

State of Colorado

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MEETING MINUTES April 20, 2021

The State Personnel Board met on April 20, 2021. Due to the COVID-19 pandemic, the Board held its meeting via a Zoom webinar.

The meeting was called to order at 8:05 a.m. Board Members Nora Kelly, Karen Niparko, Sarah Wager, and Roxane White were present for the roll call via webinar. Board Member Patricia Bangert, who was experiencing technical difficulties, joined the meeting after roll call. 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. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES ON APPEAL TO THE STATE PERSONNEL BOARD.

A. Holly Cappello v. Department Human Services, Office of Behavioral Health, Colorado Mental Health Institute at Fort Logan, SPB 2020B046(c).

The Board considered Complainant's motion to recuse Board Member Sarah Wager. Ms. Wager recused herself from consideration of the motion and exited the meeting. Following discussion of the motion, the Board acted as follows: Ms. Bangert moved to deny the motion to recuse Ms. Wager. Ms. Kelly seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, and Ms. White. Following the vote, Ms. Wager rejoined the meeting.

Following discussion of the appeal of the Administrative Law Judge's Amended Initial Decision and Respondent's Motion to Dismiss Resignation Appeal, the

Board acted as follows: Ms. Kelly moved to affirm the Amended Initial Decision and to deny Respondent's Motion to Dismiss Resignation Appeal. Ms. White seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Bangert, Ms. Kelly, Ms. Niparko, and Ms. White. Ms. Wager voted in opposition.

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

There were no Preliminary Recommendations scheduled this month for review.

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

There were no Initial Decisions scheduled this month for potential review under § 24-4-105(14)(a)(II), C.R.S.

V. REVIEW OF MINUTES FROM THE MARCH 16, 2021, PUBLIC MEETING OF THE STATE PERSONNEL BOARD.

Ms. White moved to approve the minutes as submitted. Ms. Wager seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Kelly, Ms. Niparko, Ms. Wager, and Ms. White. Ms. Bangert, who was experiencing technical difficulties, did not vote.

VI. ADMINISTRATIVE MATTERS & COMMENTS.

A. ADMINISTRATIVE MATTERS.

- Mr. Dindinger reported about the percentage of Preliminary Recommendations granted by the Board.
- Mr. Dindinger reminded everyone that the Board meeting on May 18, 2021, will start at 8:00 a.m.

B. GENERAL COMMENTS.

- In advance of the meeting, the Board did not receive any requests to make a general comment publicly.

VII. PROPOSED LEGISLATION AND/OR RULEMAKING

On March 16, 2021, the Board set a rulemaking hearing regarding Chapter 9 (Fair Employment Practices) for May 18, 2021.

VIII. EXECUTIVE SESSION.

At 8:16 a.m., Ms. Kelly moved to enter an executive session for the following purposes:

- Receiving legal advice pursuant to § 24-6-402(3), C.R.S., regarding a motion to recuse in Cappello v. DHS (SPB No. 2020B046).

- Receiving legal advice pursuant to § 24-6-402(3), C.R.S., regarding a pending court action, specifically Ulrich v. DHS, CMHIP, SPB, et al. (Case No. 20-CV-03810-KMT (D. Colo)).
- For considering the Board Director's annual review pursuant to § 24-6-402(3), C.R.S. Mr. Dindinger requested the discussion occur in executive session.

Ms. White seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Kelly, Ms. Niparko, Ms. Wager, and Ms. White. Ms. Bangert, who was experiencing technical difficulties, did not vote. Following the vote, the Board entered into executive session. Ms. Bangert joined the executive session after it started.

The executive session ended at 8:43 a.m. Following the executive session, Ms. Kelly announced that the Board had received advice relating to the first two topics and had not taken any action.

At 8:52 a.m., Ms. Kelly moved to enter a second executive session for the following purposes:

- Receiving legal advice pursuant to § 24-6-402(3), C.R.S., regarding the motion to dismiss the resignation appeal in Cappello v. DHS (SPB No. 2020B046).

Ms. Bangert seconded the motion. The motion carried on the unanimous vote of the full Board. Following the vote, the Board entered into a second executive session.

The second executive session ended at 9:10 a.m. Following the second executive session, Ms. Kelly announced that the Board had received legal advice and not taken any action.

IX. JOINT RULEMAKING HEARING.

The Board continued its joint rulemaking hearing with Ramona Gomoll (the Statewide Chief Human Resources Officer) regarding proposed changes to Chapter 6 (Performance). The joint rulemaking originally started at the Board's meeting on March 16, 2021, when the Board heard public testimony and began its deliberations. The continued joint rulemaking hearing started at 9:12 a.m.

Mr. Dindinger made additional recommendations to the Board based on the public comments and Ms. Gomoll's agreement to move Proposed Director's Procedure 6-7. The Board then deliberated on the proposed changes to Chapter 6. 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 6.

First motion. Ms. Kelly moved to repeal the Board Rules in the current version of Chapter 6 and to adopt the following proposed rules and the accompanying statements of basis and purpose as originally published on February 10, 2021:

- Board Rules 6-1 and 6-3.

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. Kelly, Ms. Niparko, Ms. Wager and Ms. White. Ms. Bangert voted in opposition,

Second motion.

Ms. Kelly moved to adopt the following proposed rules as originally published on February 10, 2021, but with the modifications as reflected in the deliberation document:

- Board Rules 6-2, 6-6, 6-7, 6-8, 6-9, 6-10, 6-11, 6-12, 6-13, and 6-14.

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. White seconded the motion. The motion carried on the affirmative vote of the following Board members: Ms. Kelly, Ms. Niparko, Ms. Wager and Ms. White. Ms. Bangert voted in opposition. (The deliberation document is attached to these Minutes as an exhibit.)

Following the votes on the motions, the joint rulemaking hearing closed by consensus at 11:54 a.m.

The Board recessed from 11:54 a.m. to 12:06 p.m. Following the recess, the Board continued its regular business.

The Board meeting adjourned by consensus at 12:23 p.m.

SIGNED THIS 18th DAY OF MAY, 2021.

Nora Kelly, Chair

Sarah Wager, Vice Chair

Patricia Bangert, Board Member

Karen Niparko, Board Member

Roxane White, Board Member

Proposed Changes during formal APA process

Changes will be in green-Red

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Chapter 6 Performance

Authority for rules promulgated in Chapter 6, Performance, is found in the Colorado Constitution Art. XII §13 and §24-50-104, 24-50-125, and 27-90-111, C.R.S. Board rules are identified by cites beginning with "Board Rule".

General Principles

Board Rule 6-1. Employees represent the state so they are required at all times to use their best efforts to perform assigned tasks promptly and efficiently, and to be courteous and impartial in dealing with those served. Employees may be rewarded based on their level of performance.

Board Rule 6-2. ~~In general a certified employee will receive a corrective action before receiving a disciplinary action. When appropriate, the appointing authority may proceed directly to disciplinary action, including termination, if the act is so flagrant or serious that immediate discipline is proper.~~

Board Rule 6-2. A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

Performance Management

Board Rule 6-3. Appointing authorities and designated raters are responsible for communicating the department's performance pay program and the performance expectations and standards, including an individual written performance plan, and for evaluating performance in a timely manner in accordance with rule.

- 6-4. The Director shall establish requirements governing the performance management system. These requirements shall be applied by all appointing authorities and designated raters, including any person employed by the state who supervises an employee. The performance management system does not apply to employees in the senior executive service or medical plan.
- A. A department's performance management program shall be approved by the Director before implementation.
 - B. The department's performance management program must:
 1. Include the department's internal dispute resolution process and the Director's external dispute resolution process as outlined in Chapter 8, Resolution of Appeals and Disputes;
 2. Include a training plan for employees and raters detailing the department's performance management program. Training is mandatory for all raters;
 3. Include the statewide, uniform core competencies defined by the Director;
 - a. The department shall incorporate the statewide uniform core competencies into each individual performance management plan and evaluation.
 - b. The statewide, uniform core competencies cannot be disregarded in the final overall rating for each employee.

4. Include the development of performance evaluation form(s) to be used for employees by the raters;
 5. Include the statewide uniform performance cycle as defined by the Director;
 6. Include a planning meeting with the employee that shall occur by the date specified in the department's performance management program;
 - a. The department should allow for coaching and feedback throughout the performance cycle, but shall include at least one (1) documented progress review.
 7. Include performance rating levels and standard definitions published in written directives by the Director;
 - a. The department shall specify whether the performance evaluations are numerical, qualitative, or a combination that correlate to one of the Director's defined performance rating levels.
 - b. A department's performance management forms shall also contain the standard definitions.
 - c. Departments may further define the levels in relation to mission and operational needs providing that such expansion falls within these required definitions.
 8. Not establish a quota for the number of employees allowed to receive any of the performance ratings;
 9. Include a description of the department's review process to monitor the quality and consistency of performance ratings within the department before final overall ratings are provided to employees; and
 10. Develop an accountability component to ensure compliance with the department's performance management program.
 - a. Such programs shall specify the sanctions, including those required by these provisions and statute, to be imposed for any rater employed by the state who fails to complete the performance management plan or evaluation.
- C. All employees shall be evaluated, in writing, at least annually based on the past year's performance.
1. If an employee moves to a position under another appointing authority or department during a performance cycle, an interim overall evaluation shall be completed and delivered to the new appointing authority or department within thirty (30) days of the effective date of the move.
 2. No evaluation is required when an employee retires from employment in the state personnel system.
- D. Department heads shall provide any required or requested information pertaining to performance management to the Director by the specified deadline.

- 6-5. Designated raters shall be evaluated by their direct supervisor on their performance management and evaluation of employees. Absent extraordinary circumstances, failure to plan and evaluate in accordance with the department's established timelines results in a corrective action and ineligibility for merit pay. If the individual performance plan or evaluation is not completed within thirty (30) days of the corrective action, the designated rater shall be disciplinarily suspended in increments of one (1) workday following the pre-disciplinary meeting.
- A. A reviewer shall sign the rater's evaluation of an employee. If the rater fails to complete an individual performance plan or evaluation, the reviewer is responsible for completion. If the reviewer fails to complete the plan or evaluation, the reviewer's supervisor is responsible, on up the chain of command until the plan or evaluation is completed as required. If a rating is not given, the overall evaluation shall be satisfactory until a final rating is completed.

Board Rule 6-6. Performance Improvement.

- A. Performance Improvement Plans.
1. When appropriate, the department may issue a performance improvement plan to communicate performance concerns and expectations.
 2. A performance improvement plan is not a corrective action.
 3. A performance improvement plan shall establish a reasonable amount of time for the employee to improve.
 4. If performance has not improved within the established amount of time in a performance improvement plan, the appointing authority may take other action as appropriate.
- B. Needs Improvement or Unacceptable Performance Rating. Performance that needs improvement or is otherwise unacceptable as documented in the annual evaluation shall result in a performance improvement plan and/or a corrective action and a reasonable amount of time to improve, unless the employee is already under performance improvement, corrective or disciplinary action for the same performance matter. If needs improvement or unacceptable performance relates to a recurring performance issue that has resulted in a prior corrective action or disciplinary action, the appointing authority may take disciplinary action concurrently with issuing the annual evaluation. The appointing authority may proceed immediately to disciplinary action, up to and including immediate termination, if the act is so flagrant or serious that immediate discipline is proper.

Corrective and Disciplinary Actions

Board Rule 6-7. An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.

Board Rule 6-8. Corrective Actions.

- A. The purpose of a corrective action is to correct performance issues or conduct. Corrective actions do not affect current base pay, status, or tenure.
- B. Corrective actions shall be in writing and include the following:

1. The performance issues or conduct that need improvement;
 2. The expectations the employee shall meet;
 3. If appropriate, a reasonable amount of time for the employee to improve the performance issues or conduct;
 4. The consequences for failing to correct the performance issues or conduct; and
 5. A statement that the employee may grieve the corrective action.
- C. A corrective action may also contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance.
- D. A removed corrective action is not relevant in any subsequent personnel actions **as to prior unsatisfactory performance or conduct**, but may be relevant for other purposes such as proof of motive, opportunity, intent, knowledge, or absence of mistake.

Board Rule 6-9. Notice of the Rule 6-10 Meeting.

- A. The appointing authority shall provide written notice to the employee about a Rule 6-10 meeting as follows:
 1. The notice shall be provided at least seven (7) days prior to the meeting;
 2. The notice shall contain the date, time, and location of the meeting;
 3. The notice shall inform the employee that the appointing authority is considering taking disciplinary action;
 4. The notice shall inform the employee of **the alleged performance issues or conduct that may result in discipline**;
 5. The notice shall inform the employee that the employee may present information during the meeting; and
 6. The notice shall inform the employee that a representative may accompany the employee to the meeting.
- B. When reasonable attempts to hold the Rule 6-10 meeting fail, the appointing authority shall provide written notice to the employee as follows:
 1. The notice shall provide the employee general information about the **alleged** performance issues or conduct that prompted the appointing authority to consider taking disciplinary action; and
 2. The notice shall inform the employee that the employee may respond in writing within ten (10) days from delivery of the notice.
- C. If reasonable attempts to meet fail and if the employee does not respond to the notice sent pursuant to **this rule**, then the appointing authority may make a disciplinary decision without information from the employee.

- D. Proof of delivery of the notices under this Rule may be established by:
1. A dated return receipt from the United States Postal Service;
 2. A dated return receipt from a commercial delivery service provider;
 3. The employee's signature affixed to the notice;
 4. An affidavit **attesting** hand-delivery; or
 5. An affidavit attesting that the sender transmitted the Notice of the Rule 6-10 Meeting to a valid email address combined with a copy of the email.

Board Rule 6-10. Rule 6-10 Meeting.

- A. The appointing authority is responsible for deciding whether to take disciplinary action.
- B. This Rule only applies to certified state employees.
- C. When considering discipline, the appointing authority shall meet with the employee before making a final decision, **unless the employee had previously filed an official complaint of improper conduct against the appointing authority. In the event that an official complaint has been raised, the department must delegate in writing the appointing authority to another person for the purposes of presiding over the Rule 6-10 meeting and making any resulting decision.**
- D. During the Rule 6-10 meeting, the appointing authority shall:
 1. Disclose the **alleged** performance issues or conduct that may result in discipline;
 2. Disclose the source of the information about the **alleged** performance issues or conduct (unless prohibited by law); and
 3. Give the employee an opportunity to respond to the alleged performance issues or conduct.
- E. During the Rule 6-10 meeting, the appointing authority and employee are each allowed one (1) representative of their own choice. The appointing authority and the employee may agree in writing to allow more than one (1) representative.
- F. Statements during the Rule 6-10 meeting are not privileged.
- G. Both sides may record the Rule 6-10 meeting using an audio-recording device.
- H. The employee shall be allowed at least seven (7) days after the Rule 6-10 meeting to provide the appointing authority any additional information relating to the subjects discussed during the meeting.
- I. In deciding whether to take disciplinary action, the appointing authority shall consider all the information discussed during the Rule 6-10 meeting and any additional information provided by the employee.

- J. If agreed upon by the appointing authority and the employee, the Rule 6-10 meeting may be conducted using video-conferencing technology. Both sides may record a Rule 6-10 meeting that is conducted via video-conferencing.

Board Rule 6-11. Factors to Consider in Taking Discipline.

- A. The decision to take disciplinary action of a certified state employee shall be based upon:
 1. The nature, extent, seriousness, and effect of the performance issues or conduct;
 2. Type and frequency of prior unsatisfactory performance or conduct (including any prior performance improvement plans, corrective actions or disciplinary actions);
 3. The period of time since any prior unsatisfactory performance or conduct;
 4. Prior performance evaluations;
 5. Mitigating circumstances; and
 6. Information discussed during the Rule 6-10 meeting, including information presented by the employee.
- B. In considering any disciplinary action of an employee who has engaged in mistreatment, abuse, neglect, or exploitation against a vulnerable person, the appointing authority shall give weight to the safety of vulnerable persons over the interests of any other person. A vulnerable person shall be as defined in § 27-90-111(2)(e), C.R.S.
- C. In considering any disciplinary action of an employee for engaging in violent behavior or a threat of violent behavior against another person while on duty, the appointing authority shall give predominant weight to the safety of the other person over the interests of the employee.

Board Rule 6-12. Disciplinary Actions.

- A. Disciplinary actions are as follows: an adjustment of base pay to a lower rate in the pay grade; base pay below the grade minimum for a specified period not to exceed twelve (12) months; demotion; dismissal; and suspension without pay, subject to FLSA provisions. Administrative leave with pay during a period of investigation is not a disciplinary action.
- B. Reasons for discipline include, but are not limited to, the following:
 1. Failure to perform competently;
 2. Willful misconduct;
 3. Failure to comply with the Board Rules, Director's Procedures, department's rules and policies, state universal policies, or other **departmental** directives;
 4. A violation of any law that negatively impacts job performance;
 5. False statements or omissions of material facts during the application process for a state position;
 6. False statements or omissions of material facts during the course of employment;

7. Violence or threats of violence;
 - a. "Violence" means any act of physical, verbal, or psychological aggression. "Violence" includes destruction or abuse of property by an individual.
 - b. "Threat" may include a veiled, conditional or direct threat **of violence** in verbal, written, electronic, or gestural form, resulting in intimidation, harassment, harm, or endangerment to the safety of another person or property.
8. Mistreatment, abuse, neglect or exploitation of a person;
9. Conviction of a felony or any other offense that involves moral turpitude; and
10. Conviction of a Department of Human Services' employee of any of the offenses in § 27-90-111, C.R.S.
 - a. Conviction means a verdict of guilty or a plea of guilty or a plea of nolo contendere for an offense in § 27-90-111, C.R.S. Conviction also includes receipt of a deferred judgment and sentence or a deferred adjudication, except that a person shall not be deemed to have been convicted if the person successfully completes a deferred sentence or deferred adjudication.
 - b. Employees charged with an offense under § 27-90-111, C.R.S., shall notify their appointing authority of such charge before returning to work. An employee who is charged with a disqualifying offense under (9)(b) of § 27-90-111, C.R.S., shall be placed on disciplinary suspension without compensation pending final disposition of the criminal proceeding. An employee who is charged with a disqualifying offense under (9)(c) of § 27-90-111, C.R.S., may be placed on disciplinary suspension without compensation pending final disposition of the criminal proceeding. If an employee who is suspended pursuant to this provision is not convicted, and if an appointing authority has not issued discipline that provides otherwise, then the employee is restored to the position and granted back pay and benefits.
 - c. If an appellate court reverses a conviction, or if an employee successfully completes a deferred sentence or a deferred adjudication, then a disciplinary action based solely on that conviction shall be reversed. In such an event, the employee is restored to the position and granted back pay and benefits.
 - d. An appointing authority may issue a disciplinary action based upon the conduct underlying a criminal charge irrespective of the outcome of the criminal proceeding.

Board Rule 6-13. Outcome of Rule 6-10 Meeting.

- A. If issuing discipline, the appointing authority shall provide a written Disciplinary Letter to the employee that includes the following:
 1. The **factual basis and specific reasons** for the discipline;
 2. The discipline imposed;

3. The employee's right to appeal the discipline to the Board, including the time frame for filing such an appeal and the place for filing such an appeal; and
 4. The Board's physical address, email address, website, telephone and facsimile numbers.
- B. The department shall provide the Disciplinary Letter to the employee no later than five (5) days following the effective date of the discipline.
- C. Proof of delivery of the Disciplinary Letter may be established by:
 1. A dated return receipt from the United States Postal Service;
 2. A dated return receipt from a commercial delivery service provider;
 3. The employee's signature affixed to the Disciplinary Letter;
 4. An affidavit **attesting** hand-delivery; or
 5. An affidavit attesting that the sender transmitted the Disciplinary Letter to a valid email address combined with a copy of the email.
- D. If **not issuing discipline, the appointing authority shall notify the employee in writing within five (5) days of the decision to not take disciplinary action.**

Board Rule 6-14. Corrective and disciplinary actions are subject to Chapter 8, Resolution of Appeals and Disputes.

