COLORADO LAW
UNIVERSITY OF COLORADO BOULDER

Civil Practice Clinic
Robert & Laura Hill Clinical Suite
Wolf Law Building | 404 UCB
Boulder, Colorado 80309-0404
303.492.8126 | 303.492.4587 fax

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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
Denver, CO 80203

Comment of Colorado Law Civil Practice Clinic

Re: Proposed Changes to the Colorado State Personnel Board Administrative Procedures and Rules

On December 15, 2020, 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 8 - Dispute Resolution (the "Proposed Rules"). While the University of Colorado Law School's Civil Practice Clinic (the "Clinic") is supportive of the general purpose of streamlining the dispute resolution process, certain provisions of the Proposed Rules—if adopted—will seriously impair the ability of state employees to obtain fair resolution of their disputes. In doing so, the portions of the Proposed Rules identified below will make it far more difficult for state employees to vindicate their Constitutional right to continued employment during efficient service and will weaken the merit-based nature of our state employment system. *See* Colo. Const. Art. XII, § 13(8).

As detailed below, our most significant concerns are about the Proposed Rules that will restrict discovery. Employment disputes naturally have information asymmetry: the employer holds the vast majority of the relevant information to a dispute. Disclosure and discovery serve as the principle way for complainants to obtain information and documents regarding adverse agency actions. We encourage the Board to consider this asymmetry in access to information when setting both the disclosure obligations and limits on discovery to ensure that complainants are not disproportionately prejudiced.

In issuing its final rule, the Board should not disproportionately sacrifice fairness in exchange for faster processing of cases. Rather, the Board should strike a balance between these goals. In submitting this comment, the Clinic aims to help the Board achieve that goal.

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 Board Rule 8-33 should impose broader mandatory disclosure obligations on state agencies, especially considering the proposed discovery limitations.

The proposed Board Rule 8-33 creates mandatory disclosure obligations for complainants and respondents. Mandatory disclosures are an important tool to facilitate the exchange of relevant information, reduce the length and amount of discovery, and encourage alternative dispute resolution. They also can be a principle way to mitigate the information asymmetry between employer and employee discussed above. However, as currently proposed, we believe that the mandatory disclosure obligations for respondent agencies may not explicitly require the disclosure of crucial documents that are relevant to a dispute and held solely by Respondent state agencies.

Proposed Board Rule 8-33(A)(2) currently requires respondents to produce all "[d]ocuments and recordings relevant to the factual allegations, claims, or defenses at issue in the appeal." While this catchall provision putatively would require the disclosure of communications such as emails, text messages, instant messages, etc. that are relevant to the case, we encourage the Board to amend this rule to make this obligation explicit. We encourage the Board to consider amending proposed Rule 8-33(A)(2) to explicitly require respondent agencies to disclose all communications among or between the appointing authority, complainant, complainant's managers and/or supervisors, and the agency's human resources representatives concerning the factual allegations or claims at issue. Rule 8-33 should also explicitly require respondents to disclose all communications made by the agency in the course of investigating the allegations which led to the disciplinary action and all communications made by or on behalf of the appointing authority in the course of determining whether to discipline an employee and determining the severity of the discipline. Rule 8-33 should also require respondents to disclose all documents which were used or relied upon in investigating and/or making the disciplinary decision.

These documents are all clearly relevant to the claims and defenses and should be provided as a matter of course. The Board must determine whether or not a respondent's decision was arbitrary, capricious, and/or contrary to rule or law. § 24-50-103(6), C.R.S. (2020). To this end the Board must consider the respondent's treatment of relevant evidence using the three "Lawley factors."[1] Under these factors, respondent's contemporaneous communications provide crucial evidence of the knowledge, understanding, and treatment of the evidence before it (or the evidence that it neglected to collect or consider). Evidence of this internal understanding is typically in the sole control of respondent, so these proposed mandatory disclosures would effectuate the efficient exchange of that evidence, resulting in more efficient dispute resolutions.

The need to make these mandatory disclosure obligations explicit is especially necessary considering the proposed limitation in Rule 8-34 which would limit complainants to five requests for documents. Unless Rule 8-33 is revised to clarify and expand mandatory disclosure obligations, complainants might be required to use all five requests for documents to request the aforementioned

[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.)

categories of communications and documents and therefore may be unable to obtain all documents relevant to their claims.

2. The Proposed Rules do not provide a sufficient number of requests for production of documents.

Proposed Board Rule 8-34 would limit parties to five requests for production of documents. Given the information asymmetry in employment disputes, this limitation will disproportionately prejudice complainants because it will limit their ability to obtain relevant documents. Rule 8-34's limit is particularly concerning in conjunction with the gaps in mandatory disclosure obligations identified above. If, for example, complainants must use some of their five requests for documents to request communications and documents relied on in making the disciplinary decision, then complainants would only have a scant number of requests remaining for more targeted requests unique to the facts of the dispute.

Finally, we believe that the five-request limit could create unfortunate incentives for parties to make overly broad requests for production, which could lead to additional discovery disputes between parties about the form and validity of discovery requests and responses. This could in turn lead to the need for additional judicial intervention in the discovery process. With this in mind, decreasing the number of allowed requests for production of documents could reduce the efficiency of case resolution.

The Clinic therefore urges the Board to keep the limit of requests for production of documents in Rule 8-34 at its current level of 20 requests for production of documents.

3. The proposed six-hour limit on depositions is far too restrictive.

The current rule regarding permitted discovery limits each side to three depositions of indeterminate length. The proposed rule will allow for each side to take an unlimited number of depositions with a cumulative total length of six hours. Adopting this proposed rule would be a mistake, because it unfairly and unequally burdens complainants, and it fails to meaningfully streamline the dispute resolution process.

The proposed rule unfairly favors respondents over complainants. This is because respondents typically need to depose only very few individuals – usually just the complainant. Respondents before the Board tend to hold all the cards in the discovery process. This is because any claim before the Board involves an adverse action taken by an appointing authority against the complainant. Respondents have already had the benefit of investigating the factual claims underlying the disciplinary action and conducting a Rule 6-10 meeting which in effect functions as a recorded interview of the complainant. Moreover, respondents have ready access to informally consult the appointing authority or state employees to obtain information regarding the adverse action and the decision-making that lead to that action. These individuals provide that information to respondents as a matter of course in their employment. Complainants do not have this same luxury.

Respondents' discovery is not meaningfully limited by the current rule because they rarely need to depose more than three individuals. Nor will respondents be limited by the proposed rule, because they will typically take only one deposition, and six hours is the maximum amount of time permitted for a deposition under the Colorado Rules of Civil Procedure.

Complainants, on the other hand, often need to depose several individuals, including the appointing authority and other fact witnesses related to their claim. Under current rules, complainants are permitted only three total depositions. The proposed rule would remove the limitation on the number of depositions but would limit the total length of all depositions to only six hours, in effect forcing complainants to decide between conducting thorough depositions and deposing all of the individuals most relevant to their claim. Adopting this proposed rule would severely limit complainants in one of the few avenues that they have to obtain crucial evidence regarding their claims prior to hearing.

Crucially, depositions can have a significant impact on the likelihood of settlement, as they allow both parties the opportunity to learn more about each other's cases in real time. Depositions allow each side to gauge the credibility of key witnesses and how a witness's testimony holds up under scrutinizing questioning. This can help both sides to identify the strengths and weaknesses of their cases and can lead to fewer cases proceeding to trial, thereby conserving the limited judicial resources of the Board. Thus, we believe that limiting depositions to only six hours may actually cause more cases to end up in a hearing, and would encourage the Board to maintain its current rule allowing each side to depose up to three witnesses.

Because the proposed modification would unequally burden complainants and unduly limit a tool that encourages dispute resolution, the Clinic recommends that the Board maintain the current rule allowing parties to take up to three depositions.

4. The proposed requirement that respondents need only make a complainant's appointing authority and supervisory chain employees available for testimony and deposition without a subpoena is too narrow and should be modified to require the availability of all employees who have information that is relevant to a complainant's claims and defenses.

The proposed rule requires that respondents must make a complainant's appointing authority and supervisory chain employees available for testimony and deposition without a subpoena, while requiring that other potential witnesses in respondent's control be subpoenaed for such purposes. The Clinic recommends that the Board modify the proposed rule to require that respondents make available for testimony and deposition all employees with information relevant to a claim or defense.

While the employees most relevant to a claim before the Board will generally be appointing authorities and supervisory chain employees, this would potentially not include three key groups of employees who likely would not be in the complainant's chain of command and may possess information relevant to an adverse action: agency investigators, human resources professionals, and fact witnesses who work at the agency. Requiring a subpoena in order to depose or compel the testimony of these individuals—who are under the control of the respondent—would unnecessarily complicate the dispute resolution process and again shift the balance of power against complainants. It would also increase costs and delays, as complainants would be required to issue subpoenas more frequently.

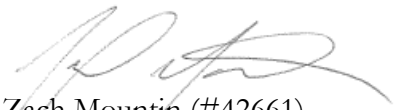
There are other protections in the discovery process that effectively limit the extent of deposition testimony that a complainant can compel. If a complainant requested to depose or call an employee whom a respondent believes is irrelevant to a claim or defense, that respondent could seek a protective order or motion to quash. However, if the respondent does not dispute that an employee

possesses information relevant to a claim or defense, there is no reason to require a subpoena to compel their testimony, when the agency can require the employee to appear. The Clinic recommends that the Board modify the proposed rule to include the requirement that respondents make all employees with information relevant to the claims and defenses available for testimony without a subpoena.

5. The Board should adopt a rule that imposes a recordkeeping requirement on Respondents whenever they take an adverse action against a state employee.

Respondents possess a wide variety of documents and records that are relevant to any adverse action, and the vast majority are in the sole possession of respondents. Under proposed rules 8-33 and 8-34, respondents must turn over these documents in discovery. However, this requirement assumes that those documents have been retained by respondents. Because respondents have the benefit of knowing when they have decided to take an adverse action against an employee, they should be required to retain all documents relevant to that disciplinary action from the time that they have determined to take such an action. We recommend that the Board consider adding a rule that makes explicit this requirement to preserve all evidence relevant to an adverse action.

Respectfully Submitted,



Zach Mountin (#42661)
Associate Clinical Professor
Director, Civil Practice Clinic
University of Colorado Law School
Civil Practice Clinic
404 UCB | Boulder, CO 80309
303-735-8762
zachary.mountin@colorado.edu

Matt Forstie
Student-Attorney, Civil Practice Clinic
University of Colorado Law School
matthew.forstie-lawclinics@colorado.edu

Daniel Perkins
Student-Attorney, Civil Practice Clinic
University of Colorado Law School
daniel.perkins-lawclinics@colorado.edu