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Submitted via e-mail to doug.platt@state.co.us
Colorado Department of Personnel and Administration
Executive Director's Office of Communications
1525 Sherman Street
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Comment of Colorado Law Civil Practice Clinic

Re: Proposed Changes to Chapter Six of the State Personnel Board Rules and Personnel Director's Administrative Procedures

On January 29th, 2021, the Colorado State Personnel Board (the "Board") issued a number of proposed modifications to its administrative procedures and rules found jointly at 4 CCR 801-1, Chapter 6 – Performance (the "Proposed Rules"). The purpose of the rulemaking is to "modernize the rules and procedures to make both consistent with contemporary practice." *See Joint Statement of Basis and Purpose*. The University of Colorado Law School's Civil Practice Clinic (the "Clinic") supports and applauds the Board's attempts to modernize and clarify its rules and believes that the changes to Chapter 6 are a step in the right direction; however, we believe there are further changes that can be made to increase accountability and transparency in the appointing authority's decision making process, especially in light of the ruling in *Dep't of Corr., Denver Reception & Diagnostic Ctr. v. Stiles*, 477 P.3d 709 (Colo. 2020), *as modified on denial of reh'g* (Jan. 11, 2021).

We preface our comments with the principle that the government should be a model employer; these Rules are therefore an opportunity for the Board to exemplify and require best practices in human resources management. Transparency is the key here; as the Board considers these amendments to Chapter 6, we encourage the Board to require appointing authorities to give the employees as much information to understand what they are facing. In the experience of our Clinic, we have found the disciplinary process to be frequently lacking in transparency for employees. Often, documents provided to employees are scant on detail, unclear in their reasoning, and difficult for an employee to decipher. We understand that many appointing authorities may have limited access to legal counsel or human resources, so we believe that the more explicit the language of the Rules can be, the more likely the appointing authorities will be to explain their reasoning and justification for the employee to understand and for the Board to subsequently review.

As articulated below, our most significant concerns surround the need for further procedural safeguards for employees in the Proposed Rules as a result of the reaffirmation of the

wide discretion of appointing authorities in *Department of Corrections v. Stiles*. *See Stiles*, 477 P.3d 709. In light of the *Stiles* decision, we recommend the Board give clearer guidance to appointing authorities on how to exercise that discretion appropriately, while still mindful of the need to balance and safeguard the reputation of government workers as a whole. *See Stiles*, 477 P.3d 709. These safeguards include more explicit guidance to appointing authorities on what types of conduct warrant discipline and what type of discipline is appropriate; further direction to appointing authorities for implementing performance, disciplinary, and corrective actions; and other suggested changes to the Rules that the Board should consider implementing for their heightened protection of employees' due process rights.

In issuing its final rule, the Board should strive to strike a balance between the discretion of the appointing authority and the rights of employees under both the Board's own rules and the Colorado Constitution. *See* Colo. Const. Art. II, §25.

About the Clinic

The Civil Practice Clinic is one of nine clinical education programs at the University of Colorado Law School. The Civil Practice Clinic represents underrepresented and/or low-income individuals with employment law claims. Student-attorneys in the Clinic represent state employees with adverse action claims before the Board. Our clients are employed by a variety of state agencies, including the Department of Corrections, the Department of Human Services, and the Colorado Secretary of State.

1. Proposed Rule 6-2 should provide guidance as to what factors an appointing authority should consider in determining whether an act is "flagrant and serious" and require the appointing authority to articulate its reasoning and justification to proceed immediately to discipline.

Despite purporting to favor progressive discipline, Proposed Rule 6-2 grants the appointing authority significant discretion over whether to impose progressive discipline, or to proceed directly to a disciplinary action. While we applaud the Board's belief in progressive discipline, we are concerned that the current scheme makes it a "toothless" concept. Proposed Rule 6-2 provides no guidance or insight into what factors an appointing authority should consider to determine if an act was "flagrant and serious," leaving the decision solely to the appointing authority. Nor does Proposed Rule 6-2 contain any sort of requirement for the appointing authority to articulate its reasoning and justification for proceeding immediately to disciplinary action.

This ambiguity permits the appointing authority to determine what acts are "flagrant and serious" enough to warrant immediate discipline without any guidance on what to consider in making that determination. The wide discretion of the appointing authority to skip progressive discipline is particularly concerning in the wake of the Colorado Supreme Court's decision in *Stiles*, which has made it exceedingly difficult for an employee to challenge the appropriateness of a penalty. *Stiles*, 477 P.3d at 720. In *Stiles*, the Court reemphasized the importance of

deference to the appointing authority under the third prong of the *Lawley* test,[1] which provides that an ALJ may only reverse or modify an appointing authority's disciplinary decision if "reasonable [people] fairly and honestly considering the evidence *must* reach contrary conclusions." *Id.* at 720 (quoting *Lawley v. Dep't of Higher Ed.,* 36 P .3d 1239, 1252 (Colo. 2001)) (emphasis added). *Stiles* thus severely limits an employee's ability to challenge an appointing authority's decision to skip progressive discipline. In the absence of procedural safeguards that require an appointing authority to explicitly consider lesser penalties before proceeding to immediate disciplinary, Proposed Rule 6-2 does little to guarantee its protections. In addition, the final Rule should require an appointing authority to justify the reasoning behind his choice of penalty. Without such requirements, Proposed Rule 6-2 is an ineffectual means of ensuring, or even encouraging, progressive discipline.

2. Proposed Rule 6-6 should include additional procedural safeguards to ensure that employee Performance Improvement Plans are used effectively.

Proposed Rule 6-6 outlines the procedure for Performance Improvement Plans ("PIPs"). While PIPs are an important part of performance management and employee notice, Proposed Rule 6-6 could include additional procedural safeguards to ensure that PIPs are used as effective tools of improving employee performance that benefit employer and employee alike.

In many cases, employees placed on PIPs simply need more training and guidance from the agency in order to meet performance expectations. Poor performance that can be corrected by specific guidance or training is far more efficient than firing an employee and rehiring a new employee. Further, the government should be investing in its people and making PIPs meaningful. As written, Rule 6-6 is silent as to what obligation the agency has to help the employee improve his performance once the employee is placed on a PIP. This omission permits an agency to "go through the motions" by placing an employee on a PIP without taking any steps to provide any remedial training or supervisory guidance to the employee's completion of the plan, placing the entire onus of improvement on the employee.

Rule 6-6 should therefore require a PIP to identify what guidance or assistance the agency will provide in each performance standard that is addressed in the employee's PIP. Adequate training should include, at minimum: regular supervision, assessment, and feedback on each of the PIP's performance standards.

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[1] *Lawley v. Dep't of Higher Ed*., 36 P .3d 1239, 1252 (Colo. 2001) (In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.)

3. The disciplinary process in Proposed Rules 6-10 and Rule 6-11 should be further augmented to require increased transparency throughout the process

The disciplinary process, primarily laid out in Rule 6-10 and 6-11, is not sufficiently protective of employees' right to due process. We begin by noting what the Colorado Supreme Court said of this process in the past: "the procedures leading up to imposition of disciplinary action are informal and afford little protection to an employee accused of misconduct." *Dep't of Institutions, Div. for Developmental Disabilities, Wheat Ridge Reg'l Ctr. v. Kinchen*, 886 P.2d 700, 707 (Colo. 1994). We believe that Proposed Rules take steps in the right direction, but urge the Board to consider further strengthening the procedural safeguards in this process. As discussed above, the recent *Stiles* decision has narrowed the viable grounds for an employee to challenge an unjust or disproportionate discipline. The Rule 6-10 meeting, and the accompanying Notice of the Rule 6-10 Meeting, are perhaps the most critical remaining guarantees of employees' due process rights. While we believe that proposed Rules 6-10 and 6-11 are an improvement over prior versions, we urge the Board to consider some recommendations to make the process more transparent for employees and to make the Rule 6-10 process a more meaningful opportunity for the employee to respond.

Because it occurs first in time, we take Proposed Rule 6-11's Notice of Rule 6-10 meeting first. This rule is an improvement over the prior version of this requirement, but we urge the Board to require even greater specificity in its requirements for this Notice. We have found that frequently these Notices are no more than a few short sentences, most of which are template recitations of the Board's requirements for the Rule 6-10 meeting. Our clients have then been frequently blindsided at the Rule 6-10 meeting, unaware of what is being discussed and with no opportunity to prepare a response. If an employee does not know what he is being accused of prior to arriving at his 6-10 meeting, his "opportunity to be heard" is highly compromised, as he has had no chance to prepare a response to the allegations against him. And, since 6-10 meetings are recorded and are often used *against* the employee in proceedings before the Board, they effectively act as an extra deposition for the agency. If the employee is not given sufficient notice as to the details of their alleged misconduct prior to the 6-10 meeting, then the recording of that meeting can paint an unfavorable picture of the employee when used at hearing, regardless of the conduct at issue. We therefore encourage the Board to consider further changes to this Proposed Rule to require greater transparency for employees about the reasons for the potential discipline and the gravity of the situation.

First, we recommend that Proposed Rule 6-11(A)(3) require that the Appointing Authority list the range of potential disciplinary and corrective actions being contemplated. In the Clinic's experience, we have had several cases where the employee did not understand the severity of actions being considered and then were shocked when they were subsequently terminated. If a situation is serious enough that an appointing authority is considering suspension or termination, the employee should be on notice of that possibility before they enter the Rule 6-10 meeting. Further, knowing what potential disciplinary alternatives the appointing authority may consider would allow the employee ample information and incentive to present all facts and defenses earlier in the Rule 6-10 process. If an appointing authority subsequently discovers additional information that changes the range of discipline, they can always provide an

amended notice to the employee. This transparency will ensure that employees are on notice of the gravity of the situation that they face.

Second, Proposed Rule 6-11(A)(4) requires that the appointing authority provide notice "of the suspected factual basis that prompted the appointing authority to consider taking disciplinary action." While this is a marked improvement over the previous version of this rule, we encourage the Board to be even more specific in spelling out this requirement. We recommend that the Board consider adding a clause that specifies that this should include dates, times, people involved, and the nature of the incidents in question; the notice should also identify any specific rules and policies allegedly violated by this conduct. Moreover, we also recommend that the appointing authority should be required to disclose the source of the information about the performance/conduct at issue in the Notice itself. Waiting until the Rule 6-10 meeting itself to disclose this information to the employee leaves the employee without enough information to present facts and defenses at the Rule 6-10 meeting, as is her right. This results in the employee's inability to respond fully and effectively to the inquiries of the appointing authority at the Rule 6-10 meeting, which then creates undue delay and confusion in the Rule 6-10 process.

We are also concerned that Proposed Rule 6-11(D)(5)—which governs the delivery of the notice—creates the possibility that actual notice to the employee will not be achieved. As written, the proposed rule allows the appointing authority to choose from a "menu" of notice options. Presumably, the appointing authority will choose the easiest option—email—and ignore other, more formal notice options. In some occasions, email may be sufficient and the most convenient way of providing notice. However, email is ephemeral, and in certain situations there is a risk that email will not result in actual notice. Emails can be easily lost, deleted, or sorted into junk folders. And, some employees may not have access to or regularly check their state agency email account when they are on leave. Given the weight of the potential consequences, it is important that the agency demonstrate that actual notice has been provided to the greatest extent possible. Moreover, the lack of a more formal notice method may also signal a lack of importance in the item transmitted. Therefore, we encourage the Board to revise Proposed Rule 6-11(D)(5) to allow e-mail notice only *in conjunction* with one of the other four methods of delivery.

Turning to Rule 6-10 itself, Proposed Rule 6-10(D) requires the appointing authority to disclose the reason for the meeting, disclose the source of the information that led to the meeting, and give the employee an opportunity to respond to the alleged misconduct. Rule 6-10(D)(1) should be *even more* specific by requiring the appointing authority to disclose the performance issues or conduct that may result in discipline, including all dates, times, and the nature of the incidents in question. It should also require that the appointing authority identify the specific rules that were allegedly violated by the employee's conduct.

Finally, Proposed Rule 6-10(I) currently requires that the appointing authority shall consider "all" the information discussed in the 6-10 Meeting and that provided by the employee. The Board should add that the appointing authority should "only" consider this information as well to ensure that the appointing authority is not considering information that has not been disclosed to the employee, which effectively violates the employee's right to due process. If an

appointing authority subsequently discovers additional information that enters her consideration, then she should have to disclose that information to the employee and give him an opportunity to respond.

These proposed changes will allow for a more precise process for notifying employees of potential disciplinary action and create greater transparency in the disciplinary process.

4. Proposed Rule 6-12 should provide further guidance to appointing authorities on what information should be considered when determining what the appropriate disciplinary/corrective action is.

As discussed earlier, the recent *Stiles* decision has reaffirmed the significant discretion that appointing authorities have to determine appropriate penalties. *See Stiles*, 477 P.3d at 720. Proposed Rule 6-12 is crucial to ensure that appointing authorities are taking the appropriate considerations into account when making those decisions. Therefore, it is important that proposed rule 6-12 provide clearer guidance to appointing authorities as to what information they should consider when determining the appropriate disciplinary action.

As an initial matter, we recommend that Proposed Rule 6-12 be revised to require that the appointing authority explicitly address the evidence and reasoning considered under the factors included under Proposed Rule 6-12 in the Disciplinary Letter under Proposed Rule 6-14. This will ensure that appointing authorities have actually articulated what information that they considered under each factor, and thus makes it easier for employees—and eventually the Board—to understand the reasoning behind the appointing authority's decision, thus improving transparency for all.

In addition, we recommend that the Board consider expanding the factors under rule 6-12 to provide greater guidance to appointing authorities and to ensure that disciplinary actions are not subsequently found to arbitrary, capricious, or contrary to rule or law. To that end, we take inspiration from the so-called "Douglas Factors" that are used in the federal sector before the Merit Systems Protections Board ("MSPB"). These twelve factors provide important guidance to federal managers on what to consider in exercising their discretionary authority to discipline an employee. Many of these factors mirror what is already required under rule 6-12, but we believe that additional factors that are not currently explicitly required by the Board will help ensure that appointing authorities are taking all the appropriate considerations into account to guarantee that their actions are not arbitrary, capricious, or contrary to rule or law. The Douglas Factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
>
> (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) The employee's past disciplinary record;

(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) Consistency of the penalty with any applicable agency table of penalties;

(8) The notoriety of the offense or its impact upon the reputation of the agency;

(9) The clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;

(10) Potential for the employee's rehabilitation;

(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-06 (1981). While there is some overlap between the factors required by the Board and those required before the MSPB, there are significant gaps that the Board should examine. In particular, we recommend that the Board consider adding concepts from the first, sixth, seventh, tenth, and twelfth *Douglas* factors to the factors required under Proposed Rule 6-12(A).

While the first *Douglas* factor overlaps with Proposed Rule 6-12(A)(1), we recommend also adding the requirement that appointing authorities should consider whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. This allows the appointing authority to distinguish between acts committed accidentally or inadvertently and those committed maliciously or intentionally for purposes of determining the appropriate disciplinary or corrective action.

Adopting the sixth *Douglas* factor would require appointing authorities to look to the consistency of the penalty imposed upon other employees for the same or similar offenses. *Id.* This would require the appointing authority to articulate why one employee is deserving of a harsher penalty than another and can lead to greater consistency between conduct and disciplinary action. This may also lead to a lesser number of appeals filed if greater consistency between conduct and discipline is established. We understand and agree that discipline must be

decided on a case-by-case basis in light of the other factors enumerated in Proposed Rule 6-12. When similar misconduct has occurred, however, one relevant consideration should be whether and to what extent discipline has been imposed, particularly where there is a reason for the appointing authority to be aware of it.[2] Indeed, perhaps the most obvious situation is when two employees are involved in the same incident or misconduct—it would arbitrary and capricious for an appointing authority to impose significantly different penalties without justification. In such a case, one factor then for the appointing authority to consider has to be how the other employee was treated and whether permissible individual factors justify treating the two differently. Moreover, to ensure that the scope of such an inquiry is not overwhelming, we recommend that it be limited to the consistency of the penalty imposed on employees within the appointing authority's chain of command.

The seventh *Douglas* factor requires that penalties are consistent with any agency table of penalties. Many federal agencies have such table of penalties, which help to provide guidance to agency managers on the appropriate range of discipline to consider in meting out penalties, especially for the types of misconduct that frequently occur in that agency. This lessens the burden on each individual manager but also helps to minimize the chance of significantly disparate penalties being imposed for the same misconduct. Such a table of penalties does not need to be binding; however, appointing authorities would need to be ready to justify a departure from the table and explain the information that it considered in making such a departure, ensuring that they can point to any specific circumstances to justify their decision. We believe that this concept would be useful for the Board to consider adopting. Incorporating a requirement that each agency create a table of penalties or something similar into the Board's rules would create greater transparency in the disciplinary process and will likely reduce claims that an appointing authority's decision was arbitrary, given that he or she will have a guide they can point to in order to support the chosen disciplinary action.

Echoing our earlier comments regarding Proposed Rule 6-2 and the concept of progressive discipline, we also recommend that the Board consider adopting the tenth and twelfth *Douglas* factors in Rule 6-12. The tenth *Douglas* factor would require appointing authorities to consider the potential for the employee's rehabilitation. *Id.* In considering whether or not an employee is able to learn from their conduct, the SPB can retain employees who were effective but made a one-time bad decision, while weeding out those who are unable to learn from their mistakes. The twelfth *Douglas* factor calls into question the adequacy and effectiveness of alternative sanctions to deter such conduct in the future. *Id.* This factor essentially encompasses the idea of progressive discipline; it requires explicit consideration of alternative disciplinary options so as to deter such conduct in the future. These two factors are how the Board can give effect to the suggestions made for Proposed Rule 6-2; if an employee is capable of rehabilitation then the principles of progressive discipline espoused in Proposed Rule 6-2 should apply, and if the appointing authority believes that the employee is not capable of rehabilitation, then he should be able to explain how he reached that conclusion.

[2] This can also be carried out in a way that protects the identity of third parties, such as redacting personal information.

Finally, Proposed Rule 6-12(A)(6) also needs further clarification. It should clarify that information provided to the appointing authority by the employee within seven days of the Rule 6-10 meeting must also be considered by the appointing authority.

These proposed changes will help provide further guidance to appointing authorities in exercising the discretion of the appointing authority as set forth in *Stiles* and *Lawley*. *See Stiles*, 477 P.3d at 720; *Lawley*, 36 P.3d at 1252. There will also be more clarity as to the type of discipline imposed for a particular instance of conduct, as well as a higher level of explicitness as to what information an appointing authority considered in imposing a particular type of discipline. This will both allow the employee greater understanding of the appointing authority's reasoning as well as making it easier for the Board to determine whether an appointing authority has honestly or credibly considered the information presented to it under the second *Lawley* prong.

5. Proposed Rule 6-14 should further define "reasons for discipline."

Proposed Rule 6-14(A)(1) should provide further guidance as to what "reasons for discipline" must be included in a Disciplinary Letter. This Proposed Rule should be expanded to specify that this should include the specific grounds for discipline under 6-13(B); the specific factual information regarding the actionable performance issues or misconduct, including the dates, times, locations, individuals involved; the specific policy or policies violated, and all information considered under the factors in Rule 6-12.

Respectfully Submitted,

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