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January 12, 2021

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

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

RE: Comments to Proposed Amendments to **Chapter 8, Part D** of the State Personnel Board Rules and 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 Personnel Director's Administrative Procedures ("SPB Rules") are prepared by the undersigned Assistant Attorneys General who advise and represent state agencies and institutions of higher education concerning of management-side interests under the Colorado Partnership for Quality Jobs and Services Act (the "Act"). These comments do not constitute the opinion, comments or feedback of the Attorney General or of any particular state agency or institution of higher education and should not be construed as such.

A. Comments to Proposed Amendments to Chapter 8, Part D

Proposed Rule The "applies to" language may cause confusion to the extent it can
8-100 be interpreted to mean Part D procedures are not binding on a
 union representative who is not a state employee. We suggest
 revising the language to state:

Chapter 8, Resolution of Appeals and Disputes, Part D, Director's Review of Coverage Designation Disputes, applies to coverage decisions for employees of the state personnel system. Chapter 8, Resolution of Appeals and Disputes, Part

D, does not apply to decisions about whether employees are in the state personnel system.

Alternatively, the language could be revised to mirror that of the Act, C.R.S. § 24-50-1106(4):

Chapter 8, Resolution of Appeals and Disputes, Part D, Director’s Review of Coverage Designation Disputes, applies to decisions about *whether certain employees are appropriately classified as covered employees under the Colorado Partnership for Quality Jobs and Services Act*. Chapter 8, Resolution of Appeals and Disputes, Part D, does not apply to *challenges to the exemption of an employee from the state personnel system*.

(Emphasis added to reflect statutory language.)

Proposed Rule 8-100.A

The citation to “§ 24-50-1102(3)(a)–(f)” omits a citation to two statutory exclusions—employees of the legislative branch and temporary appointees. In the interest of completeness, we suggest revising the citation to “§ 24-50-1102(3)(a)–(h).”

This suggested revision also applies to the citation found in Proposed Rule 8-110.

Proposed Rule 8-104

This provision prohibits retaliation “against any person *involved in*” the process. For added clarity, we suggest revising the language to prohibit retaliation “*against any person for their involvement in*” the process. (Emphasis added to reflect suggested change.)

Title to Ch. 8, Part D, Section I

This title refers to “Designation Disputes” rather than “Coverage Designation Disputes,” and in that respect is inconsistent with other references in the proposed rules. In the interest of consistency, we suggest revising the title to “**Filing Coverage Designation Disputes**” or something similar.

Proposed Rule 8-107

This rule implies that there is more than one certified employee organization. Because there is only one certified employee organization under the Act, we suggest changing the term “certified employee organizations” from plural to singular: “**and the certified employee organization shall . . .**” (Emphasis added to reflect suggested change.)

Proposed Rule 8-107.A.5 This reference to “copies of the original written coverage dispute” may cause confusion. This appears to refer to the dispute *form*. If that is the case, we suggest modifying the language to say, “**copies of the original written dispute form.**”

Proposed Rule 8-109.D This requirement can be read as imposing new formatting requirements on pre-existing supporting documents and inviting parties to alter supporting documentation before submission. We suggest clarifying that this rule refers to filings that are created for the dispute, and that original documents should be filed as they are kept in the usual course of business.

Proposed Rule 8-110 The first sentence—“The Director’s authority regarding final decisions on Director’s Coverage Designation Disputes is limited to reviewing the facts surrounding the department’s final decision, within the limits of the employee’s position description and job duties and how it is applied to a covered or non-covered designation as defined in § 24-50-1102 (3)(a) through (3)(f), C.R.S.”—may cause confusion by suggesting that the Director should or may review the *process* for an initial coverage decision/designation, as opposed to reviewing the coverage determination or status itself.

We suggest revising the entire sentence to state:

The Director has authority to determine whether an employee was properly designated as covered or non-covered under the Colorado Partnership for Quality Jobs and Service Act based on their position description and job duties.

Additionally, the citation to “§ 24-50-1102(3)(a) through (3)(f), C.R.S.” omits a citation to two statutory exclusions—employees of the legislative branch and temporary appointees. In the interest of completeness, we suggest revising the citation to “**§ 24-50-1102(3)(a)–(h).**”

Proposed Rule 8-112 We suggest revising the statement, “. . . , Division of Labor Standards and Statistics has jurisdiction to hear final decisions of the Director” to reflect that the CDLE has “**jurisdiction to hear appeals of final decisions of the Director . . .**” (Emphasis added to reflect suggested change.)

Proposed Rule 8-113 This rule contains a typographical error, replacing the word “Department” with “Letter.” This should be revised to refer to the “**Colorado Department of Labor and Employment.**”

The rule also refers to changes made to “the official job description.” To the extent that “official job description” is intended to mean to the official *position* description (the term typically used by State employers), we suggest revising accordingly for added clarity.

B. Comments to Concerns Raised by Colorado WINS’ Public Comments

Colorado WINS (“COWINS”) also submitted public comments to this proposed rulemaking, although their comments appear to be made to a previous version of the Chapter 8 rules. To the extent COWINS’ comments address language found in the publicly available version of proposed rulemaking, we add the following remarks:

Comment regarding how unit composition is determined under Proposed Rule 8-100.A and the Act.

COWINS has commented in Rule 8-100.A that “unit composition is typically determined . . . by job classification,” and states in its general Comments that coverage designations “must be based on job classification and the Act” and should not be based on “individual duties.” Those assertions are not consistent with the Act.

The Act does not establish one or more work units consisting of certain job classifications; rather, it establishes a statewide partnership unit of classified employees and excludes several, sometimes nuanced categories of employees.¹ The statutory exclusions for “confidential employees,” “executive employees,” and “managerial employees” are defined by express reference to the duties, authority, and informational access of individual “employees” and “persons,” rather than classifications. The definition of “covered employee” refers to “an employee” and “the individual.” By statute, coverage disputes must turn on “whether *certain employees* are appropriately classified as covered employees.”² While job classification may be relevant to these considerations, the structure and language of the Act do not support a conclusion that classification is the sole determining factor of whether a particular employee is or is not “covered.”

¹ See C.R.S. § 24-50-1102(3)(a)–(h) (listed exclusions), (2), (5), (8), (9), and (10) (definitions).

² C.R.S. § 24-50-1106(4) (emphasis added).

Comment regarding the informal resolution of disputes.

COWINS has commented in Rule 8-102 that informal resolution is strongly encouraged “within 30 days.” Because the filing of a dispute is the prerogative of the certified employee union or the state, it is not necessary to establish a time limit for informal resolution. The current language of Proposed Rule 8-102 is appropriate.

Comments regarding whether time limits should be imposed on the internal stage of the dispute process or the issuance of a written decision by the Director or designee.

COWINS requests the inclusion of time limits. We take no position on whether time limits are appropriate but suggest that any time limits, if adopted, allow for appropriate flexibility to account for the ability to quickly make decisions in light of other workplace pressures, the number of disputes submitted, emergencies, etc.

Comment regarding whether a department’s failure to render a final decision should be a waiver on the part of the department.

COWINS has commented regarding proposed Rule 8-111.A, that “[f]ailure to render a final decision should be a waiver.” The Act does not appear to support this waiver argument. There is no textual basis to conclude that the “covered employee” exclusions are waivable or merely voluntary.

Please contact the undersigned counsel if you have any questions regarding the comments presented above.

Sincerely,

s/ Stephen Woolsey

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