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January 12, 2021

SENT VIA EMAIL (doug.platt@state.co.us)

Mr. Doug Platt
Department of Personnel and Administration
1525 Sherman Street
Denver, CO 80203

RE: Comments to Proposed Amendments to **Chapter 8**, State Personnel Board Rules and State Personnel Director's Administrative Procedures, Set for Joint Rulemaking Hearing on January 19, 2021

Dear Mr. Platt:

These written comments to the proposed amendments to Chapter 8 of the State Personnel Board Rules and State Personnel Director's Administrative Procedures are prepared by the undersigned Assistant Attorneys General who advise and represent state agencies and institutions of higher education before the State Personnel Board and State Personnel Director. These comments do not constitute the opinion, comments or feedback of the Attorney General or of any one particular state agency or institution of higher education and should not be construed as such.

First and foremost, we extend our appreciation to the Board and DPA staff and stakeholders for their tremendous efforts and contributions in developing the sweeping revisions proposed in this rulemaking.

By and large, the proposed revisions reinforce the General Assembly's declaration in § 24-50-103(3)(a) and (b) that the state personnel system "assure[s] a qualified and competent workforce is serving the residents of Colorado," while the State Personnel Board "provide[s] fair and timely resolution of cases before it." The proposed changes aim to achieve an important objective: to organize the Board and Director's dispute resolution processes in a streamlined, more user-friendly format – particularly for pro se parties.

The revisions to the Board rules governing mandatory hearings are designed to help the Board and parties achieve a timelier resolution of appeals. The General Assembly mandated in section 24-50-125.4(2) that hearings should commence within 90 calendar days after employee files an appeal. Unfortunately, due to cumbersome and lengthy discovery processes and motions practices, the hearing

timelines for many appeals have drifted far from this statutory timeline. In most cases, it takes at least 6 months to one year before evidence is introduced at hearing. Parties in such cases spend considerable time and money on discovery, and the employees remain in limbo, waiting months to learn whether their discipline will be upheld. The proposed revisions in this rulemaking strike a balance – they provide for meaningful exchange of information between parties while putting up guardrails around those litigation processes most likely to unnecessarily consume parties' resources. Ultimately, we anticipate the revised rules will allow appeals to move more expeditiously to hearing, and to resolve appeals more quickly -- benefitting state agencies and employees alike.[1]

We note that in his comments, attorney Bill Finger suggests that the changes to Chapter 8 are made to address the recent Colorado Supreme Court case, *Dep't of Corrections v. Mathew Stiles*. We disagree. The proposed changes to Chapter 8 were initiated well before the *Stiles* decision. Moreover, the *Stiles* court focused primarily on rules in Chapter 6, which are not part of this rulemaking.

Comments on Specific Proposed State Personnel Board Rules

Board Rule 8-4.A:[2] The ten-day appeal deadline is triggered by the "delivery" of the notice. This is a change from previous references to "receipt" of the notice. This may cause some uncertainty in calculating the deadline. For example, does the date of mailing of a notice of disciplinary action constitute the delivery date? Or is it the date the post office delivers the notice to the employee? Or when the employee actually receives the notice? To avoid such uncertainty, we recommend:

> "The notice shall include a statement that the deadline for filing an appeal to the Board is ten (10) days from the date of receipt of the notice…."

Board Rule 8-5.A: Mr. Finger suggests that this rule should be less restrictive. We ask that the Board continue to use a single standardized method of receiving appeals, allowing for clarity and ease of use by pro se complainants and efficient case intake by both Board staff and Respondents' counsel. Nothing in the rule prohibits complainants from

[1] In his written comments, attorney Bill Finger suggests numerous revisions to expand discovery. These revisions create obligations for both parties that conflict with the streamlined and efficient nature of administrative proceedings.
[2] References to rule numbers use the numbering as proposed in the rulemaking.

providing additional information as attachments to their Consolidated Appeal/Dispute Form.

Board Rule 8-7.A.: This rule is inconsistent with Rule 8-4, which states that the appeal must be filed within 10 days of the delivery of the notice. We recommend revising it to state,

> "The appeal shall be filed with the Board within ten (10) days of receipt of notice of appeal rights, or if no notice was required, within ten (10) days from when the employee knew or should have known of the alleged improper action."

Board Rule 8-7.E: The proposed timeline for pleadings and filings filed electronically is inconsistent with timelines for other filings– see Board Rule 8-7.F. This may create some confusion.

Board Rule 8-7.F: The rule should specify the requirement for appeals or petitions for hearing that are mailed (see current Rule 8-36). We recommend adding to Board Rule 8-7,

> "Appeals or petitions for hearing are timely if received by the Board or postmarked no later than 10 days after receipt of the written notice of the action, or if no notice was required, no later than 10 days after the employee knew or should have known of the alleged improper action."

Board Rule 8-8.B.6: Pleadings and filings with the Board should include a good faith requirement similar to Rule 11 of the Colorado Rules of Civil Procedure (CRCP). We recommend adding the following sentence to the end of this provision:

> "In signing the filing, the signer is attesting that the filing is made in good faith and all facts and allegations are true to the best of the signer's knowledge."

Board Rule 8-14: A Step Two Decision must be issued within forty-two (42) days from the initiation of a Step Two grievance. Consistent with the ten-day appeal deadline for other matters, the deadline for filing a petition for hearing

should be ten (10) days after the Decision due date, i.e., fifty-two (52) days.

Board Rule 8-18.E:

§ 24-50-123(3), C.R.S., states in relevant part, "The board may grant the petition only when it appears that the decision of the appointing authority **violates an employee's rights under** the federal or state constitution, [the Whistleblower Act], [the Colorado Anti-Discrimination Act], or the grievance procedures adopted pursuant to subsection (1) of this section." (Emphasis added.) Unless expressly or impliedly authorized by statute, administrative rules and regulations are without force and effect if they add to, change, modify, or conflict with an existing statute. *Martinez v. Dep't Personnel and Administration*, 159 P.3d 631, 633 (Colo. App. 2006).

The phrase "violates an employee's rights under" in section 24-50-123(3) precedes a list of four items, including "grievance procedures," and should be construed to refer to all four items. The context, the plain and ordinary meaning of the language used, and the reasonable result intended by the General Assembly compels the conclusion that "which violates an employee's rights" applies to each of the listed authorities. Any other reading would require application of the "last antecedent rule," which the General Assembly has specifically disavowed. § 2-4-214, C.R.S.

The employee should have to demonstrate that a procedural violation affected the employee's rights in the grievance process. A decision that was issued one day late may violate the grievance rules/procedures but would not necessarily violate an employee's right to a meaningful review of the grievance. We recommend revising this to state,

> "A department's final grievance decision violates an employee's right to a meaningful review of the grievance under the Board's grievance Rules or department's grievance procedures."

Board Rule 8-19.A:

One commenter suggests that the requirement for filing a specific appeal form should be less restrictive. We ask that the Board continue to use a single standardized

method of receiving appeals, allowing for clarity and ease of use by pro se complainants and efficient case intake by both Board staff and Respondents' counsel. Nothing in the rule prohibits complainants from providing additional information as attachments to their Consolidated Appeal/Dispute Form.

Board Rule 8-20.A.4: This rule is not consistent with statute. Section 24-50-125.3, C.R.S. states, "In an appeal involving the civil rights division, the state personnel board shall contract with a third party to investigate the complaint."

Board Rule 8-20.B.6.a.i: We agree with Mr. Finger's suggestion that the rule require the Administrative Law Judge to issue an order to show cause why the CCRD opinion should not be adopted.

Board Rule 8-23.B: Consistent with our recommendation for Board Rule 8-18.E above, this should read,

> "A department's final grievance decision violates an employee's right to a meaningful review of the grievance under the Board's grievance Rules or department's grievance procedures."

Board Rule 8-25.A.2 and A.3: Respondent's Information Sheet and Complainant's Reply are triggered when a party "delivers" its information sheet to the other party. As discussed in reference to Board Rule 8-4.A above, use of the word "delivers" may create uncertainty. We recommend revising Rule 8-25.A.2 to say,

> "Respondent shall file its Information Sheet with the Board within ten (10) days from the date Respondent receives Complainant's Information Sheet."

We also recommend revising Rule 8-25.A.3 to say,

> "Complainant may file a reply in further support of Complainant's Information Sheet within five (5) days from the date Complainant receives Respondent's Information Sheet."

Board Rule 8-25.C: We recommend revising the second sentence to say,

> "Replies in further support of Complainant's Information Sheet are limited to five (5) pages and shall be limited to issues raised in Complainant's and Respondent's Information Sheets."

Board Rule 8-25.G: The list of personal information to be redacted should include Employee Identification Numbers (EINs).

Board Rule 8-28: State agencies and institutions of higher education may be parties to multiple appeals before the Board; they should not be precluded from seeking declaratory action in other matters unrelated to such appeals. We recommend revising the second sentence:

> "However, parties to appeals pending before the Board shall not file Petitions for Declaratory Orders on issues raised in those appeals."

Board Rule 8-32: This rule does not address circumstances involving discrimination claims under the proposed Rule 8-20.B.6.a, where an Administrative Law Judge may set a matter for hearing after the Colorado Civil Rights Division's (CCRD's) issuance of a no probable cause opinion.

Board Rule 8-33.A.1.b and A.2.f: To the extent the Board wishes for parties to exchange unemployment benefits information to determine the potential offset of damages, this is permissible. However, the parties and Board's use of information from the unemployment benefits proceedings themselves is limited by statute. Section 8-74-108, C.R.S. states, "No finding of fact or law, judgment, conclusion, or final order made with respect to a [unemployment benefits] determination made under articles 70 to 82 of [Title 8] may be conclusive or binding or used as evidence in any separate or subsequent action or proceeding in another forum, except proceedings under articles 70 to 82 of [Title 8], regardless of whether the prior action was between the same or related parties or involved the same facts."

Board Rule 8-34: We recommend revising the rule to state:

> "Unless timely modified prior to the conclusion of discovery by the Administrative Law Judge for good cause…"

Board Rule 8-35.G.: The rules contain no requirement to disclose expert witnesses prior to the prehearing statements, which are due after the discovery deadline. As a result, there is no way to conduct depositions of expert witnesses. We recommend revising Rule 8-33 to require disclosure of expert witnesses (if known) at least thirty (30) days before the close of discovery.

Board Rule 8-35.I: The list of personal information to be redacted should include Employee Identification Numbers (EINs).

Board Rule 8-36.A: We have concerns with the requirement to make employees in the Complainant's supervisory chain available to furnish testimony without a subpoena on several grounds. First, it could violate employees' rights not to be compelled to give testimony without a valid subpoena. Second, if an employee has scheduled leave during the hearing, it seems that Respondent might risk being sanctioned for not making that person available. Finally, in certain agencies, the full chain of command up to the appointing authority may include 3-5 people, some of whom may not be involved in the case. In these instances, it appears that Respondent would risk being sanctioned if it did not make the full slate of individuals available for hearing, even if they are not necessary or relevant to the case. To require these individuals to remain available for hearing may result in scheduling concerns and an unnecessary use of resources.

We recommend revising the rule as follows:

> "Respondents shall make the appointing authority available to furnish testimony at a deposition or an evidentiary hearing even without a subpoena. Respondent and Complainant shall make a good faith effort to make other employees in

Complainant's supervisory chain with relevant information available to furnish testimony at a deposition or an evidentiary hearing even without a subpoena."

Board Rule 8-36.B.: The rule should expressly reference service of the subpoena. We recommend revising the second clause to say,

"…parties may issue and serve subpoenas in conformance with the Colorado Rules of Civil Procedure…."

Board Rule 8-37: We recommend adding subsection 8-37.H,

"The Administrative Law Judge may issue Orders regarding the efficient conduct of the evidentiary hearing."

Board Rule 8-44.B: Add to the end of the second sentence,

"after issuing both parties an Order to show cause why they should not be consolidated."

Board Rule 8-47: To ensure efficient use of the parties' time and resources in preparing for hearing, we recommend adding a provision,

"The Administrative Law Judge must rule on the motion within 45 days or at least 20 days prior to the evidentiary hearing, whichever is sooner."

Board Rule 8-47.A: Add a second sentence,

"Failure of a moving party to adhere to these requirements may result in denial of the motion."

Board Rule 8-47.K: This rule should mirror CRCP 121(11). Specifically, we recommend adding the following language after the first sentence:

"A party moving to reconsider must show more than a disagreement with the court's decision. Such

a motion must allege a plain error of fact or law that clearly mandates a different result."

Board Rule 8-59.G: Rule 8-41.A states that a party can only be represented by an attorney in all proceedings except Step 2 of the grievance process. Rule 8-59.G states that parties may bring a third party to attend and participate in a settlement conference, but does not state whether the third party (be it a family member or representative of a certified employee organization) may or may not represent the employee in the settlement conference or otherwise provide guidance as to how the third party may participate in the conference. To avoid confusion and possible disputes over the role of the third party, we suggest the Rule clarify whether the third party may represent the employee or instead is expected to observe and provide support for the employee, who must speak for themselves or through an attorney.

Board Rule 8-59.H: This rule is unnecessary.

Board Rule 8-61.A: This rule impermissibly expands the scope of the Board's jurisdiction. The Board does not have jurisdiction to hear a breach of contract claim, yet this rule appears to authorize the Board to set hearings on breach of contract actions. "A rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute." § 24-4-103(8)(a), C.R.S. A party wishing to enforce the terms of a settlement agreement may file a breach of contract action in accordance with the agreement's terms or in the state district courts of Colorado, not the State Personnel Board. This provision should be repealed.

Comments on Specific Proposed State Personnel Director's Administrative Procedures

Director's Procedure 8-76.C: The proposed revision adds alleged violation of the Americans with Disabilities Act Amendments Act (ADAAA) to the list of claims over which the State Personnel Director has jurisdiction. The authority for this is unclear. The review of ADAAA claims by the Director is

likely to cause considerable confusion, as the State Personnel Board and the CCRD have exclusive jurisdiction to review discrimination claims, including claims of discrimination based on disability. *See* § 24-50-125.3, C.R.S. ("An applicant or employee who alleges discrimination or unfair employment practices, as defined in [the Colorado Anti-Discrimination Act], in the state personnel system may appeal within ten days of the alleged practice by filing a complaint in writing with the [State Personnel Board] or the [CCRD].") The reference to the ADAAA should be removed or clarified.

Director's Procedure 8-76.C: There is a typographical error in the second sentence.

> "These include alleged violations ~~to~~ **of** the Fair Labor Standards Act…"

Director's Procedure 8-79.B: There appears to a typographical error.

> "Failure by the Director to issue a decision within the ninety (90) day time limit will cause the Director to adopt the ~~Initial~~ **final** decision by the department."

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

Sincerely,

s/ Michelle Brissette Miller
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