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May 11, 2021

SENT VIA EMAIL (rick.dindinger@state.co.us)

Rick Dindinger, Director
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

RE: Comments to Proposed Amendments to Chapter 9, State Personnel Board Rules and State Personnel Director's Administrative Procedures, Set for Joint Rulemaking Hearing on May 18, 2021

Dear Director Dindinger:

These written comments to the proposed amendments to Chapter 9 of the State Personnel Board Rules and State Personnel Director's Administrative Procedures are made on behalf of the Colorado Department of Personnel & Administration, Colorado Department of Labor and Employment, Colorado Department of Regulatory Agencies, Governor's Office of Information Technology, Colorado School of Mines, Adams State University, Western Colorado University, Colorado State University Pueblo, and the University of Northern Colorado.

EXECUTIVE SUMMARY

The primary purpose of these comments is to encourage a closer examination of the State Personnel Board's ("the Board") statutory authority to adjudicate claims of discrimination and to ensure that the rules in Chapter 9 accurately reflect such statutory authority. Specifically, there is no statutory or constitutional authority for the Board to adjudicate claims of discrimination based on organizational membership or veteran's status, and the Board's authority to adjudicate claims of discrimination based on marital status or political affiliation is limited solely to selection decisions. The above agencies and institutions of higher education propose that by modifying the references to these categories in Rule 9-3 and clarifying that the Board has authority to review all discrimination claims identified by CADA, the

rules in Chapter 9 would no longer exceed their statutory authority and would eliminate the need for Administrative Law Judges to expend resources resolving the issue of statutory authority.

Importantly, the agencies and institution submitting these comments strongly support equal opportunity for all employees regardless of organizational membership, veteran's status, marital status, or political affiliation in all employment decisions. These comments are intended to encourage alignment between the Board Rules and their statutory authority, and in no way should be construed as suggesting that any state agency or institution condones discrimination based on any of the classes identified in Rule 9-3. To reinforce this point, the agencies will continue to support alternative, legally proper methods and forums for addressing discrimination which exist alongside the Board's jurisdiction.

COMMENTS

The proposed amendments to Chapter 9, Fair Employment Practices, take an important step of clarifying the sources of authority for Chapter 9 – namely, under the Colorado Constitution Art. XII § 13(1) (State Personnel System – Merit System); C.R.S. § 24-34-402, part of the Colorado Anti-Discrimination Act (CADA); and C.R.S. § 24-50-112.5(1)(b) (Selection system – definitions).

The proposed amendments, however, do not accurately reflect the discrimination claims authorized by the Constitution and statutes. Nor do they account for the provisions and procedures of the Colorado Partnership for Quality Jobs and Services Act (“Partnership Act”), which prohibits employment decisions based on membership in employee organizations, and allows impacted employees or the certified employee organization to file an unfair labor practice charge for related controversies outside the jurisdiction of the State Personnel Board. Finally, to the extent the Board wishes to include “any other protected class recognized under” CADA in its definition of discrimination under amended Board Rule 9-3, it should specifically identify the full Part 4 of Article 34 on Employment Practices as authority to promulgate rules under Chapter 9.

As explained in detail below, Chapter 9 should be amended to (1) remove the categories of organizational membership, veteran's status, political affiliation, and marital status as cognizable protected classes; (2) clarify that discrimination based on marital status or political affiliation is prohibited only as related to appointments and promotions to positions within the state personnel system; and (3) identify the full Part 4 of Article 34 on Employment Practices as authority for the promulgation of rules under Chapter 9.

I. Cognizable Claims of Discrimination Under Colorado’s Constitution and Statutes

A. Current Source of Board Jurisdiction Under Chapter 9

Pursuant to C.R.S. § 24-50-125.3, the Board has jurisdiction to consider claims of discrimination within the state personnel system under CADA, C.R.S. §§ 24-34-401, *et seq.* *Williams v. Dep’t of Pub. Safety*, 369 P.3d 70, 767 ¶ 18 (Colo. App. 2015). The Board’s jurisdiction over such claims is reflected in Board Rule 8-25.

Separately, the Board Rules discuss discrimination in Chapter 9. The statutory authority for the promulgation of rules in Chapter 9 is currently identified solely as C.R.S. § 24-34-402, Discriminatory or unfair employment practices, which is a single statute within Part 4, Employment Practices, of CADA. This section of CADA prohibits employment discrimination based on “disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry.” C.R.S. § 24-34-402(1)(a). These are the protected classes cognizable under the current statutory authority identified for the promulgation of Board Rule 9-3.

B. Proposed Clarification of Sources of Board Jurisdiction Under Chapter 9

The proposed amendments to the Preamble to Chapter 9 would clarify that Colorado Constitution Art. XII § 13(1) (State Personnel System – Merit System) and C.R.S. 24-50-112.5(1)(b) (Selection system – definitions) are additional sources of authority for the prohibited discrimination described in Chapter 9.

Colorado Constitution Art. XII § 13(1) states that “[a]ppointments and promotions to offices and employments in the state personnel system shall be made according to merit and fitness, to be ascertained by a comparative analysis of candidates based on objective criteria without regard to race, creed, color, or political affiliation.” (Emphasis added.)

Similarly, C.R.S. 24-50-112.5(1)(b) states that

Appointments and promotions to positions shall be based on a fair and open comparative analysis of candidates based on objective criteria. *Selections* shall be made without regard to race, color, creed, religion, national origin, ancestry, age, sexual orientation, marital status, or political affiliation and without regard to sex or

disability except as otherwise provided by law.

(Emphasis added.)

C. The Proposed Amendments to Rule 9-3 Exceed Scope of Identified Legal Authority

The proposed amendments to Board Rule 9-3 exceed the scope of the jurisdiction conferred by the identified legal authorities. The proposed amendments read as follows: “Discrimination and harassment against any person is prohibited because of disability, race, creed, color, sex (including sexual harassment), sexual orientation, religion, age, national origin, ancestry, religion, *political affiliation, organizational membership, veteran’s status, marital status or any other protected class recognized under the Colorado Anti-Discrimination Act (CADA). This applies to all employment decisions.*” (Emphasis added.) With the exception of marital status, these protected classes are also identified as potential bases for claims of discrimination as the titles of boxes that can be checked on the Board’s Consolidated Appeal and Dispute Form.

Nothing in C.R.S. § 24-34-402, Colorado Constitution Art. XII § 13(1), C.R.S. 24-50-112.5(1)(b) or other sections of CADA prohibit discrimination based on “organizational membership” or “veteran’s status.” Administrative Law Judge Keely McCabe recently recognized that the statutory authority limits the types of cognizable claims under Chapter 9. On April 12, 2021, in an order dismissing the Complainant’s claim of organizational membership discrimination in *David Warren v. Department of Human Services*, SPB No. 2021B036, ALJ McCabe concluded that

The State Personnel Board has jurisdiction to hear claims of discrimination under CADA pursuant to § 24-50-125.3, C.R.S. The Colorado Anti-Discrimination Act does not protect individuals from being discriminated against on the basis of organizational membership. See § 24-34-402(1)(a).

(Order Granting Respondent’s Motion and Clarifying Hearing Issues, at 1, attached hereto as Exhibit 1.) Moreover, although “organizational membership” has long been recognized as a reference to union membership, the term itself is not defined and could potentially be construed to protect membership in other kinds of unspecified and potentially unlawful organizations.

With respect to veteran’s status, the Board has jurisdiction under the Colorado Constitution to administer veterans’ preferences in hiring and layoffs, *see* Colo. Const. art. XII, § 15(4). However, neither the Colorado Constitution, nor the State Personnel System Act, nor CADA authorize the Board’s review of

discrimination claims based on veteran's status or military service. Individuals seeking protection based on veteran's status or military service have other avenues for relief. For example, the State Personnel Director retains authority to ensure that the state personnel system complies with all applicable federal employment laws, including the Uniformed Services Employment and Reemployment Rights Act (38 U.S.C. § 4301, et seq.). See C.R.S. § 24-50-104.5(1). C.R.S. section 28-3-506 also prohibits employment discrimination based on military service and allows aggrieved persons to bring actions at law for damages or applications for equitable relief in district court.

Additionally, discrimination based on political affiliation is prohibited only in selection decisions pursuant to Colorado Constitution Art. XII § 13(1), and C.R.S. 24-50-112.5(1)(b), not in all employment decisions as stated in the proposed amendments to Rule 9-3.

With regard to "marital status," C.R.S. § 24-34-402(1)(h)(I) makes it an unfair employment practice "[f]or any employer to discharge an employee or to refuse to hire a person solely on the basis that such employee or person is married to or plans to marry another employee of the employer." There is currently no reference in C.R.S. § 24-34-402 to a broader protected category of "marital status."

The undersigned agencies respectfully submit that the Board previously exceeded its rulemaking authority by expanding the scope of cognizable discrimination claims within the state personnel system to include those based on organizational membership and veteran's status, as well as those based on political affiliation and marital status outside the context of selection decisions.

Because there is currently no constitutional or statutory authority for a state employee or applicant to assert a claim of discrimination based on organizational membership, veteran's status, or marital status, and because there are other, statutorily-authorized methods for challenging discrimination on such bases, Rule 9-3 should be amended to remove these categories.

D. Adding Any Other Protected Class Recognized Under CADA

The proposed amendments to Board Rule 9-3 also reference "any other protected class recognized under the Colorado Anti-Discrimination Act (CADA)" as a prohibited basis of discrimination. To properly clarify the authority for this language, however, the preamble to Chapter 9 should be amended to include all of Part 4, Article 34, Title 24 of the Colorado Revised Statutes as additional statutory authority for Chapter 9. This addition to the preamble is permissible under C.R.S. § 24-50-125.3, under which the Board has jurisdiction to consider claims of discrimination within the state personnel system under Part 4 of Article 34.

Importantly, the inclusion of all classes recognized under CADA will allow the classes protected by the Board Rules to change as CADA is amended, which could potentially include further protected classes in the future. Such a provision also makes the inclusion of protected categories that are not specifically identified by CADA unnecessary and at times confusing, as with the proposed inclusion of the overly broad category of “marital status.”

Indeed, other specific categories of prohibited discrimination, including that based on pregnancy or childbirth, lawful off-duty conduct, and efforts to seek a civil protection order to prevent domestic abuse, identified by C.R.S. §§ 24-34-402.3, 24-34-402.5, and 24-34-402.7 of CADA respectively, are subject to the jurisdiction of the Board pursuant to C.R.S. § 24-50-125.3, yet they are not specifically listed in Board Rule 9-3. Amending the Chapter 9 preamble to include all of Part 4, Article 34, Title 24 and maintaining the proposed new language referencing “any other protected class recognized under the Colorado Anti-Discrimination Act (CADA)” would be sufficient to encompass all claims of discrimination within the Board’s jurisdiction pursuant to C.R.S. § 24-50-125.3 and would avoid the exclusion of other categories of discrimination under CADA.

Finally, state agencies and institutions of higher education are free to promulgate their own policies preventing discrimination based on organizational membership, veteran’s status, marital status, and political affiliation, thus allowing them to address discrimination on any such bases outside the context of the statutorily limited jurisdiction of the State Personnel Board.

II. Challenges to Employment Actions Based On Organizational Membership Are Governed By the Partnership Act

The Partnership Act, enacted in 2020 and codified at C.R.S. §§ 24-50-1101 *et seq.*, “is intended to create formal labor-management partnerships between state employees and the executive branch of state government.” House Bill 20-1153, Section 1. The Partnership Act protects “covered employees”¹ by allowing them to collectively bargain with the state through a certified employee organization of their choice. C.R.S. § 24-50-1107. Colorado WINS (“COWINS”) is the statewide certified employee organization under the Partnership Act.

The Partnership Act codifies the rights of covered employees at C.R.S. § 24-50-1107. Importantly, § 24-50-1107(4) provides: “the interference with the rights as stated in this section by the state...constitutes an unfair labor practice subject to review pursuant to section 24-50-1113(3).” Section 24-50-1103 further provides that

¹ “Covered employees” are employees within the state personnel system, unless specifically excluded under the Partnership Act. C.R.S. § 24-50-1102(3). Excluded employees include Confidential employees, Managerial employees, Executive employees, and Administrative Law Judges and Hearing Officers, among others. *Id.*

“the Division [of Labor Standards and Statistics] has the authority to adjudicate unfair labor practice charges.” The Division promulgated rules regarding how to file an unfair labor charge at 7 CCR 1103-12. These rules took effect January 1, 2021.

Claims of discrimination based on organizational membership under Board Rule 9-3 are more properly categorized as claims that an agency has engaged in an unfair labor practice as defined by C.R.S. § 24-50-1107(4). Pursuant to the Partnership Act, such a claim must be brought as an unfair labor practice charge as opposed to a discrimination claim under CADA. The Board is without jurisdiction to review whether there has been a violation to a covered employee’s rights under C.R.S. § 24-50-1107 because the legislature intended the remedy for such a charge to rest with the Division, and because the Division promulgated rules for such charges pursuant to the authority granted under C.R.S. § 24-50-1103(1).

Additionally, the Board lacks jurisdiction to determine whether any employee is a covered employee under, and therefore protected by, the Partnership Act because the legislature vested that power with the State Personnel Director and the Division. Specifically, C.R.S. § 24-50-1106(4) provides, “a certified employee organization or the State may file a petition with the [State Personnel] Director to resolve disputes about whether certain employees are appropriately classified as covered employees. Appeals of the Director’s decisions shall be brought to the division for adjudication.” *See also* 7 CCR 1103-12, Rule 5 (2021).

III. Comments on Specific Proposed State Personnel Board Rules

For the reasons discussed above, the Rules should be amended to read as follows:

- Preamble: “Authority for rules promulgated in Chapter 9, Fair Employment Practices, is found in the Colorado Constitution Art. XII § 13(1), C.R.S § 24-50-112.5(1)(b), and C.R.S. Title 24, Article 34, Part 4. Board rules are identified by cites beginning with “Board Rule”.”
- Board Rule 9-3: “Discrimination and harassment against any person is prohibited because of disability, race, creed, color, sex (including sexual harassment), sexual orientation, religion, age, national origin, ancestry, religion, or any other protected class recognized under Part 4 of the Colorado Anti-Discrimination Act (CADA). This applies to all employment decisions. Discrimination in selection decisions against any person because of political affiliation or marital status is also prohibited.”

If you have any questions regarding the comments presented above, please contact the undersigned counsel.

Sincerely,

s/ Amanda C. Swartz

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Colorado School of Mines, Adams State
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