Finger Law, P.C.
29025 D Upper Bear Creek Rd
Evergreen, CO 80439
Tele: 303-674-6955
Fax: 303-674-6684
Bill@fingerlawpc.com

January 6, 2021,

Rick Dindinger
Director, State Personnel Board
1525 Sherman St.
Denver, Colorado 80203

RE: Personnel Board Rule Revisions, Chapter 8, Comments

Dear Rick:

These comments are being provided following the Supreme Court's December 21, 2020 decision in *DOC v. Stiles*. The *Stiles* decision leaves unanswered numerous issues concerning the Board's appeal and adjudicatory process.

The decision most likely enhances the need, at a Board trial, to determine how the Rule 6-10 process was carried out in a given case and exactly what was considered by an appointing authority in his or her decision making that has been appealed.

Further, the *Stiles* decision leaves unanswered the question of how the state procedure for providing disciplinary decisions squares with federal requirements for due process required under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and the decision prodigy of *Loudermill*. See, for example, *Yelland v Arlington Heights School District* 2018 WL 3217643 (D.C. M.D. Pa., 2018) discussing the requirements of a pretermination due process claim and specificity needed in the processing and its reference to *Jennings-Fowler v. Scranton*, 680 Fed. Appx 112, 116 (3rd Cir. 2017) holding the pre-termination process was insufficient.

We suspect that the pre-termination process will now be a considerable area of litigation in appeals and in federal court. We also suspect that the post termination process will be under attack in federal court if the process is too narrowly restricted. These comments are designed to help address issues that may arise in this now uncharted territory.

Preamble: The preamble should include language that the changes are also made to address the legal standards established by *DOC v. Stiles*.

As an initial matter, the rules changes proposed in Chapter 8, when considered as a whole, appear to increase procedural advantages to state agencies and to reduce the rights of state employees. This conflicts with the Board's constitutional and statutory purpose, which is to provide "fair and timely resolution to cases before it." C.R.S. § 24-50-101 (3) (b). The Department of Personnel for

the State of Colorado is to "administer an affirmative action program," which indicates that the legislature has expressed a clear desire to ensure that the state proactively protects and endeavors to hire a diverse work force. C.R.S. § 24-50-101 (3) (e).

Even more than state statutes, the Colorado Constitution protects state employees and indicates a clear preference for employees' rights to an adjudication process:

> "Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law. They shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties." Colorado Constitution, Article 12, Section 13, Part 8.
>
> "Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both." *Id*.

Board Rule 8-4. This rule should be modified to make it clearer that it applies to appeals and that discussion should occur about resolution of the issues on appeal.

> "All appeals may be resolved informally through mutual agreement between the Complainant and Respondent. The parties to an appeal pending before the Board are encouraged to have discussions on a mutually agreeable resolution of the issues on appeal and to use the settlement process in Chapter 8. Resolution of Appeals and Dispute, Part A."

The rationale for broadening this language is to encourage early discussions on resolution, even before using the Board mediation services.

Rule 8-5 A. The mandatory language of using the Standard Appeal Form is too restrictive. This should be modified to read:

> "The Appeal: The employee or applicant filing an appeal shall use the standard Consolidated Appeal/Dispute Form found on the Board's website, or alternatively shall provide the Board a written Appeal containing the information required in Board Rule 8-5 B."

Rule 8-12 A 4. The Step 1 decision should include identification of the person to whom any Step 2 Grievance should be addressed.

Rule 8-13 B 1. The last sentence of this section should be clarified to read:

> Only the issues raised in the Written Step 2 grievance will be considered in any subsequent proceedings.

Rule 8-13 B 2. The time period for initiating the Step 2 should be expanded to 10 days. This is

because there is a need to fully provide in writing all issues and reasons why the employee thinks the action was improper, and the rules state that an employee may only take issues to appeal at the Board which were fully exhausted in the grievance process. Formulating the Step 2 should be a thorough process. The Step 2 Grievance is usually more complicated than the Step 1 decision.

Rule 8-13 B-4. The Step 2 process needs to be more open with the appointing authority and the appointing authority's delegated person providing *all* information and answering questions and giving the employee an opportunity to respond to information. Too often, also, in meetings with a panel, the panel will ask questions and then indicate that they will be talking to a supervisor or other employee and the employee is excluded from hearing what the other person said and rebutting the information or providing different information. If the goal is resolution then there needs to be a free flow information, and the rule should provide for such.

Rule 8-13-C. Any waiver or modification should require a written waiver or modification.

Rule 8-14. The 49-day period should be changed to 52 days, which is 10 days after the 42 days to respond period elapses. The 10-day period for an appeal is consistent with other deadlines.

Rule 8-16. The Rule should include the right to a mandatory hearing where a Department has disqualified an applicant for employment in a classified position from eligibility from employment. An example of this is that one state agency disqualified a well-qualified Native American applicant from all positions based on false and erroneous information given by a prior employer. This was not a routine selection decision concerning individuals competing for a single position but was a total disqualification from having employment when many positions were available. It also highlights the need for each state agency to develop a policy providing some due process for individual applicants to challenge hiring decisions which are alleged to be wrongful not simply because the employee disagrees with the hiring decision but on the basis that there was a demonstrable violation, such as reliance on fraudulent or untruthful information in making the hiring decision.

This is also borne out in state statute wherein the Legislature stated its intended delegation of its power to the Board. "It is the purpose of the state system, as a merit system, to assure that…any person has an equal opportunity to apply and compete for state employment." C.R.S. § 24-50-101 (3) (a). "Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence *without regard to race, creed, or color, or political affiliation*." Colorado Constitution, Article 12, Section 13, Part (1).

Rule 8-19 A. This rule should be broadened to allow filing of a written document containing the required information for a hearing on the Consolidated Appeal Form and specified in Board Rule 8-5. This is also consistent with the Supreme Court's decision in *Federal Express v. Holowicki*, which found that a Charge of Discrimination did not need to be on the EEOC's official form in order to be considered a valid Charge.

Rule 8-20 B 6 a i. For the Board to adopt CCRD's opinion after an objection is filed, at a minimum

a show cause order should be filed as to why the Board should not adopt the opinion and a party should be given the opportunity to establish a record. The *Bodaghi* decision clearly sets forth the indirect manner of proving discrimination and acknowledges that it is very infrequent that there is direct evidence of discrimination. CCRD frequently does not adequately evaluate indirect evidence, particularly where a hostile work environment is alleged. The CCRD process in the past five years has found probable cause of discrimination in the range of 2-4% of the time, and often the CCRD does not even interview witnesses. Due process for state employees requires a hearing, and the CCRD does not provide adequate due process. A Board hearing is necessary and should continue to be offered to employees who allege discriminatory practices.

Rule 8-21. The word "discretionary" should be removed and the word "primary" or "original" should be inserted. The Board appears to be mandated by statute to review and make a threshold determination of the claims.

Rule 8-21 A. This should be broadened and written document containing the information in the forms should be accepted.

Rule 8-25. This Rule should be broadened because it will make preparation of the information sheet easier and provide a more even playing field for the Complainant, who has the burden of proof. The Complainant frequently does not have full information on who was involved in decision making and relevant facts relating to the decisions that were made. Various agencies purge e-mails from the electronic systems and the purged e-mails are not disclosed. Disclosures should include:

1. Documents that are relevant or potentially relevant to the claims and defenses of the parties.
2. Documents that have been destroyed, lost, or purged that are relevant or potentially relevant and a description how such documents can be recreated or recovered.
3. Identification through a privilege log of documents and communications where some privilege is claimed (Privilege Log)
4. Persons with knowledge about the relevant facts and general identification of the known facts or information.

Extensions of time should not be limited to five (5) days. This is needlessly restrictive, for both parties. Especially given the Board's increased case load and desire to process cases quickly, many cases are being handled by small firms, all at the same time. The Information Sheet is a critical document which can be dispositive of the entire appeal filed. There is also no reason why this restriction should exist for Information Sheets when it is not applicable to other Board filings.

Rule 8-36. Mandatory Disclosures need to focus on avoiding extra written discovery for information that should be provided without written discovery. The disclosures should also identify privileged communications and privileged documents, documents that have been destroyed, lost, or purged, and persons with knowledge. This is similar information that is required in Court litigation.

Rule 8-36 A. 1. Complainant should provide:

a. All documents and recordings in Complainant's possession and control that are relevant or potentially relevant to Complainant's claims and Respondent defenses.

b. Disclosure of any documents or items that have been destroyed, lost, or purged that may be relevant or potentially relevant, the date that the document was lost, purged, or destroyed and the name of the person who last had possession of the document or who destroyed the document. Also, information on how the document or item can be recovered or recreated.
c. The name of all persons with knowledge relating to claims or defenses, including any person involved in meetings and the persons known to be involved in the decision-making process that is the subject of the appeal and what was the involvement.
d. Any claim for economic loss, including last three months of pay stubs from Respondent and other supporting document, including communications seeking new employment, acceptance of new employment and pay records from new employment. (Respondent is prohibited from contacting any prospective employer or new employer without order from the Board, except to give a neutral reference for employment). Documents relevant to application and receipt of unemployment benefits.
e. If any expert has given a final opinion on an issue involved in the appeal and is expected to testify, the name of the expert and field in which the expert practices and a summary of the opinion. This includes any medical or mental health treater or expert.
f. If any charge or claim for discrimination was made with EEOC or CCRD, all documents supplied to those agencies as part of any charge or claim.

Rule 8-37. The Respondent's disclosure requirements should be the same as Complaint's except for item d. (Economic Loss Claim). In addition, the following should be disclosed:
a. Complainants complete personnel file, Complainant's Position Description, any record of writeups, and written congratulations or accommodations that are not part of the personnel file.
b. Complainant's pay records, including records relating to deductions taken for benefits and a mathematical calculation concerning the value of any benefits lost in the job action under Appeal.
c. The relevant personnel policies related to the employment action, including but not limited to Administrative Regulations of the Department, or written personnel policies and any employee handbook.
d. The entire file of the delegated appointing authority or personnel delegated to take the action that is under appeal, including notes, recordings, prepared statements for any meeting or discussions, reports, regulations, rules referenced in any meeting with the Complainant, and other documents referenced with the Complainant.
e. The drafts of any proposed resolution to the subject matter being appealed, including any disciplinary action or corrective action, and e-mail transmitting any drafts for review.
f. All recordings and notes of any investigator, who interviewed the Complainant or witnesses related the subject matter of the action being appealed.
g. E-mails sent to Human Resources or other Department Officials or other Departments, Agencies or Government entities that relate to the subject matter of the Appeal.
h. Documents relevant to the employer's position on a claim for Unemployment Compensation Benefits.
i. If any investigation, of any sort, has been conducted relating to claims appealed, such investigation should be disclosed.
j. If an EEOC or CCRD charge or claim was made for Discrimination by Complainant, related to the subject matter of the Appeal, all documents and information supplied to EEOC and CCRD in response to the charge or claim.

Rule 8-37 B. The six hours of deposition time is prejudicial to the Complainant and deprives the Complainant of a fair process and opportunity to fully develop his or her case. Frequently the employer as had some investigation done through a person delegated by the appointing authority. Employees are frequently told that they cannot talk to employees about the events and witness employees are told that they cannot talk to the person being charged with misconduct. Frequently there are several persons who alleged some form of misconduct by the employee that need to be deposed. It is routine that the appointing authority will need to be deposed and this is even more necessary with the decision in *Stiles*. Then, in many cases, an investigator needs to be deposed. The present rule allows for three depositions and in most instances that is sufficient, except in complex case or cases where two or more appeals have been consolidated. Three depositions as a presumptive number should be authorized with the ability of the either party to seek additional depositions – or a reduction in the presumptive number - upon agreement or a showing of good cause. A motion may always be filed. In the alternative, the rule could provide that the parties are to confer with one another at the beginning of the process and agree on a number. The length of a deposition is difficult to predict and part of it depends on witness cooperation, but a presumptive total of 20 hours for the depositions with no more than 6 hours per deponent is a fair number.

The limit of 5 Request for Production, thirty Interrogatories consisting of 1 question each and twenty Requests for Admissions consisting of one admission each is prejudicial to the Complainant and is slanted toward the Respondent. Interrogatories that are asked by the Complainant are answered by Respondent's legal counsel with some input from an appointing authority. You therefore get lawyer answers that have minimal value, except for identifying documents and persons. Complainant rarely needs more than 20 to 25 Interrogatories, some of which are to obtain information about Requests for Admissions that are denied or partially denied. In discrimination cases the Interrogatories often focus on data or similar or dissimilar treatment. Information in Interrogatories response can be distorted. Requests for Production are frequently the best way of obtaining accurate information without distortion. In discrimination cases, obtaining the raw data for analysis is critical.

Another factor in this issue of written discovery is that it is partially dependent on the deposition limitations. The more limited the Complainant is in terms of conducting depositions, the more important written discovery becomes, and vice-versa. The Board here is proposing major revisions to the discovery process, and the revisions are all in favor of limiting discovery rather than expanding it. Ideally, the parties would have the ability to make strategic decisions about which form of discovery, written or oral, is to be utilized, but if depositions are limited as currently proposed, the limit on Requests for Production is especially prejudicial.

One way of limiting the number of written discovery requests is to allow a party to ask in a single Interrogatory for the opposing party to explain and provide facts and information and identification of documents that support each denial or partial denial of a Request for Admission. There is routinely a dispute whether a separate request has to be made before each denial or you can do a blanket Interrogatory for denials. The Board should allow a blanket Interrogatory on denials or partial denials for Requests for Admission. The same is true for Requests for Production relating to documents supporting a denial or partial denial for Request for Production.

The following is recommended to the Board based on years of experience in doing all sorts of cases, including Whistleblowing cases, discrimination cases, disciplinary cases, grievances, layoffs, promotion cases, FMLA issues, involuntary terminations etc.

The presumptive number for Requests for Admissions should be 20; the presumptive number for Interrogatories should be 20 with an Interrogatory requesting information on each of the Request for Admission not admitted or not fully admitted counting as one interrogatory; and the presumptive number of Requests for Production should be 20 with a Request for Production for documents supporting each denial for a Request for Admission or partial denial counting as one request. Limiting Requests for Production to 5 is generally unworkable, particularly in cases where Complainant is represented. Such a limitation will likely create discovery disputes of some magnitude that will take up unnecessary time for the ALJ and cause counsel to expend unnecessary time arguing about what the number should be and cause a more confrontational aspect to the proceedings. Getting cases ready for trial is a time-consuming process and the more counsel can work together the smoother the process. Avoiding discovery disputes should be a concern. Unduly limiting written discovery will not be a productive way to govern an orderly administrative process and will create more disputes, not less.

In reviewing the Director Appeals the following is noted:

8-77 First sentence should be modified to read: The Director shall not substitute his or her judgment for that of the appointing authority.

8-78 The Confidentiality of Director's Appeal Material should be broadened to include a Personnel Board Review of a final Director's decision. The Rule can provide that the information is filed in a confidential manner.

Yours Truly,

/s/ Bill Finger
Bill Finger

/s/Casey Leier
Casey Leier