be entitled to on such a claim? Does the employee entering into an invalid waiver then have the right to appeal to the Board as if the waiver never existed? These questions were specifically asked of Mr. Dindinger and Board counsel, to which they offered no answer. The proposed rule creates a right with no right of enforcement, the significance of which is the rule is largely meaningless. To the extent that proposed Rule 1-19 is an attempt to inject the Board's policy perspective concerning collective bargaining into the actions of state personnel director and Colorado WINS pursuant to the Partnership Act, it should be rejected. As stated by the court of appeals as to statutory interpretation, courts are limited by the principles of judicial review and "may not substitute our view of public policy for that of the General Assembly." *Williams*, 369 P.3d at 769. Likewise, proposed Rule 1-19 is an attempt to substitute the Board's view of public policy regarding partnership agreements for that of the General Assembly through its passage of the Partnership Act.

Colorado WINS respectfully requests that all language, other than the reference to disciplinary actions, be stricken from the rule.

Sincerely,



Mark Schwane on behalf of Colorado WINS