

State of Colorado



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MEETING MINUTES

February 16, 2021

The State Personnel Board met on February 16, 2021. Due to the COVID-19 pandemic, the Board held its meeting via a Zoom webinar.

The meeting was called to order at 8:04 a.m. Board Members Patricia Bangert, Nora Kelly, Karen Niparko, Sarah Wager, and Roxane White were present for the roll call via webinar. Rick Dindinger, Board Director, and Assistant Attorney General Amy Lopez, Board Counsel, were also present via webinar.

Members of the public also attended the meeting via webinar. In advance of the meeting, the Board posted information about the agenda and the webinar on its website.

I. REPORT OF DEPARTMENT OF PERSONNEL AND ADMINISTRATION [DPA] AND REPORT OF THE DIVISION OF HUMAN RESOURCES [DHR].

There was no report scheduled this month.

II. MATTER ON REMAND FROM THE COLORADO SUPREME COURT.

Mathew Stiles v. Department of Corrections, Denver Reception & Diagnostic Center, SPB 2016B034. Following discussion of the Colorado Supreme Court's Opinion and the Colorado Court of Appeals' Mandate, the Board acted as follows: Ms. Bangert moved to remand the case to the Administrative Law Judge for further proceedings consistent with the opinion of the Supreme Court. Ms. White seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, Ms. Wager and Ms. White.

III. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES TO GRANT OR DENY PETITIONS FOR HEARING.

Debra Oplinger v. Colorado Department of Labor & Employment, SPB 2021S009. Following discussion of the Administrative Law Judge's Preliminary Recommendation, the Board acted as follows: Ms. Kelly moved to adopt the recommendation, deny Complainant's petition for hearing, and refer the matter to the State Personnel Director. Ms. Wager seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, Ms. Wager and Ms. White.

IV. INITIAL DECISIONS OF THE ADMINISTRATIVE LAW JUDGES FOR POTENTIAL REVIEW UNDER § 24-4-105(14)(a)(II), C.R.S.

A. Desmond Manning v. Department of Corrections, SPB 2021B004.

The Board did not take any action.

B. Dean Pace v. Department of Human Services, Colorado Mental Health Institute at Pueblo, Admissions/Restoration Program, SPB 2019B023(c).

The Board did not take any action.

V. REVIEW OF MINUTES FROM THE JANUARY 19, 2021, PUBLIC MEETING OF THE STATE PERSONNEL BOARD.

Ms. Niparko moved to approve the minutes as submitted. Ms. Kelly seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, Ms. Wager, and Ms. White.

VI. ADMINISTRATIVE MATTERS & COMMENTS.

A. ADMINISTRATIVE MATTERS.

- Board Counsel Lopez reported that the briefing is in progress in Dep't of Revenue v. McCauley, SPB No. 2014B061. Ms. Lopez also reported that the Court of Appeals affirmed the Board in Akinbode v. Dep't of Corrections, SPB No. 2020G024.
- Director Dindinger reminded everyone that the Board Meeting on March 16, 2021 will start at 8:00 a.m. He also reminded everyone that a rulemaking hearing regarding Chapter 9 (Fair Employment Practices) is tentatively scheduled for May 18, 2021.

B. GENERAL COMMENTS.

- In advance of the meeting, the Board did not receive any written comments for the Board's consideration or any requests to share a general public comment.

VII. EXECUTIVE SESSION.

At 8:34, Ms. Kelly moved to enter executive session for the following purposes: receiving legal advice pursuant to § 24-6-402(3), C.R.S., regarding a recent decision by the Colorado Supreme Court, specifically, Stiles v. Department of Corrections (Supreme Court No. 2020 CO 90; SPB No. 2016B034).

Ms. Bangert seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, Ms. Wager and Ms. White. Following the vote, the Board entered into executive session.

The Board re-entered open, public session at 9:03 a.m. The Board members then prepared informally for the joint rulemaking, including certain webinar screen arrangements.

VIII. JOINT RULEMAKING HEARING.

The Board continued its joint rulemaking hearing with Ramona Gomoll (the Statewide Chief Human Resources Officer) regarding proposed changes to the Board Rules in Chapter 8 (Resolution of Appeals and Disputes). The rulemaking originally started at the Board's meeting on January 19, 2021, when the Board heard public testimony and began its deliberations. The continued rulemaking hearing started at 9:08 a.m.

The Board deliberated on the proposed changes. Ms. White exited the meeting at 10:59 a.m. and rejoined the meeting at 11:38 a.m. The Board recessed from 11:04 a.m. to 11:15 a.m. At the conclusion of deliberations, Board Chair Nora Kelly entertained motions to adopt the proposed changes, amend the proposed changes, or to reject the proposed changes to the Board Rules in Chapter 8.

First motion. Ms. Kelly moved to repeal the Board Rules in the current version of Chapter 8 and to adopt the following proposed rules and the accompanying statements of basis and purpose as originally published on December 25, 2020:

- Board Rules 8-9 to 8-10, 8-16, 8-21 to 8-23, 8-26, 8-30, 8-37 to 8-40, 8-42 to 8-46, 8-49 to 8-50, and 8-55 to 8-60.

Ms. Kelly's motion stated that the specific authority of the State Personnel Board to promulgate these rules is found at Article XII, sections 13 and 14 of the Colorado Constitution; the State Personnel System Act, section 24-50-101, *et seq.*, C.R.S.; and the Administrative Procedure Act section 24-4-103, 105 and 106, C.R.S. Ms. Kelly's motion also stated that the purpose for adopting and revising these rules is: (a) clarification for the Board Rules for improved understanding and ease of use by stakeholders, including the general public; (b) removal of redundant information and simplifying language of procedural requirements; and (c) correction of typographical errors, grammatical errors, and formatting errors. Ms. Kelly's motion also stated that the Board finds, as required by section 24-4-103(4)(b), C.R.S., that the record of the rulemaking proceedings demonstrates the need for the rules; the proper statutory authority exists for the rules; to the extent practicable, the rules are clearly and simply stated; the rules do not conflict with other provisions of law; and any duplication or overlapping was explained. Ms. Niparko seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, Ms. Wager and Ms. White.

Second motion.

Ms. Kelly moved to adopt the following proposed rules as originally published on December 25, 2020, but with the modifications as reflected in the deliberation document:

- Board Rules 8-1 to 8-8, 8-11 to 8-15, 8-17 to 8-20, 8-24 to 8-25, 8-27 to 8-29, 8-31 to 8-36, 8-41, 8-47 to 8-48, 8-51 to 8-54, and 8-61.

Ms. Kelly's motion cited specific authority of the Board, the purposes for adopting the rules, and the Board's findings required under § 24-4-103(4)(b), C.R.S. Ms. Bangert seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms.

Kelly, Ms. Niparko, Ms. Wager and Ms. White. (The deliberation document is attached to these Minutes as an exhibit.)

Following the motions, the joint rulemaking hearing closed by consensus. The Board did not conduct any further business.

The Board meeting adjourned by consensus at 12:48 p.m.

SIGNED THIS 16th DAY OF MARCH, 2021.

Nora Kelly, Chair

Sarah Wager, Vice Chair

Patricia Bangert, Board Member

Karen Niparko, Board Member

Roxane White, Board Member

Suggestions will be in Green see the comments on the side →

Changes will be in ~~green~~-Red

Comments

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Chapter 8 Resolution of Appeals and Disputes

Authority for rules promulgated in Chapter 8, Resolution of Appeals and Disputes, is found in the Colorado Constitution Art. XII §13, § 24-34-402, 24-11-110, 24-50-101, 24-50-103, 24-50-104, 24-50-104.5, 24-50-123, 24-50-125, 24-50-125.3, 24-50-125.4, 24-50-125.5, 24-50-131, 24-50-132, and 24-50.5-101 to 107, C.R.S. Board rules are identified by cites beginning with "Board Rule".

Chapter 8, Part A. Board Rules for Appeals.

Board Rule 8-1. Chapter 8, Resolution of Appeals and Disputes, Part A contains the State Personnel Board Rules that govern appeals and includes the following:

- Section I: Overview & Filing with the Board.
- Section II: Grievances.
- Section III: Mandatory Board Hearings.
- Section IV: Discretionary Board Hearings & Preliminary Review Process.
- Section V: Petitions for Declaratory Orders.
- Section VI: Rules for Hearings.
- Section VII: General Provisions.
- Section VIII: State Personnel Board Review of Initial Decisions and other final orders issued by an Administrative Law Judge.
- Section IX: Settlement Process.

Part A. Section I. Overview & Filing with the Board

Board Rule 8-2. Chapter 8, Resolution of Appeals and Disputes applies to employees of and applicants to the state personnel system. Chapter 8, Resolution of Appeals and Disputes does not apply to individuals outside of the state personnel system.

~~**Board Rule 8-2:** Chapter 8, Resolution of Appeals and Disputes, Part A contains the State Personnel Board Rules that govern appeals and includes the following:~~

- ~~● Section I: Overview & Filing with the Board.~~
- ~~● Section II: Grievances.~~
- ~~● Section III: Mandatory Board Hearings.~~
- ~~● Section IV: Discretionary Board Hearings & Preliminary Review Process.~~
- ~~● Section V: Petitions for Declaratory Orders.~~
- ~~● Section VI: Rules for Hearings.~~

- ~~Section VII: General Provisions:~~
- ~~Section VIII: State Personnel Board Review of Initial Decisions and other final orders issued by an Administrative Law Judge:~~
- ~~Section IX: Settlement Process:~~

Board Rule 8-2.1 Filing Reference Diagram

The diagram is illustrative only. The language in the Board Rules is controlling.

An employee wanting to file an appeal with the Board shall follow the filing procedures in Chapter 8, Part A, Section I . The appeal shall use the standard Consolidated Appeal/Dispute Form found on the Board's website.			
Chapter 8 includes the procedures for resolving appeals and disputes. Appeals proceed depending on the nature of the employee's claim as summarized below:			
Grievance	Discipline / Actions that impact Pay, Status, or Tenure	Whistleblower / Discrimination / Retaliation	Director's Review: selection, performance management, and coverage designation.
↓			An applicant's or a certified employee's appeal may fall within the Director's Review process. Part B. Section I: Filing with the Director. Part B. Sections I and II: Selection disputes. Part C: Performance management disputes. Part D: Coverage designation disputes.

Grievance	Discipline / Actions that impact Pay, Status, or Tenure	Whistleblower / Discrimination / Retaliation
An employee who is attempting to resolve a dispute internally should follow the grievance process and may file an appeal of a Step Two Grievance Decision to the Board. The Board may use its discretion to review a Step Two Grievance Decision when it appears that: (a) the employment action violates the Whistleblower Act; (b) the employment action violates the Colorado Anti-Discrimination Act ("CADA"); (c) the Step Two Decision violates an employee's rights under the federal or state constitution; or (d) the Step Two Decision violates the Board's grievance rules or the department's grievance procedures. Part A. Section II: Grievances. Part A. Section IV: Discretionary Board Hearings & Preliminary Review.	↓	

Discipline / Actions that impact Pay, Status, or Tenure	Whistleblower / Discrimination / Retaliation
A certified state employee may appeal a disciplinary action (such as a termination or demotion). A certified state employee may also appeal other actions that adversely affect the employee's pay, status, or tenure (such as a layoff or administrative separation). The Board will grant a hearing and issue a Notice of Hearing and Prehearing Order. Part A. Section III: Mandatory Hearings. Part A. Section VI: Rules for Hearings.	↓

Whistleblower / Discrimination / Retaliation
Employee and applicants may appeal employment actions that violate the Colorado Anti-Discrimination Act ("CADA"). Employees may also appeal employment actions that violate the State Employee Protection Act (commonly referred to as the "Whistleblower Act"). Both CADA and the Whistleblower Act prohibit retaliation. The Board may use its discretion to review these types of employment actions.

Part A. Section IV. Discretionary Board Hearings & Preliminary Review.

Exclusions

Only an applicant or a certified employee ("Appellant") who is directly affected as a result of an action by a department ("Respondent") may appeal to the Director under Parts B, C, and D of this Chapter 8.

Employees do not have the right to a hearing in the following situations;

- Discipline of probationary employees for unsatisfactory performance;
- Reversion of trial service employees for unsatisfactory performance;
- Demotion of conditional employees to the class in which last certified; and
- Resignations in lieu of a disciplinary action.

However, employees may ask the Board to grant a discretionary hearing in the above-listed situations.

The following items are not subject to the grievance process:

- Disciplinary actions;
- Any action that adversely affects pay, status, or tenure;
- Selection disputes;
- Performance management disputes that do not result in a disciplinary action;
- Coverage designation disputes;
- In-range salary movements;
- Issues pertaining to leave sharing;
- Discretionary pay differentials; and
- Hazardous duty premium pay

The Director shall not review the following actions:

- Hiring once an applicant has advanced to referral and an applicant received an offer to interview;
- Personal services contracts; and
- Job evaluation system and actions.

Board Rule 8-3. All disputes may be resolved informally. Parties with appeals pending before the Board are encouraged to use the settlement process in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section IX**.

Board Rule 8-4. **Notice of Appeal Rights**. Applicants and employees shall be notified, in writing, of any rights to dispute a final department decision that adversely impacts pay, status, or tenure and any final grievance decisions or selection decisions.

- A. 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-delivery** of the notice, the Board's physical address, email address, website, telephone and facsimile numbers, the requirement that the appeal shall be in writing, and the availability of the **Consolidated Appeal/Dispute Form**.

Board Rule 8-5. **Appealing to the Board**.

A. **The Appeal**. The appeal shall use the standard Consolidated Appeal/Dispute Form found on the Board's website.

B. **Contents of the Appeal**. The appeal shall clearly state the following:

1. Identification of the person filing the appeal ("Complainant"), Complainant's address, telephone number, email address and whether Complainant is a certified employee or a probationary employee.
2. The name, address, email address and telephone number of Complainant's legal representative, if any.
3. The department ("Respondent") that took the alleged improper action.
4. The action that Complainant believes was improper and the reasons Complainant disagrees with the action.
5. The date Complainant received notice of the action and a copy of the written notice, if one was provided.
6. The relief requested.
7. The appeal shall indicate if it is being filed with the Board, the Director, or both.
8. The appeal shall be signed by Complainant or Complainant's attorney.

C. **Filing the Appeal**. The appeal shall be filed according to rules in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section I**.

Board Rule 8-6. **Where to File**. Appeals and other documents may be filed by hand delivery, United States Postal Service, commercial delivery service, facsimile, or via email.

- A. The physical address for filing is State Personnel Board, 1525 Sherman Street, 4th Floor, Denver, Colorado 80203.

1. Normal business hours for the Board are from 8:00 a.m. to 5:00 p.m., Monday through Friday, except for official state holidays or days that state offices in Denver are closed due to weather or safety **or by governor order**.
- B. The facsimile number is 303-866-5038. Facsimile filings may not exceed ten (10) pages.
- C. Filings Via Email.
1. The Board's email address is dpa_state_personnelboard@state.co.us.
 2. The subject line for the filing via email shall include:
 - a. Case name;
 - b. Case number (if a new appeal, write "New Appeal"); and
 - c. The phrase "Electronic Filing."

Example: "Doe v. Department (2020B879) (Electronic Filing)" and "Doe v. Department (New Appeal) (Electronic Filing)".
 3. The appeal, motion, or other filings must be attached to the email as a PDF document. The Board will only consider the contents of the attached document. The Board will not consider information in the text of the email. The email is not a filing; rather the email is a method for parties to file something with the Board.
 4. As with any filing, the attached filings shall be signed. This can be done by signing the document and scanning the document with the signature. This can also be done by writing or typing "/s/" followed by the filer's full name on the signature block line, so long as the person filing the document signs a paper form of the document and makes that form available for situations where a judge might seek verification of the signature.
 5. Upon its receipt of a filing via email, the Board will send the filing party an email stating "Received." That email will be the proof of filing.

Board Rule 8-7. Filing Deadlines.

- A. Appeals or petitions for hearing are timely if received by the Board or postmarked no later than ten (10) days after receipt of the written notice of the action, or if no notice was required, no later than ten (10) days after the employee knew or should have known of the alleged improper action. ~~The appeal shall be filed with the Board within ten (10) days from when the employee knew or should have known of the alleged improper action.~~
- B. Other documents filed with the Board are due according to the deadlines in Chapter 8, Resolution of Appeals and Disputes, Part A, or as set in a Board Order.
- C. If a deadline falls on a weekend, ~~or~~ official state holiday, **or by governor order** the deadline is extended to the next regular business day.
- D. Any motion to extend a deadline shall be filed prior to the deadline.
- E. ~~Other than as set forth in part (A) of this Rule, all filings must be received by the Board by 5:00 p.m. Colorado time to be deemed to have been filed on that date. Any filing via facsimile~~

~~or email that is received by the Board by 11:59 p.m. Colorado time shall be deemed to have been filed on that date.~~

~~4. Upon satisfactory proof that a facsimile or email was untimely because of the Board's technology problems, the Board may enter an order deeming the filing as timely.~~

- F. Upon satisfactory proof that a filing via facsimile or email was untimely because of the Board's technology problems, the Board may enter an order deeming the filing as timely. ~~All other filings must be received by the Board during its normal business hours.~~
- G. Failure to timely file an appeal may result in the Board losing jurisdiction over the matter and result in the dismissal of the appeal.

Board Rule 8-8. Requirements for all Board filings.

- A. The appeal shall be filed in accordance to the requirements in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section I**.
- B. After the appeal has been filed, all documents filed with the Board shall contain the following:
 - 1. The case number;
 - 2. The names of the parties;
 - 3. The title of the document;
 - 4. The contact information for the party or the attorney filing the document, including email address, physical address, and phone number;
 - 5. If the document is filed by an attorney, the attorney registration number; and
 - 6. The signature of the party or the attorney filing the document. This signature is in addition to the signature on the certificate of service.

Board Rule 8-9. Service of Filings and Certificate of Service.

- A. Whenever a party files anything with the Board, that party shall serve the opposing party with a copy. This service shall be done at the same time the party files the document with the Board.
- B. Service to the opposing party shall be made by email. In the event the opposing party cannot be served by email, service may be accomplished by hand delivery, United States Postal Service, commercial delivery service, or facsimile transmission.
- C. When an attorney represents a party, service shall be made to the attorney.
- D. Any documents filed with the Board shall include a signed certificate of service. The certificate of service shall provide:
 - 1. The address used to deliver a copy of the document to the opposing party (for example, the email address);

2. The method of delivery of the document to the opposing party (for example, sent email); and
3. The date of delivery of the document to the opposing party.

Board Rule 8-10. Size and Format of Filings. All documents filed with the Board shall be prepared as follows:

- A. 8-1/2" x 11" page size, on plain, white paper (recycled paper preferred);
- B. Black type or print;
- C. No less than twelve (12) point font, excluding footnotes. Footnotes shall be no less than nine (9) point font;
- D. Margins of at least one inch (1") at the top, left, right, and bottom of each page; and
- E. If single-spaced, there shall be a blank line between each paragraph.

Part A. Section II. Grievances

Board Rule 8-11. Actions Subject to the Grievance Process. The grievance process applies to all workplace actions except for: (a) disciplinary actions; (b) any action that adversely affects pay, status, or tenure; (c) selection disputes; (d) performance management disputes that do not result in a disciplinary action; (e) coverage designation disputes; (f) in-range salary movements; (g) issues pertaining to leave sharing; (h) discretionary pay differentials; and (i) hazardous duty premium pay.

Board Rule 8-12. Grievance - General Provisions.

- A. The grievance process is designed to address and resolve problems at the lowest level possible.
- B. Each department shall establish a grievance process. At a minimum, the department's grievance process shall include the procedures in Chapter 8, Resolution of Appeals and Disputes, Part A, Section II.
- C. Departments shall make their grievance processes readily available to employees. This requirement may be satisfied by posting the grievance process on the department's website.
- D. A grievance initiated within ten (10) days from the disputed action or occurrence suspends the deadline to file an appeal with the Board if the written grievance at Step Two asserts:
 1. Discrimination or retaliation in violation of the Colorado Anti-Discrimination Act ("CADA"); or
 2. Retaliation for disclosing protected information in violation of the Whistleblower Act.

Board Rule 8-13. Grievance Procedures.

- A. Step One:

1. Initiating a Grievance. To initiate the grievance process, the employee shall notify the employee's supervisor or **another person within the employee's chain of command other authorized person**. Such notification may be verbal, but must communicate that the employee is initiating Step One of the grievance process.
2. Deadline for Initiating a Grievance. The employee shall initiate the grievance process within ten (10) days from the disputed action or occurrence.
3. Step One Discussion. (a) The Step One Discussion shall include the employee and the supervisor or **another person within the employee's chain of command other authorized person**. (b) The Step One Discussion shall include ideas for resolving the matter. (c) The employee does not have the right to representation during the Step One Discussion. (d) The Step One Discussion shall occur within fourteen (14) days from the employee initiating the grievance process.
4. Step One Decision. (a) The employee shall be informed in writing of the Step One Decision. (b) The Step One Decision is binding on the parties unless the employee proceeds to Step Two of the grievance process. (c) The department shall provide its Step One Decision to the employee within fourteen (14) days from the date of the Step One Discussion. (d) **The Step One Decision shall state that if the employee initiates Step Two, the employee must provide a written grievance to the appointing authority within ten (10) seven (7) days from receipt of the Step One Decision.** (e) **The Step One Decision shall identify the employee's appointing authority.**

B. Step Two:

1. Written Grievance. To initiate Step Two of the grievance process, the employee shall provide a written grievance to the employee's appointing authority. The written grievance shall include all of the reasons the employee believes the action or occurrence was improper. Only the issues raised in the written grievance will be considered in subsequent proceedings.
2. Deadline for Initiating Step Two. (a) The employee shall initiate Step Two of the grievance process within **ten (10) seven (7) days** from receipt of the Step One Decision. (b) If the department fails to issue the Step One Decision within **fourteen (14) ten (10) days** from the Step One Discussion, the employee may initiate Step Two without awaiting the Step One Decision but shall do so no later than twenty-one (21) days after the Step One Discussion.
3. Review of Step Two Grievance. (a) The appointing authority will **typically** review the grievance at Step Two of the grievance process **unless** ~~-(b)-~~ **the** appointing authority **may** appoints another person or a panel to investigate and/or make recommendations regarding the grievance. ~~(bc)~~ The appointing authority may delegate the Step Two Decision to another person or a panel.
4. Step Two Meeting. (a) The appointing authority or delegate will meet with the employee to gather information and/or attempt to resolve the grievance. (b) The Step Two Meeting shall occur within twenty-eight (28) days from the employee initiating Step Two. (c) The employee may bring a representative to the Step Two Meeting **that may or may not be an attorney**. (d) A representative during the Step Two Meeting may participate and speak

during the meeting but the employee is expected to answer any questions and actively participate.

5. Step Two Decision. (a) The employee shall be informed in writing of the Step Two Decision. (b) The department shall provide its Step Two Decision to the employee within fourteen (14) days from the date of the Step Two Meeting. (c) The Step Two Decision is binding on the parties unless the employee elects to appeal the Step Two Decision to the Board.
- C. Any of the timeframes for completion of the grievance process may be waived or modified if agreed to by both parties, including deferral of action to allow the parties a chance to resolve the issue.

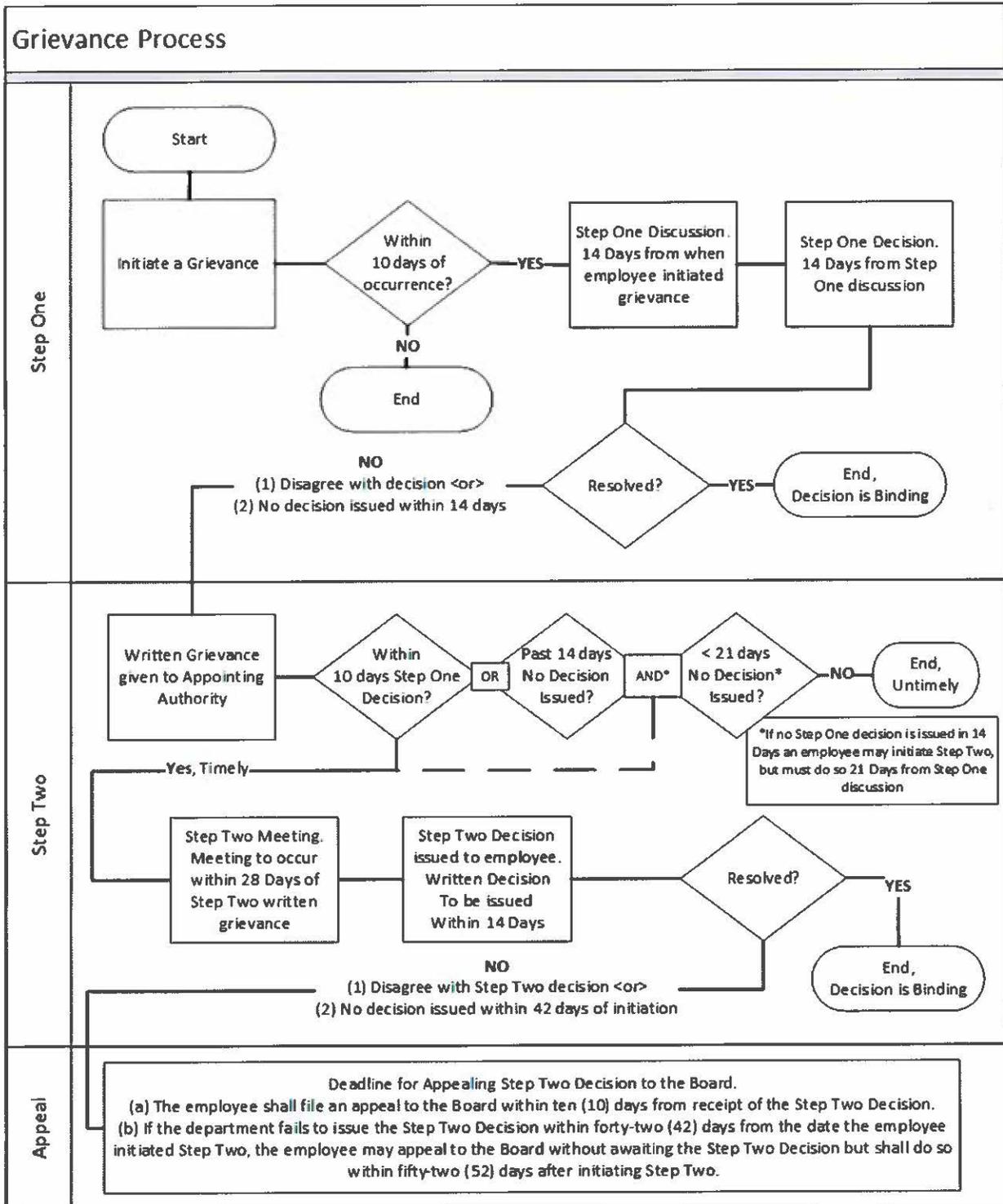
Board Rule 8-14. Deadline for Appealing Step Two Decision to the Board. (a) The employee shall file an appeal to the Board within ten (10) days from receipt of the Step Two Decision. (b) If the department fails to issue the Step Two Decision within forty-two (42) days from the date the employee initiated Step Two, the employee may appeal to the Board without awaiting the Step Two Decision but shall do so within ~~fifty-two (52)~~~~forty-nine (49)~~ days after initiating Step Two. (c) ~~The Board may exercise its discretion to hear an appeal of a Step Two Decision under the Board Rules for discretionary hearings set forth in Part A, Section IV of this Chapter 8.~~

Board Rule 8-15. Effect of a Separation on a Pending Grievance.

- A. If a grievant is separated from employment in the state personnel system, any grievance pending at the department level is ended.
- B. If the grievant's employment is restored at the same department, then the grievant may resume any grievance that had been pending at the time of the separation. To resume a grievance, the restored employee shall notify the supervisor in writing within ten (10) days after the employee's return to work.
- C. A separation does not preclude the Board from hearing a discrimination or a whistleblower claim related to the facts underlying a grievance.

Board Rule 8-15.1 Grievance Flowcharts

The diagram is illustrative only. The language in the Board Rules is controlling.



Part A. Section III. Mandatory Board Hearings

Board Rule 8-16. Appeals Subject to a Mandatory Hearing before the Board.

- A. Except as provided in this Rule, any employment action that adversely affects a certified employee's current base pay, status, or tenure may be appealed and will be set for hearing if timely filed. An adverse action includes the loss of rights to which an employee is entitled (including denial of reemployment rights or removal from a reemployment list).
- B. Employees do not have the right to a hearing in the following situations;
 - 1. Discipline of probationary employees for unsatisfactory performance;
 - 2. Reversion of trial service employees for unsatisfactory performance;
 - 3. Demotion of conditional employees to the class in which last certified; and
 - 4. Resignations in lieu of a disciplinary action.

Board Rule 8-17. Hearing.

- A. If the appeal is subject to a mandatory hearing before the Board, an Administrative Law Judge will issue a Notice of Hearing and Prehearing Order that sets the appeal for hearing.
- B. The hearing will proceed pursuant to the rules set forth in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section VI**.
- C. If good cause is shown or upon agreement of the parties, an Administrative Law Judge may receive all or parts of the evidence by telephone, video-conferencing, or in written form.

Part A. Section IV. Discretionary Board Hearings & Preliminary Review

Board Rule 8-18. Appeals Subject to the Board's Discretion. The Board may use its discretion to grant a hearing for employment actions where the applicant or employee does not have a right to a mandatory hearing and when it appears that:

- A. The employment action violates the State Employee Protection Act (commonly known as the "Whistleblower Act");
- B. The employment action violates the Colorado Anti-Discrimination Act ("CADA");
- C. An appointing authority's decision violates a rule or statute relating to the comparative analysis process. However, the Board may only review such decision after the Director has issued a final decision pursuant to § 24-50-112.5(4), C.R.S.;
- D. A department's final grievance decision violates an employee's rights under the federal or state constitution;
- E. A department's final grievance decision violates the Board's grievance Rules or the department's grievance procedures; or

- F. A final decision of the Director on a matter involving the overall administration of the state personnel system is arbitrary, capricious, or contrary to rule or law.
- G. The Board cannot grant a hearing to a probationary employee who appeals discipline for unsatisfactory performance unless the employee alleges unlawful discrimination or other statutory or constitutional violation.

Board Rule 8-19. Petitioning the Board for a Discretionary Hearing.

- A. Individuals wishing to request a discretionary hearing shall file an appeal with the Board using the **Consolidated Appeal/Dispute Form**. An appeal requesting a discretionary hearing is often referred to as a "Petition for Hearing."
- B. The Board shall grant or deny a Petition for Hearing within one hundred and twenty (120) days from the filing of the appeal with the Board.
- C. If the Board grants a Petition for Hearing, the matter is set for hearing and proceeds in accordance to the Rules for Hearings in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section VI**.
- D. Upon receipt of a Petition for Hearing, an Administrative Law Judge will issue a Notice of Preliminary Review unless the petition alleges a violation of CADA or the Whistleblower Act.

Board Rule 8-20. Allegations of a Violation of the Colorado Anti-Discrimination Act ("CADA").
Pursuant to § 24-50-125.3, C.R.S., the Board has discretionary jurisdiction over claims of discrimination within the state personnel system.

- A. **CCRD Investigations.** Upon receipt of an appeal on matters covered by the CADA, § 24-34-402, C.R.S., the Board will refer the matter to the **Colorado Civil Rights Division ("CCRD")** for investigation and issue a Notice of Referral.
 1. If the applicant or employee wants the CCRD to investigate the discrimination claim, the person shall file a charge of discrimination with the CCRD. The person shall file the charge with the CCRD within twenty (20) days from the date of the certificate of service of the Board's Notice of Referral.
 2. Within ten (10) days from filing a charge of discrimination with the CCRD, the applicant or employee shall file a verification with the Board indicating that a CCRD charge has been filed. If an individual fails to file a verification, the Board may deem that the individual has waived the CCRD investigation and the Board will proceed to reviewing the discrimination claim.
 3. At any time prior to completion of the CCRD investigation, the applicant or employee may waive the CCRD investigation and the Board will then proceed to Preliminary Review or hearing.
 4. If the allegation is against the CCRD, ~~the Board will contract with a third party to investigate the matter. the Board will proceed to Preliminary Review or hearing and will not refer the matter to the CCRD for investigation.~~

5. Absent an extension of time, the Board will issue a Notice of Preliminary Review or hearing after two hundred and seventy (270) days from the date the Board referred the matter to the CCRD even if the CCRD investigation is not completed.

B. CCRD Opinions.

1. When the CCRD completes its investigation, the CCRD issues a written opinion of probable cause or no probable cause. The CCRD provides its opinion to the Board. The Board then notifies the parties of the CCRD's opinion **and their right to appeal it to the Board within ten (10) days of receipt of the notification.**
2. If the CCRD concludes there is probable cause of unlawful discrimination, the Board will set the matter for hearing.
3. If the CCRD concludes there is no probable cause of discrimination, the individual may file an objection with the Board within ten (10) days from the notification of the CCRD's no probable cause opinion.
4. To file an objection of the CCRD opinion, the applicant or employee shall provide a written statement to the Board indicating that the individual requests the Board to decide the discrimination claim.
5. If an applicant or employee does not file an objection to the Board within ten (10) days from receipt of the notification of the CCRD's no probable cause opinion, the discrimination claim will be deemed abandoned and will be dismissed.
6. If an applicant or employee files an objection to the Board within ten (10) days from receipt of the notification of the CCRD's no probable cause opinion, the Board shall:
 - a. Set the matter for hearing or adopt the CCRD's opinion as its own if the matter falls under § 24-50-125.3, C.R.S.; or
 - i. For the Board to adopt the CCRD's opinion, the CCRD's findings must demonstrate that Complainant is unable to establish a prima facie case of discrimination as set forth in *Bodaghi & State Personnel Board v. Department of Natural Resources*, 995 P.2d 288 (Colo.2000).
 - ii. **Prior to adopting the CCRD's opinion, the Board shall issue an Order to Show Cause to the parties to show why the Board should not adopt the opinion.**
 - b. Set the matter for Preliminary Review if the matter falls under § 24-50-123, C.R.S.; or
 - c. **Set the matter for hearing if the matter falls under § 24-50-124 or § 24-50-125, C.R.S.**

Board Rule 8-21. Allegations of a Violation of the Whistleblower Act. Pursuant to § 24-50.5-104, C.R.S., the Board has discretionary jurisdiction over claims of retaliation in violation of the Whistleblower Act filed by employees in the state personnel system.

- A. Employees shall file both the Consolidated Appeal/Dispute Form and the Whistleblower Complaint Form. Both forms are available on the Board's website.
- B. The Board will notify the employee of the notice requirements of the Governmental Immunity Act, § 24-10-101, C.R.S., et seq.
- C. The Board will refer the whistleblower complaint to the department.
- D. The department shall respond to the whistleblower complaint as follows:
 - 1. The department's response shall provide substantive responses to each of the material allegations in the whistleblower complaint.
 - 2. The department shall file its response within forty-five (45) days from the Board's referral to the department of the whistleblower complaint.
- E. Upon the department filing its response to the whistleblower complaint, unless the matter is stayed pending a CCRD investigation, the Board will issue a Notice of Preliminary Review or a Notice of Hearing.

Board Rule 8-22. Allegations Regarding the Comparative Analysis Process.

- A. Pursuant to § 24-50-112.5(4)(e), C.R.S., the Board has discretionary jurisdiction to review final decisions of the Director regarding alleged violations of the comparative analysis process.
- B. The Board may only grant the Petition for Hearing when it appears that the appointing authority's decision violates the comparative analysis standards set forth in § 24-50-112.5, C.R.S., in any other provision of law, or in any Director's Procedures relating to the comparative analysis process.

Board Rule 8-23. Other Allegations Subject to the Board's Discretion. The Board will issue a Notice of Preliminary Review upon the timely filing of an appeal that alleges:

- A. A department's final grievance decision violates the employee's rights under the federal or state constitution;
- B. A department's final grievance decision violates the Board's grievance Rules or the department's grievance procedures; or
- C. A final decision of the Director on a matter involving the overall administration of the state personnel system was arbitrary, capricious, or contrary to rule or law.

Board Rule 8-24. The Parties' Obligation to Disclose Information. Within fifteen (15) days from the date of the certificate of service of the Notice of Preliminary Review, ~~the parties shall provide to each other the disclosures of documents as required in Part A, Section VI of this Chapter 8 for mandatory disclosures. the parties shall provide to each other copies of all documents or information that are relevant to the matters in dispute. If either party asserts a privilege regarding such documents or information, it shall provide a privilege log. Disclosures are not filed with the Board.~~

Board Rule 8-25. Information Sheets. After the Board issues a Notice of Preliminary Review, each party is required to file an Information Sheet.

A. Deadlines.

1. Complainant shall file an Information Sheet with the Board within twenty-five (25) days from the date of the Notice of Preliminary Review.
2. Respondent shall file its Information Sheet with the Board within ten (10) days from ~~its receipt of Complainant's Information Sheet. the date Complainant delivers Complainant's Information Sheet to Respondent.~~
3. Complainant may file a reply in further support of Complainant's Information Sheet within five (5) days ~~of Complainant's receipt of Respondent's Information Sheet. from the date Respondent delivers its Information Sheet to Complainant.~~

B. Extension of Time. Motions for extension of time of more than five (5) days to file Information Sheets will not be granted.

C. Page Limits. Information Sheets are limited to ten (10) pages. Replies in further support of Complainant's Information Sheet are limited to five (5) pages. These page limits do not include the case caption, signature block, certificate of service and exhibits.

D. Burden. The Complainant has the burden to persuade the Board that it appears the employment action violates the applicant's or employee's rights. In CADA cases, the Complainant ~~meets their burden by establishing~~ ~~must establish~~ the four prongs of a *prima facie* case of discrimination as set forth in *Bodaghi & State Personnel Board v. Department of Natural Resources, 995 P.2d 288 (Colo.2000)*, including that the evidence in the record supports or permits an inference of unlawful discrimination. In Whistleblower Act cases, the Complainant ~~meets their burden by establishing disclosure of matters~~ ~~must establish disclosing matters~~ within the Whistleblower Act's protections and that the disclosures were a substantial or motivating factor in the discipline. In cases alleging a violation of the grievance process, Complainant ~~meets their burden by establishing facts~~ ~~must establish facts~~ showing that the department violated a Board Rule or department procedure governing grievances, the applicable Rule or Procedure, and that meaningful relief can be granted.

E. Content of Complainant's Information Sheet. Complainant's Information Sheet shall state the following information:

1. The facts Complainant is prepared to prove if a hearing is granted;
2. The legal arguments and authorities that support Complainant's claims;
3. The names of all anticipated witnesses, together with a description of the person's anticipated testimony;
4. A list of each exhibit that supports Complainant's claims; and
5. A description of the remedy or relief sought by Complainant.

F. Content of Respondent's Information Sheet. Respondent's Information Sheet shall state the following information:

1. The facts Respondent is prepared to prove if a hearing is granted;
 2. The legal arguments and authorities that support Respondent's defenses;
 3. The names of all anticipated witnesses, together with a description of the person's anticipated testimony;
 4. A list of each exhibit that supports Respondent's defenses; and
 5. A description of any remedy or relief sought by Respondent.
- G. Filing Requirements for Information Sheets and Exhibits. In addition to the Board's general requirements for all filings, the parties shall:
1. Carefully review all exhibits and redact any personal identifying information. Redactions shall include mailing and physical addresses, email address(es), telephone number(s), dates of birth, social security numbers, driver license numbers, passport numbers, **employee identification numbers**, military identification numbers, student identification numbers, health insurance identification numbers, biometric data, and any other personal identifying information; and
 2. Provide the Board with an electronic version of the Information Sheets as a Word document and an electronic version of the exhibits as a PDF file. **If creating electronic versions is not available to you, then please contact the Board for assistance.**

Board Rule 8-26. Preliminary Recommendation.

- A. An Administrative Law Judge will review the material presented by the parties in their Information Sheets.
- B. An Administrative Law Judge will issue a Preliminary Recommendation indicating whether the judge recommends that the Board grant or deny a hearing.
- C. The Preliminary Recommendation shall recite the parties' factual allegations and legal arguments.

Board Rule 8-27. Board Decision Whether to Grant or Deny a Hearing.

- A. The Board will consider the Preliminary Recommendation and render a decision whether to grant or deny a hearing pursuant to § 24-50-123(3), C.R.S.
 1. In making its decision whether to grant or deny a hearing, the Board will only consider the Preliminary Recommendation and the material provided by the parties in their Information Sheets, **including any exhibits.**
- B. If a hearing is granted, it will proceed in accordance with the Rules for Hearings in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section VI.**
- C. If a hearing is denied, the Board will issue an order that includes further appeal rights.

Part A. Section V. Petitions for Declaratory Orders

Board Rule 8-28. Any person may petition the Board to issue a Declaratory Order regarding the applicability of a statute, or Board Rule, or other legal authority. However, parties to appeals pending before the Board shall not file Petitions for Declaratory Orders **on issues raised in those appeals.**

Board Rule 8-29. Form of a Petition for a Declaratory Order.

- A. Petitions for Declaratory Orders shall conform to the filing requirements in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section I.**
- B. Petitions for Declaratory Orders shall specify:
 - 1. The statute or Board Rule or other legal authority that the petitioner requests the Board to entertain.
 - 2. A description of the controversy or uncertainty giving rise to the petition.
 - 3. Whether a Declaratory Order will remove the controversy or uncertainty.
 - 4. Whether the petitioner has another avenue for resolving the controversy or uncertainty; and
 - 5. Whether there is another proceeding pending before the Board, the CCRD, a court, or another department involving the controversy or uncertainty.

Board Rule 8-30. Review of a Petition for a Declaratory Order.

- A. Upon receipt of a Petition for a Declaratory Order, an Administrative Law Judge may:
 - 1. Order briefing on the issues presented in the Petition for a Declaratory Order; and/or
 - 2. Hear oral arguments on the issues presented in the Petition for a Declaratory Order.
- B. At its sole discretion, an Administrative Law Judge will either issue a Declaratory Order or notify the petitioner that a Declaratory Order is not being issued.

Board Rule 8-31. A Declaratory Order may be reviewed by the Board pursuant to Chapter 8, Resolution of Appeals and Disputes, Part A, **Section VIII.** Following Board review, a Declaratory Order is subject to judicial review.

Part A. Section VI. Rules for Hearings

Board Rule 8-32. Notice of Hearing. An Administrative Law Judge will issue a Notice of Hearing and Prehearing Order upon receipt of an appeal subject to a mandatory hearing, ~~or~~ upon the Board granting a discretionary hearing, **or-and when the Board does not adopt the CCRD's opinion as its own.** At the discretion of the Administrative Law Judge, the Notice of Hearing may be in the form of a Scheduling Conference.

Board Rule 8-33. Mandatory Disclosures.

A. Within twenty-one (21) days from the date of the certificate of service of the Notice of Hearing or of a Notice of Scheduling Conference, the parties shall provide to each other these mandatory disclosures:

1. Complainant shall produce all documents and recordings in Complainant's possession that are relevant to the factual allegations or claims at issue in the appeal. If the Complainant is appealing a termination, the Complainant shall also produce all:

a. Documents relevant to **calculation of lost pay and benefits including:**

~~Communications with potential employers;~~

~~Job search efforts;~~

~~Offer(s) of employment; and~~

i. Income and benefits of subsequent employment, **including the last three (3) months of pay stubs.**

(a). Respondent shall not contact a prospective or current employer to discover information about Complainant without providing Complainant ten (10) days notice so Complainant has an opportunity to file a motion for protective order or a motion to quash. If Complainant files such a motion, Respondent shall not initiate contact until the motion is ruled upon.

ii. **Unemployment benefit documents that are relevant to any calculation of damages.** ~~Documents relevant to claims for unemployment benefits.~~

b. **Any witnesses that the Complainant knows that may have information relevant to the factual allegations or claims, and a brief description of the information believed to be known by that witness.**

2. Respondent shall produce all:

a. Documents in the Complainant's personnel file;

b. The relevant personnel policies and employee handbooks;

c. The materials discussed by the appointing authority during the Rule 6-10 meeting and any of its recordings of the meeting;

d. Documents and recordings relevant to the factual allegations, claims, or defenses at issue in the appeal **including:**

i. **documents or recordings considered or relied upon by the appointing authority in making a disciplinary decision;**

ii. **documents or recordings among or between the appointing authority, Complainant, Complainant's supervisor, and human resources relevant to the issues in the appeal;**

- iii. documents or recordings of any investigation related to the factual allegations; and
 - iv. any witness statements.
- e. Documents showing the Complainant's compensation and benefits at the time of the disputed action including Complainant's pay stubs for the three months preceding the disputed action;
 - f. Unemployment benefit documents that are relevant to any calculation of damages; and ~~Documents in the Respondent's possession relevant to any claim by Complainant for unemployment benefits.~~
 - g. Any witnesses that the Respondent knows that may have information relevant to the factual allegations or claims, and a brief description of the information believed to be known by that witness.
- B. At least thirty (30) days before the close of discovery, the parties shall disclose any expert witnesses a party may call at hearing including:
- 1. The name, address, email address, telephone number and the qualifications of the expert witness; and
 - 2. A detailed statement as to the opinions or conclusions to which the expert is expected to testify. This requirement may be satisfied by the party incorporating a resume for each expert and a report containing the opinions or conclusions of each expert, along with the basis of each opinion or conclusion.
- C. The parties shall not file their disclosures with the Board.
- D. The term "documents" in this Board Rule includes writings, drawings, graphs, charts, photographs, emails, notes, or other documents of any kind.

Board Rule 8-34. **Discovery.** Unless modified by the Administrative Law Judge for good cause, the following procedures govern discovery:

- A. **Discovery Deadlines.** Discovery requests shall be served no later than twenty-eight (28) days from the date of the certificate of service of the Notice of Hearing or of a Notice of Scheduling Conference. Depositions shall be completed at least twenty (20) days prior to the start of an evidentiary hearing. Responses to interrogatories, requests for production of documents, and requests for admissions shall be provided within twenty (20) days from service of the request.
- B. **Permitted Discovery.** Each party may take a combined total of not more than ~~twelve (12) six (6)~~ hours of depositions. Each party may serve up to ~~fifteen (15) five (5)~~ requests for production of documents. Each party may serve ~~twenty (20) thirty (30)~~ interrogatories consisting of one (1) question each. Each party may serve twenty (20) requests for admission consisting of one (1) admission each.
 - 1. For good cause shown, the Board may modify the limits in this rule.

Board Rule 8-35. **Prehearing Statements.** At least fifteen (15) days prior to the start of the evidentiary hearing, the parties shall file a Prehearing Statement with the following:

- A. Statement of Claims and Defenses. A statement of all claims or defenses asserted by the party filing the Prehearing Statement. Complainant shall also include background information, including the action being appealed and date of the action, the date Complainant was notified of the action, Complainant's job position and time in the position at the time of the action (including date Complainant was certified in the position), Complainant's current position, and the reasons Complainant disagrees with the action;
- B. Undisputed Facts. A statement of the facts that the party filing the Prehearing Statement believes are stipulated or undisputed;
- C. Disputed Issues of Fact. A statement of the facts that the party filing the Prehearing Statement believes are true but the opposing party disputes;
- D. Pending Motions. A list of all outstanding motions that the Administrative Law Judge has not yet decided;
- E. Points of Law. The legal arguments and authorities that support the party's claims or defenses, including statutes, case law, Board Rules, and Board decisions;
- F. Witnesses. The name, address, email address, and telephone number of any witness who the party may call at hearing, with a description of the person's testimony;
- G. Experts. ~~A statement regarding whether the party will be calling any expert witness. The name, address, email address, telephone number and the qualifications of any expert witness a party may call at hearing, together with a detailed statement as to the opinions or conclusions to which the expert is expected to testify. This requirement may be satisfied by the party incorporating a resume for each expert and a report containing the opinions or conclusions of each expert, along with the basis of each opinion or conclusion;~~
- H. Exhibits. A description of any physical or documentary evidence to be offered at the hearing. Complainant's exhibits shall be marked using letters, and Respondent's exhibits shall be marked using numbers. Copies of exhibits shall be provided to the opposing party but shall not be filed with the Board unless the Board orders otherwise;
- I. Redactions to Exhibits. Both sides shall carefully review all exhibits and redact any personal identifying information. Redactions shall include mailing and physical addresses, email address(es), telephone number(s), dates of birth, social security numbers, driver license numbers, passport numbers, ~~employee identification numbers~~, military identification numbers, student identification numbers, health insurance identification numbers, biometric data, and any other personal identifying information;
- J. Stipulations. A listing of all stipulations of fact or law, or admissibility of evidence (including exhibits), as well as any other stipulations reached by the parties; and
- K. Remedy. List the remedies and/or relief the party is requesting. If the party is requesting the Board to order the opposing party to do something, the party shall specify what it wants the Board to order. If Complainant is requesting money damages, Complainant shall list the precise amount and the basis for requesting that amount. If a party is requesting another type of remedy, the party shall specify the nature of the request.

Board Rule 8-36. Subpoenas to Provide Testimony.

- A. Respondents shall make the appointing authority and other employees **with relevant information** available to furnish testimony at a deposition or an evidentiary hearing even without a subpoena.
- B. ~~For employees who are not in Complainant's supervisory chain and for~~ For non-state employees, parties may issue **and serve** subpoenas in conformance with the Colorado Rules of Civil Procedure for those individuals to appear at a deposition or an evidentiary hearing.
- C. For appeals under this Chapter 8, Resolution of Appeals and Disputes, state employees who serve as witnesses may count any time spent at a deposition or hearing as work time.

Board Rule 8-37. Evidentiary Hearings.

- A. Any stipulated exhibits and facts will be admitted into evidence.
- B. The party with the burden of proof proceeds first and may call witnesses and seek the admission of evidence. The opposing party proceeds second and may call witnesses and seek the admission of additional evidence. In cases with mixed burdens of proof, the Administrative Law Judge shall determine the order of presentation on a case-by-case basis. Regardless of who has the burden, witnesses may be called out of order at the discretion of the Administrative Law Judge.
- C. At the sole discretion of the Administrative Law Judge, a party may present rebuttal evidence.
- D. Each party is responsible for deciding the witnesses to call at the hearing. Testimony is given under oath or affirmation. Each party may cross-examine the other party's witnesses.
- E. Each party is responsible for deciding the exhibits to use and to offer for admission into evidence.
- F. The Administrative Law Judge may call a witness and may also examine any witness called by a party.
- G. The Administrative Law Judge will record the proceedings by an electronic recording device.

Board Rule 8-38. Conduct and Decorum. To ensure proper conduct and decorum, an Administrative Law Judge may:

- A. Exclude any person from the hearing;
- B. Restrict media access as provided by the Colorado Code of Judicial Conduct and the Rules of Civil Procedure; and
- C. Enter other orders that are reasonable to maintain the order and decorum of the proceedings.

Board Rule 8-39. Initial Decision. The Administrative Law Judge shall issue the Initial Decision no later than forty-five (45) days after the close of the hearing. The Initial Decision shall include findings of fact and conclusions of law affirming, modifying, or reversing the action of the appointing authority.

Part A. Section VII. General Provisions

Board Rule 8-40. The Colorado Rules of Civil Procedure and Evidence. To the extent practicable, the Colorado Rules of Civil Procedure ("C.R.C.P.") and the Colorado Rules of Evidence ("C.R.E.") apply to the proceedings at the Board.

- A. In the event the C.R.C.P. or the C.R.E. are inconsistent with this Chapter 8, Resolution of Appeals and Disputes, the Board Rules control.
- B. Unless the context requires otherwise, whenever the terms "court," "judge," or "jury" appear in the C.R.C.P. or the C.R.E., the terms are construed to mean the Board or an Administrative Law Judge.
- C. An Administrative Law Judge has the discretion to admit evidence not admissible under C.R.E., as permitted by law.

Board Rule 8-41. Representation.

- A. During the Step Two grievance process, an employee may have a representative **that may or may not be an attorney**. During all other proceedings under this Chapter 8, Resolution of Appeals and Disputes, Part A, an individual may only appear on their own behalf, or by an attorney authorized to engage in the practice of law in Colorado.
- B. An attorney representing a party shall file an entry of appearance or sign a pleading. The entry of appearance shall contain the attorney's name, mailing address, email address, telephone number, attorney registration number, and the identity of the party for whom the appearance is made.
- C. In the event a party is not represented, counsel for the represented party is responsible for coordinating with the unrepresented party for the purpose of scheduling conferences, obtaining hearing dates, and preparing any joint filings or stipulations.
- D. Attorneys may provide limited representation to Complainants so long as the representation complies with the Colorado Rules of Professional Conduct and the Colorado Rules of Civil Procedure.

Board Rule 8-42. Current Information. Anyone who files an appeal or who enters an appearance shall keep the Board informed of their current email address, mailing address and telephone number. Failure to provide the Board with current information may result in dismissal.

Board Rule 8-43. Hearing to Determine Jurisdiction. If the Board's jurisdiction is in doubt, the Administrative Law Judge may set a hearing limited to determining whether the Board has jurisdiction.

Board Rule 8-44. Consolidation of Appeals.

- A. If an applicant or employee files more than one appeal with the Board, the Board may consolidate the appeals into a single proceeding.
- B. Parties may file a motion requesting consolidation of appeals. The Board may also consolidate appeals on its own motion.

- C. An Administrative Law Judge will not consolidate appeals unless:
1. The appeals relate to the same or closely related facts;
 2. Consolidation will likely result in greater efficiencies for the parties and for the Board;
 3. Consolidation will not significantly delay the Board's resolution of the earlier filed appeal; and
 4. Consolidation will not unduly prejudice any party.

Board Rule 8-45. Informal Requests for Information. Parties may informally request information from the opposing party. Informal requests are not subject to oversight by the Board or by an Administrative Law Judge. Informal requests may be made at any time.

Board Rule 8-46. Privilege Log. If a party asserts a privilege relative to any document or materials, that party shall provide the opposing party a privilege log describing the title, author, date, and subject matter of the document or material, along with the legal basis for asserting the privilege.

Board Rule 8-47. Motions.

- A. Motions. Motions are a formal request to the Board to enter an order.
- B. Deadline for Responding to a Motion. Unless ordered otherwise by an Administrative Law Judge, the responding party has ten (10) days after receipt of a motion to file a response.
- C. Replies. Unless ordered otherwise by an Administrative Law Judge, the moving party may not file a reply in further support of a motion.
- D. Length of Motions and Responses. Unless ordered otherwise by an Administrative Law Judge, motions and responses are limited to ten (10) pages. This page limit does not include the case caption, signature block, certificate of service and any exhibits.
- E. Duty to Confer, Certification of Conferral, and Summary of the Conferral.
1. Prior to filing a motion, the party filing the motion shall confer in good faith with the opposing party about the motion.
 2. The first paragraph of a motion shall contain a certification that the party filing the motion has conferred in good faith with the opposing party about the motion.
 3. The first paragraph of the motion shall state if the motion is opposed or unopposed.
 4. If no conferral has occurred, the first paragraph of the motion shall state the reasons for not conferring and describe all efforts to confer.
 5. If the parties agree to a motion's request, the caption on the motion shall include the word "Unopposed."
 6. A good faith conferral requires the parties to initiate efforts to confer long enough before the anticipated filing to engage in a meaningful communication.

- F. Legal Authority. Motions shall include the legal arguments and authorities that support the motion.
- G. No Oral Argument. Unless ordered otherwise by an Administrative Law Judge, motions will be determined based upon the information in the written motion and response.
- H. Time-Sensitive Motions. A party filing a time-sensitive motion may request an expedited ruling. The Administrative Law Judge exercises sole discretion of whether to issue an expedited ruling.
- I. Stipulations for Extensions of Time. Stipulations between the parties for extensions of time are not controlling unless there is an order granting the extension of time.
- J. Failure to Respond to a Motion. The Administrative Law Judge may grant a party's motion if the opposing party does not timely respond to the motion.
- K. Motions for Reconsideration. The parties are discouraged from filing motions for reconsideration. If the Administrative Law Judge does not rule on a motion to reconsider within twenty-one (21) days from the filing of the motion, it is denied

Board Rule 8-48. Modifications.

- A. For good cause shown, the Board may modify or waive the requirements of this Chapter 8, Resolution of Appeals and Disputes, Part A.
- B. If seeking a modification, parties shall comply with the requirements for filing motions set forth in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section VII**.
- C. Any motion to extend a deadline shall be filed prior to the deadline.

Board Rule 8-49. Public Nature of Proceedings. All proceedings before the Board are open to the public except that an Administrative Law Judge may conduct a hearing in private if good cause is established.

Board Rule 8-50. Security. For good cause, a party may file a motion requesting security during any hearings or Board meetings. If the motion is granted, the party requesting security may be charged the reasonable costs for providing such security.

Board Rule 8-51. Sanctions.

- A. Failure to comply with the provisions in this Chapter 8, Resolution of Appeals and Disputes, Part A, may result in sanctions as determined at the discretion of an Administrative Law Judge.
 - 1. Failure, without good cause, of a party to appear at a hearing may result in judgment for the opposing party.
 - 2. During the Preliminary Review process, (a) if a Complainant fails to file a complete and timely Information Sheet, the matter may be dismissed; and (b) if a Respondent fails to file a complete and timely Information Sheet, the Board will decide whether to grant a hearing based solely upon the information provided by the Complainant.

- B. Upon final resolution of a proceeding under this Chapter 8, Resolution of Appeals and Disputes, Part A, attorney fees and costs may be assessed against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, a means of harassment, or was otherwise groundless.
 - 1. Frivolous means that no rational argument based on the evidence or law was presented.
 - 2. In bad faith, malicious, or as a means of harassment means that the appeal or defense was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.
 - 3. Groundless means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory.
- C. Attorney fees may **also** be assessed against a party as permitted by law.
- D. Pursuant to § 24-50.5-104(2), C.R.S. attorney fees shall be assessed against the department if the Board finds a violation of the Whistleblower Act.
- E. Any party seeking sanctions or attorney fees shall file and serve a motion within ten (10) days of:
 - 1. The alleged failure to comply with the provisions in this Chapter 8, Resolution of Appeals and Disputes, Part A;
 - 2. When the party knows or reasonably should have known of the alleged abuse giving rise to the request for fees;
 - 3. A final order of an Administrative Law Judge, including an order of dismissal; or
 - 4. An Initial Decision.
- F. Anyone potentially affected by a motion for sanctions or for attorney fees may request a hearing. The Administrative Law Judge may hold a hearing if the judge determines that a hearing will materially assist in deciding the motion.

Part A. Section VIII. State Personnel Board Review of Initial Decisions and Other Final Orders Issued by an Administrative Law Judge

Board Rule 8-52. General Provisions.

- A. The purpose of this Section is to provide the procedures for the Board to review Initial Decisions and other final orders issued by an Administrative Law Judge.
- B. The first party to request the Board to review an Initial Decision or other final order is the "Appellant." The other party is the "Appellee."
- C. Except as provided in this Section, the parties shall follow the filing requirements in Chapter 8, Resolution of Appeals and Disputes, Part A, **Section I.**

Board Rule 8-53. Procedures for Initiating a Request for the Board to Review an Initial Decision or Other Final Order Issued By an Administrative Law Judge.

A. Designation of Record.

1. The record may include transcripts of any proceedings, documents that the parties have filed during the course of the proceedings, exhibits, and any orders issued by an Administrative Law Judge.
2. The Appellant shall file a Designation of Record with the Board no later than twenty (20) days from the date of the certificate of service of the disputed Initial Decision or other final order. The Appellant's Designation of Record shall specify all portions of the record that the Appellant deems necessary and relevant.
3. Within ten (10) days from Appellant's Designation of Record, the Appellee may file an additional Designation of Record specifying any other portions of the record that the Appellee deems necessary and relevant.
4. If neither party designates an item to be included in the record, then the Board will not consider that item as part of its review.
5. Any party who designates a transcript as part of the record shall arrange for preparation of the transcript directly with a neutral and certified court reporter.
6. A party designating a transcript shall file the transcript with the Board within fifty-nine (59) days from the date Appellant files the Designation of Record. If no transcript is filed by the deadline, the record will not include the transcript.
7. Any transcript to be included as part of the record shall be signed and certified by the court reporter who prepared the transcript.

B. Notice of Request for Board Review.

1. The party requesting the Board to review an Initial Decision or other final order shall file a Notice of Request for Board Review.
2. The Notice of Request for Board Review shall state the basis for requesting the Board review, including the disputed findings of fact and/or conclusions of law.
3. The Appellant shall file the Notice of Request for Board Review within thirty (30) days from the date of the certificate of service of the disputed order.

C. Payment. A party requesting Board review of an Initial Decision or other final order shall submit a \$5.00 payment for the certification of the record at the time the party files the Notice of Request for Board Review. This amount does not include the cost of a transcript, which needs to be paid directly to the court reporter by the party. ~~preparation of the record at the time the party files the Notice of Request for Board Review.~~

D. Certification of Record. The Board shall certify the record within sixty (60) days from the date the record is designated.

Board Rule 8-54. Briefing. Upon certification of the record, the parties shall file written arguments for the Board to consider as part of its review.

A. Briefing Schedule.

1. The Appellant shall file an opening brief within twenty (20) days from the certification of record.
2. The Appellee shall file an answer brief within ten (10) days from service of the opening brief.
3. The Appellant may file a reply brief within five (5) days from service of the answer brief.
4. If both parties request Board review, the parties shall file simultaneous briefs using the above briefing deadlines.

B. Extensions of Time. No motions for extension of time will be granted unless the parties are able to complete all briefing at least fourteen (14) days before the Board meeting related to the briefs.

C. Page Limit. Briefs are limited to ten (10) pages. This page limit does not include the case caption, table of contents, tables of citations, signature block, certificate of service, and exhibits.

D. Briefs shall conform to Chapter 8, Resolution of Appeals and Disputes, Part A, **Section I**, with respect to margins, font size, and other requirements.

E. Copies. Parties shall file an original and seven copies of their briefs with the Board.

Board Rule 8-55. Board Review.

A. Review Date. The Board will review and render a written decision within ninety (90) days from the certification of record.

B. Materials Considered in the Board Review. In reviewing an Initial Decision or other final order, the Board will only consider:

1. The disputed order; and
2. The items included in the certified record. If the certified record does not contain a transcript of the evidentiary hearing, the Board is bound by the findings of fact in the Initial Decision.

C. Oral Argument. In general, no oral argument is permitted.

Board Rule 8-56. Any party appealing to the Colorado Court of Appeals shall serve a copy of the Notice of Appeal on the Board at the time of filing the notice.

Part A. Section IX. Settlement Process

Board Rule 8-57. Parties are encouraged to resolve disputes at the lowest level and as informally as possible. Parties may settle at any time. Parties may agree to use alternative dispute forms other than the settlement process in this Section.

Board Rule 8-58. Scheduling Settlement Conferences. Subsequent to filing an appeal with the Board, any party may ask the Board to facilitate a settlement conference.

- A. In most situations, the Board will assign an Administrative Law Judge to serve as the settlement facilitator. The Administrative Law Judge who serves as a settlement facilitator shall be someone other than the Administrative Law Judge assigned to adjudicate the dispute.
- B. If one party requests a settlement conference, the opposing party shall appear at least once at a conference and attempt in good faith to settle the matter.
- C. The Administrative Law Judge assigned to adjudicate the dispute may waive the requirement of a settlement conference upon good cause shown.
- D. The Administrative Law Judge assigned to adjudicate the dispute may require a settlement conference even if the parties do not request one.
- E. A settlement facilitator may determine that settlement discussions are futile. The settlement facilitator may terminate the settlement conference at the facilitator's sole discretion.

Board Rule 8-59. Provisions Relating to Settlement Conference.

- A. Unless information reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child, settlement discussions are confidential. Therefore, the parties shall keep confidential all communications made in connection with a settlement discussion.
- B. Neither party may call a settlement facilitator as a witness in any legal proceedings relating to the dispute. Neither party may contact a settlement facilitator for information.
- C. Settlement communications are not discoverable or admissible at the hearing. However, this does not preclude admission of facts or evidence known to the parties prior to the settlement conference or discovered independently by the parties.
- D. All notes taken by a settlement facilitator are kept in a separate area that is not accessible to the Administrative Law Judge assigned to adjudicate the dispute. The settlement facilitator shall destroy the notes once the settlement process has concluded.
- E. The settlement facilitator shall not disclose discussions at the settlement conference to the Administrative Law Judge assigned to adjudicate the dispute.
- F. The parties participating in a settlement conference shall have someone present at the conference with authority to resolve the dispute.
- G. In general, only the parties and their legal representatives may participate in a settlement conference. However, the settlement facilitator may permit a third party to attend if that will facilitate the conference. A party shall provide at least two (2) business days notice if that party wishes to invite a third party to participate in the settlement conference.
- H. Any settlement agreement reached shall be put in writing and reviewed by both parties prior to signature.

Board Rule 8-60. Upon reaching a signed settlement agreement, the parties shall file a joint or unopposed motion with the Board requesting a dismissal.

Board Rule 8-61. Alleged Breach of a Settlement Agreement.

~~A. If a party contends the opposing party has not complied with the terms of a settlement agreement, the party may petition the Board for a hearing.~~

~~B. In addition, if~~

A. If either party contends the opposing party has not complied with the terms of a settlement agreement, the party may seek judicial review or other remedies as set forth in the parties' agreement.