COLORADO STATE PERSONNEL BOARD

PRACTICE AND PROCEDURE TRAINING

December 16, 2005

Holland & Hart
555 17th Street, Suite 3200
Denver, Colorado

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COLORADO STATE PERSONNEL BOARD CLE
PRACTICE AND PROCEDURE

December 16, 2005

Holland & Hart
555 – 17th Street, Suite 3200
Denver Colorado 80203

8:30 a.m. to 9:00 a.m. Registration

9:00 a.m. to 9:10a.m. Welcome – John Zakhem, Chair of the State Personnel Board

9:10 a.m. to 10:00 a.m. Overview of the State Personnel Board – Kristin Rozansky, Director

- Board/Staff functions
- Board resources – website; settlement services; training
- Board powers – rulemaking and adjudication
- Jurisdictional Issues
- Alternative Dispute Resolution

2005 Changes to the Board Rules – Kristin Rozansky, Director

10:00 a.m. to 10:50 a.m. Discretionary Hearings and the Preliminary Review Process – Hollyce Farrell, ALJ

- Process and Timelines
- Burden of Proof
- Information Sheets

10:50 a.m. to 11:00 a.m. BREAK

11:00 a.m. to 11:50 p.m. Discipline and Separations – Mary McClatchey, ALJ

- Burdens of Proof
- Disciplinary Actions
- Constructive Discharge
- Administrative Actions
- Probationary Employees

Substantive Law – Mary McClatchey, ALJ

- Discrimination
- Retaliation

11:50 p.m. to 1:00 p.m.	LUNCH (provided as part of your registration fee)
1:00 p.m. to 2:00 p.m.	Prehearing Procedure Practice Points – Denise DeForest, ALJ Hearing Procedure Practice Points – Mary McClatchey, ALJ
2:00 p.m. to 2:50 p.m.	Ethical Issues – Denise DeForest, ALJ • *Ex Parte* Communications with ALJs versus Board staff
2:50 a.m. to 3:00 p.m.	BREAK
3:00 p.m. to 3:50 p.m.	Appeals of Initial Decisions and Preliminary Recommendations to the Board – Jane Sprague, GPIII • Timelines and filing requirements • Standard of Review to Challenge Findings of Fact and Legal Conclusions • Reconsideration of ALJ decision/recommendation • Practice Tips Board Member Perspective on Reviewing Appeals to Board – Elizabeth Salkind, Board Member • Practice Tips Appeals of Board Decisions to the Court of Appeals – Pam Sanchez, Board Counsel • Timelines and filing requirements • Standard of Review to Challenge Findings of Fact and Legal Conclusions • Practice Tips

OVERVIEW OF THE STATE PERSONNEL BOARD

I. BOARD'S MISSION

- To resolve disputes involving state employees and agencies in a manner that is fair, efficient, and understandable for all parties;

- To establish policies and rules that protect and recognize merit as the basis for state employment while balancing management's need for discretion and flexibility;

- To provide guidance in achieving and maintaining a sound, comprehensive, and uniform system of human resource management through rules, decisions, communication, and training.

II. BOARD MEMBERS and STAFF

The Board consists of five members serving five-year terms. Three members are appointed by the governor and two members are elected by certified state employees. None of the Board members can be a current state employee. The current Board members are:

- John Zakhem, Chair (appointed through 6/30/08)
- Diedra Garcia, Vice-Chair (appointed through 6/30/07)
- Troy Eid (appointed through 6/30/09)
- Don Mares (elected through 6/30/10)
- Elizabeth Salkind (elected through 6/30/06)

Board meetings are regularly held at 9:00 a.m. on the third Tuesday of every month, in Courtroom 1, 633-17th Street, 14th Floor, Denver, Colorado 80202.

The Board's staff consists of:

- Director – Kristin Rozansky
- Administrative Law Judges - Denise DeForest, Hollyce Farrell and Mary S. McClatchey
- General Professional III – Jane Sprague
- Program Assistant - Andrea Woods

The Board's offices are at 633 – 17th Street, Suite 1320, Denver, CO 80202; telephone 303-866-3300; fax 303-866-5038; e-mail co.persl.board@state.co.us.

> **PRACTICE TIP:** Board employees are allowed to answer questions concerning procedural matters (deadlines, whether a pleading was filed, how many copies to file, and the like). Board employees are NOT allowed to give legal advice, and parties are

NOT allowed to rely upon advice from Board staff in support of any arguments they may make.

The ALJs conduct settlement conferences and hearings, rule on pre-hearing matters, and issue initial decisions and preliminary recommendations. The Director issues procedural orders on appeals to the Board, issues preliminary recommendations and decisions on requests for residency waivers, handles hearings on an as needed basis and is responsible for the administrative functions of the Board and its staff. The General Professional III conducts research, drafts documents for the ALJs and the Director, conducts settlements, handles inquiries and calls to the Board, assists the Director in the preparation of reports and coordinates postings on the Board's web site. The Program Assistant handles inquiries and calls to the Board, maintains case files, drafts orders for the ALJs and the Director, assists the Director in the preparation of reports and performs docketing and calendaring functions.

III. BOARD RESOURCES

A. Website: Information may be obtained regarding the Board and its programs by visiting the Board's website at http://www.colorado.gov/dpa/spb/

Contains seven links which will provide you with information, including the following:

- Board Minutes (approved), Agendas and Meeting Location
- Board Orders
- Board Rules
- Initial Decisions
- Annotations of the Initial Decisions
- The Non-Lawyers Guide for State Personnel Board Proceedings (on the Board Home link)
- Forms for filing an appeal or petition for hearing; grievances; and whistleblower complaints
- CLE

B. Settlement Services

C. Training

IV. BOARD POWERS

A. Rulemaking:

The State Personnel Board adopts rules and the State Personnel Director adopts administrative procedures that apply to the Colorado state personnel system. The rules and procedures are adopted through the

formal rulemaking process which is governed by Colorado's Administrative Procedures Act (§24-4-103, C.R.S.).

If there is going to be a rulemaking then the first step of the formal rulemaking process is a written notice to the Secretary of State's Office announcing (1) the date, time, and location of a public hearing to take comments on the proposed changes; and (2) the proposed changes under consideration by the Board. The proposed changes and a statement about the basis and purpose for those changes are made available prior to a public hearing. Interested persons can attend a public hearing and testify about proposals. The Board then votes to either adopt, reject or modify the proposed changes. The final adopted rules and procedures are then published.

If you would like to be added to the e-mail list to receive notices and rules for the Board, please contact the Board's office at 303.866.3300. If you believe that any rules should be clarified, amended, added, or repealed, please contact the Board Director with your suggestions.

B. Adjudication:

The Board, through its ALJs, hears and decides cases filed by state employees and agencies. The cases fall into one of four categories – petitions to grant a hearing, appeals and petitions for declaratory orders.

Petitions to grant a hearing fall within the discretionary hearing process and involve cases in which employees do not have a right to a hearing. Most petitions involve grievances by certified or probationary employees or terminations of probationary employees.

Appeals involve actions by an appointing authority which involve a loss of pay, status or tenure, including appeals of disciplinary actions (such as terminations, suspensions, demotions, and pay reductions), non-disciplinary actions that affect property rights (such as layoffs and administrative discharges), discrimination charges, whistleblower claims, and other issues. *See §§ 24-50-103; 125; 125.3; 125.5; and 24-50.5-104*

Petitions for declaratory orders may be filed by employees and agencies seeking a determination of the applicability of a statute or Board rule or order. They are governed by Board Rule 8-21B and § 24-4-105 (11), C.R.S.

Finally, requests for residency waivers may be filed by agencies seeking an exemption from the constitutional mandate that all state employees must be residents of Colorado. These requests are reviewed and ruled upon, on behalf of the Board, by the Director. Such requests are

governed by the Colorado Constitution (art. XII, Section 13(6)) and Board Rule 4-3B.

V. JURISDICTION

A. Board's Oversight Role – The Board is a constitutionally created entity, independent and distinct from all other state agencies. There is a structural tension as it has a unique role with respect to the state personnel system and the Department of Personnel and Administration:

- The Board has rulemaking authority over various areas, including standardization of positions, determination of grades of positions, standards of efficient and competent service, the conduct of competitive examinations of competence, grievance procedures, appeals from actions by appointing authorities and conduct of hearings. Colo. Const., art. XII, Section 14(3).

- The DPA Director is responsible for "the administration of the personnel system under the state constitution, laws enacted pursuant to the state constitution and the Board's rules. Colo. Const., art. XII, Section 14(4)

- Case law interpretation of these constitutional authorities: The General Assembly's laws and Board's rules, under the state constitution, have coordinate authority over the DPA Director's administration of the personnel system, with the Board reviewing the actions of the DPA Director. C.A.P.E. v. Lamm, 677 P.2d 1350, 1355, n.1 (Colo. 1984) and *Spahn v. Department of Personnel,* 615 P.2d 66, 68 (Colo. 1980).

- Board serves as a check and balance to insure that Colorado's state personnel system is merit based, rather patronage based. Interests of the executive branch and the employees themselves are represented - Governor has three appointments to the Board, state employees elect two members to the Board.

B. Mootness – The Board would not have jurisdiction over a case when a judgment, if entered, would have no practical legal effect upon an existing controversy. *Crowe v. Wheeler,* 439 P.2d 50, 53 (Colo. 1968)

PRACTICE TIP: When assessing a case, be sure that the remedy has not already been provided.

C. Constitutional Issues – The Board cannot determine facial constitutionality of statutes but may determine if a statute has been unconstitutionally applied with respect to a particular personnel action. *Horrell v. Department of Administration,* 861 P.2d 1194, 1199, n. 4 (Colo. 1993).

VI. ALTERNATIVE DISPUTE RESOLUTION

A. Board Mediation and Settlement Rules (Rules 8-9B to 8-20B)

- If a mediation involves a grievance, the time limits governing the grievance process are suspended until the mediation is completed or discontinued
- Participants present at the conference must have authority to settle the dispute
- Merits ALJ may require mediation or a settlement conference
- Parties must attempt to resolve an appeal before the hearing
- If a party requests settlement conference, the other party must appear at least once at a conference and attempt in good faith to settle
- Good faith includes an honest attempt to resolve a dispute; the agency and the employee are obligated to come to the settlement conference with an open mind
- Private, confidential and privileged process
- Notes are separate, not accessible to merits ALJ and destroyed at end of case
- Communication between merits ALJ and settlement facilitator – limited to discussion as to whether or not a matter has settled
- Settlement facilitator cannot be a witness
- Statements at a settlement conference may not be used as evidence at hearing, but evidence which is discovered outside of conference may be
- Notification to the Board of settlement – pending and finalized

B. Benefits of Settlement

- Efficiency
- Mutual Resolution
- Cost
- Timeliness

C. Board's Settlement Facilitators and Process

- Settlement Facilitators are assigned on a rotating basis and you are notified by Andrea Woods as to who is your assigned settlement facilitator
- You will be contacted by your settlement facilitator 2-3 weeks after the Notice of Hearing is sent out. If you haven't heard from her, contact her.

D. Other Settlement Resources

- Colorado State Employee Assistance Program (C-SEAP) at 303.866.4314 or 303.866.8154
- State Employees Mediation Program at 303.866.6559

2005 CHANGES TO THE BOARD RULES

1. Overall Approach – Board and DPA

- Differences in numbering – the Board's rules are designated with a "B" after the number; Director's procedures have no letter designation after the number.
- Legislation – Petitions for Hearing: Board, not ALJ, must consider and decide on a petition for hearing within 90 days. Board meets the third Tuesday of every month. The Board packet is sent out to Board members twelve days prior to that. If the 90th day falls on the day before a Board meeting, then the matter must be reviewed by the Board at its meeting the month before, in which case 29 to 30 days have been cut off of the 90 day timeline.
- Legislation – Deadline for commencing a hearing is 90 days, with one extension for 30 days.
- Rules promulgated with a view towards those deadlines and early resolution of these actions. Forcing communication and resolution at lowest possible level; while tightening the hearing process.
- While the number of cases filed has remained relatively steady, the number of cases going to hearing and the number of days spent in hearing on those cases has been increasing.

2. Focus of Changes

Majority of changes to Board Rules occurred in Chapter 8; however, there is a Layoff Rules Review Committee which is currently reviewing that portion of Chapter 7 which covers layoffs.

3. Access to Board Rules

Board rules may be downloaded at the Board's website:

- Post July 1, 2005: http://www.colorado.gov/dpa/spb/rulesnew.pdf
- Pre July 1,2005: http://www.colorado.gov/dpa/spb/rulesold.pdf

4. Top Ten Changes

a. Pending Grievances (Board Rule 8-7B): If any employee is separated and doesn't appeal that separation then any grievance at the Board level is now also concluded.

b. Grievance Process (Board Rule 8-8B): All employees must be informed of grievance process in writing. If there is not an established grievance process then Board process applies.

PRACTICE TIP: In addition to giving notice in writing, post the process on your department intranet. In addition, the Board will provide a link on its website. Currently Colorado Historical Society; CSU; DHS; DNR; CDPHE; DORA and CDOT have posted their grievance processes on the Board's website

c. Mediation (Board Rule 8-10B): ALJs may require mediation or settlement conferences during discretionary hearing process.

d. Settlement Agreements and Dismissals (Board Rule 8-17B): Once parties have a signed settlement agreement, they need to file a stipulated motion with the Board. We track these cases.

e. Discovery Abuses (Board Rule 8-39B): Attorney fees may be awarded against an employee, department or an attorney who abuses our discovery process.

f. Service of Disciplinary Notice (Board Rule 8-41B): Deadline to appeal is ten days from service must be by certified mail; fax or hand delivery. If served on an employee by any other method, then three days will be added to the appeal deadline.

g. Early disclosure for grievances (Board Rule 8-48B): Referred to as "mandatory disclosures" – requires a department, within 15 days of receiving notice of the filed petition, to provide copies of documents and information upon which they relied in reaching the final decision in a matter.

PRACTICE TIP: If you consider any documents or tangible pieces of information during the decision making process, set them aside or make copies of them so that they may be easily provided if an appeal is filed.

h. Filing of Information Sheets (Board Rule 8-50B): Must be filed within 25 days of the filing of the Petition for Hearing by the employee. Only one 5 day extension is allowed.

i. Early disclosure for appeals (Board Rule 8-58B): 15 days after the appeal is filed with the Board by the employee, both parties must disclose to each other a list and copy of documents that are relevant to the action and which the parties have in their possession. (See practice tip above under "g")

j. Commencement of Hearing (Board Rule 8-61B): All discovery "must be concluded prior to commencement of the hearing." In order to commence a hearing, must present an opening statement, factual stipulations and stipulated exhibits.

DISCRETIONARY HEARING PROCESS

I. Purpose

The Board may grant a discretionary hearing on appeals from agency grievance decisions (rules governing grievances are found in State Personnel Board Rules 8-5B through 8-8B), or for other appeals that do not have a mandatory right to a hearing. Examples include a violation of federal or state constitutional rights, certain decisions by the State Personnel Director, discrimination that does not involve a mandatory right to a hearing, including discrimination in the selection or examination process, and reversion of a trial service employee for unsatisfactory performance. A certified employee **does have** the right to a hearing if his or her base pay, status, or tenure is adversely affected. The Board **cannot** grant a hearing to probationary employees who appeal discipline for unsatisfactory performance unless the employee alleges unlawful discrimination or other statutory or constitutional violations. *See State Personnel Board Rule 8-46B.*

II. Procedure

A. The Petition For Hearing

An employee must file a petition for hearing no more than 10 days after the action for which the employee is seeking a hearing. The employee may use the same form as the mandatory appeal, and the employee should follow the same instructions on completing the form. The form and the instructions are found on the Board's website. *See State Personnel Board Rule 8-47B*

The employee **must attach a copy of the action he or she is appealing** to the petition for hearing. If the action is a final agency grievance decision, the employee **must attach both the decision and the original written grievance**. The employee must also provide a copy of the petition and the attachments, to the respondent (employer) at the same time he or she files the petition with the Board. **Failure to provide a copy to the respondent may be grounds to deny the petition for hearing.** *See State Personnel Board Rule 8-47B.*

Within fifteen days after the employee has filed a petition with the Board, the agency must provide the employee with copies of all the documents or information it relied upon in making the decision which constitutes the subject of the petition for hearing. The agency may assert a privilege regarding any documents or information. If it does so, it must provide a privilege log to the employee. The privilege log must describe each document and provide a legal basis for preserving the privilege. *See State Personnel Board Rule 8-48B.*

B. Board Action After Receiving Petition for Hearing

When the Board receives a Petition for Hearing, it may take one of the following actions:

1. Refer the matter to the Colorado Civil Rights Division (CCRD) for investigation, if the petition alleges discrimination in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-401, *et seq.* If CCRD investigates the matter and issues an opinion, the employee must appeal that opinion within 10 days of receiving the opinion in order to preserve the issue of discrimination at hearing.

2. Refer the matter to agency for a response to whistleblower allegations, if appropriate.

3. Defer the matter until the agency has had the opportunity to make a final grievance decision, if that has not yet happened.

4. Set the matter for Preliminary Review.

C. Preliminary Review

When the petition is set for preliminary review, Board will issue a Notice of Preliminary Review, which informs the parties of their deadlines. The Notice of Preliminary Review will also order the parties to file information sheets. Information sheets are written offers of proof where each party must set forth a description of the relevant facts that would be proved at hearing, the witnesses and exhibits that would be used to prove those facts, legal arguments and the nature of the relief the party is seeking. The requirements of what must be contained in the information sheets are found in State Personnel Board Rule 8-50B. **In addition to filing an original paper copy of an information sheet with the Board, the parties must also file their information sheets with the Board electronically (either on a disk or a CD-Rom).** The Board may grant **one extension of time** for each party to file an information sheet. The extension **may be no more than five days, and granted only upon good cause shown.**

The employee has the burden of proving that valid issues exist that merit a hearing. To meet that burden, the employee must demonstrate:

1. The existence of evidence that the agency's decision or action was arbitrary and capricious, identifying any witnesses and their testimony and providing copies of any exhibits that would support such a finding; and

2. The Board has jurisdiction to award relief.

The Board will not grant a hearing based upon arguments that the agency's action or decision was wrong or that the agency could have ruled otherwise. If the employee does not provide evidence that, if believed, would support a finding that the action or decision was arbitrary and capricious, contrary to rule or law, or in violation of the ground set forth in §24-50-123, C.R.S., the Board will not grant a hearing. *See State Personnel Board Rule 8-49B.* Moreover, if the employee cannot describe any relief which is within the Board's constitutional or statutory power, then the Board will not grant a hearing.

Practice Tips:

- The Board can order an agency to comply with the Board's or its own regulations, policies and procedures. If the employee can demonstrate that an action or decision violated such a requirement, the Board is more likely to grant a hearing.

- Both parties can save themselves and the Board a great deal of time and money by drafting a complete and persuasive information sheet. Please draft a comprehensive and cohesive statement of the facts you will be prepared to prove at hearing. An information sheet is more persuasive if it includes affidavits from witnesses.

- The complainant's information sheet should specify the issues for which hearing is sought and the specific relief desired. Remember, though, that the Board cannot grant a hearing on grievance issues that were not contained in the original grievance, nor can it grant relief that was not requested in the original grievance. The Board is more likely to grant a hearing on narrow issues with narrowly-tailored relief.

- The respondent's information sheet should identify the reasons why a hearing should not be granted, should seek to narrow the issues in the event that a hearing is granted, and should set forth legal argument if respondent contends that either the subject matter or relief is not within the Board's jurisdiction.

- If respondent files a motion to dismiss a petition for hearing, respondent's deadline for filing its information sheet **is not tolled while the motion to dismiss is pending.**

- Many of the petitions for hearing the Board receives essentially ask the Board to order another employee to be nice. The Board can reverse or modify an agency's action, but it cannot order people to be nice or make friends with each other.

D. Preliminary Recommendation

The Board's director or an administrative law judge will review the information sheets to determine if valid issues exist which merit a hearing. (At any stage in the preliminary review process the administrative law judge or the Board's director can request the parties to participate in a mediation conference.) The administrative law judge or the Board's director will then make a written Preliminary Recommendation to the Board as to whether the petition for hearing should be granted or denied. *See State Personnel Board Rule 8-50B.* The Board will consider the preliminary recommendation and decide whether to grant or deny the employee a hearing. The Board will not consider any information submitted by either party after the Preliminary Recommendation has been issued, and if the Board denies the petition for hearing, its decision is not subject to reconsideration. *See State Personnel Board Rule 8-51B.*

If the Board decides to grant a discretionary hearing, the procedures for that hearing are generally the same as for a disciplinary appeal. However, because a discretionary hearing does not implicate an employee's property right, the employee will bear the burden of proving, by a preponderance of the evidence, that the agency's action or decision was arbitrary, capricious, or contrary to rule or law.

Unless the a petition for hearing is referred to CCRD or to the agency for a whistleblower allegation response, or deferred pending final agency action of a grievance, the Board must consider the preliminary recommendation within 90 days of the Board receiving the petition.

DISCIPLINARY ACTIONS

A. Property Right to Employment

The Colorado Constitution, art. XII, §13(8), states, "Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law." This provision creates a property right to state employment.

B. Discipline May be Imposed Only for Just Cause

Certified state employees may only be disciplined for just cause based on constitutionally specified criteria. *Id*; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). "A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by his appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude. . . ." Colo.Const. art. XII, §13(8).

State Personnel Board Rule 6-12B outlines the reasons for discipline:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform;
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform the job or may have an adverse effect on the department if employment is continued. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court; and,
(6) final conviction of an offense of a Department of Hunan Services' employee subject to the provisions of §27-1-110, C.R.S. Final conviction includes a no contest plea or acceptance of a deferred sentence. If the conviction is appealed, it is not final until affirmed by an appellate court.

C. Right to Appeal; Burden of Proof

- Colo. Const. art. XII, Section 13(8) also provides the mandatory right to appeal: "Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both."

- State agencies bear the burden of proof in hearings involving appeals of disciplinary action. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

- The standard of review is whether the action of the appointing authority was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.

- In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

D. Progressive Discipline; Factors to Consider

- Board Rule 6-2B requires that certified employees be given a corrective action prior to disciplinary action "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."

- Rule 6-9B requires, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance

evaluations, and mitigating circumstances. Information presented by the employee must also be considered."

- 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 6-8B.

PRACTICE TIP: The criteria set forth in Board Rule 6-9B are relevant to the Board's determination whether the agency considered all appropriate information under the *Lawley* standard. Counsel for agencies and employees should be certain that these factors are covered in hearing.

E. Pre-disciplinary Meeting

When considering discipline, the appointing authority must meet with the employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. Each side is allowed one representative at the meeting. Board Rule 6-10B.

F. Corrective Actions.

Board Rule 6-11B defines corrective actions. They are intended to correct and improve performance or behavior. They do not adversely affect pay, status, or tenure. Corrective actions must include the areas for improvement, the actions the employee must take to improve, a reasonable amount of time to make corrections, if appropriate, consequences for failure to correct performance, and information regarding the right to grieve.

Corrective actions that have been removed from the employee's personnel file cannot be considered for any subsequent personnel action. Rule 6-11B.

ADMINISTRATIVE SEPARATIONS

A. Burden of Proof.

In *Valesquez v. Department of Higher Education*, 93 P.3d 540 (Colo.App. 2004), the Colorado Court of Appeals held that employees bear the burden of proof in discharge cases (such as layoffs) that do not involve disciplinary action. The Court held that a discharge for job abolishment does not implicate state constitutional protections, which require disciplinary discharge for just cause. It further reasoned, "Discharge for job abolishment, like reallocation [in *Renteria v. Dept. of Labor & Employment*, 907 P.2d 619 (Colo.App. 1994)] is more administrative than disciplinary in nature and thus does not involve credibility judgments arising from contested allegations of employee misconduct." *Velasquez*, 93 P.3d at 542.

B. Director's Procedure 5-10.

The majority of administrative discharge cases are either layoffs or administrative separations upon exhaustion of leave under Director's Procedure 5-10. That Procedure states, "If an employee has exhausted all credited paid leave, unpaid leave may be granted or the employee may be administratively separated by written notice after pre-separation communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively separated if FML or short-term disability leave (includes the 30-day waiting period) apply or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been separated under this rule and subsequently recovers, a certified employee has reinstatement privileges."

PROBATIONARY EMPLOYEMENT

A. No appeal right if terminated for unsatisfactory performance.

Colo. Const. art. XII, Section 13(10) states, "The state personnel board shall establish probationary periods for all persons initially appointed, but not to exceed twelve months for any class or position. After satisfactory completion of any such period, the person shall be certified to such class or position within the personnel system, *but unsatisfactory performance shall be grounds for dismissal by the appointing authority during such period without right of appeal."*) (Emphasis added.) Probationary employees therefore have no right to appeal a termination for unsatisfactory performance during the probationary period.

B. The Board will not probe the basis for termination based on allegations of unsatisfactory performance.

In *Williams v. Colorado Dept of Corrections*, 926 P.2d 110 (Colo.App. 1996), a probationary employee terminated for unsatisfactory performance appealed to the Board, alleging race discrimination. After evidentiary hearing, the Board found the race claim to lack merit, but vacated the disciplinary termination on grounds the department had violated one of its own regulations. The Court of Appeals vacated the Board order, clarifying that "because the Department argued that its decision to terminate Williams' employment was based on his unsatisfactory performance, the Board was without jurisdiction to probe the basis for the termination, except to determine the merit of his racial discrimination claim."

C. Otherwise, the same appeal rights apply.

Section 24-50-125(5), C.R.S., states, "A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee."

For example, probationary employees who allege discrimination do have a right to a Board hearing on the discrimination claim. *Williams*, 926 P.2d at 114.

CONSTRUCTIVE DISCHARGE

A. Burden of proof.

A state employee alleging constructive discharge carries the burden of proof. *Harris v. State Bd. of Agriculture*, 968 P.2d 148 (Colo.App. 1998).

B. Definition of Constructive Discharge.

"The determination of whether the actions of an employer amount to a constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable, and not upon the subjective view of the individual employee." "To prove a constructive discharge, a plaintiff must present sufficient evidence establishing deliberate action on the part of an employer which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign." *Boulder Valley School Dist. R-2 v. Price*, 805 P.2d 1085, 1088 (Colo. 1991).

C. Bifurcate from hearing on merits.

For purposes of efficiency, if a state employee alleges constructive discharge on his or her appeal form, the Board may set a preliminary, evidentiary hearing on the constructive discharge issue. Then, if the employee prevails at that hearing, a hearing on the merits of the termination will be set. If the employee fails to prevail on the constructive discharge claim, the resignation will be found to have been voluntary, and the case will be dismissed with prejudice.

If a state classified employee establishes that a termination was in fact a constructive discharge, that employee is entitled to a hearing on the merits of the termination. At hearing, the appointing authority will bear the burden of proving that the termination imposed was justified by the factual circumstances. *Harris*, 968 P.2d at 152.

D. Withdrawal of Resignation

Board Rule 6-13B states, "An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. When resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal."

Board Rule 7-4B governs resignations. It states in part, "If the employee believes the resignation was coerced or forced, the employee has 10 days

from the date of the resignation to appeal to the Board, except that an employee cannot appeal a resignation that is tendered in lieu of disciplinary action."

Board Rule 7-5B states, "An employee may withdraw a resignation within two business days after giving notice of resignation. The appointing authority has discretion to approve a request to withdraw a resignation that is made more than two business days after the notice of resignation."

Board Rule 1-19B states, "An employee may voluntarily and knowingly waive, in writing, all rights under the state personnel system, except where prohibited by state or federal law."

DISCRIMINATION

I. The Colorado Anti-Discrimination Act, section 24-34-402, C.R.S.

A. Elements of Intentional Discrimination

1. In 1997, the Colorado Supreme Court adopted the U.S. Supreme Court's shifting burdens analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and its progeny, finding it "represents a clear and thorough analytical framework for evaluating claims of employment discrimination." *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997). See also *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000).

2. ***Prima facie* case.** To prove intentional discrimination under section 24-34-402, C.R.S., an employee must establish, by a preponderance of the evidence, a *prima facie case* ("*pfc*") of discrimination. The elements of a *pfc* of intentional discrimination are:

   a. complainant belongs to a protected class;
   b. complainant was qualified for the position;
   c. complainant suffered an adverse employment decision despite his or her qualifications; and
   d. circumstances give rise to an inference of unlawful discrimination.

   Big O Tires, 940 P.2d at 400; *Bodaghi,* 995 P.2d at 300.

   Usually, the parties can stipulate to the *pfc*. However, sometimes the facts do not raise the necessary inference.

   Once the employee has established a *pfc* of intentional discrimination, he or she has created a presumption that the employer unlawfully discriminated against the complainant. If the employer does not rebut the presumption, the factfinder is required to rule in favor of the complainant.

3. **Legitimate business reason**. The burden next shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *pfc* is rebutted and drops from the case.

4. **Pretext**. The burden then shifts back to the employee to prove that the employer's proffered reasons were in fact a pretext for discrimination. The employee can satisfy this burden of proof through evidence already in the record. Colorado law does not require, in every case, that the

complainant offer additional evidence to support an inference of intentional discrimination. *Bodaghi*, 995 P.2d at 298.

Complainant's prima facie case, combined with the factfinder's conclusion that the employer's asserted justification is false or pretextual, is sufficient to permit the trier of fact to conclude that the employer unlawfully discriminated. *Id*.

5. Demonstrating Pretext.

a. "Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1317 (10th Cir. 1999).

b. Proving Pretext Indirectly (vast majority of cases)

- Pretext may be proven by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." *Bullington, supra*.

- Disparate treatment can also form the basis for an ultimate conclusion of pretext, as in *Big O Tires, supra*. In that case, the Court noted that in response to the employer's legitimate, nondiscriminatory reason for firing the employee, the employee submitted evidence "that during the same week in which Thurman committed the time clock violations for which she was fired, Edmonds, a Caucasion inside sales clerk, committed comparable time clock violations but that Edmonds was not fired at the same time. This evidence was sufficient to create an inference that Big O's asserted legitimate reason for terminating Thurman's employment was a pretext for discrimination." *Big O Tires*, 940 P.2d at 401 – 402.

- When comparing relative treatment of similarly situated minority and non-minority employees, the comparison need not be based on identical violations of identical work rules; the violations need only be of "comparable seriousness." *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995).

- "The use of subjective factors supports an inference of pretext when an employer justifies rejection of [an employee] on the basis of such subjective factors even though [that candidate] is

objectively better qualified than the [individual] chosen." *Bodaghi*, 995 P.2d at 300 (Colo. 2000).

- In failure to hire or promote cases, a plaintiff may prove pretext by demonstrating a "disparity in qualifications" that is "overwhelming." *Bullington*, 186 F.3d at 1319. In addition, pretext may also be proven indirectly by demonstrating pre-selection. *See, Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995).

c. Proving Pretext Directly

Pretext may be proven directly through evidence showing that an unlawful motive more than likely motivated the employment decision. *Burdine, supra.* Such direct evidence may consist of statements by an appointing authority or supervisor indicating they do not like employees that rock the boat or make waves.

6. Mixed Motive Cases

Under *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003), direct evidence of discrimination is not required to prove employment discrimination in mixed motive cases.

PRACTICE POINT - Waive the CCRD investigation, unless you believe your client will benefit from the investigatory process, and you are not opposed to significant delay. Because CCRD's investigative reports contain no findings of fact, they do not meet the minimum requirements of an Initial Decision under the Administrative Procedures Act. Board ALJ's therefore must conduct a de novo hearing on all matters in which discrimination is alleged, regardless of whether probable cause was or was not found. CCRD findings have no binding effect on the Board.

B. Additional Provisions

1. Harassment Claims

The Colorado Anti-Discrimination Act has been amended to include claims alleging harassment. Section 24-34-402(1)(a), C.R.S. This provision states, "For purposes of this paragraph (a), 'harass' means to create a hostile work environment based upon an individual's race, national origin, sex, disability, age, or religion. Notwithstanding the provisions of this paragraph (a), harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate."

2. Remedies in Discrimination Cases

Board Rule 9-6B states, "If the Board finds that discrimination has occurred, it may order: cease and desist orders; hiring, reinstatement, or upgrading of employees, with or without back pay and compensation; referral of applicants for employment; admission or continuation of enrollment in on-the-job training; posting of notices and issuing orders as to the manner of compliance and corrective and/or disciplinary actions, as required, and, altering terms and conditions of employment as appropriate."

3. Order of Presentation

When an employee claims discrimination in an appeal of disciplinary action, the agency must present its case-in-chief first. The employee will then present his or her defense case while also presenting the case-in-chief on the discrimination claim. The agency will have the opportunity to present its rebuttal and response cases next. The employee will then have the opportunity to present evidence of pretext, unless he or she rests on the record at that point in the proceedings.

II. Disability Discrimination

A. Elements of a Disability Discrimination Claim

The Colorado Anti-Discrimination Act states,

"It shall be a discriminatory or unfair employment practice . . . to discharge . . . any person otherwise qualified because of disability . . . ; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1)(a), C.R.S.

1. Defining Disability

a. The Act defines disability as, "a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." Sections 24-34-301(2.5)(a) and (b), C.R.S. *See also* 42 U.S.C. Section 12102(2).

b. In determining whether an individual is substantially limited in a major life activity, "three factors should be considered: (1) the nature and severity of

the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2)." *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999).

c. **Major life activity of working**. To prove an impairment substantially limits an employee in the major life activity of "working," federal regulations and case law interpreting the ADA require,

"With respect to the major life activity of working - (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. Section 1630.2(j)(3)(i); *Gonzagowski, supra; Kuehl v. Wal-Mart Stores, Inc.*, 909 F.Supp. 794, 800 (D.Colo. 1995).

d. **"Otherwise qualified"** for the position.

Under the Colorado Act, a "qualified disabled person" is one who, with or without reasonable accommodation, can perform the essential functions of the job.

e. **Essential functions**. Federal regulations define essential functions as follows,

"(1) The term essential functions means the fundamental job duties of the employment position . . . The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform the function;
(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed;
(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) . . .
(vi) The current work experience of incumbents in similar jobs." 29 Code of Federal Regulations, Section 1630.2(n).

f. **Reasonable Accommodation**. CCRC Rule 60-2(C) addresses reasonable accommodation as follows:

"(1)A person subject to [the Act] shall make reasonable accommodation to the known physical limitations of an otherwise qualified disabled . . . employee unless the person can demonstrate the accommodation would impose an undue hardship or that it would require any additional expense that would not otherwise be incurred."

"(2) Reasonable accommodation may include: (a) making facilities used by employees readily accessible to and useable by physically disabled persons, and (b) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." Commission Rule 60-2(C), 3 CCR 708-1. *See also* 29 CFR Section 1630.2(o)(2)(ii).

g. **Undue Hardship.** CCRC Rule 60.2(C)(3) states,

"In determining whether an accommodation would impose an undue hardship on an employer's operation, pursuant to paragraph (1) of this section, factors to be considered include:

(a) the overall size of the employer's operation with respect to number of employees, number and type of facilities, and size of budget;
(b) the type of the employer's operation, including the composition and structure of the employer's work force; and
(c) the nature, cost, and funding for the accommodation needed, including, but not limited to, such sources as the Colorado state division of vocational rehabilitation, the personal resources of the person with the disability, and private organizations which provide financial support and auxiliary aids."

h. **Interactive Process**. Federal regulations further provide, "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified

individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 CFR Section 1630.2(o)(3).

Implementation of the reasonable accommodation aspect of the ADA is an interactive process that requires participation by both parties. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). The interactive process begins with the employee providing enough information about his limitations and desires to convey the employee's desire to remain with the employer despite his disability and limitations. *Smith v. Midland Brake*, 180 F.3d 1154, 1172 (10th Cir. 1999). Once the employer's responsibilities to engage in the interactive process are triggered, both the parties are obligated to engage in good-faith communications with each other. Id.

PRACTICE TIP: Two separate Board rules require involvement of the agency ADA coordinator. Board Rule 8-32B states, "Any time an appointing authority becomes aware of an allegation of discrimination based on disability, the matter must be referred to the department's ADA coordinator for investigation, no later than 7 days from the date of the allegation. This includes grievances and meetings to consider adverse action against the employee. Any time limits are suspended pending the investigation."

Board Rule 9-5B(A) requires, "Each department will notify applicants and employees of the name, business address, and telephone number of the ADA coordinator. Appointing authorities and employees should consult with their departmental ADA coordinator concerning what constitutes a disability, reasonable accommodation, and undue hardship."

RETALIATION CLAIMS

- Colorado Anti-Discrimination Act, section 24-34-402, C.R.S.;
- Colorado Employee Protection Act ("whistleblower act"), section 24-50.5-101, C.R.S.;
- Retaliatory action that is arbitrary and capricious action or contrary to rule or law, section 24-50-103(6), C.R.S.;
- First Amendment claims

I. Colorado Anti-Discrimination Act, Section 24-34-402(1)(e)(IV), C.R.S.

It is a discriminatory or unfair employment practice to "discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." Section 24-34-402(1)(e)(IV), C.R.S.

This language is identical to that in the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). Therefore, federal case law interpreting this provision is given persuasive authority by the Board. Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997).

A. Elements of a Retaliation Claim under the State Anti-Discrimination Act.

To establish a *prima facie case* ("*pfc*") of retaliation under the Act, Complainant must establish he or she:

1. engaged in protected activity of opposing discriminatory conduct or filing a charge of discrimination;
2. was subjected to adverse employment action; and
3. a causal connection exists between the protected activity and the adverse action.

*Berry v. Stevinson Chevrol*et, 74 F.2d 980, 985 (10th Cir. 1996).

1. **Opposition activity is broadly defined**. Opposition activity is protected when it is based on a mistaken good faith belief that the Act has been violated. *Love v. RE/MAX of America, Inc.,* 738 F.2d 383, 385 (10th Cir.

1984). Those who "informally voice complaints to their superiors or who use their employers' internal grievance procedures" are protected under the Act. *Robbins v. Jefferson County School Dist. R-1,* 186 F.3d 1253, 1258 (10th Cir. 1999).

2. **Adverse employment action is also broadly defined, "to discriminate."** No requirement of an action adversely affecting pay, status or tenure. For instance, change in work assignment, more travel, that type of retaliation, is covered. See *Deavenport v. MCI Telecommunications Corp.*, 973 F.Supp. 1221, 1224-1227 (D.Colo. 1997)(interpreting identical language in Title VII liberally to effectuate its remedial purpose).

3. **Causal connection**. The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Love v. RE/MAX of America, Inc.,* 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.,* 76 F.3d 324, 329 (10th Cir. 1996). For instance, the Tenth Circuit has held that a six-week period between protected activity and adverse action may, by itself, establish causation for purposes of the pfc.

   - Generally, unless the adverse action is "*very closely* connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." Id. at 328 (citations omitted; emphasis in original)

   - The close temporal proximity standard is relaxed, however, "where the pattern of retaliatory conduct begins soon after [the protected activity] and only culminates later in actual discharge" [or a more serious adverse action. *Marx*. In some cases, mild retaliatory action immediately follows protected conduct, but a long period of time passes before any serious adverse action is imposed.

   - -In *Love, supra*, the plaintiff demonstrated the causal connection by showing that the employer's reasons for her termination "were unconvincing 'afterthoughts.'" 738 F.2d at 386.

PRACTICE POINT: The entire history of retaliatory actions is relevant to determination of *pfc* of retaliation. In assessing the strengths and weaknesses of your case, whether you represent the employer or the employee, you should ask your clients about this kind of history in working up your cases.

- Testimony of other employees about treatment by employer is relevant to issue of employer's discriminatory intent if it establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motives. *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776-77 (10th Cir. 1999).

B. Shifting Burdens, as in *Big O Tires*.

Once complainant has established a *pfc* of retaliation, the burden shifting analysis in *Big O Tire*s applies. The agency must proffer a legitimate, nonretaliatory reason for the adverse employment action. Then, the employee must demonstrate that reason to be a pretext for retaliation.

II. Colorado Employee Protection Act, section 24-50.5-101 *et seq*, C.R.S.

Also known as the "whistleblower act," this statute protects state employees from retaliation by their appointing authorities or supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985).

A. The purpose of the Act appears in the legislative declaration, which states,

"The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official." Section 24-50.5-101, C.R.S.

B. Elements of a Statutory Whistleblower Claim

1. What disclosures are protected?

The threshold determination is whether an employee's disclosures fall within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as

the "written provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." Section 24-50.5-102(2), C.R.S.

Under *Ward, supra*, the disclosure may be oral and need not be written.

2. To whom must the disclosure(s) be made?

The Act is not known for its artful drafting. It actually requires two separate disclosures in order to secure its protection: "It shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." Section 24-50.5-103(2), C.R.S. (emphasis added).

In summary, two disclosures are necessary:

First, to one's "supervisor or appointing authority or member of the general assembly" and,

Second, to "any person or the testimony before any committee of the general assembly."

This obligation to disclose such serious concerns to one's immediate supervisor or appointing authority makes sense: it assures that the agency has the opportunity to correct a problem before the issue escalates.

3. Adverse actions.

The Act prohibits "disciplinary action" in retaliation for protected activity. It defines "disciplinary action" broadly to include:

"any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." C.R.S. section 24-50.5-102(1).

4. Were the disclosures a substantial or motivating factor in the employer's adverse action?

Once it is established that protected disclosures occurred, the employee must demonstrate that the disclosures were "a substantial or motivating factor" in the agency's adverse actions taken against the employee. *Ward*, 699 P.2d at 968; Section 24-50-103(1), C.R.S. This requires a showing of employer knowledge of the disclosure and a causal connection between the disclosure and the adverse action.

5. **Would the agency have reached the same decision even in the absence of protected conduct?**

If it is concluded that an employee's protected disclosures were a substantial or motivating factor in the agency's adverse action, the agency can escape liability under the Act by demonstrating that "it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968.

6. **Defenses**. The following types of disclosures are not protected by the Act:

a. disclosure of information the employee knows to be false or, or with disregard for the truth or falsity thereof;

b. disclosure of information from public records that are closed pursuant to the Open Records Act;

c. disclosure of any other confidential information.

III. Retaliatory action that is arbitrary and capricious or contrary to rule or law.

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001).

Examples of retaliatory conduct that could constitute arbitrary and capricious agency action include:

- imposing a corrective or disciplinary action against an employee for filing a grievance or filing an appeal with the State Personnel Board;

- changing the working conditions of an employee because that employee reported his or her supervisor's misconduct.

IV. First Amendment Claims.

1. Government employees enjoy First Amendment protections on their speech. However, the government as an employer may limit its employees' speech. *Bass v. Richards*, 308 F.3d 1081, 1088 (10th Cir. 2002), citing *Pickering v. Board of Education*, 391 U.S. 563 (1968). When the government restricts the speech rights of its employees, its interest in limiting the speech must be balanced against the employees' interest in speaking. *Id.*

2. To prevail on a *Pickering* claim, an employee must demonstrate that: 1) the speech in question involves a matter of public concern; 2) his or her interest in engaging in the speech outweighs the government employer's interest in regulating it; and 3) the speech was a substantial motivating factor behind the government's decision to take an adverse employment action against the employee. *Id.* If the employee makes the required showing, the government employer may escape liability if it can show that it would have taken the same employment action in the absence of the protected speech. *Id.*

3. Generally, speech involves a matter of public concern when it is "of interest to the community, whether for social, political, or other reasons," rather than a matter of a mere personal interest to the speaker. *Id.*, 308 F.3d at 1089; *Paradis v. Montrose Memorial Hospital*, 157 F.3d 815 (10th Cir. 1998). The fundamental inquiry is whether the individual speaks as an employee (to redress personal grievances) or as a citizen (to address broader public purpose). *David v. City and County of Denver*, 101 F.3d 1344 (10th Cir. 1996). A public employee's speech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern. *Id.*

4. The First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation, unless their work requires political allegiance. *Snyder v. City of Moab*, 354 F.3d 1197, 1184 (10th Cir. 2003). An employee can establish a violation of his or her First Amendment association rights if s/he demonstrates that 1) "political affiliation and/or beliefs were substantial or motivating factors behind [his or her] dismissal; and 2) the position did not require political allegiance." *Bass v. Richards*, 308 F.3d 1081, 1090 (10th Cir. 2002). There is no

meaningful distinction for First Amendment purposes between nonpartisan political alignment and membership in a political party. *Id.* at 91.

PREHEARING PROCEDURES AND PRACTICE POINTS

I. Authority For State Personnel Board Hearings:

A. The Board's constitutional authority is derived from Colorado Constitution, Art. XII, §13 and §14. *See* Annotations Attachments 1 and 2 (constitutional annotations). These sections create and define a merit-based personnel system, create the Board, and grant the Board the authority to implement procedures for hearing grievances and appeals from employees within the state personnel system.

B. The Board's statutory authority for hearings is primarily found at C.R.S. §§ 24-50-125, 24-50-125.3, and 24-50-125.4. *See* Annotations Attachments 3, 4, and 5 (statutory annotations).

C. The Board is authorized to use administrative law judges to conduct hearings on any matter within the jurisdiction of the board. C.R.S. §24-50-103(7). These hearings are subject to the Board's rules but are also "subject to the provisions are article 4" of title 24, which also requires and allows the Board to follow the state Administrative Procedures Act.

D. As a practical matter, these sources of authority create a system of expedited administrative review of state employee personnel issues. When the Board is audited by the JBC, the auditors often fully review the time the Board requires to process appeals, from the initial filing to the final Board decision.

E. The Board's statutes were amended recently to change the commencement hearing deadline from 45 days to 90 days, with one possible extension for 30 days. *See* C.R.S. §24-50-125(4). In keeping with the overarching goal to have an expedited process for the review of personnel issues, the Board has revised its rules to create additional and earlier disclosure requirements for the parties. The goal is to use the additional time for hearings more productively by limiting the need for pre-hearing discovery arguments, and to provide fairer and more focused hearings.

II. Web Resources:

The Board has the current Board rules, the previous rules, Initial Decisions, and annotations to Initial Decisions on the web at: www.colorado.gov/dpa/spb

III. Steps in the Pre-Hearing Process:

A. Prehearing Order –

1. Once an appeal is docketed, the first thing to occur is the assignment of a hearing ALJ and a settlement facilitator for the case. These selections are made on a blind rotating basis administratively.

2. The Board's standard Prehearing Order has changed since last year. It now contains the following provisions:

   a. A hearing date – set for an open calendar date on the ALJ assigned to hear the matter within 90 days of the filing of the appeal. If there is a need to continue the hearing past that date, a motion should be filed.

   b. References to the Board's guide for *pro se* litigants at www.colorado.gov/dpa/spb/nonlawyersguide.htm

   c. A statement of the requirements for settlement discussions, per Board Rule 8-62B.

   d. The outline of requirements for Prehearing Statements.

   e. A statement of the mandatory disclosures requirement.

   f. A discovery deadline providing 15 days from the date of the Prehearing Order to serve requests. The Prehearing Order also provides that parties have 3 business days in which to confer with the opposing party about a discovery dispute, and then 2 business days to file a motion with the Board. Failure to comply with the time limit waives the issue.

   g. A statement of the procedure for motions, including the ten day response time unless the ALJ has modified that deadline.

   h. A variety of hearing procedures, including procedures related to subpoenas, stipulations, exhibits, trial briefs and failure to appear.

B. Mandatory Disclosures -

1. Board Rule 8-58B provides that both parties must disclose to each other a list of, and a copy of, all documents and other information that are relevant to the appeal and which the parties have in their possession. This early disclosure must take place within 15 days after the appeal is filed.

2. Board Rule 8-48B now requires a department to provide copies of the documents and information upon which the department relied in reaching its final decision on a grievance. This information is to be provided within 15 days of receiving notice of the filed Board petition.

3. The practical effect of these early disclosure requirements is to require agencies, and employees if the hearing is a disciplinary appeal, to do a significant amount of preparation early in the hearing process. Agencies should understand that the documents and materials that their staff used in grievance or discipline processes must be disclosed almost immediately after the filing of a Board petition.

C. Discovery –

1. An ALJ's authority to rule on discovery issues arises from the APA, C.R.S. §24-4-105, C.R.S., and Board rules. *See* Board Rule 8-58B(A)(applying C.R.C.P. 26 through 37 "to the extent practicable").

2. Board Rule 8-58B(B)(2) requires that all requests for information, other than depositions, "must be served no later than 15 days from the date of issuance of the notice of hearing." Responses are to be provided within 20 days after the receipt of the request. Board Rule 8-58B(B)(3).

3. The rules provide for limits on discovery – 30 interrogatories of one question each, 20 requests for production of documents, and 20 requests for admission. Board Rule 8-58B(B)(5).

4. Depositions are limited to three per party. Depositions are required to be completed at least 10 days prior to hearing. Board Rule 8-58B(B)(4).

5. All discovery "must be concluded prior to commencement of the hearing." Board Rule 8-61B. Board Rule 8-58B(B)(4) provides that all exchanges of information, including depositions, must be completed at least ten days prior to hearing.

6. The practical effect of the new discovery deadlines is to require significant preparation well in advance of the hearing date. The rules are set so as to prevent last minute depositions, or mid-hearing depositions, or other discovery issues from arising at, or near, the time of hearing.

7. Board rules require a good faith effort to resolve discovery disputes before filing a motion to compel. Board Rule 8-58B(B)(6). The Prehearing Order provides very short deadlines for the conferral between parties and, if discussion does not resolve the issue, upon the filing a motion to compel.

8. Discovery abuses may result in the award of attorney fees against an employee, department or attorney who abused the Board's discovery process. Board Rule 8-39B.

D. Pre-trial Motions –

1. Response Time for Motions – Under Board Rule 8-57B(B), an opposing party has ten days to respond to a motion. That date may be expedited by the ALJ. If a motion is filed just a few days before the hearing, the ALJ has various options – to expedite the response, to set a telephone motions hearing, to obtain a verbal response on the day of hearing, to reserve ruling on the motion until the Initial Decision, or to continue the hearing.

2. Continuances – Motions for continuance require consultation with opposing counsel on the question of continuance and the issue of available dates. The party requesting the continuance should contact the Board to determine which dates may be available for the hearing ALJ, and the motion should include a proposal of at least two alternative dates.

3. Motions to Dismiss or for Summary Judgment –

   (a) Motions for Dismissal (C.R.C.P, Rule 12) or Motions for Summary judgment (C.R.C.P. Rule 56) may be appropriate in a particular personnel case. The Board

typically sees Motions to Dismiss from the agency on jurisdictional grounds based upon the probationary status of the employee or, more recently, arguments about the Board's jurisdiction over grievance appeals.

(b) These motions are substantive and time consuming – both to prepare and to decide. The earlier these motions can be filed, the more likely they will be decided in time to possibly spare the parties work in the case. Case deadlines are not typically extended on the basis of a pending motion, so be prepared to go forward with your case unless you have convinced the ALJ that a stay of deadlines is appropriate in your case while the motion is pending.

(c) Practitioners should take care to present summary judgment motions in the proper C.R.C.P Rule 56 format. The motion requires the use of affidavits based upon personal knowledge; a response also typically requires answering affidavits as well.

E. Testimony Via Telephone or Video Conferencing –

1. ALJs have the authority to regulate the manner in which evidence is to be received. C.R.S. §24-4-105(4).

2. Motions for telephone or video testimony must always be discussed with opposing counsel. If there an objection to the procedure, then the motion should be filed well in advance of hearing. An opposed motion made at, or close to, the time of hearing does not stand a good chance of being granted.

3. A motion for telephone or video conference testimony should address a variety of issues, such as whether the witness to be presented via phone or video is necessary to determine a credibility issue in the hearing, the amount of testimony to be presented in this manner, whether the witness will need to refer to exhibits or demonstrative evidence during testimony, and any material information about the setting in which the witness will be located during testimony.

4. If the motion is granted, the party offering that witness must be prepared. Make sure to have copies of exhibits provided to the witness, that the witness is in an area where she or he will not be interrupted or potentially coached, and where the background noise if low. Witnesses who testify in this

manner should be prepared to state on the record whether or not they are testifying with notes or other documents in front of them.

F. Pre-hearing Statements -

1. The required format is set out in the Notice of Hearing and Prehearing Order and in Board Rule 8-59B.

2. The deadline for submission of prehearing statements is "no less than 15 days prior to the commencement of a hearing." Board Rule 8-59B.

3. Use the prehearing statement to educate the ALJ. Notices of Appeal are perfunctory and often very broad. The prehearing statement, however, can focus the ALJ on the issues which you believe to be most important.

4. Stipulations save everyone time and help to clearly frame the issues for hearing. Work with opposing counsel to obtain reasonable statements of the uncontested facts.

5. Take care to list all of your potential case-in-chief witnesses and exhibits. If there is a need to add a witness or document after the prehearing statement is filed, the primary question for the ALJ will be one of whether there is surprise or other unfairness to the opposing party by the late addition.

G. Settlement –

1. Board Rule 8-62B provides that "both parties must attempt to resolve an appeal before the hearing." (emphasis added). The ALJs will often ask for a statement on the record about what was attempted.

2. Board Rule 8-10B now provides that the ALJ may require mediation conferences.

3. The Board's settlement process is described in Board Rules 8-13B through 8-20B.

HEARING PROCEDURE - PRACTICE POINTS

A. Hearing Logistics.

1. **Preliminary Matters**. Discuss all preliminary matters with opposing counsel in an attempt to get a stipulation prior to the start of the hearing.

2. **Witness Coordination**. The Board recognizes that most witnesses in our hearings are employees of the State of Colorado; therefore, we will work with you to minimize the time public employees are away from their jobs.

a. Talk to opposing counsel at least a week prior to hearing in order to coordinate witnesses. If you present your case-in-chief first, there is no need to have all of your witnesses present at the outset of the first day of hearing. Depending on the length of your hearing, you may stagger their arrival.

b. If you present your case-in-chief second, you have some flexibility as to when your witnesses will need to appear. If the hearing will go two days, you may agree with opposing counsel, subject to the ALJ's approval, not to have many of your witnesses appear until the second day of hearing.

PRACTICE TIP: In planning your case presentation, assume the first party will have the first 50% of hearing time; the second party will have 40%; and 10% will be left for rebuttal. At least one of the Board ALJ's has started limiting the time for case presentation in accordance with these ratios.

c. Check in with the ALJ on witness coordination at the outset of the hearing, and throughout the hearing, as necessary.

d. Gauge the length of each witness's testimony (including direct, cross, re-direct, and re-cross), and then make an informed decision on when you expect to call each witness.

e. Prepare a list of all witnesses and their contact information and be sure your next witness (or two) is always within ten minutes of the hearing room. We will not take break time in order to wait for a witness; you will have to call your client or advisory witness in the event a witness is late.

f. If necessary, we will take witnesses out of order, to accommodate work schedules.

g. All witnesses must be available to you by telephone at all times during the hearing.

3. **Stipulations**. The parties must confer on stipulations of fact and exhibits prior to the time they submit Prehearing Statements. It is absolutely essential, early in your case preparation, to make lists of proposed stipulated facts and exhibits. This will save you hearing preparation time in the long run, and will also save time at hearing.

a. Prehearing Statements require that you include a list of Stipulated Facts and Exhibits. Therefore, you must confer with the opposing party concerning those stipulations very early in case preparation.

b. Prehearing Statements must also include a list of "any additional stipulations [of fact] offered to facilitate disposition of the case."

PRACTICE TIP: While there is no requirement that the opposing party respond to this list, you may send opposing counsel a letter requesting his or her position on your proposed stipulated facts. If you do not receive any response after a reasonable period of time, you may file a motion seeking relief under Board Rule 8-60B. This rule requires the parties to comply with all prehearing procedures. The ALJ may then require the parties to confer regarding proposed stipulations, under the powers set forth in the APA.

c. If the case is commenced prior to evidentiary hearing, Stipulated Facts and Exhibits must also be presented at that time.

d. Keep in mind that Stipulated Exhibits enable your witness to testify about a document immediately, without first having to take time to lay a foundation. This testimony is far more efficient and compelling.

B. <u>The Heart of the Case</u>

1. **Evaluate Your Evidence**. As you begin to prepare for hearing, identify exactly what facts you need to prove. Then, make a simple chart of the evidence and how you will get it into the record. For example, "Events on July 6, 2005. Exhibits: incident reports; email by x to y dated July 6; etc. Witnesses: Mr. Blue and Mrs. Green."

a. List all witnesses you need to call and the subjects of their testimony. Cases with highly contested facts usually involve intensive witness testimony. These cases often hinge on credibility determinations. Assess your witnesses' credibility; try to anticipate attacks on your witnesses' motives and credibility prior to hearing; develop a strategy for addressing those concerns.

b. Some cases involve primarily documentary evidence. In these cases, you need to review the documents closely to determine the most important parts of the documents to bring to the ALJ's attention.

c. Prior to hearing, it is essential to determine what parts of the exhibits need explanation or clarification by witnesses.

PRACTICE TIP: It is equally important to identify those portions of the exhibits you can simply discuss and highlight in Opening Statement and Closing Argument. Determine this prior to hearing and start to draft your Closing Argument at that time. This will save unnecessary time spent on the issue in hearing.

2. **Handling Witnesses.**

a. Prepare Witnesses Thoroughly. If credibility will be a determining factor in your case, as it usually is, be absolutely sure you have fully prepared your witnesses. They need to have been brought back in time to the events in question. They need to have reviewed all important exhibits in the case within a week or two of the hearing. This will give them a command of the facts and the recall necessary to testify with confidence.

b. Witnesses with almost no recall generally have weak credibility, and can take up a lot of hearing time lingering over questions. You do a disservice to the Board and to your client if you fail to have your witnesses review documents prior to hearing.

c. There are sometimes tactical reasons for not preparing witnesses prior to hearing. You have to make this determination.

d. Notwithstanding the above, it is also important to note that you should not over-prepare witnesses either. The best witnesses are those who have been fully advised of the subject areas they will be asked to cover, and have a good command of the documents before them, but have not been so coached as to have answers remarkably similar to other witnesses for the same party.

e. Prepare your witnesses for the rigors of cross-examination. Discuss how they can and should handle their anger and self-indignation when opposing counsel calls their honesty into question. Acknowledge that we all have a tough time in this situation and ask them to prepare for it in the manner that works best for them.

f. Inform your witnesses that telling the truth, warts and all, results in a far better credibility determination than a great sales job.

3. **Direct Examination.** The most powerful evidence is provided through your witnesses and exhibits. DO NOT TESTIFY FOR YOUR WITNESSES - it undercuts the power of your case.

a. Ask direct examination questions that begin with: Who, What, How, Why, or When.

b. Maintain control of your witnesses. If they start to ramble, not answering your question, interrupt and bring them back. Needless to say, you may not interrupt a witness who is giving a responsive answer you don't want to hear.

c. Do use leading questions on direct examination in order to guide your witness through uncontested information. It is an essential time saver. C.R.E. 611(C) permits this, stating, "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." For example, "After talking to those co-workers you then sent the disciplinary action letter, which is Exhibit 1?" There is no need to ask, "What did you do next?"

d. Use bridge statements to move to a new subject area, "I am now going to ask you questions about x." These orient everyone in the room, including the witness.

4. **Cross-Examination**. "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." C.R.E. 611(b).

a. Choose your battles on cross-examination. Attorneys sometimes want to rebut every single issue raised on direct examination. This is very often a waste of time. If necessary, ask for a break so you can review your notes taken on direct examination, thereby enabling you to highlight the important areas you must cover on cross.

b. Failure to prioritize the issues on cross-examination will likely result in a time limit being imposed by the ALJ.

c. Don't take the bait! Sometimes, ancillary issues arise that parties get hooked on in cross-exam. If a new side issue arises during hearing, don't put too much time into it. Determine how you want to handle the issue in the most efficient way possible, and move on.

PRACTICE TIP: On both direct and cross, listen to the witness's answers. Don't think about your next question until you hear the answer first. Take advantage of the opportunities witnesses provide you with their answers.

5. **Handling Exhibits.**

a. As stated above, get a stipulation to admit as many exhibits as possible early in case preparation. This is an enormous time saver and fosters a more powerful presentation of evidence at hearing.

b. Prior to hearing, make notes on each contested exhibit indicating:

- name of witness who will get it in;
- foundation questions you will ask the witness in order to have it admitted into evidence;
- rules of evidence that apply to its admission, including your responses to anticipated objections.

c. Lay a foundation for the introduction of exhibits into evidence as follows: date and title of the document; to and from whom; confirm who actually wrote it; the general subject matter; is the exhibit the entire document; if it is a copy, is the copy an accurate one.

d. If the document is a business record, lay the appropriate foundation under C.R.E. 803(6), including whether the document was kept in the normal course of business.

e. If the document consists of an individual's personal notes, establish when the witness wrote them, so the ALJ can determine their degree of accuracy and trustworthiness.

PRACTICE TIP: Never have witnesses read portions of exhibits that have been admitted into evidence. This constitutes cumulative evidence.

f. Be sure all witnesses have reviewed the exhibits they will testify about prior to hearing. When they take the stand, they should be ready to testify about the document.

g. Make notes on the exhibit as to what questions you will ask. For example, "Did you consider this document in making your decision? [Answer]. How? [Answer] What were the most critical pieces of information you considered from this document? Turning to page 3, section A, did you consider this issue? How?"

h. If an explanation of the exhibit, its origin, its purpose, is necessary, ask those questions.

i. Do not make arguments through your witness. Save those for your Closing Argument.

j. If portions of the exhibit are hard to read, have the witness clarify them.

k. Use witnesses to clear up apparent conflicts in the documentary record.

6. **Hearsay.** The Colorado Administrative Procedures Act, Section 24-4-105(7), C.R.S. provides:

> "The rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts. However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceeding, the person so conducting the hearing may receive and consider evidence not admissible under such rules if such evidence possesses the **probative value commonly accepted by reasonable and prudent men in the conduct of their affairs**. . . The [ALJ] may exclude incompetent and unduly repetitious evidence. Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available; but, upon request, the party shall be given an opportunity to compare the copy with the original." (Emphasis added.) *Indus. Claim Appeals Office v. Flower Stop*, 782 P.2d 13 (Colo. 1989).

a. In Colorado, we are extremely fortunate to have *Flower Stop*. Most jurisdictions nationwide do not have such a well reasoned decision, based on sound common sense, setting forth the factors to be utilized under the APA.

b. The factors under *Flower Stop* that guide the ALJ in determining whether evidence is reliable, trustworthy, and probative for the purposes of an administrative hearing are:

- whether the statement was written and signed;
- whether the statement was sworn to by the declarant;
- whether the declarant was a disinterested witness or had a potential bias;

- whether the hearsay statement is denied or contradicted by other evidence;
- whether the declarant is credible;
- whether there is corroboration for the hearsay statement;
- whether the case turns on the credibility of witnesses;
- whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and
- whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant. *Id.*

PRACTICE TIP: Prior to introducing hearsay testimony through a witness, establish as much of a record on the above factors as possible. Develop the record enough to give the ALJ a feel for where the hearsay evidence fits into the context of the case, and whether its trustworthiness is such that it should be admitted.

c. When opposing counsel objects on grounds of hearsay, please do not respond, "Under *Flowerstop* it comes in." This is not a persuasive argument! Discuss the facts of the case as they apply to *Flowerstop*.

d. **Admitting Documents but not for Truth.** It is not uncommon in Personnel Board proceedings to admit documents considered by the appointing authority, because they are relevant to the Board's determination of whether he or she adequately investigated and considered all relevant information under *Lawley*. However, if such documents contain hearsay statements of individuals that will not be called as witnesses, a close *Flowerstop* analysis will be conducted.

e. If you need time to find a citation or an evidentiary rule in the middle of a hearing, you may ask for short break in order to do so.

f. **PRACTICE TIP**: Read the Colorado Rules of Evidence periodically. To be fresh on the Rules prior to hearing gives you an edge in the heat of battle. You will discover something useful every time you read them.

g. Always bring the Rules of Evidence to the hearing.

7. **Opening Statements**. Use your opening statement to paint a picture for the ALJ and to sell your client's story. The joy of the opening statement is that no one can interrupt you - nothing interferes with your worldview of the case. Feel free to introduce a theme in the opening statement that you will repeat throughout the trial, if appropriate.

   Take notes on opposing party's opening statement; repeat the facts they did not prove in your closing argument.

8. **Closing argument.** Closing argument is the time to tie all the evidence together and make sense of it. If credibility is an issue, discuss and resolve credibility determinations for the ALJ, based on your theme of the case. In addition,

   a. Prior to hearing, identify those portions of the record you will need to highlight in Closing Argument.

   b. List the facts the opposing party never established.

   c. Discuss all elements of the claims and defenses pertaining to the case.

   d. Explain why your version of the case is the most logical and credible one.

9. **Commencements**. Under new legislation, we are setting first hearing dates ninety days following the filing of appeal. Section 24-50-125.4(2), C.R.S. You may have only one continuance for thirty days. We are adhering to this mandate strictly; exceptions are rare.

   a. If your case is commenced pursuant to Board Rule 8-61B, you must present an opening statement and stipulations as to facts and exhibits.

   b. If your case has settled and you want to save the expense of additional litigation, you may file a motion to vacate the evidentiary hearing and to commence the case. The Board will push you to get the agreement signed quickly.

   c. Unless you have filed a stipulated motion to dismiss the case and have been advised by Board staff that the ALJ has signed a Dismissal Order, you must appear at the commencement.

   d. Failure to appear at a commencement without good cause is subject to the provisions of section 24-50-125(7), C.R.S.

e. Notice of settlement to a member of the Board's staff does not constitute good cause for failure to appear under 24-50-125(7).

f. If both parties fail to appear at a commencement without good cause, judgment will enter against the party who bears the burden of proof.

EX PARTE COMMUNICATIONS WITH TRIBUNALS:

LEGAL REQUIREMENTS AND COMMON SENSE

Originally Compiled by Marshall A. Snider
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I. Both the Colorado Rules of Professional Conduct and the Colorado Code of Judicial Conduct prohibit *ex parte* communications between judges and lawyers.

a. Lawyers shall not communicate *ex parte* with a judge or tribunal except as permitted by law. Colo. RPC 3.5(b).

b. A judge should not initiate or consider *ex parte* or other communications concerning a pending or impending proceeding, except as authorized by law. Colorado Code of Judicial Conduct, Canon 3(A)(4).

c. A judge must conduct himself or herself in a manner that promotes confidence in the integrity and impartiality of the judiciary. Colorado Code of Judicial Conduct, Canon 2(A).

II. The state Administrative Procedures Act ("APA") also prohibits the use of *ex parte* materials or representations by either the agency or a hearing officer. Colo.Rev.Stat. § 24-4-105(14)("[N]o *ex parte* material or representation of any kind offered without notice shall be received or considered by the agency or by the hearing officer").

III. *Ex parte* communications are written or oral communications to a tribunal made without notice to other parties. *See Rothrock*, *Ex Parte Communications With A Tribunal: From Both Sides*, 29 The Colorado Lawyer, No. 4, pg. 55 (April 2000)(hereafter *Rothrock*).

a. The key to avoiding an *ex parte* written communication is to provide copies of the documents to all parties at the same time. *See In the Matter of Green*, 11 P.3d 1078, 1087 n. 8 (Colo. 2000)(written communication to a judge was not *ex parte* when copies were provided simultaneously to opposing counsel).

b. The rules of professional conduct prohibit violation of the rules through the actions of another person. Colo.RPC 8.4(a). Government lawyers should ensure that their government clients understand this prohibition and do not communicate with judges. *See Comiskey v. District Court*, 926 P.2d 539 (Colo. 1996)(allegations of improper *ex parte* contact based upon a call made by an expert witness for the state to the judge); *Wilkerson v. District Court*, 925 P.2d 1373 (Colo. 1996)(improper *ex parte* communication by victim-witness coordinator). It is also possible to violate the rules against *ex parte* communications through improper use of staff to communicate information. *See Colorado Energy Advocacy v. Public Service Company of Colorado*, 704 P.2d 298, 303 and n. 7(Colo. 1985)(holding that information obtained from a party to a tariff proceeding and presented by staff to the P.U.C. at a meeting in which the other party was not notified was an improper *ex parte* communication in violation of C.R.S. § 24-4-105(14); noting that an *ex parte* communication to the PUC from PUC staff who participate in the hearing, as opposed to the staff member who advise the PUC, "would be an improper as an *ex parte* communication from any other party").

IV. Communications "permitted" or authorized by law" may include communications made during default judgment proceedings, restraining orders and other emergencies, and scheduling matters. *Rothrock* at 57- 58. However, it is not appropriate to contact a judge directly to determine if a decision has issued.

a. Communications may be made to a judge's staff on scheduling matters, but avoid discussion of substantive or procedural matters with staff. *Rothrock* at 59. A communication between a judge and counsel regarding the preparation of a proposed order may be proper if the communication constitutes a simple directive to prepare the order. *Aztec Minerals Corp. v. State*, 987 P.2d 895, 900 (Colo.App. 1999). However, such a communication will result in an invalid order if the judge and counsel discuss the form and content of the order in an *ex parte* manner. *Williams v. Farmers Insurance Group, Inc.*, 720 P.2d 598, 600 (Colo. App. 1985).

b. Communication with a judge may be permissible on ministerial matters with the consent of opposing counsel. To avoid even the appearance of impropriety it is preferable that those communications be made with the judge's staff.

c. Even in emergency, ministerial, or scheduling matters, a direct *ex parte* communication runs the risk of an ethical violation of a recusal motion.

V. The rules of professional conduct and the rules governing recusal are designed to avoid even the appearance of impropriety. S.S. v. Wakefield, 764 P.2d 70, 73 (Colo. 1988); *Rothrock* at 58.

a. Improper communications run the risk of recusal as well as an ethical violation for the involved individuals. *Ex parte* communications can have real attorney disciplinary consequences, not only for violation of Colo. RPC 3.5(b), but also potentially for assisting judges in violation of their own ethical obligations pursuant to Colo.RPC 8.4(f). *Rothrock* at 59 and note 97.

b. Improper contact with by a judge can result in an ethical violation even if the contact does not require recusal of the judge. *Comiskey*, 926 P.2d at 544 (holding that "previous decisions demonstrate that the mere allegation [in a motion for recusal] that a judge engaged in an *ex parte* communication is not enough to require recusal. The petitioner must also allege facts sufficient to infer that the judge is or appears to be biased"). *See also Wilkerson*, 925 P.2d at 1377; *Wakefield*, 764 P.2d at 72 – 74.

c. In the quasi-judicial setting of an administrative court, the Colorado Supreme Court has endorsed the concept of "curing" *ex parte* contacts for purposes of the state APA requirements by conducting a supplemental hearing or proceeding at which the absent party may inquire about the *ex parte* communications. *Colorado Energy Advocacy*, 704 P.2d at 305(holding that a second hearing at which plaintiffs cross-examined opposing party and agency representatives on the information previously given to the Public Utilities Commission *ex parte* and presented their own analysis and data in rebuttal "placed in the public record all of the evidence… and allowed plaintiffs to consider and rebut the evidence previously received by the PUC in secret").

PRACTICAL PROBLEMS FOR LAWYERS AND JUDGES

Frequency of Contact:

Government practice often brings attorneys into contact with the same judges on a regular basis. Frequency of contact by itself, however, is not grounds for recusal. *People v. Elsbach*, 934 P.2d 877, 881 (Colo.App. 1997).

Nevertheless, both counsel and judges must be vigilant to avoid comments or actions that give rise to an appearance of impropriety. For example, though it may be a common courtesy, an attorney or judge on appearing in court should

not say to each other words such as, "Nice to see you again." If the attorney wishes to discuss another case with the judge after the present case is conducted (assuming that this is an allowable ex parte contact), be sure to state in making those arrangements that the discussion in on another case.

In contacts outside of the courtroom, judges and attorneys should avoid any conversation, even if it is an innocent comment regarding the weather or the Denver Broncos. Consider the appearance to those currently before the judge who are not privy to the content of the conversation. It may appear to others that the conversations is about a pending case or, even if not, that the judge and counsel are friendly in manner that may result in bias. *See Wells v. Del Norte School District C-7*, 753 P.2d 770, 772 (Colo.App. 1987)(holding that there was a blatant appearance of impropriety created when the hearing officer and government witness shared a table at lunch during the hearing, and that the remedy required vacating the hearing officer's decision even though the hearing officer and witness did not discuss the pending case).

Even if there is no current case pending between the judge and attorney observed in conversation, other frequent participants before the judge (e.g. defense counsel) may gain a lack of confidence in the judge's impartiality upon seeing that conversation. Conversation should be limited to a mere acknowledgement of presence ('hello," "good morning").

Socializing between frequent participants and the judge may be appropriate in public settings outside of the courthouse (such as CLE and bar association meetings).

Former Colleagues:

Care should be taken in meeting and addressing former colleagues who are not on the bench. Follow the above guidelines regarding frequency of contact an also avoid familiar forms of address. The judge should be addressed as "judge" and not be name in any public contact.

Socializing with former colleagues or friends who are now on the bench is permissible. However, a lawyer should not put the judge in an uncomfortable position by asking about pending matters, even if the lawyer is not involved in the case.

The Pro Se Opponent:

The Board's rules explicitly require that counsel for a represented party take the lead in coordinating with a *pro se* party. Board Rule 8-63B requires that counsel for the represented party "shall be responsible for coordinating with the unrepresented party for the purpose of scheduling conferences, obtaining

hearing dates and preparing and submitted prehearing pleadings and documents."

APPEALS OF INITIAL DECISIONS TO THE STATE PERSONNEL BOARD

PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES

There is no right to appeal a Preliminary Recommendation of the Administrative Law Judge. In fact, under Board Rule 8-51B, the Board will not consider anything submitted by either party after the preliminary recommendation has been issued. Under §24-50-123(3), C.R.S., the Board is required to review and grant or deny a petition within ninety (90) days of receipt of the petition, except petitions filed with the Board that result in an investigation into allegations of discrimination or whistleblowing are exempt from the 90-day review requirement.

INITIAL DECISIONS OF THE ADMINISTRATIVE LAW JUDGES

Each party has the following rights: (1) to abide by the Initial Decision of the Administrative Law Judge; or (2) to appeal the Initial Decision of the Administrative Law Judge to the State Personnel Board.

I. COLORADO REVISED STATUTES:

A. Timelines. Section 24-4-105(15)(a) provides filing deadlines for any party who seeks to reverse or modify the Initial Decision of the Administrative Law Judge. The first deadline is twenty (20) days after the issuance of the initial decision, when a designation of record must be filed and served on all parties. The designation of record indicates precisely what the appealing party wants to include as the record. Ten (10) days after that, any other party may also file a designation of additional parts of the record or transcript of the proceedings. The transcript must be prepared by a court reporter or "disinterested, recognized transcriber." If the Board's review is limited to a pure question of law, no transcript is necessary, and the grounds of the Board's decision will be within the scope of the issues presented on the record. By statute, the record shall include everything upon which the decision of the administrative law judge was based, the rulings upon the proposed findings and conclusions, the Initial Decision of the Administrative Law Judge, and any other briefs filed. After the designation of record is filed, the 30/60/90 deadlines apply.

Section 24-50-125.4(4), the controlling statute for appeals, provides for a 30/60/90-day scenario. The party who seeks to modify the Initial Decision of the Administrative Law Judge, that is, the appellant, must file an appeal with the Board within **thirty (30) days** of the issuance of the initial decision. Within **sixty (60) days** after a designation of record is filed by the appellant, the Board shall certify the record, which means that a record is prepared by Board staff, and then certified as the official version of

events before the Board. Finally, the Board will meet in public session, conduct its review, and issue its final decision within **ninety (90) days** after the record has been certified.

B. Transcript Fees. Section 24-4-105(13) discusses payment of the cost of a transcript of hearing by the party seeking to reverse or modify the decision. If a transcript is ordered, the cost is to be borne by the appealing party. If the Respondent agency acquires a copy of the transcription of the proceedings, its copy of the transcription is to be made available to any party at reasonable times for inspection and study, according to this statute.

PRACTICE TIP: A disk containing the hearing proceedings is available via written request to the Board's Program Assistant, at the rate of $10.00 per disk. Board staff will inform you of the number of disks per hearing. Upon receipt of the written request and payment, a copy of the CD ROM will be produced within five days. Parties are responsible for making their own arrangements for preparation of transcripts.

C. The Record. Section 24-4-105(14)(a) states that the record shall include pleadings, applications, evidence, exhibits, and other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any party, and any written brief filed. The Board may permit oral argument, but rarely does it grant a motion for oral argument.

II. BOARD RULES:

Chapter 8 Dispute Resolution

Post-Hearing Proceedings

8-65B. Petitions for Reconsideration. Rule 8-65B defines the parameters for a request or petition for reconsideration of the initial decision, which may be filed by a party within five (5) days of receipt of the Initial Decision of the Administrative Law Judge. In addition, the administrative law judge may reconsider an initial decision without the petition within ten (10) days of issuance. Petitions for reconsideration are limited to matters alleged to be overlooked or misunderstood by the administrative law judge and cannot contain other or new arguments. Oral arguments are not permitted on any petition. The administrative law judge typically issues an order or determination of the petition for reconsideration, but if no order is issued, the petition for reconsideration is considered denied. Filing a petition for reconsideration does not extend the time for filing an appeal of the initial decision; thus, the time for filing an appeal of the initial decision runs contemporaneously with the time for filing a petition for reconsideration.

8-66B. States that tape recordings of a hearing shall be erased sixty (60) days after expiration of all rights resulting from that hearing.

Board Review of Initial Decisions and Dismissal Orders

8-67B. Essentially mirrors §24-50-125.4(4), C.R.S., addressing appeals of dismissal orders and initial decisions of the administrative law judge. Appeals must be filed with the Board and a copy served on the opposing party, within thirty (30) days of mailing of the dismissal order or initial decision, and there are no extensions of time for cross-appeals. Timely filing is determined by the date the Board actually receives the appeal, not the date of the postmark, while failure to serve a copy on the opposing party may result in dismissal.

8-68B. Parallels §24-4-105(15)(a), C.R.S., with regard to the requirements for a designation of record to be filed within twenty (20) days following the date of issuance of the initial decision and for a copy of this designation of record to be served on all parties. Within ten (10) days after the initial designation of record is filed, any other party or the Board may also file a designation of additional parts of the transcript. It is a rare occurrence for the Board to file a designation of additional parts of the transcript. At the time the appeal is filed, which is within thirty (30) days of the issuance of the initial decision, the appealing party must pay for preparation of the record, which is currently $50.00. An appeal may be dismissed for failure to pay the cost of preparing the record.

8-69B. Like §24-4-105(13), C.R.S., addresses a transcript as part of the record and the responsibility on the part of the appealing party for obtaining and paying a certified court reporter to prepare the transcript and file it with the Board no more than fifty-nine (59) days after the designation of record. If a party does not designate a transcript, the failure to do so is deemed a waiver of a request to prepare the transcript. The record will be certified without a transcript if it is not timely prepared, and the transcript will not be included in the record or considered on appeal. In absence of a transcript, the Board is bound by the findings of fact of the administrative law judge, but may still modify or reverse one or more conclusions of law of the administrative law judge.

8-70B. States that the appeal of the initial decision must describe, with specificity, the basis for the appeal and the findings of fact and/or conclusions of law in the initial decision that the appealing party alleges to be improper. In addition, the appeal must clearly enunciate the remedy being sought by the appealing party.

8-71B. Refers to the steps the Board takes at "day 60," upon the certification of the record of administrative proceedings. At this step, the Board notifies the parties in writing of the date the Board will consider the appeal. The parties are sent both a "Certificate of Record of Administrative Proceedings before the State Personnel Board" and a "Notice of Briefing Schedule and Board Review."

8-72B. Specifies filing timelines for the briefs, directing the appellant to serve and file the opening brief within twenty (20) days after the Board certifies the record. The opposing party must file its brief ten (10) days after it receives the appellant's brief. The appellant may then file a reply brief within five days. There is no 3-day extension of time for pleadings sent by mail. There are no provisions for a reply brief to be filed by the opposing party. Another requirement is that the final brief must be filed no later than twelve (12) days before the Board meeting where the appeal will be considered so that the Board members may be given enough time to read the briefs for the appeal. Board packets are sent out to Board members and include all briefs submitted for a scheduled Board review. Finally, no extensions of time will be granted unless they allow both parties to file briefs within that time limit.

8-73B. Directs the parties to submit "typewritten" briefs, double-space the text, and use only 8 ½ x 11-inch paper. This rule specifically states that briefs shall not exceed ten (10) pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing statutes, rules, regulations, etc. An original and eight copies of a brief must be filed with the Board so that Board members, Counsel, Director, and Legal Assistant may each have a copy for the Board meeting. Also, a copy must also be served on the opposing party.

8-74B. Addresses the filing of motions and directs the parties to file an original and eight copies of any motion (except extension of time), plus serve a copy of any motion on the opposing party. The Board Director will rule on motions for extension of time or motions to dismiss based upon settlement.

8-75B. Reiterates §24-4-105(14)(a), C.R.S., stating that in general, no oral argument will be heard and parties do not need to be present at the Board meeting where the appeal will be reviewed. Oral arguments may be allowed at the discretion of the Board, and a request for oral argument must be filed no later than the date the requesting party's brief is due.

8-76B. Instructs an appealing party to serve a copy of the notice of appeal on the Board at the time of filing the notice.

III. **STANDARD OF REVIEW** (the State Administrative Procedure Act ("APA"):

A party may appeal an Initial Decision of the Administrative Law Judge based on a challenge to the findings of fact of the administrative law judge ("ALJ") and/or a challenge to the ALJ's conclusions of law.

A. Challenge to findings of fact:

- Section 24-4-105(15)(b), C.R.S., states, "The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the

administrative law judge or the hearing officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence. The agency may remand the case to the administrative law judge or the hearing officer for such further proceedings as it may direct, or it may affirm, set aside, or modify the order or any sanction or relief entered therein, in conformity with the facts and the law."

- Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another. Findings of fact involve the raw, detailed, historical data underlying the controversy upon which a legal determination rests, including testimony from witnesses, whose credibility and weight are within the province or purview of the ALJ. *Barrett v. University of Colorado*, 851 P.2d 258 (Colo.App. 1993).

- A party's challenge to the factual findings of the ALJ must be supported by transcripts made available for the Board's review. A party challenging the ALJ's findings of facts must take the critical steps in the initial stages of mounting an appeal of designating as part of the record, and then ordering, the complete transcript of an evidentiary hearing to be made part of the record. A complete transcript must be requested if the sufficiency of the evidence is going to be argued. The arrangement, including payment, for a transcript by a disinterested, recognized transcriber or certified court reporter is the responsibility of the appealing party.

- If a party is challenging the factual findings of the ALJ, the appeal of the initial decision should describe, in detail, the basis for the appeal, the specific findings of fact that are alleged to be improper, and the remedy being sought. Absent these basics, an appeal may not be clearly enough set forth for Board review and may not result in a favorable decision by the Board.

- A party challenging the findings of fact needs to keep in mind that the standard for setting aside an ALJ's findings of fact establishes the assumption that the ALJ's findings of fact are accurate. Thus, arguments to the contrary of this assumption, as developed in the appellant's briefs, must demonstrate inaccuracies in any finding of fact that is being challenged.

- The Board may, upon review of the record and of the Initial Decision of the ALJ, adopt findings different than those of the ALJ if it concludes that the findings are contrary to the weight of the evidence.

- Therefore, a party's challenge to any finding of fact must demonstrate that the finding of fact is contrary to the weight of the evidence, not that the ALJ's decision was arbitrary or capricious.

B. Challenge to conclusions of law, also referred to as "ultimate conclusions of facts" or "ultimate facts":

- Conclusions of law are findings as determined through application of rules of law. A conclusion of law involves a mixed question of law and fact, settles the rights and liabilities of the parties, and usually is phrased in the language of the controlling statute or legal standard. *State Board of Medical Examiners v. McCroskey*, 880 P.2d 1188 (Colo. 1994).

- Unlike a challenge to an ALJ's finding of fact, an ultimate fact or conclusion of law may be challenged or changed without a transcript of the hearing. Therefore, a party mounting a challenge to a conclusion of law need not designate as part of the record or order a transcript.

- If a party is challenging the conclusions of law of the ALJ, the appeal of the initial decision must describe, in detail, the basis for the appeal, the specific conclusions of law that are alleged to be improper, and the remedy being sought. Absent these basics, an appeal may not be successful and an initial decision may not be overturned.

- An ultimate fact may be "disturbed on appellate review" if it is unsupported by any competent evidence or if it is based on an incorrect legal conclusion applied by the ALJ to the underlying facts.

- However, the distinction between evidentiary facts and ultimate facts is not always clear. It is up to the party challenging the conclusion of law to clarify what is being challenged for the Board's review by carefully laying out the issues of the appeal. *McCroskey, supra.*

- An ALJ's determination of an ultimate fact may be set aside on review if it is unsupported by any reasonable basis.

- Although an ALJ's finding of evidentiary fact may not be altered by the Board if supported by the evidence or any reasonable basis, the Board is not precluded from drawing a different ultimate conclusion from it.

- The Board may remand the case to the ALJ for such further proceedings as it may direct, or it may affirm, set aside, or modify the order of the ALJ. If the Initial Decision of the ALJ is overturned by the Board, the Board's decision will be upheld on review by the Court of

Appeals unless that decision is found to be arbitrary, capricious or contrary to rule or law.

IV. FREQUENTLY ASKED QUESTIONS:

- Once an Initial Decision is issued, how do I get notice of my appeal rights? The Initial Decision contains a written Notice of Appeal Rights, attached. See Attachment to Initial Decision of the Administrative Law Judge (below).
- When should I file a petition for reconsideration? See Notice of Appeal Rights.
- How will I know when the record has been certified. You will receive a Certificate of Record of Administrative Proceedings before the State Personnel Board. See Example of Board's Certificate of Record of Administrative Proceedings before the State Personnel Board (below).
- How do I know when to file briefs? You will receive a Briefing Schedule. See Example of Board's Notice of Briefing Schedule and Board Review (below) and read Notice of Appeal Rights carefully.
- How do I get copies of tapes/disks? Contact the Board Program Assistant and see Board Policy regarding Obtaining Copies of Hearing Proceedings (below).
- How do I get a hearing transcript? Contact and pay a disinterested, recognized transcriber who will contact the Board, obtain a disk of the hearing and transcribe it.
- Once prepared, can I check out a record? See Board Policy regarding Preparation of the Record on Appeal (below).
- How do I file a cross-appeal and briefs on a cross-appeal? A cross-appeal must be filed like an appeal, that is, within the time frames designated. The order of filing is as follows: appeal, cross-appeal, opening brief by appellant, answer brief to opening brief & cross-appellant's opening brief by cross-appellant, reply brief & answer brief to cross-appellant's opening brief by appellant, reply brief by cross-appellant.

V. PRACTICE TIPS:

- A motion or petition for reconsideration may be filed within five (5) days after receipt of the Initial Decision and may be helpful in correcting a clear factual error or omission or legal authority that has been published since the closing of the record, but a motion for reconsideration is not likely to result in a judicial change of mind based on continuing legal argument.
- A petition for reconsideration does not extend the thirty-calendar day deadline for filing a notice of appeal of the decision of the ALJ.
- An appeal to the Board must be decided within one hundred fifty (150) days based on the official record and the briefs of the parties.
- The Board will issue a notice of the parties' briefing schedule and Board review, so that the parties know exactly when their briefs are due and when the Board must review the appeal in order to meet the statutory deadline.
- The Board Director has the authority to grant extensions of time on the briefs. However, if granting the extension of time will impact the timely consideration of

the appeal by the Board, the request is not typically granted. When requesting an extension and calculating the amount of time you will be requesting, take into consideration that the Board packets are closed twelve (12) days before the monthly Board meeting and mailed to Board members, pursuant to Board Rule 1-5B. For example, the January 2006 Board packet closes at 5:00 p.m. on January 5, 2006, to be mailed on January 6, 2006, for the January 17, 2006 Board meeting.

- If Complainant is granted an extension of time within which to file a brief, then Respondent will also be granted an extension of time within which to file a brief – so long as the granting of the extensions does not impact the timely consideration by the Board of the appeal.

APPENDIX

INITIAL DECISIONS OF THE ADMINISTRATIVE LAW JUDGES

I. COLORADO REVISED STATUTES:

A. §24-50-125.4(4):

If an administrative law judge conducts a hearing on behalf of the board, any party who seeks to modify the initial decision must file an appeal with the board within thirty days of the initial decision pursuant to section 24-4-105(14). Within sixty days after the record is designated in accordance with section 24-4-105(15)(a), the board shall certify the record. The board shall conduct its review in accordance with section 24-4-105(15)(b) and issue its final decision within ninety days after the record has been certified.

B. §24-4-105(13):

The administrative law judge or the hearing officer shall cause the proceedings to be recorded by a reporter or by an electronic recording device. When required, the administrative law judge or the hearing officer shall cause the proceedings, or any portion thereof, to be transcribed, the cost thereof to be paid by the agency when it orders the transcription or by any party seeking to reverse or modify an Initial Decision of the Administrative Law Judge or the hearing officer. If the agency acquires a copy of the transcription of the proceedings, its copy of the transcription shall be made available to any party at reasonable times for inspection and study.

§24-4-105(14)(a):

For the purpose of a decision by an agency which conducts a hearing or an initial decision by an administrative law judge or a hearing officer, the record shall include: All pleadings, applications, evidence, exhibits, and other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any party, and any written brief filed. The agency, administrative law judge, or hearing officer may permit oral argument. No ex parte material or representation of any kind offered without notice shall be received or considered by the agency, the administrative law judge, or by the hearing officer. The agency, an administrative law judge, or hearing officer, with the consent of all parties, may eliminate or summarize any part of the record where this may be done without affecting the decision. In any case in which the agency has conducted the hearing, the agency shall prepare,

file, and serve upon each party its decision. In any case in which an administrative law judge or a hearing officer has conducted the hearing, the administrative law judge or the hearing officer shall prepare and file an initial decision which the agency shall serve upon each party, except where all parties with the consent of the agency have expressly waived their right to have an initial decision rendered by such administrative law judge or hearing officer. Each decision and initial decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented by the record and the appropriate order, sanction, relief, or denial thereof. An appeal to the agency shall be made as follows. . .

§24-4-105(15)(a):

Any party who seeks to reverse or modify the Initial Decision of the Administrative Law Judge or the hearing officer shall file with the agency, within twenty days following such decision, a designation of the relevant parts of the record described in subsection (14) of this section and of the parts of the transcript of the proceedings which shall be prepared and advance the cost therefor. A copy of this designation shall be served on all parties. Within ten days thereafter, any other party or the agency may also file a designation of additional parts of the transcript of the proceedings which is to be included and advance the cost therefor. The transcript or the parts thereof which may be designated by the parties or the agency shall be prepared by the reporter or, in the case of an electronic recording device, the agency and shall thereafter be filed with the agency. No transcription is required if the agency's review is limited to a pure question of law. The agency may permit oral argument. The grounds of the decision shall be within the scope of the issues presented on the record. The record shall include all matters constituting the record upon which the decision of the administrative law judge or the hearing officer was based, the rulings upon the proposed findings and conclusions, the Initial Decision of the Administrative Law Judge or the hearing officer, and any other exceptions and briefs filed.

II. BOARD RULES:

Chapter 8 Dispute Resolution

Post-Hearings Proceedings

8-65B. A petition for reconsideration of the initial decision may be filed by an original party within five days of receipt of the initial decision. The administrative law judge may reconsider an initial decision without the petition within 10 days of issuance. Petitions shall be limited to matters alleged to be overlooked or

misunderstood by the administrative law judge and cannot contain other arguments. Oral arguments shall not be permitted on any petition. A determination on the petition is typically issued but if no order is issued, the petition is considered denied. Filing a petition does not extend the time for filing an appeal of the initial decision.

8-66B. Tape recordings of a hearing shall be erased 60 days after expiration of all rights resulting from that hearing.

Board Review of Initial Decisions and Dismissal Orders

8-67B. Appeals of dismissal orders and initial decisions of the administrative law judge are made in accordance with statute. Appeals should be filed with the Board and a copy served on the opposing party, within 30 days of mailing of the order or decision. Any party who seeks review of all or part of the dismissal order or initial decision must file an appeal within 30 days, with no extensions for cross-appeals. Timely filing is determined by the date the Board actually receives the appeal. Failure to serve a copy on the opposing party may result in dismissal. The Board is required by statute to certify the record within 60 days after the date the record is designated. The Board will review and render a written decision within 90 days of the date the record is certified.

8-68B. Any party who seeks to reverse or modify the initial decision must file with the Board a designation of record within 20 days following the date of issuance of the initial decision. A copy of this designation shall be served on all parties. Within 10 days, any other party or the Board may also file a designation of additional parts of the transcript of the proceedings which is to be included. Any appeal of the initial decision must be filed within 30 days of the date of the decision. Any appealing party shall submit appropriate payment for preparation of the record at the time the appeal is filed.

8-69B. Any party who designates a transcript as part of the record is responsible for obtaining and paying a certified court reporter who shall prepare the transcript and file it with the Board no more than 59 days after the designation of record. Failure to designate a transcript is deemed a waiver of a request to prepare the transcript. If no transcript has been filed within the time limit, the record will be certified and the transcript will not be included in the record or considered on appeal. In absence of a transcript, the Board is bound by the findings of fact of the administrative law judge.

8-70B. The appeal of the initial decision shall describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that are alleged to be improper, and the remedy being sought.

8-71B. Upon certification of the record of administrative proceedings, the parties shall be notified in writing of the date the Board will consider the appeal. The Board is required by statute to decide the appeal no more than 90 days after the certification of the record.

8-72B. Absent specific orders to the contrary, the appellant shall serve and file the brief within 20 days after the Board certifies the record. The opposing party's brief shall be filed within 10 days after receipt of the appellant's brief. The appellant may file a reply brief within five days. Three days shall not be added for pleadings sent by mail.

A. The final brief must be filed no later than 12 days before the Board meeting where the appeal will be considered. No extensions of time will be granted unless they allow both parties to file briefs within that time limit.

B. In cases where both parties have filed an appeal, they will be ordered to file simultaneous briefs as described above unless the parties file a stipulated amended briefing schedule.

8-73B. All briefs must be typewritten and the text double-spaced, using only 8 ½ x 11-inch paper. Except by permission of the Board's director, briefs shall not exceed 10 pages, exclusive of pages containing the table of contents, tables of citations, and any addendum containing statutes, rules, regulations, and the like. An original and eight copies must be filed with the Board and a copy must also be served on the opposition.

8-74B. For any appeal to the Board, an original and eight copies of any motion (except extension of time) must be filed. For extensions of time or motions to dismiss based upon settlement of the appeal, the original and one copy must be filed with the Board. The Board director may grant motions for extension of time or motions to dismiss based upon settlement. A copy of any motion must be served on the opposition.

8-75B. In general, no oral argument will be heard and parties need not be present before the Board. Oral arguments may be allowed at the discretion of the Board. A request for oral argument shall be filed no later than the date the requesting party's brief is due. If granted, oral argument shall not exceed 15 minutes for each party. A request for additional time may be made by motion within 10 days after the briefs are closed but granted only for good cause. If oral argument is granted, parties are given reasonable notice of the time and place. The Board may terminate the argument whenever, in its judgment, further argument is unnecessary.

8-76B. Any party appealing a final Board order shall serve a copy of the notice of appeal on the Board at the time of filing the notice.

ATTACHMENT TO INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE:

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Board Rule 8-73B, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

EXAMPLE OF PARTIAL CERTIFICATE OF RECORD OF ADMINISTRATIVE PROCEEDINGS BEFORE THE STATE PERSONNEL BOARD:

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B500**

CERTIFICATE OF RECORD OF ADMINISTRATIVE PROCEEDINGS BEFORE THE STATE PERSONNEL BOARD

JANE DOE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

I, _____, Administrative Law Judge for the State Personnel Board of the State of Colorado, hereby certify that the following items attached hereto and enumerated below constitute the full and complete record of the administrative proceedings in the above-captioned case.

VOLUME NUMBER	RECORD NUMBER	PAGE NUMBER	ITEM DESCRIPTION
I	01	0001- 0002	RESPONDENT'S IT DOCUMENTATION SUPPORTING PAYMENT FOR THE PREPARATION OF THE RECORD
	02	0003 - 0004	REQUEST FOR PAYMENT PURSUANT TO BOARD RULE R-8-59 FOR PREPARATION OF RECORD
	03	0005 - 0008	RESPONDENT'S NOTICE OF APPEAL
	04	0009 - 0010	ORDER RE: POST-INITIAL DECISION MOTIONS
II	05	0011 - 0054	TRANSCRIPT

DATED this **1st** day of **November, 2005,** at Denver, Colorado.

_____
Mary S. McClatchey, Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, Colorado 80202-3604

CERTIFICATE OF MAILING

This is to certify that on this 1st day of **November, 2005**, I placed true copies of the foregoing **CERTIFICATE OF RECORD OF ADMINISTRATIVE PROCEEDINGS BEFORE THE STATE PERSONNEL BOARD** in the United States mail, postage prepaid, addressed as follows:

Diligent & Earnest, P.C.
I. M. Earnest, Esq.
Post Office Box 777
Denver, Colorado 80202-777

And in the interagency mail:

Bach Atyou
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver CO 80203

Andrea C. Woods

EXAMPLE OF NOTICE OF BRIEFING SCHEDULE AND BOARD REVIEW:

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006B500**

NOTICE OF BRIEFING SCHEDULE AND BOARD REVIEW

JANE DOE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

The brief of the appealing party is due to be filed with the Board and served on the opposing party within **20 calendar days** from the date of mailing on the Certificate of Record of Administrative Proceedings.

The brief of the opposing party is due to be filed with the Board and served on the other party within **10 calendar** days from the date of service of the appellant's brief. A reply brief may be filed within **5 calendar days**.

Briefs are to be typewritten with the text double spaced. No brief shall exceed 10 pages in length. Only 8 1/2 x 11 inch paper shall be used. An **original and 8 copies** of each brief must be filed with the Board. See Board Rules 8-73B and 8-74B, 4 CCR 801.

The Board is scheduled to review this case on at approximately 10:30 a.m. at its Regular Board Meeting on **Tuesday, January 17, 2006,** to be held at the **State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver Colorado 80202-3604.** The parties need not be present at this Board meeting.

DATED this **1st** day of
November, 2005, at
Denver, Colorado.

Kristin F. Rozansky, Board Director
State Personnel Board
633 17th Street, Suite 1320
Denver, Colorado 80202-3604

CERTIFICATE OF MAILING

This is to certify that on this **1st** day of **November, 2005**, I placed true copies of the foregoing **NOTICE OF BRIEFING SCHEDULE AND BOARD REVIEW** in the United States mail, postage prepaid, addressed as follows:

Diligent & Earnest, P.C.
I. M. Earnest, Esq.
Post Office Box 777
Denver, Colorado 80202-777

And in the interagency mail:

Bach Atyou
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver CO 80203

_____
Andrea C. Woods

BOARD POLICIES:

OBTAINING COPIES OF HEARING PROCEEDINGS

Hearings conducted before the State Personnel Board's administrative law judges are recorded, and may be obtained on CD-ROM by a party or the party's counsel to such hearing as follows:

1. Written Request. Any request by a party or counsel must be in writing addressed to the Board's offices. The written request shall contain the case name and number of the proceeding, date(s) of the hearing, and shall specify what portion(s) of the hearing are sought.

2. Preparation Fee. A $10 per disk preparation fee will be assessed to the requesting party or counsel. This fee shall be payable at the time the written request is submitted to the Board's offices, either in the form of a check or money order made payable to the "Colorado State Personnel Board" (DO NOT submit cash.). In the event additional CD-ROM disks are required to copy the proceeding requested, the Board will notify the requesting party or counsel of any additional charge. A party or counsel requesting an expedited copy, as discussed below, will be assessed a preparation fee of $20 per disk.

3. Preparation Time. The Board will complete a properly submitted request, accompanied by the preparation fee, within 5 business days of receipt. In the event a party or counsel submits an expedited request (i.e., for preparation in less than the normal 5 business days), the party or counsel shall also submit the fee for such expedited preparation as set forth above.

4. Required Player. A player is required in order that a party or counsel may listen to the CD-ROM. When the Board prepares the CD of a hearing, a copy of the player is installed on the CD. If a party or counsel has difficulty with the player or the CD, please contact the Board offices for assistance.

[**NOTE**: Only parties and counsel to a proceeding may use this process to obtain a copy of the hearing; requests from any other person will be subject the Board's Open Records Request policy.]

PREPARATION OF THE RECORD ON APPEAL

In June 2002, in response to statewide revenue losses and the resulting need to reduce expenditures, the then-Director of the State Personnel Board instituted a policy regarding the preparation and copying of records on appeal for Board cases. This policy continues today.

The Board will continue to charge appellants $50.00 to prepare and certify the administrative record. Once prepared and certified, the Board will send the parties or their counsel notice that the record has been certified, with a briefing schedule. The record will be maintained at the Board's offices, where the parties and their counsel may review the record during regular State business hours. Consistent with the practice in the Colorado appellate courts, counsel of record may check the record out for use in preparing briefs, and may make copies of the record while it is checked out, if they desire. Parties that are not represented by counsel (*pro se*) may review the record at the Board's offices during regular State business hours; however, they may not check the record out. If a *pro se* party wishes to have copies of some or all of the record, the Board will assess a charge of $.12 per page for such copies.

BOARD MEMBER PERSPECTIVE ON REVIEWING APPEALS

1. **Consider Forum**- unique membership of Board-combination of attorney/non-attorney, variety of backgrounds, amount of experience with state system, etc.

2. **Content and Organization of Brief-**

   a. **Facts**
      - relevant facts- give a logical and chronological outline of relevant facts, avoid irrelevant detail
      - explain parties and how they relate to one another
      - "bad facts"- address and distinguish/don't ignore
      - if discretionary hearing issue, be very clear about what you can prove and how, not just conclusions
      - don't confuse facts and argument
      - quote relevant documents
      - do not address new facts or documents

   b. **Tone of Brief**
      - avoid hostile, unprofessional or personal attacks
      - balance emotional appeal with facts and law
      - It is important for any decision making body to want to rule for your client and to have a well reasoned legal basis to do so

   c. **Law**
      - clearly outline the relevant legal standards and issues
      - separately analyze each legal issue
      - give the Board a sense of the history of the issue-use the Board's annotated decisions on the website
      - explain why your issue is important-avoid trivial or inconsequential appeals

   d. **Basics**
      - follow the rules- time limits, procedures, page limits, etc.

APPEALS OF STATE PERSONNEL BOARD DECISIONS TO THE COLORADO COURT OF APPEALS

I. REVIEW OF FINAL BOARD ORDER BY COURT OF APPEALS; PROCEDURES FOR APPELLATE REVIEW

The Board or an administrative law judge for the Board will issue a written decision within forty-five (45) calendar days after the conclusion of a hearing and the submission of closing briefs, if there are closing briefs. §24-50-125.4(3), C.R.S. Once the Board has issued its Final Agency Order, the parties may initiate an appeal to the Court of Appeals within forty-five (45) days after the date of the service of the Board order in accordance with §24-4-106(11), C.R.S.

Specifically, an appeal to the Court of Appeals is initiated by the filing of a notice of appeal within forty-five (45) days after the date of the service of the Board order, together with a certificate of service showing service of a copy of the notice of appeal on the Board and on all other parties to the action before the Board. The date of service of an order is the date on which a copy of the order is delivered in person or, if service is by mail, the date of mailing. §24-4-106(11), C.R.S.

Just as in an appeal to the Board of a decision of an administrative law judge, there is a designation of record required in an appeal to the Court of Appeals. The designation and preparation of the record and its transmission to the Court of Appeals are in accordance with the Colorado appellate rules, ("C.A.R"). In an appeal to the Court of Appeals, the Board prepares the record, which is then sent or taken to the Court of Appeals. A request for an extension of time to transmit the record to the Court of Appeals is made directly to the Court of Appeals and may be granted only by that court.

Although the agency is not required to pay a docket fee, the appellant pays a docket fee. All persons who have appeared as parties to the action before the agency that are not appellants, together with the Board, are designated as appellees.

II. STANDARD OF REVIEW

The Court of Appeals can set aside the decision of the Board, if the Board decision is "arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law." §24-4-

106(7), C.R.S. In addition to setting aside the Board decision, the Court of Appeals can prevent the enforcement of the Board order or rule under review, force any agency action to be taken which was previously withheld or delayed, remand the case back to the Board for further proceedings, and/or grant any other appropriate relief. The purpose of review by the Court of Appeals is to determine questions of law, to interpret the statutes and constitutional provisions involved, and to apply its interpretation to the facts found or established in the Board decision.

III. BOARD ROLE IN APPEALS

Once the Board receives notice that the Board's decision is being appealed to the Court of Appeals, Counsel for the Board enters an appearance as attorney of record for the State Personnel Board. Counsel will review the Opening Brief, discuss it with the Board Director, and together they determine whether or not any issues of a larger scope have been raised that warrant the Board's participation. Issues that might prompt the Board's participation in an appeal might include a challenge to the Board's authority or to a policy in which the Board has a strong interest, as opposed to a challenge to the reasonableness of the Board's determination. If there is a Board issue, Counsel will file a brief on behalf of Appellee State Personnel Board; if not, then Counsel, in the interests of administrative economy and efficiency, may request an extension of time in order to have an opportunity to review the other Appellee's Answer Brief. After reviewing that brief, Counsel, together with the Board Director, will decide whether to join or stand on the other Appellee's Brief or file a brief on behalf of the Board.

IV. FREQUENTLY ASKED QUESTIONS

- How much is the filing fee in the Court of Appeals? Appellant is $150.00; appellee is $75.00.
- What rules apply to an appeal to the Court of Appeals? The Colorado Appellate Rules (C.A.R.) apply. See Colorado Revised Statutes, Court Rules Book 2.

V. PRACTICE TIPS

- Most cases go forward on appeal without the Board's participation beyond the entry of appearance by Board Counsel as attorney of record.
- The Board, as Appellee, is entitled to do oral argument in general if there is a brief submitted on behalf of the Board; however, counsel can reach an agreement that Board Counsel do all or none of the oral argument or split the time between counsel.
- The Board does not initiate appeals by itself; the Board is always on the same side as the other appellee.

- An appellate court will consider only those questions properly raised by the appealing parties; appellate review is limited to a consideration of issues between the parties to an appeal.

APPENDIX

I. COLORADO REVISED STATUTES

§24-4-106(7), C.R.S.

If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

§24-4-106, C.R.S.

(11) (a) Whenever judicial review of any agency action is directed to the court of appeals, the provisions of this subsection (11) shall be applicable except for review of orders of the industrial claim appeals office.

(b) Such proceeding shall be commenced by the filing of a notice of appeal with the court of appeals within forty-five days after the date of the service of the final order entered in the action by the agency, together with a certificate of service showing service of a copy of said notice of appeal on the agency and on all other persons who have appeared as parties to the action before the agency. The date of service of an order is the date on which a copy of the order is delivered in person or, if service is by mail, the date of mailing.

(c) The record on appeal shall conform to the provisions of subsection (6) of this section. The designation and preparation of the record and its transmission to the court of appeals shall be in accordance with the Colorado appellate rules. A

request for an extension of time to transmit the record shall be made to the court of appeals and may be granted only by that court.

(d) The docketing of the appeal and all procedures thereafter shall be as set forth in the Colorado appellate rules. The agency shall not be required to pay a docket fee. All persons who have appeared as parties to the action before the agency who are not designated as appellants shall, together with the agency, be designated as appellees.

(e) The standard for review as set forth in subsection (7) of this section shall apply to appeals brought under this subsection (11).

§24-50-125.4(3), C.R.S.

The board or an administrative law judge for the board shall issue a written decision within forty-five calendar days after the conclusion of the hearing and the submission of briefs. Any party may appeal the decision of the board to the court of appeals within forty-five days in accordance with section 24-4-106 (11).

II. BOARD RULE

8-76B. Any party appealing a final Board order shall serve a copy of the notice of appeal on the Board at the time of filing the notice.

ATTACHMENT TO BOARD ORDERS

NOTICE OF APPEAL

Each party has the following rights:

1. To abide by the decision of the State Personnel Board; or

2. To appeal this decision to the Colorado Court of Appeals within 45 days pursuant to Section 24-4-106(11), C.R.S., as provided in Section 24-50-125.4(3), C.R.S.

In the event the decision is appealed, pursuant to Section 24-4-106(11)(b), C.R.S., the party filing the appeal with the Court of Appeals must serve the State Personnel Board with a copy of the Notice of Appeal at: 633 17th Street, Suite 1320, Denver, Colorado 80202-3604. In addition to serving the State Personnel Board with a copy of the Notice of Appeal, the party filing the appeal with the Court of Appeals must name the State Personnel Board as a party (appellee) to the appeal. Section 24-4-106(11)(d), C.R.S.

Constitution of the State of Colorado
ARTICLE XII - Officers

§ 13. Personnel system of state--merit system

(1) Appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without regard to race, creed, or color, or political affiliation.

(2) The personnel system of the state shall comprise all appointive public officers and employees of the state, except the following: Members of the public utilities commission, the industrial commission of Colorado, the state board of land commissioners, the Colorado tax commission, the state parole board, and the state personnel board; members of any board or commission serving without compensation except for per diem allowances provided by law and reimbursement of expenses; the employees in the offices of the governor and the lieutenant governor whose functions are confined to such offices and whose duties are concerned only with the administration thereof; appointees to fill vacancies in elective offices; one deputy of each elective officer other than the governor and lieutenant governor specified in section 1 of article IV of this constitution; officers otherwise specified in this constitution; faculty members of educational institutions and departments not reformatory or charitable in character, and such administrators thereof as may be exempt by law; students and inmates in state educational or other institutions employed therein; attorneys at law serving as assistant attorneys general; and members, officers, and employees of the legislative and judicial departments of the state, unless otherwise specifically provided in this constitution.

(3) Officers and employees within the judicial department, other than judges and justices, may be included within the personnel system of the state upon determination by the supreme court, sitting en banc, that such would be in the best interests of the state.

(4) Where authorized by law, any political subdivision of this state may contract with the state personnel board for personnel services.

(5) The person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations set forth in rules of the state personnel board applicable to multiple appointments from any such list.

(6) All appointees shall reside in the state, but applications need not be limited to residents of the state as to those positions found by the state personnel board to require special education or training or special professional or technical

qualifications and which cannot be readily filled from among residents of this state.

(7) The head of each principal department shall be the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department. Heads of such divisions shall be the appointing authorities for all positions in the personnel system within their respective divisions. Nothing in this subsection shall be construed to affect the supreme executive powers of the governor prescribed in section 2 of article IV of this constitution.

(8) Persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law. They shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties. A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined. Any action of the appointing authority taken under this subsection shall be subject to appeal to the state personnel board, with the right to be heard thereby in person or by counsel, or both.

(9) The state personnel director may authorize the temporary employment of persons, not to exceed six months, during which time an eligible list shall be provided for permanent positions. No other temporary or emergency employment shall be permitted under the personnel system.

(10) The state personnel board shall establish probationary periods for all persons initially appointed, but not to exceed twelve months for any class or position. After satisfactory completion of any such period, the person shall be certified to such class or position within the personnel system, but unsatisfactory performance shall be grounds for dismissal by the appointing authority during such period without right of appeal.

(11) Persons certified to classes and positions under the classified civil service of the state immediately prior to July 1, 1971, persons having served for six months or more as provisional or acting provisional employees in such positions immediately prior to such date, and all persons having served six months or more in positions not within the classified civil service immediately prior to such date but included in the personnel system by this section, shall be certified to comparable positions, and grades and classifications, under the personnel system, and shall not be subject to probationary periods of employment. All

other persons in positions under the personnel system shall be subject to the provisions of this section concerning initial appointment on or after such date.

NOTES OF DECISIONS

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Validity of legislative provisions 2

1. Purpose

Purpose of civil service legislation is to protect employees from arbitrary and capricious political action and to insure employment during good behavior. Coopersmith v. City and County of Denver, 1965, 399 P.2d 943, 156 Colo. 469. Officers And Public Employees 11.8

The safeguards and provisions of the civil service laws are for the protection only of those who have taken examinations and have thereby shown the necessary qualifications and as a result thereof are within the classified service. State Civil Service Com'n of Colorado v. Cummings, 1928, 265 P. 687, 83 Colo. 379. Officers And Public Employees 26(1)

2. Validity of legislative provisions

University hospital that was reorganized to private, nonprofit corporation remained state entity subject to constitutionally mandated personnel system, and, thus, portion of reorganization statute exempting employees from state personnel system was unconstitutional; university regents created reorganized hospital and continued to control its internal operations, and reorganization did not affect nature of jobs held by hospital's civil service employees. Colorado Ass'n of Public Employees v. Board of Regents of University of Colorado, 1990, 804 P.2d 138. Health 105

Application of Denver occupational privilege tax to members of General Assembly and state civil service employees did not unconstitutionally interfere with, or impose a condition precedent to, employment by the state. Hamilton v. City and County of Denver, 1971, 490 P.2d 1289, 176 Colo. 6. Municipal Corporations 956(1)

Administrative Reorganization Act sections excluding from the civil service the Coordinators of State Planning and of Highway Safety, each designated "a member of the staff of the Governor", were unconstitutional as contravening the Civil Service Amendment of the Constitution. Colorado State Civil Service Emp. Ass'n v. Love, 1968, 448 P.2d 624, 167 Colo. 436. Officers And Public Employees 9

3. Construction and application--In general

Surgeon did not retain rights of certified state employee under state personnel system where his compensation exceeded that authorized by statute by more

than $20,000 due to his appointment as senior instructor at state university. Fogel v. Colorado State Hosp., App.1989, 778 P.2d 318. States 53

The Civil Service Law should be liberally construed to accomplish its object of increasing the efficiency of the service by confining it membership to those who have qualified by examination. Shinn v. People, 1915, 149 P. 623, 59 Colo. 509. Officers And Public Employees 11.8

The protection of the civil service law extends only to those who have taken the examination and disclosed the necessary qualification, and to those who shall do so in the future. Shinn v. People, 1915, 149 P. 623, 59 Colo. 509. Officers And Public Employees 11.1

4. ---- Effective dates, construction and application

Under Const. art. 12, § 13, which put certain state offices under civil service and provided that persons holding positions when the act went into effect shall hold their positions until removed, under the provisions of the laws enacted in pursuance thereof, a person who was appointed by the Governor to fill a vacancy after the act went into effect is not entitled to its protection. Wilson v. People, 1922, 208 P. 479, 71 Colo. 456. Officers And Public Employees 69.5

The civil service amendment to the Constitution (see Laws 1919, p. 341), providing for appointment according to merit, and that persons in the classified service shall hold their positions during efficient service, and that persons holding such positions when such section takes effect shall retain their positions until removed, withdrew an office thereby placed in the classified service from the provisions of article 5, § 30, as to increases in salary, and the legislature had power, by Laws 1919, p. 325, with the approval of the civil service commission, to increase the salary of such office during the time for which the person in office when the constitutional amendment was adopted was elected. People v. Stong, 1920, 189 P. 27, 67 Colo. 599. Officers And Public Employees 100(2)

One wrongfully holding an office when the civil service amendment to the Constitution was passed, providing that all persons holding positions in the classified service shall retain their positions, was not a "person holding a position," within the meaning of such amendment. People v. Chew, 1920, 187 P. 513, 68 Colo. 158. Officers And Public Employees 69.5

One holding over as a de facto officer pending appointment and qualification of a successor at the time the Civil Service Act took effect cannot claim the protection of § 10 of that Act as amended by election in 1912, as against one who has been certified for the position under the provisions of the Act. Shinn v. People, 1915, 149 P. 623, 59 Colo. 509. Officers And Public Employees 11.8

5. ---- State personnel, construction and application

State was not "employer" for purposes of Wage Claim Act, even though statutory definition of "employer" had expanded, Act applied to receivers and other officers of court, and state was not specifically included in list of excluded public entities, where limited expansion indicated strong legislative intent to restrict Act's applicability, at no point did definition of "employer" explicitly extend beyond realm of nongovernmental entities, reference to "receivers and officers of court" referred to court-appointed receivers, liquidators, and like of private corporations or unincorporated associations, state, unlike other public entities, was created by constitution, and presumably, General Assembly was aware that constitution created separate state personnel system that governed payment of state employees, and Act, if applied, would conflict with constitutional state system. Lang v. Colorado Mental Health Institute in Pueblo, App.2001, 44 P.3d 262, certiorari denied. States 57

Provisions of the Anti-Discrimination Act of 1967 which define "employer" and "employee" must be read together with constitutional provisions conferring jurisdiction on the Civil Service Commission in civil service removal or disciplinary cases, so as to exclude from the jurisdiction of the Civil Rights Commission those state employees who are members of the classified civil service. State By and Through Dept. of Institutions, Division of Youth Services, Division of Juvenile Parole v. Colorado Civil Rights Commission ex rel. McAllister, 1974, 521 P.2d 908, 185 Colo. 42, appeal dismissed 95 S.Ct. 672, 419 U.S. 1084, 42 L.Ed.2d 677. Civil Rights 1707

Civil Service Amendment applies only to officers and employees of the executive branch of state government. Colorado State Civil Service Emp. Ass'n v. Love, 1968, 448 P.2d 624, 167 Colo. 436. Officers And Public Employees 11.1

Although employees in county departments of public welfare are not "state employees" in classified civil service as provided by state Constitution, jurisdiction can be conferred upon State Department of Public Welfare to provide for the selection, retention, and promotion of all such employees on a basis of merit and fitness. In re Employees in County Welfare Departments, 1940, 106 P.2d 464, 106 Colo. 475. Counties 63; Counties 65

The Civil Service Amendment (Const. art. 12, § 13), applies only to appointive state offices. Chambers v. People, 1921, 202 P. 1081, 70 Colo. 496. Officers And Public Employees 69.4

Under Mills' Ann.St.1912, § § 7577, 7578, creating the office of public trustee in every county, to be appointive by the Governor in first and second class counties and elected in others, held that it is a county office and not appointive state office, subject to the Civil Service Amendment (Const. art. 12, § 13). Chambers

v. People, 1921, 202 P. 1081, 70 Colo. 496. Officers And Public Employees 69.4; States 44

Const. art. 12, § 13, adopted at the November election, 1918 (see Laws 1919, p. 341), providing that all persons holding positions in the classified civil service shall hold office until removed pursuant to law, limits its civil service provisions to officers and employes of the state. People, ex rel. Walker v. Higgins, 1919, 184 P. 365, 67 Colo. 441. Officers And Public Employees 69.4

The water commissioner is a peace officer, whose duties concern the whole state, and he is a part of the state's system for the distribution of water, and is controlled by state's authority, and is neither a county nor a municipal officer, and is therefore a "state officer," within the meaning of Const. art. 12, § 13, adopted at the November election, 1918 (see Laws 1919, p. 341), relating to state officers under civil service. People, ex rel. Walker v. Higgins, 1919, 184 P. 365, 67 Colo. 441. Officers And Public Employees 69.4

6. ---- Contracted personnel, construction and application

To extent that Department of Human Services' contract with college attempted to substitute nonclassified employee positions for former classified positions at two schools established as training schools for juveniles committed to custody of Department, it violated constitutional provision generally requiring appointive public employees to be a part of the classified personnel system, even though content of educational program and method of instruction in two schools may have undergone some changes, where functions performed by classified employees selected to fill "new" exempt positions did not differ from those that had previously been performed by classified employees. May v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Officers And Public Employees 11.1

Although state Department of Administration was acting in response to footnote in appropriations bill which requested Department to contract for custodial services from community programs serving developmentally disabled persons insofar as possible, Department violated Civil Service Amendment of State Constitution by contracting with private corporations for performance of duties previously conducted by state classified personnel, since no statute or rule set forth standards for contracting for services at issue. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Officers And Public Employees 69.11

State constitutional Civil Service Amendment which establishes state personnel system would not be construed to apply only to personal services contracts creating employer-employee relationship involving state, so as to allow Department of Highways to contract with private sector vendors for services previously performed by state employees within state personnel system.

Colorado Ass'n of Public Employees v. Department of Highways, 1991, 809 P.2d 988. Officers And Public Employees 69.11

7. Exemptions--In general

State personnel director has no authority to exempt a position from the classified service, unless the constitution authorizes such an exemption. May v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Officers And Public Employees 11.1

Whether a particular position is properly exempted from classified service under Civil Service Amendment depends upon functions assigned to it, not upon the title bestowed upon it. May v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Officers And Public Employees 11.1

Constitutional provision exempting certain classes of public employees from classified civil service is self-executing and statute could not add to rights of exemption created thereunder. Board of Ed. of State of Colo. v. Spurlin, 1960, 349 P.2d 357, 141 Colo. 508. Constitutional Law 33

8. ---- Board of land commissioners, exemptions

Members of the state board of land commissioners, created by Const. art. 9, § 9, are not included and were not intended to be included in the operation of the civil service amendment to the Constitution (Const. art. 12, § 13). People v. Field, 1919, 181 P. 526, 66 Colo. 367.

9. ---- Educational institution faculty members, exemptions

Agreement between Office of Youth Services (OYS) and state college, regarding provision of educational programming at juvenile corrections facility, did not violate Civil Service Amendment to state Constitution or State Personnel System Act, where teachers were fundamentally employees of an educational institution that was constitutionally exempt from the state personnel system, and no classified employees were separated involuntarily from their protected positions. Department of Human Services v. May, 2000, 1 P.3d 159. Schools 133.1(4)

Schools established by Department of Social Services were "reformatory in character," for purposes of provision of Constitution exempting from classified civil service officers and teachers in educational institutions not reformatory or charitable in character, and thus state personnel director lacked authority to exempt teaching positions at those schools from classified service, where statutes creating the schools established the schools so that youngsters committed by juvenile justice system would receive education and training. May

v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Officers And Public Employees 11.1

Even if schools established to educate youngsters committed by juvenile justice system were not characterized as "reformatory in character," Department of Social Services was institution or department that was reformatory in character, for purposes of provision of Constitution exempting from classified civil service officers and teachers in educational institutions and departments not reformatory or charitable in character, thus depriving state personnel director of authority to exempt teaching positions at those schools from classified service. May v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Officers And Public Employees 11.1

Teachers at schools established to teach juveniles committed to juvenile justice system were "faculty members" under constitutional provision exempting from classified civil service faculty members in educational institutions not reformatory or charitable in character, though their positions were not referred to as instructors or teachers, but rather as administrators, where the function and responsibility of position was to teach juveniles in custody of Department of Human Services. May v. Department of Human Services, Office of Youth Services, App.1998, 976 P.2d 281, rehearing denied, certiorari granted, reversed 1 P.3d 159. Schools 133.1(4)

Under constitutional provision exempting from classified civil service officers and teachers in educational institutions not reformatory or charitable in character, it was intention of people to exclude from classified service all educators except those teaching in institutions reformatory or charitable in character. Board of Ed. of State of Colo. v. Spurlin, 1960, 349 P.2d 357, 141 Colo. 508. Officers And Public Employees 11.1

Provision of Constitution exempting from classified civil service officers and teachers in educational institutions not reformatory or charitable in character includes in exemption Department of Education of State of Colorado, and statutory provision declaring all positions in Department, classified as assistant commissioners, supervisors or instructors together with other positions having duties primarily of instructing or teaching, to be educational in nature and not classified under civil service of state was valid. Board of Ed. of State of Colo. v. Spurlin, 1960, 349 P.2d 357, 141 Colo. 508. Officers And Public Employees 9; Officers And Public Employees 11.1

10. ---- Judicial officers and employees, exemptions

Officers of the court are not state officers, and hence, are beyond purview of the Civil Service Amendment. Colorado State Civil Service Emp. Ass'n v. Love, 1968, 448 P.2d 624, 167 Colo. 436. Officers And Public Employees 11.1

Employees of courts of record of state and positions they occupy, as authorized by statute, are not subject to civil service amendment of state Constitution. In re Interrogatory of Governor, 1967, 425 P.2d 31, 162 Colo. 188. Officers And Public Employees 11.1

The commissioner of insurance is not a person "appointed to perform judicial functions," and hence does not come within the exception of Const. art. 12, § 13. Wilson v. People, 1922, 208 P. 479, 71 Colo. 456. Officers And Public Employees 69.4

A clerk of a county court and his deputies are not state officers, but officers of the court, and hence are not within the civil service amendment to the state Constitution. People v. Luxford, 1922, 207 P. 477, 71 Colo. 442. Clerks Of Courts 8

Under the civil service amendment to the Constitution, expressly exempting from its operation persons appointed to perform judicial functions, the jury commissioner, who is authorized to administer oaths, to summon jurors and examine them and pass upon their qualifications, and to return a list of selected jurors to the court, which duties had theretofore been performed by judges of the court, performs "judicial functions" and is therefore not within the civil service. People ex rel. Riordan v. Hersey, 1921, 196 P. 180, 69 Colo. 492. Officers And Public Employees 69.4

District court bailiffs are "officers of the court," not "state officers," and are not within terms of civil service amendment to constitution (article 12, § 13 [see Laws 1919, p. 341]). People ex rel. Clifford v. Morley, 1919, 184 P. 386, 67 Colo. 331. Officers And Public Employees 69.4

11. Civil service commission authority

The Civil Service Commission has exclusive jurisdiction to ascertain the qualifications, fitness and merits of applicants for positions under classified service and to finally determine when, under what circumstances and for what causes, those in such service may be removed therefrom. State Civil Service Com'n v. Hazlett, 1948, 201 P.2d 616, 119 Colo. 173. Officers And Public Employees 11.4; Officers And Public Employees 69.3

Municipal civil service commission cannot exercise power that is not expressly conferred and cannot assume enlarged power by making its own rules. Bratton v. Dice, 1933, 27 P.2d 1028, 93 Colo. 593. Municipal Corporations 216(1)

12. Personnel director authority

Sections of Colorado Constitution do not grant Director of the Personnel Department exclusive authority to establish levels of compensation payable to state employees by virtue of Director's authority to certify classifications and grades, thereby prohibiting General Assembly from establishing maximum monthly salary levels for particular pay grades. Dempsey v. Romer, 1992, 825 P.2d 44. Constitutional Law 58; Officers And Public Employees 94

Constitution gives State Personnel Director exclusive authority regarding temporary appointments to positions that are not exempt from state personnel system. Op.Atty.Gen. No. OAG9101661.ARY, Aug. 6, 1991.

12.5. Role of deputy treasurer

Absent a statutory or other legal limitation, a deputy to a statewide elected official is one who is appointed to act in all matters on behalf of the elected official, as designated by that elected official. Thus, unless changed by statute or otherwise in the future, the Deputy Treasurer may act in all matters on behalf of the Treasurer, as and when the Deputy Treasurer is authorized to do so by the Treasurer. Op.Atty.Gen. Opinion No. 04-5 (Dec. 6, 2004), 2004 WL 3120041.

13. Appointing authorities--In general

Chief of state patrol is to be appointed by head of department of highways, and such appointment must be made from list of three persons ranking highest on eligible list for such position as determined from competitive test of competence administered by state personnel board. Schippers v. Colorado State Personnel Bd., 1972, 496 P.2d 307, 178 Colo. 154. States 53

The Commissioner of Agriculture is the appointing authority for the Brand Commissioner, and the statutory authority of the State Board of Stock Inspection Commissioners to administer funds is unaffected by article XII, § 13(7) of our state constitution. AG File No. ORL 8706207/AQG October 13, 1987.

14. ---- Governor, appointing authorities

Provision of statute, which created the real estate brokers board, giving power to appoint members of the board to governor, was not impliedly repealed by Administrative Code Bill which created a department of state with the secretary of state as its chief executive officer and placed the real estate board in one division of that department, but which did not change in any degree either the duties of

the board or the duties of the secretary of state with respect to supervision or control of real estate brokers, and therefore member appointed by governor was entitled to judgment in quo warranto proceeding against member appointed by secretary of state. People ex rel. Wade v. Downen, 1940, 108 P.2d 224, 106 Colo. 557. Officers And Public Employees 79

Under provision of administrative code establishing executive department as first administrative department with Governor as chief executive officer, placing department of agriculture in executive department and providing that division of agriculture should consist of administrative department, agencies, and offices, including hail insurance department, which, should continue as then organized and existing, and that executive officer of administrative department should have full charge and general supervision of department with power to appoint all officers and employees, power to appoint commissioner of hail insurance was in Governor. People ex rel. Swayze v. Bixby, 1938, 81 P.2d 880, 102 Colo. 583. Insurance 1030

Position of secretary to civil service commission held of legislative and not constitutional creation, as respects right of Legislature to delegate power to abolish such position to Governor because of insufficient revenues. Getty v. Gaffy, 1935, 44 P.2d 506, 96 Colo. 454. Constitutional Law 62(5.1)

Under statute empowering Governor to appoint prohibition agent as necessity may require, Governor is sole judge of necessity, and, on his determining that no agents are required, appointee is no longer entitled to office or compensation. Lee v. Morley, 1926, 247 P. 178, 79 Colo. 481. States 53

Const. art. 12, § 13, relating to establishment of civil service commission is self-executing, and Governor has right, without any act of Legislature, to appoint members to constitute a state civil service commission, the word "self-executing" meaning capable of fulfillment without aid of any legislative enactment, and word "establish," as used in such constitutional provision, meaning to make firm or stable. People v. Bradley, 1919, 179 P. 871, 66 Colo. 186. Constitutional Law 31

15. ---- Legislature, appointing authorities

Where Legislature impliedly reserved power to abolish position of secretary to civil service commission through creation thereof, it could provide for temporary cessation thereof, and could delegate such power to Governor, although exercise of power depended on contingency to be ascertained by Governor (Laws 1933, p. 863, § 1). Getty v. Gaffy, 1935, 44 P.2d 506, 96 Colo. 454. Constitutional Law 62(5.1)

While the Legislature has power to abolish an office, it may not avoid the civil service amendment (Const. art. 12, § 13), by abolishing the office and creating a

new one, with duties substantially the same, to which new officers are appointed. People ex rel. Kelly v. Milliken, 1923, 223 P. 40, 74 Colo. 456. Officers And Public Employees 🔑 2

16. Appointments--In general

State Personnel Board's rule gave it authority to order that black Department of Highway's foreman be appointed to next available position, rather than merely requiring that Department place foreman's name on eligibility list. Cunningham v. Department of Highways, App.1991, 823 P.2d 1377, certiorari denied. Civil Rights 🔑 1711

Where some time after appointee had taken civil service examination and had been certified by commission as hearing officer of Department of Revenue, Division of Motor Vehicles, title of his position was changed from hearing officer to hearing commissioner, change in nomenclature did not change essence of position and thereby destroy validity of qualification or appointment. Campbell v. State, Dept. of Revenue, Division of Motor Vehicles, 1971, 491 P.2d 1385, 176 Colo. 202. Officers And Public Employees 🔑 11.4

If request from proper officials is made, Civil Service Commission fills a lawfully created position from an eligible list if such exists, and if not, holds competitive examination for the position and, in the meantime, may make a provisional appointment until results of the examination are obtained. Vessa v. Johnson, 1957, 310 P.2d 564, 135 Colo. 284. Officers And Public Employees 🔑 11.3; Officers And Public Employees 🔑 11.4; Officers And Public Employees 🔑 11.6

Determination of practicability of filling vacancy by promotional examination is essentially an administrative function for the Civil Service Commission and not a judicial function. Hewitt v. State Civil Service Com'n, 1946, 167 P.2d 961, 114 Colo. 561. Officers And Public Employees 🔑 26(1)

Whether the administration of the civil service law by State Civil Service Commission is good or bad is generally not a judicial, but an executive, problem, and although the Constitution requires personnel of commission to be persons of known devotion to the merit system, whether they are such is solely a question for the appointing power. Getty v. Witter, 1941, 111 P.2d 636, 107 Colo. 302. Constitutional Law 🔑 72

17. ---- Due process, appointments

So long as integrity of competitive examination process was not compromised and so long as appointing authority's decision did not rest upon factors such as race, color, creed, or gender, it was not clearly established under State Personnel system that an official had to select particular applicant and thus

employee who selected one of top three applicants for position had qualified immunity from due process claims by qualified applicant not selected for position. Conde v. Colorado State Dept. of Personnel, App.1994, 872 P.2d 1381. Civil Rights 🔑 1376(10); Officers And Public Employees 🔑 11.7

Employee who claimed she was best applicant was not denied due process right to be selected for promotion where statute required appointing authority to select one of three persons ranking highest on eligible list for such position, and one of the other two top scoring applicants was selected for promotion, and thus supervisor making selection was entitled to qualified immunity from § 1983 claim. Conde v. Colorado State Dept. of Personnel, App.1994, 872 P.2d 1381. Civil Rights 🔑 1376(10)

18. ---- Merit and fitness, appointments

Failure to select Department of Highways employee for promotion to higher position on ground that employee would have been required to report to his father, who was a supervisor in Department, did not render selection process illegal, notwithstanding constitutional provision requiring that promotions within state personnel system be made according to "merit and fitness." Butero v. Department of Highways, App.1988, 772 P.2d 633, certiorari denied. Officers And Public Employees 🔑 11.7

The civil service amendment to the State Constitution conferred upon Civil Service Commission alone the discretion to ascertain qualifications of all applicants, whether the standards thereof were prescribed by Constitution, statute, or rule. People ex rel. Beardsley v. Harl, 1942, 124 P.2d 233, 109 Colo. 223. Officers And Public Employees 🔑 11.8

19. ---- Competitive tests, appointments

Fair and open competition to determine job-related ability and quality of performance does not contravene state constitutional requirement that employment decisions be based on merit and fitness as established by competitive tests. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 🔑 11.3

The purpose of competitive examination provisions in Colorado Constitution and civil service laws is to promote efficiency of civil service by employing and advancing only those persons who have demonstrated qualification through testing. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 🔑 11.3

Generally, whether an examination for a state position be promotional or open is a matter within the discretion of the State Civil Service Commission. Hewitt v.

State Civil Service Com'n, 1946, 167 P.2d 961, 114 Colo. 561. Officers And Public Employees 🔑 26(1)

20. ---- Eligible list ranking, appointments

If there is no showing that appointing authority has applied nonnepotism policy in uneven or discriminatory manner, then appointing authority may validly consider familial relationship in determining which of three highest applicants on eligibility list is to be selected for available position within state personnel system. Butero v. Department of Highways, App.1988, 772 P.2d 633, certiorari denied. Officers And Public Employees 🔑 11.4

State Personnel Board rule which provided that in filling more than one position, three eligible applicants were to be referred for the first position and one eligible for each additional position, and under which applicant, although among the three scoring highest on promotional examination, was not appointed to any of three positions open at time of his application, did not contravene constitutional amendment providing that person appointed to any position under personnel system shall be one of three persons ranking highest on eligible list for such position "subject to limitations set forth in rules of the state personnel board applicable to multiple appointments." Haines v. Colorado State Personnel Bd., App.1977, 566 P.2d 1088, 39 Colo.App. 459. Officers And Public Employees 🔑 11.4

21. Temporary employment--In general

Provisional employees in service of state, such as employees of State Industrial School for Boys, were not persons in the "classified service" within constitutional provision that persons in such service shall hold their respective positions during efficient service and shall be graded and compensated according to standards of efficient service which shall be the same for all persons having like duties, so that there was no clear legal duty on part of commission to give employees of the school the same examination as other persons having like duties, and mandamus would not lie to compel the commission to do so. Getty v. Witter, 1941, 111 P.2d 636, 107 Colo. 302. Officers And Public Employees 🔑 26(1)

Temporary appointment of plaintiff as commander of Soldiers' and Sailors' Home terminated on date set by civil service commission, and he was thereafter de facto officer until permanent appointment of another. Roberts v. People ex rel. Duncan, 1927, 255 P. 461, 81 Colo. 338. Armed Services 🔑 124

Under the clause in Const. art. 12, § 13, providing that appointments to offices in the classified civil service shall be made according to merit, to be ascertained in a competitive examination, a person who was appointed as commissioner of insurance, under the clause providing for a temporary appointment without competitive examination in case of emergency, is not entitled to the protection of

the clause providing that persons in the classified civil service shall not be removed, except on written charges and after opportunity to be heard. Wilson v. People, 1922, 208 P. 479, 71 Colo. 456. Officers And Public Employees 69.6

Pay schedules for temporary hires by the state can be different from the pay schedules for classified employees in the same job classification. Op.Atty.Gen. No. 93-2, Feb. 26, 1993.

22. ---- Time limitation, temporary employment

Secretary of State did not violate section of state Constitution providing for the hiring of temporary personnel by state department heads when Secretary hired temporary personnel to examine initiative petition signatures; Secretary hired temporary workers to examine large number of petitions during 21-day period in which she was inundated with petitions for review. McClellan v. Meyer, 1995, 900 P.2d 24. States 53

Appointment of temporary workmen's compensation hearing officer for period of 40 hours not to exceed one year did not violate length of employment limitation in State Constitution pertaining to temporary appointments. Neoplan USA Corp. v. Industrial Claim Appeals Office of State of Colo., App.1989, 778 P.2d 312. Workers' Compensation 1082

Section of State Personnel System Act permitting temporary appointments of state employees for up to 1040 hours of work in a 12-month period was unconstitutional to the extent that it purported to authorize temporary appointments for periods longer than six calendar months. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 11.6

23. Probationary employment--In general

Director of Department of Personnel's interpretation of personnel system rules, which determined that probationary period for new employees would be tolled during any periods where such employee was no longer on payroll, including authorized leave without pay, was neither arbitrary nor capricious, and consistent with statutory provisions requiring satisfactory completion of probationary period before such employee would become certified. Zurek v. Colorado Dept. of State, App.1987, 754 P.2d 390. Officers And Public Employees 11.5

Provision of State Personnel System Act establishing probationary status for state employees who are promoted, transferred at their own request, or elevated in pay grade within state personnel system does not contravene Colorado Constitution. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 11.5

A rule of the State Civil Service Commission, providing for a probationary period of employment and for dismissal of probationer if appointing authorities are of opinion that dismissal would be for good of the service, is void, since it attempts to subject those who have submitted to competitive tests of competence and who have been certified permanently into the classified civil service to the hazards of discharge by authority other than the commission. McDevitt v. Corfman, 1941, 120 P.2d 963, 108 Colo. 571. Officers And Public Employees 26(1)

24. ---- Completion, probationary employment

Under provision of Colorado Constitution, satisfactory completion of probationary period by public employee after initial appointment results in certification to class or position for which appointment was made; such provision does not guarantee certified status in event of requested transfer or promotion to new class or position. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 11.5

Issue as to whether dismissal of public employee during subsequent probationary period following involuntary promotion, transfer, or reallocation violates provisions of Colorado Constitution providing certification to class or position for which appointment of public employee was made following satisfactory completion of probationary period after initial appointment must be resolved on case-by-case basis. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 69.6

25. Promotions and transfers

Phrases "upward allocation of a position" and "movement of the incumbent employee with his position" were together nothing but euphemistic description of a "promotion," so that provision of State Personnel System Act, providing that such upward allocation and movement did not require new competitive tests of competence or invalidation of tests previously given for the position, violated article of Colorado Constitution requiring that merit and fitness be basis of appointment and promotion in state personnel system. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 11.7

The State Civil Service Commission's certification of person on preferred eligible list of former state revenue collectors for appointment as chief of staff services in revenue department was invalid as in effect a promotion in rank and grade without competitive examination, in violation of Constitution, though he was temporarily out of civil service position. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 11.7

Civil service rules, inconsistent with constitutional provisions that promotions in state's classified civil service shall be made according to merit and fitness ascertained by competitive tests and that persons ascertained to be most fit and of highest excellence must be first appointed, are void and of no effect. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 26(1)

The State Civil Service Commission's certification of person on preferred eligible list of permanent civil service appointees, separated from service without their fault, for appointment to position of higher rank and grade than that which he previously held, under commission's rule respecting reinstatements, is invalid as in conflict with constitutional provision that promotions shall result only from competitive examinations and seniority. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 11.7

A transfer from one civil service position to another can be made only when it does not in fact constitute a promotion, which may be made only after examination demonstrating fitness of person promoted for new position, whereas transfers are customarily allowed on request without any requirements as to examination. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 11.7

26. Compensation and grading--In general

Decision of Director of Department of Personnel to reduce salaries for correctional officers did not violate residency requirement for state employees in State Constitution though decision was based on study that examined salary levels in job markets outside of state, as constitutional provision applies to appointments, not to classification and salary determinations. Blake v. Department of Personnel, App.1994, 876 P.2d 90, certiorari denied. Prisons 8

In view of constitutional and statutory provisions requiring that prospective civil service employee be both appointed and certified before he can be placed on payroll, plaintiff, who had been referred to state institution as one on civil service eligible list but who had been rejected by institution, and thus neither appointed by institution nor certified by Civil Service Commission, could not recover from head of institution, in official capacity, for services not rendered nor could head of institution be compelled to certify plaintiff, this being function of Commission. Meredith v. Smith, 1968, 443 P.2d 975, 166 Colo. 256. States 53

The state treasurer is required to pay salaries as fixed by legislative enactment, or by any duly authorized agency as to class and grade as set up by Civil Service Commission, upon certification by commission of appointment. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. States 64(1)

The power of General Assembly to fix salaries for classes and grades of officers set up by Civil Service Commission is subject to Governor's veto as in case of other legislation. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 99

27. ---- Authority over compensation

Except as restricted by civil service amendment or constitutional limitation, the Legislature has plenary authority over compensation to be paid state employees. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. States 57

The General Assembly may delegate its authority to fix salaries of persons in the classified service, but that authority remains subject to limitation that salaries fixed must apply to classes and grades established by Civil Service Commission. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Constitutional Law 62(5.1)

The General Assembly has power to fix compensation of persons within the classified service in absence of any specific provision placing such power in any other body. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 99

Although General Assembly may fix compensation of persons within the classified service, it cannot fix salary of an individual employee, but only salary of each class and grade established by Civil Service Commission, thereby assuring equal salaries for persons having like classifications. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 99

28. ---- Authority over grading

The power to classify officers given to Civil Service Commission does not carry with it by necessary implication the power to fix compensation, as salary is an incident to office and not a standard. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 99

Under civil service amendment providing that persons in classified service should be graded and compensated according to standards of efficient service, giving Civil Service Commission authority to standardize and grade, but not stating that compensation should be fixed by commission, the specific declaration of authority to grade indicated exclusion of authority to fix compensation. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 99

29. ---- Similar services, compensation and grading

Section of the Colorado Constitution provides that state employees performing "like" or similar services must be graded and compensated according to same standards, and thus prohibits preferential compensation treatment for persons equally qualified who perform substantially similar services; provision neither expressly nor by necessary implication prohibits payment of identical compensation to state employees performing unlike or dissimilar services. Dempsey v. Romer, 1992, 825 P.2d 44. States 57

The basic level of compensation paid to employees with like duties may not vary according to the mere geographic location of the job with any additional remuneration to be based upon factors other than the core job duties of the classification involved. Op.Atty.Gen. No. 96-4, April 12, 1996.

Both the Colorado Constitution and the statutes prohibit the payment of Colorado state personnel system salaries which are not based solely upon comparable duties and responsibilities. A system of compensation based upon the location of the employee would not meet this standard. AG File No. OHR/AGATZ/LW February 16, 1983.

30. ---- Seniority, compensation and grading

Under statute providing that civil service employee hired in specific job classification will receive longevity salary increments at specified intervals, civil servants who receive job classification promotion are entitled to longevity pay based on time spent in state service rather than in a particular grade. Colorado Ass'n of Public Emp. v. Colorado Civil Service Commission, App.1972, 505 P.2d 54, 31 Colo.App. 369. Officers And Public Employees 99

31. Employment rights--In general

Even if language of Colorado Judicial System Personnel Rules could be read to create a contractual right to continued employment in chief juvenile probation officer, such officer still could not prevail on claim of denial of procedural due process in termination of his employment, since recognition of such a contract would violate express public policy of state of Colorado. Hamm v. Scott, 1977, 426 F.Supp. 950. Constitutional Law 278.4(3)

Colorado Constitution creates property interest in continued employment for certified state employees. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 69.1

The liberty of the public employee, as distinguished from that of the ordinary citizen, may under some circumstances be subjected to comprehensive and

substantial governmental restrictions which impede activities at the very core of specifically guaranteed constitutional rights. Chiappe v. State Personnel Bd., 1981, 622 P.2d 527. Constitutional Law 83(1)

There was no contract of employment between plaintiff, who was on civil service eligible list and who received from institution notice labeled "offer of employment" but directing plaintiff to appear for interview, where institution rejected plaintiff and he was neither appointed nor certified. Meredith v. Smith, 1968, 443 P.2d 975, 166 Colo. 256. States 53

32. ---- Tenure, employment rights

Whether public employees' rights were violated by executive's failure to transfer any of them to new position upon abolition of division in which they worked depended upon whether nature of new positions created with another agency required substantially the same qualifications and entailed performance of substantially same functions as abolished positions. Bardsley v. Colorado Dept. of Public Safety-Division of Disaster Emergency Services, App.1994, 870 P.2d 641. Officers And Public Employees 69.11

Rights granted to certified state employee by the Civil Service Amendment include right not to be displaced by abolition of position occupied and creation of new position which is required to perform substantially same service. Bardsley v. Colorado Dept. of Public Safety-Division of Disaster Emergency Services, App.1994, 870 P.2d 641. Officers And Public Employees 69.11

Certified position may not be abolished and incumbent employee terminated if new position is created with substantially the same duties and responsibilities as the old position, but filled by another employee. Bardsley v. Colorado Dept. of Public Safety-Division of Disaster Emergency Services, App.1994, 870 P.2d 641. Officers And Public Employees 69.11

Contraction of state personnel system through Department of Highways' contracting with private sector vendors for services previously performed by state employees within state personnel system that would result in termination of state employees and elimination of classified positions would implicate tenure protection features of the Civil Service Amendment to the State Constitution. Colorado Ass'n of Public Employees v. Department of Highways, 1991, 809 P.2d 988. Officers And Public Employees 69.11

Absent guidance derived from standards established by statute or rule, the state Department of Highways could not contract out with private sector vendors for custodial, maintenance, and utility services previously performed by state employees within state personnel system consistent with provisions of the Civil Service Amendment to the State Constitution. Colorado Ass'n of Public

Employees v. Department of Highways, 1991, 809 P.2d 988. Officers And Public Employees 69.11

Civil service tenure does not guarantee duration of employment for any number of set years or over any particular period of time. Coopersmith v. City and County of Denver, 1965, 399 P.2d 943, 156 Colo. 469. Officers And Public Employees 69.1

33. ---- Seniority, employment rights

Employees within classified service must be paid at salary fixed for class or grade in which they are classified, and if appropriation fails, they must be dismissed in accordance with seniority rights. Vivian v. Bloom, 1947, 177 P.2d 541, 115 Colo. 579. Officers And Public Employees 69.7; Officers And Public Employees 99

The State Civil Service Commission's certification of one who was thirty-first on preferred eligible list of former revenue collectors for appointment as chief of staff services in revenue department was invalid and unauthorized because it was not based on seniority, and position of revenue collector is not of same or similar character as that of chief of staff services. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 11.4

34. Dismissal and discipline--In general

A liberty interest in selecting one's appearance, particularly for a public employee, is of much less significance than other constitutional liberties and is, therefore, subject to ordinary regulation by the Government without special judicial oversight. Chiappe v. State Personnel Bd., 1981, 622 P.2d 527. Constitutional Law 83(1.5)

Where food service workers at university, discharged for failure to comply with "no-beard" rule, failed to show that the policy was not rationally related to the objective of providing sanitary food to the public, the university did not act arbitrarily in enforcing the "no-beard" rule and in making it a condition of continued employment for the workers, as the penalty of discharge was job related and was not arbitrarily imposed. Chiappe v. State Personnel Bd., 1981, 622 P.2d 527. Colleges And Universities 8.1(3)

Action of Civil Service Commission in removing officer is final if evidence at hearing is sufficient to justify finding of inefficient service, or that removal is for good of service. State Civil Service Com'n v. Hoag, 1930, 293 P. 338, 88 Colo. 169. States 52

35. ---- Notice and hearing, generally, dismissal and discipline

Placement of burden of proof on certified state employee in administrative hearing following discharge from job at state college due to job abolishment did not violate due process, even though employee had a property interest in job under state constitution, and employee was entitled to hearing under statute; employee had no due process right to hearing following job abolishment, as opposed to discharge for cause, and thus providing hearing but placing burden of proof on employee could not violate due process. Velasquez v. Department of Higher Educ., App.2003, 93 P.3d 540, certiorari denied 2004 WL 1375406. Colleges And Universities 8.1(5); Constitutional Law 278.5(4)

Appointing authority cannot discipline certified state employee without giving employee opportunity to petition for hearing. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 72.32

Pretermination meeting in which appointing authority notifies state employee of charges against him and intended disciplinary action does not afford employee due process, and such deficiency is sustainable only if there is opportunity for posttermination evidentiary hearing before neutral third party, at which authority must present and support its case; conferences are not of record, nor does authority present or even identify witnesses or full range of evidence against employee. Kinchen v. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center, App.1993, 867 P.2d 8, certiorari granted, affirmed 886 P.2d 700. Constitutional Law 278.4(5)

State university employee whose position had not been determined to be exempt was entitled to procedural due process rights applicable to classified employees and would be reinstated with full back pay and benefits after being terminated without being afforded those rights. Salas v. State Personnel Bd. of State of Colo., App.1988, 775 P.2d 57, certiorari denied. Constitutional Law 278.4(5); Officers And Public Employees 69.4; Officers And Public Employees 76

Food service workers at university, discharged for failure to comply with "no-beard" rule, were not entitled to an individualized hearing on the substantive rationality of the policy, as they did not seriously contest the underlying rationale of the policy, but instead sought a "heightened" scrutiny of the university's action in enforcing it, a form of review which would impermissibly permit the hearing officer of the state personnel board or the district court judge to substitute their judgments for that of the agency director who was responsible for administering the Government's program and personnel. Chiappe v. State Personnel Bd., 1981, 622 P.2d 527. Colleges And Universities 8.1(5)

Where, as a result of an examination conducted by the Civil Service Commission, applicants qualified for the preferment into which they were permanently certified by prevailing in competitive tests of competence, applicants

could not be removed from their positions by employing authority without hearing, and they were subject to removal or discipline only on written charges to be finally and promptly determined by the commission on inquiry and after an opportunity to be heard. McDevitt v. Corfman, 1941, 120 P.2d 963, 108 Colo. 571. Officers And Public Employees 69.5

A deputy water commissioner of water district holding position under state civil service could not be removed by state civil service commission without notice or hearing on ground that he was an alien and hence was never eligible to the position. State Civil Service Com'n v. Lehl, 1941, 118 P.2d 1080, 108 Colo. 397. Officers And Public Employees 72.12; Officers And Public Employees 72.16(1)

Summary suspension, with loss of pay, of police officer qualified under civil service without notice, written charges, and without hearing, held unauthorized, and rule of civil service commission permitting such suspension was invalid (Charter of City and County of Denver, § § 224, 225, 238; Const. art. 2, § 25; art. 12, § 13; art. 20, § 3). Bratton v. Dice, 1933, 27 P.2d 1028, 93 Colo. 593. Municipal Corporations 185(3)

An employee of the state who is within the civil service amendment to the Constitution, cannot be discharged without a hearing on the charges preferred against him. Board of Capitol Managers v. Rusan, 1922, 210 P. 328, 72 Colo. 197. States 53

36. ---- Notice and hearing, probationary and temporary employees, dismissal and discipline

Probationary state employee who is terminated for unsatisfactory job performance is not entitled to notice of disciplinary action pursuant to State Personnel Board rule requiring appointing authority to notify employee by certified mail of disciplinary action within five days. Lucero v. Department of Institutions, Div. of Developmental Disabilities, App.1996, 942 P.2d 1246, rehearing denied, certiorari denied. Officers And Public Employees 72.14

State's six-month delay in informing discharged employee that he was probationary employee dismissed for unsatisfactory job performance did not warrant award of six months' back pay to employee pursuant to State Personnel Board rule; State Personnel Board's notice requirements did not apply to probationary employees discharged for unsatisfactory performance. Lucero v. Department of Institutions, Div. of Developmental Disabilities, App.1996, 942 P.2d 1246, rehearing denied, certiorari denied. Officers And Public Employees 76

A probationary employee lacks a legally protected interest in continued employment sufficient to create an entitlement to a due process hearing prior to

discharge, at least in the absence of a showing that the dismissal has been exacted as a penalty for the exercise of the employee's constitutionally protected rights of speech or association, or that the charges are such as to seriously damage the employee's standing and association in the community or to create a stigma or other disability that abridges the freedom to take advantage of other employment opportunities. Department of Health v. Donahue, 1984, 690 P.2d 243. Constitutional Law 277(2)

Personnel rule governing predisciplinary meetings granted probationary government employee the right to an appropriate predisciplinary meeting with her supervisor in the State Department of Health before being discharged for unsatisfactory job performance prior to the expiration of her probationary period, and thus where Department failed to accord her predisciplinary meeting, her early discharge two and one-half weeks before the expiration of her one-year probationary term was in violation of her procedural due process rights. Department of Health v. Donahue, 1984, 690 P.2d 243. Constitutional Law 278.4(5); Officers And Public Employees 72.16(2)

Denial of a predisciplinary meeting did not justify an award of back pay during the period of discharge, because employee of State Department of Health was a probationary employee and, as such, she could have been dismissed at any time as long as her dismissal was not predicated on some impermissible reason, such as, for example, race, color, national origin, creed, gender, or political affiliation. Department of Health v. Donahue, 1984, 690 P.2d 243. Officers And Public Employees 76

The rule of the civil service commission providing for five days' notice before a provisional appointee may be dismissed, was not passed for the benefit of the employee, but is for the convenience of the commission and may be waived by it. State Civil Service Com'n of Colorado v. Cummings, 1928, 265 P. 687, 83 Colo. 379. Officers And Public Employees 26(1)

A provisional appointee under civil service may be removed, discharged or relieved from duty at the pleasure of a head of a department and with the approval of the commission if the latter deems it for the best interests of the service. A provisional appointee is not entitled either to notice or hearing as a condition precedent to removal. State Civil Service Com'n of Colorado v. Cummings, 1928, 265 P. 687, 83 Colo. 379. States 52

37. ---- Grounds, dismissal and discipline

Discharge of a certified state employee due to job abolishment does not implicate state constitutional protections against wrongful discipline. Velasquez v. Department of Higher Educ., App.2003, 93 P.3d 540, certiorari denied 2004 WL 1375406. Officers And Public Employees 72.10

Central feature of state personnel system is principle that persons within system can be subjected to discharge or other discipline only for just cause. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 69.7

Implicit in protection for certified state employees, that they can be discharged only for just cause based on constitutionally specified criteria, is principle that appointing authority must establish constitutionally authorized ground in order to discharge such employee. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 69.7

Though filing of a lawsuit against employer was not, in and of itself, a sufficient ground for dismissal of civil service employee, dismissal of the employee was justified on basis of his conduct and results thereof, whether such conduct was evidenced primarily by filing of lawsuit or by any other overt act on his part. Paris v. Civil Service Commission, App.1973, 510 P.2d 910, 32 Colo.App. 21, affirmed 519 P.2d 323, 184 Colo. 207. Officers And Public Employees 69.7

38. ---- Evidence, dismissal and discipline

Conduct of client manager with Division of Youth Service (DYS) in meeting with escaped youth several times, concealing those meetings from supervisors, providing youth with counseling and identification, and erroneously advising that if he did not turn himself in for one year, his name would be removed from DYS roster, violated code of ethics for state employees, general provisions in client implementation manual, and established standards in manager's office, and were sufficient basis upon which to find that he engaged in willful misconduct warranting termination, even though manager did not violate specific rule promulgated by employing agency. Bishop v. Department of Institutions, Div. of Youth Services, App.1992, 831 P.2d 506. Officers And Public Employees 66

Prior conduct of Department of Administration employee which was subject of prior corrective action could be considered to determine penalty to be imposed upon determination that disciplinary action was warranted, where prior corrective action letter warned employee that corrective action remained in effect until specific date, and that disciplinary action would be taken in event another serious violation occurred. McLaughlin v. Levine, App.1986, 727 P.2d 410. Officers And Public Employees 72.16(1)

Findings by Civil Service Commission that State Bank Commissioner was partial, arbitrary and capricious in granting or refusing to grant certificates for the opening and operating of bankrupt institutions, that he used abusive and threatening language to a commissioner, that he was uncooperative with the commission and that he failed to observe regulations of the commission with

respect to appointments under the civil service was sustained by ample competent evidence and justified the removal of the State Bank Commissioner from office. State Civil Service Com'n v. Hazlett, 1948, 201 P.2d 616, 119 Colo. 173. Officers And Public Employees 72.32; Officers And Public Employees 72.33(1)

39. Administrative appeal--In general

Statute authorizing State Personnel Director and Director's Panel to hear allocation appeals did not violate constitutional provision giving State Personnel Board authority to hear classified employees' appeals of disciplinary actions taken against them by appointing authorities. Renteria v. Colorado State Dept. of Personnel, 1991, 811 P.2d 797, on remand 907 P.2d 619, rehearing denied. Officers And Public Employees 69.2

40. ---- Probationary employees, administrative appeal

State employee's unsatisfactory job performance is ground for dismissal by appointing authority during employee's probationary period without right of appeal. Lucero v. Department of Institutions, Div. of Developmental Disabilities, App.1996, 942 P.2d 1246, rehearing denied, certiorari denied. States 53

Probationary state employee has no constitutional or statutory right to appeal dismissal from employment for unsatisfactory performance. Williams v. Colorado Dept. of Corrections, App.1996, 926 P.2d 110, rehearing denied, certiorari denied. Officers And Public Employees 72.24

Under the State Constitution, probationary employees have no right to an appeal as a result of a dismissal for unsatisfactory performance. Department of Health v. Donahue, 1984, 690 P.2d 243. Officers And Public Employees 72.24

41. ---- Jurisdiction of board, administrative appeal

Board of Personnel exceeded its jurisdiction in determining that probationary employee's termination for unsatisfactory performance was arbitrary and capricious; after determining that employee's racial discrimination claim was unsupported by evidence, Board of Personnel lacked authority to examine factual basis supporting employee's termination for unsatisfactory performance. Williams v. Colorado Dept. of Corrections, App.1996, 926 P.2d 110, rehearing denied, certiorari denied. Officers And Public Employees 72.31

In state employee's challenge to reallocation of his position by agency, where employee was reinstated during pendency of appeal, employee's claim that agency misapplied order of State Personnel Board following his reinstatement was required to be presented to Board for consideration before it could be presented to Court of Appeals, since issue of misapplication of order arose by

reason of reinstatement during pendency of appeal. Renteria v. Department of Labor and Employment, App.1994, 907 P.2d 619, rehearing denied. Administrative Law And Procedure 669.1; Officers And Public Employees 72.44

Authority of state Personnel Board is limited to consideration of actions taken by state agencies and appointing authorities pursuant to legislation or executive rules governing such actions. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Officers And Public Employees 72.31

State Personnel Board has no authority to determine whether acts of legislature are constitutional on their face or to evaluate executive conduct in administering statutes, but it may evaluate whether otherwise constitutional statute has been unconstitutionally applied with respect to particular personnel action. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Administrative Law And Procedure 316; Officers And Public Employees 72.31

Remand was necessary for determination whether hearing officer's continued "employment" following termination of his regular employment fell within ambit of temporary appointment or, if it did, whether appointment complied with State Personnel System Act and rules or whether "employment" was pursuant to contract for personal services which had been approved by state personnel director for purposes of determining whether hearing officer had jurisdiction to enter order denying claim for workmen's compensation benefits following termination of his regular employment. Welch v. Industrial Com'n of State of Colo., App.1986, 722 P.2d 439. Workers' Compensation 1950

Dismissed public employee's claim that statute or rules governing disciplinary actions in state personnel system were violative of federal constitutional protections because they did not provide predismissal hearings did not give judiciary power to interfere with State Personnel Board's proceedings in advance of Board's taking final action. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.15

Under constitutional provision in effect prior to July 1, 1971, vesting in Civil Service Commission jurisdiction to determine all removal or disciplinary cases in the classified service of State, the Civil Rights Commission had no jurisdiction to consider complaint by classified civil servant, who had remedy for discriminatory employment practices which could be pursued before the Civil Service Commission, that she was dismissed from her employment as a juvenile parole agent because of her sex. State By and Through Dept. of Institutions, Division of Youth Services, Division of Juvenile Parole v. Colorado Civil Rights Commission ex rel. McAllister, 1974, 521 P.2d 908, 185 Colo. 42, appeal dismissed 95 S.Ct. 672, 419 U.S. 1084, 42 L.Ed.2d 677. Civil Rights 1707

42. ---- Burden of proof, administrative appeal

Appointing authority has the burden of proof as to the factual basis for disciplinary action taken against state employee. Harris v. State Bd. of Agriculture, App.1998, 968 P.2d 148. States 53

For purposes of statute which requires that, except as otherwise provided by statute, proponent of order shall have burden of proof in administrative hearing, "proponent of an order" is person who brings forward matter for litigation or action. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Administrative Law And Procedure 460

In disciplinary hearings before State Personnel Board, appointing authority is party bringing charges against employee, and propounder of employee's dismissal. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 72.61

Implicit in requirement that appointing authority must have just cause for discipline or discharge of persons within state personnel system is that appointing authority must prove its reasons for discharge before neutral decision maker. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 72.61

43. Judicial review--In general

State Personnel Board did not have authority to determine constitutional issues raised by state employees, and thus employees were not required to exhaust administrative remedies prior to bringing court action requesting declaratory relief, reinstatement and back pay, where employees had been adversely affected by appropriations statute which eliminated funding for full-time state positions and which requested Department of Administration to contract with private employers for custodial services formerly provided by state employees, and complaint asserted that request contained in appropriations statute constituted substantive legislation, in violation of State Constitution, and that Department's actions violated Civil Service Amendment to State Constitution. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Administrative Law And Procedure 229; Administrative Law And Procedure 316; Constitutional Law 44.1; Officers And Public Employees 72.41(2)

Where Governor's order suspending office of secretary to civil service commission was based on finding of "insufficient revenues" to carry on governmental functions, as provided in statute, finding, where supported by

evidence, was not open to judicial inquiry (Laws 1933, p. 863, § 1). Getty v. Gaffy, 1935, 44 P.2d 506, 96 Colo. 454. Constitutional Law 74

Order of Civil Service Commission in removing officer may be reviewed by court, where evidence is insufficient to support charges against officer. State Civil Service Com'n v. Hoag, 1930, 293 P. 338, 88 Colo. 169. States 52

Where quo warranto was brought to oust respondent from office of division engineer, and judgment of lower court was for respondent, and such judgment was reversed on appeal, and judgment was again had for respondent below, and while the case was pending before the Supreme Court the civil service amendment to the Constitution was passed, respondent cannot claim that he was lawfully holding the position at the time the amendment took effect, in that the first judgment of the court below was not superseded, since the reversal of such judgment in effect determined that respondent was holding the position wrongfully and unlawfully; action of the trial court in sustaining a demurrer to the petition in quo warranto being reversed on the first appeal. People v. Chew, 1920, 187 P. 513, 68 Colo. 158. Appeal And Error 1180(1)

44. ---- Scope of review, judicial review

On certiorari to review order of Civil Service Commission removing State Bank Commissioner from classified service, the court cannot determine whether the Commission's findings were right or wrong or substitute its judgment for that of the Commission or interfere with the Commission's findings if there is any competent evidence to support them. State Civil Service Com'n v. Hazlett, 1948, 201 P.2d 616, 119 Colo. 173. Officers And Public Employees 72.50

In action by civil service commission secretary to restrain suspension by Governor under act authorizing suspension of state departments on finding of insufficient revenue, court was limited in inquiry to consideration of whether act challenged was within constitutional powers of Legislature, and whether executive order transcended Governor's authority (Laws 1933, p. 863, § 1). Getty v. Gaffy, 1935, 44 P.2d 506, 96 Colo. 454. Constitutional Law 74

45. ---- Standard of review, judicial review

State Personnel Board's interpretation of its own rules is generally entitled to great weight unless it is plainly erroneous or inconsistent with rule or underlying statute. Bishop v. Department of Institutions, Div. of Youth Services, App.1992, 831 P.2d 506. Administrative Law And Procedure 413; Officers And Public Employees 69.3

Action of State Personnel Board will be upheld if there is sufficient evidence in record to support it. Bishop v. Department of Institutions, Div. of Youth Services,

App.1992, 831 P.2d 506. Administrative Law And Procedure 785; Officers And Public Employees 72.54

Where defendant had been employed by Department of Labor without qualifying examination and her employment was continued for approximately one year at which time she was appointed as probationary employee continuing performance of similar duties as before, it was reasonable for State Personnel Board to interpret its rules to treat such position as similar to provisional appointment, and thus trial court should have deferred to Board's treatment of the matter. Department of Labor and Employment, Division of Employment and Training v. State Personnel Bd., App.1980, 625 P.2d 1036. Officers And Public Employees 72.54

State Civil Service Commission was vested with discretion to determine whether it was for the best interest of the service to hold an open examination for the position of State Highway Engineer and, where no abuse of that discretion was shown, the courts were powerless to interfere. Hewitt v. State Civil Service Com'n, 1946, 167 P.2d 961, 114 Colo. 561. Officers And Public Employees 26(1)

46. ---- Presumptions, judicial review

Once graphic artist at state university became state employee, he was presumed to be member of classified personnel system and was entitled to notice and opportunity to be heard before there could be any valid determination that he was exempt from that system. Salas v. State Personnel Bd. of State of Colo., App.1988, 775 P.2d 57, certiorari denied. Officers And Public Employees 11.1

State Personnel Board's exercise of its powers within the scope of its authority is entitled to presumption of validity and constitutionality. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.52

Where the police power is properly exercised, the burden of persuasion is upon the public employee, not the state, to demonstrate that there is no rational connection between the personnel rule and the agency's decision to promote the public interest. Chiappe v. State Personnel Bd., 1981, 622 P.2d 527. Constitutional Law 81

Where appointment of hearing commissioner of Department of Revenue, Division of Motor Vehicles, complied with statute and the Constitution, it was presumed that officer, who ruled that motorist's driver's license was required to be revoked, was both qualified and authorized to perform the duties of a hearing commissioner. Campbell v. State, Dept. of Revenue, Division of Motor Vehicles, 1971, 491 P.2d 1385, 176 Colo. 202. Evidence 83(1)

Presumption existed that Supreme Court, as constituted in 1919, and as being contemporary of civil service amendment of state Constitution, was in better position than Supreme Court, as existing in 1967, to ascertain true intent and purpose of those who placed civil service amendment in Constitution. In re Interrogatory of Governor, 1967, 425 P.2d 31, 162 Colo. 188. Constitutional Law 12

47. Remedies--In general

University police officer whose position was eliminated during reorganization but who was subsequently rehired by university as public safety officer was entitled to opportunity to continue in his present employment with length of service and other benefits presently recognized or to transfer to guard position, in which event he would be entitled to receive all benefits which he would have received had he continuously served in that position from effective date of reorganization, after it was determined that university improperly contracted out security guard positions as part of reorganization. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. Officers And Public Employees 69.11; Officers And Public Employees 76

When faced with public employee's claim of improper discharge, employer may terminate its liability for continuing back pay by offering, unconditionally, to reinstate such employee to same or substantially equivalent position from which he or she was discharged; such offer need not be accompanied by offer to pay past damages and may be made without prejudice to any of the parties' claims or defenses. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. Officers And Public Employees 76

48. ---- Mandamus, remedies

Employees of superior court who did not assert in their petition in nature of mandamus for classification as civil service employees that they had complied with statutory and constitutional requirements for such classification were not entitled to relief, and complaint was properly dismissed on grounds that petition failed to state a claim upon which relief could be granted. Aspgren v. Burress, 1966, 417 P.2d 782, 160 Colo. 302. Mandamus 154(4)

Where position of chief plumbing inspector had been vacant for two years following retirement of previous inspector, representative action for relief in nature of mandamus by plumber, and plumbing contractor's association to compel members of State Civil Service Commission to establish a classification of chief plumbing inspector, deputy plumbing inspector, or plumbing inspector and to hold an examination therefor would not lie, in absence of showing that commission had received request from Department of Public Health to hold such

examination, and action, if any, would lie against the department. Vessa v. Johnson, 1957, 310 P.2d 564, 135 Colo. 284. Mandamus 151(2)

Where Civil Service Commission admitted plaintiff's appointment as tax examiner, but denied that plaintiff ever requested the commission to issue a certificate of appointment as required by the Constitution, plaintiff was not entitled to a writ of mandamus upon the pleadings, since demand of performance of the act sought to be enforced was a condition precedent to right to relief by mandamus. Raymond v. State Civil Service Commission, 1939, 92 P.2d 331, 104 Colo. 458. Mandamus 14(1)

Mandamus and not certiorari held remedy for provisional appointee in civil service seeking reinstatement. State Civil Service Com'n of Colorado v. Cummings, 1928, 265 P. 687, 83 Colo. 379. Certiorari 25

One who claims to be an officer of district court and is denied recognition as such may bring original proceeding in mandamus in Supreme Court to compel such recognition. People ex rel. Clifford v. Morley, 1919, 184 P. 386, 67 Colo. 331. Mandamus 24

49. ---- Back pay, remedies

In public employee's challenge to reallocation of his position on grounds that it was pretext for discipline and that it constituted constructive discharge, employee was entitled to award of back pay for period during which he received benefits from Public Employees' Retirement Association (PERA), even though he was not able to work during that period, since agency caused employee to become disabled. Renteria v. Department of Labor and Employment, App.1994, 907 P.2d 619, rehearing denied. Officers And Public Employees 76

In state employee's challenge to reallocation of his position on grounds that it was pretext for discipline and that it constituted constructive discharge, Workers' Compensation Act did not preclude employee from asserting claim for back pay during period when he was disabled; award sought was proper remedy for violation of employee's rights as state employee resulting in constructive discharge, and fact that violation of those rights also led to form of disability did not defeat employee's remedy as state employee. Renteria v. Department of Labor and Employment, App.1994, 907 P.2d 619, rehearing denied. Officers And Public Employees 76; Workers' Compensation 2088

In state employee's challenge to reallocation of his position on grounds that it was pretext for discipline and that it constituted constructive discharge, State Personnel Board did not abuse its discretion in awarding offset from employee's back pay for disability payments received by employee from Public Employees' Retirement Association (PERA); disability payments were analogous to unemployment compensation payments by which back-pay awards are required

to be offset, and offset was not a penalty since back-pay award included all contributions to PERA attributable to employee's back pay. Renteria v. Department of Labor and Employment, App.1994, 907 P.2d 619, rehearing denied. Officers And Public Employees 76

If state employee is improperly terminated, that employee is entitled to be reimbursed for any wage loss resulting from that improper termination; he or she is not entitled to any "windfall," however. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. States 53

University police officers whose positions were eliminated during reorganization and who were replaced by unarmed guards employed by private security firm were not entitled to award of back pay based upon their former rate of pay after it was determined that university's contracting out of their functions was improper; even if there had been no contracting out of officers' positions, they would nevertheless have been demoted to position of unarmed guards as result of general reorganization of police force. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. Officers And Public Employees 76

Where it was determined that employee under state civil service was improperly removed by state civil service commission and employee was ordered restored to his former status, commission's duty with regard to employee's compensation for period during which he was improperly removed would be discharged when it certified its approval of vouchers representing his withheld pay for the controverted period. State Civil Service Com'n v. Lehl, 1941, 118 P.2d 1080, 108 Colo. 397. Officers And Public Employees 76

50. ---- Reinstatement, remedies

University police officer whose sergeant position was eliminated during restructuring was not entitled to be reinstated as public safety officer after it was determined that university improperly contracted out security guard work to private security firm, absent showing that officer could reasonably have expected to advance to public safety officer position. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. Officers And Public Employees 76

For job offered to public employee following termination to be substantially equivalent to job lost, so as to terminate employer's continuing back pay obligation, job offered must utilize similar skills, must call for similar pay, must have similar working conditions, and must provide similar benefits. Sutton v. University of Southern Colorado, App.1994, 870 P.2d 650. Officers And Public Employees 76

C. R. S. A. Const. Art. 12, § 13, CO CONST Art. 12, § 13
Current with amendments adopted through the Nov. 2, 2004 General Election

Constitution of the State of Colorado [1876]
ARTICLE XII - Officers

§ 14. State personnel board--state personnel director

(1) There is hereby created a state personnel board to consist of five members, three of whom shall be appointed by the governor with the consent of the senate, and two of whom shall be elected by persons certified to classes and positions in the state personnel system in the manner prescribed by law. Each member shall be appointed or elected for a term of five years, and may succeed himself, but of the members first selected, the members appointed by the governor shall serve for terms of one, two, and three years, respectively, and the members elected shall serve for terms of four and five years, respectively. Each member of the board shall be a qualified elector of the state, but shall not be otherwise an officer or employee of the state or of any state employee organization, and shall receive such compensation as shall be fixed by law.

(2) Any member of the board may be removed by the governor for willful misconduct in office, willful failure or inability to perform his duties, final conviction of a felony or of any other offense involving moral turpitude, or by reason of permanent disability interfering with the performance of his duties, which removal shall be subject to judicial review. Any vacancy in office shall be filled in the same manner as the selection of the person vacating the office, and for the unexpired term.

(3) The state personnel board shall adopt, and may from time to time amend or repeal, rules to implement the provisions of this section and sections 13 and 15 of this article, as amended, and laws enacted pursuant thereto, including but not limited to rules concerning standardization of positions, determination of grades of positions, standards of efficient and competent service, the conduct of competitive examinations of competence, grievance procedures, appeals from actions by appointing authorities, and conduct of hearings by hearing officers where authorized by law.

(4) There is hereby created the department of personnel, which shall be one of the principal departments of the executive department, the head of which shall be the state personnel director, who shall be appointed under qualifications established by law. The state personnel director shall be responsible for the administration of the personnel system of the state under this constitution and laws enacted pursuant thereto and the rules adopted thereunder by the state personnel board.

(5) Adequate appropriations shall be made to carry out the purposes of this section and section 13 of this article.

NOTES OF DECISIONS

1. Construction and application

State Personnel Board and State Department of Personnel are distinct entities with separate powers and responsibilities. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 15

Possibility that administrative directive of State Personnel Director could infringe upon area of rule making of State Personnel Board supplied no basis for claim that challenged provisions of State Personnel System Act authorizing such directive, on their face, violated article of Colorado Constitution setting forth principles under which state personnel system was to operate. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 15

2. Board authority

Authority of state Personnel Board is limited to consideration of actions taken by state agencies and appointing authorities pursuant to legislation or executive rules governing such actions. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Officers And Public Employees 72.31

State Personnel Board has no authority to determine whether acts of legislature are constitutional on their face or to evaluate executive conduct in administering statutes, but it may evaluate whether otherwise constitutional statute has been unconstitutionally applied with respect to particular personnel action. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Administrative Law And Procedure 316; Officers And Public Employees 72.31

State Personnel Board did not have authority to determine constitutional issues raised by state employees, and thus employees were not required to exhaust administrative remedies prior to bringing court action requesting declaratory relief, reinstatement and back pay, where employees had been adversely affected by appropriations statute which eliminated funding for full-time state positions and which requested Department of Administration to contract with private employers for custodial services formerly provided by state employees, and complaint asserted that request contained in appropriations statute

constituted substantive legislation, in violation of State Constitution, and that Department's actions violated Civil Service Amendment to State Constitution. Horrell v. Department of Admin., 1993, 861 P.2d 1194. Administrative Law And Procedure 229; Administrative Law And Procedure 316; Constitutional Law 44.1; Officers And Public Employees 72.41(2)

Dismissed public employee's claim that statute or rules governing disciplinary actions in state personnel system were violative of federal constitutional protections because they did not provide predismissal hearings did not give judiciary power to interfere with State Personnel Board's proceedings in advance of Board's taking final action. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.15

3. Director authority

Sections of Colorado Constitution do not grant Director of the Personnel Department exclusive authority to establish levels of compensation payable to state employees by virtue of Director's authority to certify classifications and grades, thereby prohibiting General Assembly from establishing maximum monthly salary levels for particular pay grades. Dempsey v. Romer, 1992, 825 P.2d 44. Constitutional Law 58; Officers And Public Employees 94

Constitution gives State Personnel Director exclusive authority regarding temporary appointments to positions that are not exempt from state personnel system. Op.Atty.Gen. No. OAG9101661.ARY, Aug. 6, 1991.

4. Rule-making authority

State Personnel Board's rule gave it authority to order that black Department of Highway's foreman be appointed to next available position, rather than merely requiring that Department place foreman's name on eligibility list. Cunningham v. Department of Highways, App.1991, 823 P.2d 1377, certiorari denied. Civil Rights 1711

In general, rule making is within proper ambit of authority of State Personnel Board, while duties and responsibilities of State Personnel Director are limited to administration; however, administration, if it is to be effective, requires development of procedures to implement policy determinations reflected in Constitution, statutes, and rules. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 15

Where State Personnel Board's responsibilities include adopting rules concerning employee efficiency, competency, and grievances, and holding hearings to review actions of heads of departments, whereas responsibilities of State Department of Personnel include directing administration of state personnel

system under rules promulgated by Board and directing administration of Board, Board and Personnel Department are distinct entities with separate powers and responsibilities. Spahn v. State Dept. of Personnel, Division of Employment and Training, App.1980, 615 P.2d 66, 44 Colo.App. 446. Officers And Public Employees 69.1

Civil service rules, inconsistent with constitutional provisions that promotions in state's classified civil service shall be made according to merit and fitness ascertained by competitive tests and that persons ascertained to be most fit and of highest excellence must be first appointed, are void and of no effect. Schmidt v. Hurst, 1942, 124 P.2d 235, 109 Colo. 207. Officers And Public Employees 26(1)

5. Administration

Empowering State Personnel Director to establish administrative procedures and directives is consistent with article of Colorado Constitution setting forth principles under which state personnel system is to operate and does not infringe on whatever constitutional authority State Personnel Board may have. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 15

Requiring heads of principal departments and presidents of colleges and universities to act under administrative directives issued by State Personnel Director and to be subject to postaudit review by Director, who in turn is governed by rules promulgated by State Personnel Board under its constitutional authority, is consistent with article of Colorado Constitution setting forth principles under which state personnel system is to operate. Colorado Ass'n of Public Employees v. Lamm, 1984, 677 P.2d 1350. Officers And Public Employees 15

6. Disciplinary actions

Absent final agency action by State Personnel Board on dismissal of state employee, district court had no authority to interfere with administrative agency proceedings by granting stay of employee's dismissal. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.15

7. Judicial review

For purposes of district court review of dismissal of state employee, final agency action did not occur when hearing officer for State Personnel Board denied employee's request for stay of his dismissal, but would occur only when Board rendered its decision. State Personnel Bd. v. District Court In and For City and

County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.41(1)

State Personnel Board's exercise of its powers within the scope of its authority is entitled to presumption of validity and constitutionality. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Officers And Public Employees 72.52

State employee's complaint, which sought review of State Personnel Board's decision to terminate her employment, was properly dismissed for failure to join indispensable party, Board, since fact that Board and State Department of Personnel were distinct entities meant that employee's designation of Personnel Department instead of Board as party was not merely technical error. Spahn v. State Dept. of Personnel, Division of Employment and Training, App.1980, 615 P.2d 66, 44 Colo.App. 446. Officers And Public Employees 72.43

C. R. S. A. Const. Art. 12, § 14, CO CONST Art. 12, § 14
Current with amendments adopted through the Nov. 2, 2004 General Election

§ 24-50-125. Disciplinary proceedings--appeals--hearings--procedure

(1) A person certified to any class or position in the state personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined. In considering the conviction of a crime, the board shall be governed by the provisions of section 24-5-101.

(2) Any certified employee disciplined under subsection (1) of this section shall be notified in writing by the appointing authority, by certified letter or hand delivery, no later than five days following the effective date of the action, of the action taken, the specific charges giving rise to such action, and the employee's right of appeal to the board. The notice shall include a statement setting forth the time limit for filing an appeal with the board, the address of the board, the requirement that the appeal be in writing, and the availability of a standard appeal form. Upon failure of the appointing authority to notify the employee in accordance with this subsection (2), the employee shall be compensated in full for the five-day period and until proper notification is received.

(3) Within ten days after the receipt of the notification required by subsection (2) of this section or within such additional time as may be permitted by the board in unusual cases for good cause shown, the employee may petition the board for a hearing upon the action taken. Upon receipt of such petition, the board shall grant a hearing to the employee. If the employee fails to petition the board within ten days or within such additional time granted by the board, the action of the appointing authority shall be final and not further reviewable.

(4) The hearing shall be held within ninety days of receipt of the employee's appeal pursuant to the provisions of section 24-50-125.4. The employee shall be entitled to representation of his or her own choosing at his or her own expense, consistent with the rules of the Colorado supreme court concerning the unauthorized practice of law. The board shall cause a verbatim record of the proceedings to be taken and shall maintain the record. At the conclusion of the hearing, but not later than forty-five days after the conclusion of the hearing, the board shall make public written findings of fact and conclusions of law affirming, modifying, or reversing the action of the appointing authority, and the appointing authority shall thereupon promptly execute the findings of the board.

(5) In addition, upon request by the employee or the employee's representative and within the period provided in section 24-50-125.4 (2), the board shall hold a hearing on an appeal for any certified employee in the state personnel system

who protests any action taken that adversely affects the employee's current base pay as defined by board rule, status, or tenure. A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee. This subsection (5) shall not apply to appeals brought pursuant to section 24-50-104.

(6) Disciplinary hearings shall be limited to those specified in this section.

(7) Failure, without good cause, of an employee or his representative to appear at a hearing shall be deemed a withdrawal of his appeal, and the action of the appointing authority shall be final. Failure, without good cause, of the appointing authority or his representative to appear at a hearing shall be deemed cause to dismiss the case and to award the employee all rights, salaries, and benefits as though the employee had won the appeal.

CREDIT(S)

Amended by Laws 1977, S.B.115, § 3; Laws 1981, S.B.308, § 21; Laws 1983, H.B.1187, § 6; Laws 1983, S.B.2, § 1; Laws 1984, H.B.1084, § 10; Laws 1993, H.B.93-1119, § 3, eff. March 4, 1993; Laws 2005, Ch. 182, § 3, eff. May 27, 2005.

NOTES OF DECISIONS

1. Due process

Placement of burden of proof on certified state employee in administrative hearing following discharge from job at state college due to job abolishment did not violate due process, even though employee had a property interest in job under state constitution, and employee was entitled to hearing under statute; employee had no due process right to hearing following job abolishment, as opposed to discharge for cause, and thus providing hearing but placing burden of proof on employee could not violate due process. Velasquez v. Department of Higher Educ., App.2003, 93 P.3d 540, certiorari denied 2004 WL 1375406. Colleges And Universities ⚿ 8.1(5); Constitutional Law ⚿ 278.5(4)

No significant procedural inefficiency resulted from placement of burden of proof on certified state employee in administrative hearing challenging employee's discharge from job at state college due to job abolishment; employee reviewed and copied human resources documents pursuant to discovery request, and presented testimony from several college employees, including college president and director of human resources. Velasquez v. Department of Higher Educ.,

App.2003, 93 P.3d 540, certiorari denied 2004 WL 1375406. Colleges And Universities 8.1(5)

Police officer employed by public university was not entitled to criminal procedural protections in proceedings that led to corrective action against him for excessive use of force, where officer was not charged with criminal offense, no statements he made were later used against him in criminal proceeding, and proceedings against him were administrative in nature and not analogous to criminal prosecution. Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Colleges And Universities 8.1(4.1)

Due process requires that public university comply with Department of Personnel Rule requiring appointing authority to meet with employee facing disciplinary action, to present information to employee, and to give employee opportunity to admit or refute information. Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Colleges And Universities 8.1(5); Constitutional Law 278.5(4)

Assistant vice chancellor's letter advising police officer employed by public university of meeting to discuss disciplinary action against him provided officer with sufficient notice, for due process analysis, of purpose of, and matters to be addressed at meeting by stating "[a]t the meeting, we will be discussing your alleged failure to comply with standards of effecient [sic] service or competence. Specifically, we will discuss: the incident on October 15, 1993, which resulted in the arrest of [the suspect]; whether or not you exercised proper judgment in the incident; and whether or not you followed proper police and departmental procedures." Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Colleges And Universities 8.1(5); Constitutional Law 278.5(4)

Neither regulation requiring appointing authority to meet with employee facing disciplinary action, to present information to employee, and to give employee opportunity to admit or refute information, nor fundamental due process requires that appointing authority provide employee with reports, statements of witnesses, or other evidence relating to disciplinary action; regulation provides, instead, that employee be permitted to refute charges against him at meeting. Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Constitutional Law 278.4(5); Officers And Public Employees 72.10

Evidence was sufficient to support public university's corrective action against police officer accused of using excessive force, and thus officer was not denied substantive due process rights. Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Colleges And Universities 8.1(4.1); Constitutional Law 278.5(3)

Due process requires that deprivation of public employment be preceded by notice and opportunity for hearing appropriate to nature of case. University of Southern Colorado v. State Personnel Bd. of State of Colo., App.1988, 759 P.2d 865. Constitutional Law 278.4(5)

Discharged university employees who were provided pretermination hearing and posttermination hearing, the latter occurring after completed reorganization plan and contract of employment were available were afforded due process of law. University of Southern Colorado v. State Personnel Bd. of State of Colo., App.1988, 759 P.2d 865. Administrative Law And Procedure 470; Colleges And Universities 8.1(5); Constitutional Law 278.5(4)

Although police officer was discharged from classified service for violation of rules and duty manual of police department by executive order of chief of police and manager of safety without opportunity to be heard, he was not denied due process where procedure followed was pursuant to city and county charter which established procedure for appeal and review before Civil Service Commission. Cain v. Civil Service Commission of City and County of Denver, 1966, 411 P.2d 778, 159 Colo. 360. Constitutional Law 277(2)

2. Grounds for disciplinary action

State employee's unsatisfactory job performance is ground for dismissal by appointing authority during employee's probationary period without right of appeal. Lucero v. Department of Institutions, Div. of Developmental Disabilities, App.1996, 942 P.2d 1246, rehearing denied, certiorari denied. States 53

Central feature of state personnel system is principle that persons within system can be subjected to discharge or other discipline only for just cause. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center v. Kinchen, 1994, 886 P.2d 700. Officers And Public Employees 69.7

Certified state employees have property interest in their positions and may only be terminated for just cause. Kinchen v. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center, App.1993, 867 P.2d 8, certiorari granted, affirmed 886 P.2d 700. Constitutional Law 277(2); Officers And Public Employees 69.7; States 53

Conclusion of State Personnel Board that detention center employee's termination was within range of alternatives available to reasonable and prudent administrator as result of employee's reporting to work in intoxicated condition, and series of incidents occurring which led to charges being filed against him and to his dismissal, was not arbitrary or capricious, abuse of discretion, or unsupported by substantial evidence. Adkins v. Division of Youth Services, Dept. of Institutions, App.1986, 720 P.2d 626. Officers And Public Employees

72.53; Officers And Public Employees 🔑 72.54; Officers And Public Employees 🔑 72.63

Public employee who refused to accept reassignment was not subject to disciplinary action under personnel regulations. Zagar v. Colorado Dept. of Revenue, App.1986, 718 P.2d 546. Officers And Public Employees 🔑 69.7

Filing of lawsuit by a state civil service employee would not in and of itself be a sufficient ground for dismissal of employee. Paris v. Civil Service Commission, 1974, 519 P.2d 323, 184 Colo. 207. Officers And Public Employees 🔑 69.7

Where plaintiff classified as a civil service employee refused without justification to accept an assignment of duty given him outside of Denver and absented himself without leave for period in excess of five days, pursuant to pertinent rule in case made and provided, Commission was justified in removing plaintiff from classified service of state and in dropping name from roll of classified employees. Kenny v. State Civil Service Com'n, 1960, 348 P.2d 367, 141 Colo. 422. Officers And Public Employees 🔑 69.7

3. Knowledge or intent of employee

Bill of particulars which recited that prison employee had conspired with an inmate to bring contraband drugs into the prison, which activity was prohibited by the rules, sufficiently specified charge of which the Civil Service Commission ultimately found employee guilty, since as an employee of the prison he had been issued a copy of the rules and regulations with which he was expected to be familiar, and where he was found guilty of violating one of those rules. Jones v. Civil Service Commission, 1971, 489 P.2d 320, 176 Colo. 25. Officers And Public Employees 🔑 72.12

Certification as a civil service employee does not entitle person to ordain and dictate location, terms and conditions of his employment particularly when an employee accepts a position with full knowledge of existing applicable terms and conditions which are not manifestly unreasonable. Kenny v. State Civil Service Com'n, 1960, 348 P.2d 367, 141 Colo. 422. Officers And Public Employees 🔑 91

4. Defenses to charges

That, in addition to unsatisfactory work performance of state compensation fund employee, insubordination and disloyalty, a stated ground for dismissal of employee was his filing of libel action against his immediate superior did not render dismissal in violation of state constitutional provision that courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character and that right and justice should be administered

without sale, denial or delay. Paris v. Civil Service Commission, 1974, 519 P.2d 323, 184 Colo. 207. Constitutional Law 328

Where employee of prison, who was discharged for allegedly conniving and conspiring with an inmate to smuggle contraband drugs into the prison, was charged with violating a departmental rule rather than with a criminal offense, defense of entrapment had no application. Jones v. Civil Service Commission, 1971, 489 P.2d 320, 176 Colo. 25. Officers And Public Employees 69.7

5. Strict compliance with procedural requirements

Where the procedures for dismissal of a civil service employee are not strictly followed, the dismissal is invalid and the employee must be reinstated. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. Officers And Public Employees 72.10; Officers And Public Employees 76

Where statements in letter handed to state employee by superior, and conduct of superior, disclosed that the immediate termination of employee's employment, either by resignation or discharge was inevitable and that any attempts by employee to refute information or present mitigating evidence at that point would have been an exercise in futility, the agency, by such action, violated both spirit and letter of civil service regulation requiring that employee be afforded an opportunity to refute or mitigate information upon which a disciplinary action may be based, and thus employee was entitled to be reinstated. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. Officers And Public Employees 72.58(1)

6. Administrative rules governing disciplinary proceedings

State Personnel Board's interpretation of its own rules is generally entitled to great weight unless it is plainly erroneous or inconsistent with rule or underlying statute. Bishop v. Department of Institutions, Div. of Youth Services, App.1992, 831 P.2d 506. Administrative Law And Procedure 413; Officers And Public Employees 69.3

Although administrative agency is vested with power to alter its own rules, it must do so without being arbitrary or unreasonable. Mayberry v. University of Colorado Health Sciences Center, App.1987, 737 P.2d 427. Administrative Law And Procedure 420

When a state agency promulgates rules governing such matters as discharge of its employees which are more stringent in favor of employee than due process would require, the agency must strictly comply with those rules. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. States 53

Rules and regulations of the Civil Service Commission may not be applied retroactively, so that civil servant could not be discharged for violation of a rule of the Commission that was not in existence at the time of the alleged violation. Reeb v. Civil Service Commission, App.1972, 503 P.2d 629, 31 Colo.App. 488. Officers And Public Employees 69.3

Charter of city and county, giving police chief power to establish rules of conduct for violation of which one could suffer suspension or discharge, did not delegate arbitrary power in violation of constitutional provisions relating to separation of power or in violation of home rule amendment. Cain v. Civil Service Commission of City and County of Denver, 1966, 411 P.2d 778, 159 Colo. 360. Municipal Corporations 65; Municipal Corporations 176(3.1)

Chief of police was charter officer designated by people with authority to promulgate and adopt internal rules and regulations governing daily affairs and activities of members of police department. Cain v. Civil Service Commission of City and County of Denver, 1966, 411 P.2d 778, 159 Colo. 360. Municipal Corporations 182

7. Meeting preceding disciplinary action

Although trial service employee's procedural rights were violated when she failed to receive predisciplinary meeting prior to her reversion to former Administrative Officer II position for unsatisfactory performance, employee, who received compensation for full six months trial service period at Administrative Officer III level was fully compensated for procedural violation, and thus, order for employee's certification as Administrator Officer III with full back pay bestowed economic windfall on employee vastly disproportionate to legal wrong she sustained where reversion was, in fact, based upon employee's unsatisfactory job performance. McCoy v. Department of Social Services, Div. of Aging and Adult Services, App.1990, 796 P.2d 77. Officers And Public Employees 76

Under administrative regulation which requires a "meeting" between a proper representative of agency and employee to discuss alleged violations, so that disciplinary action may be forestalled, the meeting must afford employee a reasonable chance of succeeding if he chooses to avail himself of opportunity to defend himself. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. Officers And Public Employees 72.10

8. Probationary employees--In general

Personnel rule governing predisciplinary meetings granted probationary government employee the right to an appropriate predisciplinary meeting with her supervisor in the State Department of Health before being discharged for unsatisfactory job performance prior to the expiration of her probationary period, and thus where Department failed to accord her predisciplinary meeting, her

early discharge two and one-half weeks before the expiration of her one-year probationary term was in violation of her procedural due process rights. Department of Health v. Donahue, 1984, 690 P.2d 243. Constitutional Law 278.4(5); Officers And Public Employees 72.16(2)

Under the State Constitution, probationary employees have no right to an appeal as a result of a dismissal for unsatisfactory performance. Department of Health v. Donahue, 1984, 690 P.2d 243. Officers And Public Employees 72.24

A rule of the State Civil Service Commission, providing for a probationary period of employment and for dismissal of probationer if appointing authorities are of opinion that dismissal would be for good of the service, is void, since it attempts to subject those who have submitted to competitive tests of competence and who have been certified permanently into the classified civil service to the hazards of discharge by authority other than the commission. McDevitt v. Corfman, 1941, 120 P.2d 963, 108 Colo. 571. Officers And Public Employees 26(1)

9. ---- Hearing before discharge, probationary employees

A probationary employee lacks a legally protected interest in continued employment sufficient to create an entitlement to a due process hearing prior to discharge, at least in the absence of a showing that the dismissal has been exacted as a penalty for the exercise of the employee's constitutionally protected rights of speech or association, or that the charges are such as to seriously damage the employee's standing and association in the community or to create a stigma or other disability that abridges the freedom to take advantage of other employment opportunities. Department of Health v. Donahue, 1984, 690 P.2d 243. Constitutional Law 277(2)

10. Reinstatement

Where it was determined that employee under state civil service was improperly removed by state civil service commission and employee was ordered restored to his former status, commission's duty with regard to employee's compensation for period during which he was improperly removed would be discharged when it certified its approval of vouchers representing his withheld pay for the controverted period. State Civil Service Com'n v. Lehl, 1941, 118 P.2d 1080, 108 Colo. 397. Officers And Public Employees 76

11. Hearing--In general

Pretermination hearings for discharged university employees need not resolve propriety of discharge but rather determine whether reasonable grounds exist to serve as basis for discharge. University of Southern Colorado v. State Personnel Bd. of State of Colo., App.1988, 759 P.2d 865. Administrative Law And Procedure 470; Colleges And Universities 8.1(5)

In the absence of a statute or regulation, due process would have been satisfied by post termination hearing afforded deputy director of State Bureau of Investigation. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. Constitutional Law 278.4(5)

12. ---- Right to hearing

State Personnel Board properly upheld corrective action taken against police officer employed by public university without granting officer hearing. Bourie v. Department of Higher Educ., App.1996, 929 P.2d 18, rehearing denied, certiorari denied. Colleges And Universities 8.1(5)

Probationary employee of Department of Corrections was entitled to hearing on his administrative appeal of termination of his employment absent showing that he was terminated for unsatisfactory job performance. Maurello v. Colorado Dept. of Corrections, Buena Vista Correctional Facility, App.1990, 804 P.2d 280. Officers And Public Employees 72.24

A permanently certified employee under civil service may be removed or disciplined only upon written charges and hearing. Reeb v. Civil Service Commission, App.1972, 503 P.2d 629, 31 Colo.App. 488. Officers And Public Employees 72.10

Where, as a result of an examination conducted by the Civil Service Commission, applicants qualified for the preferment into which they were permanently certified by prevailing in competitive tests of competence, applicants could not be removed from their positions by employing authority without hearing, and they were subject to removal or discipline only on written charges to be finally and promptly determined by the commission on inquiry and after an opportunity to be heard. McDevitt v. Corfman, 1941, 120 P.2d 963, 108 Colo. 571. Officers And Public Employees 69.5

A deputy water commissioner of water district holding position under state civil service could not be removed by state civil service commission without notice or hearing on ground that he was an alien and hence was never eligible to the position. State Civil Service Com'n v. Lehl, 1941, 118 P.2d 1080, 108 Colo. 397. Officers And Public Employees 72.12; Officers And Public Employees 72.16(1)

13. ---- Res judicata, hearing

Where only charge against plaintiff civil servant which the Civil Service Commission could consider was the one set out in the bill of particulars, which alleged that civil servant committed the criminal offense of shoplifting, her acquittal of the criminal charge by a court of competent jurisdiction was a

conclusive determination on the issue of her guilt and operated as a bar to redetermination of the same issue by the Commission. Reeb v. Civil Service Commission, App.1972, 503 P.2d 629, 31 Colo.App. 488. Judgment 559

While disciplinary proceedings against a civil servant are civil in nature, and such proceedings are not barred by an acquittal in criminal proceedings based upon the same transaction which forms the basis of the disciplinary proceedings, specific terms of charges filed against plaintiff civil servant made the rule inapplicable where, as a basis for discharge, plaintiff was not accused of conversion or other civil wrongs, but rather she was accused, on a specific date, of having committed the crime of shoplifting, of which crime she was acquitted by a court of competent jurisdiction. Reeb v. Civil Service Commission, App.1972, 503 P.2d 629, 31 Colo.App. 488. Judgment 559

14. ---- Time for proceeding, hearing

Employee dissatisfied with decision of the State Personnel Board must either file a petition for review or a request for an extension of time within the statutory ten-day limit; if he does not, decision becomes final. State Personnel Bd. v. Gigax, 1983, 659 P.2d 693. Officers And Public Employees 72.45(3)

15. ---- Admissibility of evidence, hearing

Civil Service Commission did not abuse its discretion in admitting statement of prison employee, who was discharged for allegedly conniving and conspiring with an inmate to smuggle contraband drugs into the prison, where employee was not the subject of a criminal prosecution; rather, he was the subject of an administrative hearing, where the rules of evidence and procedure are not as strict as they are in a criminal case. Jones v. Civil Service Commission, 1971, 489 P.2d 320, 176 Colo. 25. Officers And Public Employees 72.62

16. ---- Sufficiency of proof, hearing

Evidence sustained finding that there was no true "lack of funds," so as to form basis for layoff of employee of the Department of Local Affairs upon termination of federal grant; there was a balance remaining for those funds prior to the layoff date and the Department thereafter accepted an offer from the federal government to extend the grant for another four months, so that employee's layoff prior to expiration of those four months was improper. Brennan v. Department of Local Affairs, App.1989, 786 P.2d 426, certiorari denied. Officers And Public Employees 72.63

Evidence was sufficient to support conclusion of Civil Service Commission that typewriter traded by police officer, discharged from classified service for violation of rules and duty manual of police department, to another in downpayment for refrigerator was one taken in burglary. Cain v. Civil Service Commission of City

and County of Denver, 1966, 411 P.2d 778, 159 Colo. 360. Municipal Corporations 🔑 185(10)

17. ---- Findings, hearing

Evidence supported State Personnel Board's findings that agency employee complied with agency's policies for requesting sick leave and that employee was able to return to work at end of leave period; testimony of employee, his supervisor, and his doctor supported Board's findings. Ornelas v. Department of Institutions, Div. of Youth Services, App.1990, 804 P.2d 235, certiorari denied. States 🔑 53

Although it would have been a better practice for State Personnel Board to enter specific findings of facts and conclusions in determining case of wrongful termination of state university police officer, its failure to do so did not require reversal given evidence supporting the decision. Beardsley v. Colorado State University, App.1987, 746 P.2d 1350, certiorari dismissed 761 P.2d 792. Administrative Law And Procedure 🔑 676; Officers And Public Employees 🔑 76

Where Civil Service Commission modified dismissal order of chief of police by changing the discharge to suspension for one year, without making findings which would explain such modification, there could be no meaningful review on the merits in district court, and such court should have remanded the case to Civil Service Commission for such findings instead of reinstating the discharge. Lawless v. Bach, 1971, 489 P.2d 316, 176 Colo. 165. Municipal Corporations 🔑 182

18. ---- Attorney fees, hearing

University's failure to follow rule prohibiting presence of persons other than employee and appointing authority at meeting on employee's proposed termination, constituted bad faith as matter of law, justifying attorney fees and costs, and no evidentiary proceeding was required to show bad faith; opinion of State Personnel Board interpreting rule to limit parties present at such meeting was available at least one month prior to meeting. Mayberry v. University of Colorado Health Sciences Center, App.1987, 737 P.2d 427. Administrative Law And Procedure 🔑 370; Officers And Public Employees 🔑 72.70

19. Time of appeal

Appeal of public employee who claimed that reallocation process was used by appointing authority for disciplinary purposes was not barred as untimely on grounds he did not file appeal with State Personnel Board within ten days after receiving notification of disciplinary action, where employee was not notified of his right to appeal to Board, as required by Board rule. Renteria v. Colorado

State Dept. of Personnel, 1991, 811 P.2d 797, on remand 907 P.2d 619, rehearing denied. Officers And Public Employees 72.27

Public employee's time to appeal decision of appointing authority does not run if notice does not properly advise employee of his or her right to appeal. Renteria v. Colorado State Dept. of Personnel, 1991, 811 P.2d 797, on remand 907 P.2d 619, rehearing denied. Officers And Public Employees 72.27

"Service" is not synonymous with "receipt," for purposes of statute mandating that any appeal of hearing officer's decision be filed within 30 days after service of initial decision. Vendetti v. University of Southern Colorado, App.1990, 793 P.2d 657. Administrative Law And Procedure 722.1

Thirty-day period for former university employee to appeal hearing officer's decision upholding termination from employment commenced on date decision was dated and mailed to parties, and appeal filed more than 30 days later was untimely. Vendetti v. University of Southern Colorado, App.1990, 793 P.2d 657. Colleges And Universities 8.1(5)

Even if motion for order to declare prior order to be void because of lack of agency jurisdiction were construed as administrative appeal, Colorado Court of Appeals lacked jurisdiction to review final order denying the motion where review proceeding was filed in Court of Appeals more than five months after service of the order. Fiebig v. Wheat Ridge Regional Center, App.1989, 782 P.2d 814, certiorari denied. Administrative Law And Procedure 723; Officers And Public Employees 72.45(3)

Appeal by nonexempt state university employee of his termination, filed more than ten days after employee received notification of discharge, was timely where notice of termination advised only that administrators and exempt professionals had no right to appeal termination or nonrenewal of appointment. Salas v. State Personnel Bd. of State of Colo., App.1988, 775 P.2d 57, certiorari denied. Administrative Law And Procedure 722.1; Officers And Public Employees 72.27

20. Pleadings

School warehouse foreman's allegations that he was classified employee, that he received handbook from school district indicating classified employee would be discharged for poor work only after school district had attempted to improve employee's performance by program of progressive discipline that he would be immediately dismissed only for enumerated acts of misconduct and that he was discharged shortly after returning from medical leave of absence without hearing sufficiently pleaded breach of contract claim. Dickey v. Adams County School Dist. No. 50, App.1988, 773 P.2d 585, certiorari granted, affirmed and remanded 791 P.2d 688. Officers And Public Employees 71.5

21. Judicial review--In general

Employee of state university could appeal reduction in force which resulted in abolition of her position through state personnel system, even though employee was able to exercise her retention rights and bump into position with similar base pay, status and tenure, where employee alleged that university acted in arbitrary, capricious and discriminatory manner in implementing reorganization leading to elimination of her position. Hughes v. Department of Higher Educ., App.1997, 934 P.2d 891. Officers And Public Employees 72.41(1)

Probationary state employee has no constitutional or statutory right to appeal dismissal from employment for unsatisfactory performance. Williams v. Colorado Dept. of Corrections, App.1996, 926 P.2d 110, rehearing denied, certiorari denied. Officers And Public Employees 72.24

Statute permitting courts to enjoin agency action "clearly beyond the constitutional or statutory jurisdiction or authority of the agency * * *" referred to authority granted agency under Colorado Constitution and Colorado statutes, and thus this statute could not serve as basis for district court order staying dismissal of state employee until such time as proceedings before State Personnel Board were completed, since Colorado Constitution and Colorado statutes clearly authorized dismissal before hearing. State Personnel Bd. v. District Court In and For City and County of Denver, 1981, 637 P.2d 333. Injunction 81

22. ---- Scope of judicial review

Board of Personnel exceeded its jurisdiction in determining that probationary employee's termination for unsatisfactory performance was arbitrary and capricious; after determining that employee's racial discrimination claim was unsupported by evidence, Board of Personnel lacked authority to examine factual basis supporting employee's termination for unsatisfactory performance. Williams v. Colorado Dept. of Corrections, App.1996, 926 P.2d 110, rehearing denied, certiorari denied. Officers And Public Employees 72.31

Action of State Personnel Board will be upheld if there is sufficient evidence in record to support it. Bishop v. Department of Institutions, Div. of Youth Services, App.1992, 831 P.2d 506. Administrative Law And Procedure 785; Officers And Public Employees 72.54

On review of discharge of prison employee the Supreme Court was limited to determining whether the Civil Service Commission abused its discretion in admitting statement of the employee. Jones v. Civil Service Commission, 1971, 489 P.2d 320, 176 Colo. 25. Officers And Public Employees 72.53

In reviewing findings made by Civil Service Commission in carrying out its duties, court may not substitute its judgment for that of the Commission. Stevens v. State Civil Service Commission, 1970, 474 P.2d 156, 172 Colo. 446. Officers And Public Employees 72.55(1)

23. ---- Findings of fact, judicial review

Determination of whether particular conduct constitutes "willful misconduct" is finding of ultimate fact, and as such, it may be disturbed on appellate review only if it is unsupported by any competent evidence or is based on incorrect legal conclusion applied to underlying facts. Barrett v. University of Colorado Health Sciences Center, App.1993, 851 P.2d 258. Officers And Public Employees 69.7; Officers And Public Employees 72.55(2)

Any finding of fact by Civil Service Commission will be upheld if it is supported by any competent evidence in the record. Stevens v. State Civil Service Commission, 1970, 474 P.2d 156, 172 Colo. 446. Officers And Public Employees 72.55(2)

24. ---- Discipline imposed, judicial review

Determination of State Personnel Board that Department of Institutions had not proved that former employee had done acts for which discipline was imposed and that Department had not properly conducted prediscipliinary proceeding was not contrary to weight of evidence, despite contention of Department that imposition of discipline involving same Department witness in similar allegations had been upheld in another Board proceeding. Kinchen v. Department of Institutions, Div. for Developmental Disabilities, Wheat Ridge Regional Center, App.1993, 867 P.2d 8, certiorari granted, affirmed 886 P.2d 700. Officers And Public Employees 72.63; States 53

Discipline to be invoked by Civil Service Commission is peculiarly a matter for its expertise, and must not be interfered with by the courts unless a clear, gross abuse of discretion is shown. Stevens v. State Civil Service Commission, 1970, 474 P.2d 156, 172 Colo. 446. Officers And Public Employees 72.56

25. ---- Costs, judicial review

Costs were no taxable against state upon judicial review of State Personnel Board action with respect to dismissal of employee. Shumate v. State Personnel Bd., App.1974, 528 P.2d 404, 34 Colo.App. 393. States 215

26. Misconduct

Conduct of client manager with Division of Youth Service (DYS) in meeting with escaped youth several times, concealing those meetings from supervisors, providing youth with counseling and identification, and erroneously advising that if he did not turn himself in for one year, his name would be removed from DYS roster violated code of ethics for state employees, general provisions in client implementation manual, and established standards in manager's office and were sufficient basis upon which to find that he engaged in willful misconduct warranting termination, even though manager did not violate specific rule promulgated by employing agency. Bishop v. Department of Institutions, Div. of Youth Services, App.1992, 831 P.2d 506. Officers And Public Employees 66

Civil Service Commission was reasonable in determining that conduct of supervisor in using harsh and abusive language toward personnel assigned to him would detract from working harmony of the department, that supervisor showed favoritism without justification and that efficiency and morale of department were impaired by supervisor's reference to superiors as "frauds" and as "incapable" of performing their jobs. Stevens v. State Civil Service Commission, 1970, 474 P.2d 156, 172 Colo. 446. Officers And Public Employees 72.54

27. Burden of proof

Hearing officer's reference to state employee's failure to produce any evidence of motive on part of supervisor to fabricate racially discriminatory remarks allegedly made by employee was not misallocation of burden of proof in disciplinary proceeding where written findings indicated that lack of evidence of motive to fabricate was merely one factor considered in resolving credibility, and hearing officer concluded her detailed analysis of evidence with finding that employer met its burden or proof by preponderance of evidence. Barrett v. University of Colorado Health Sciences Center, App.1993, 851 P.2d 258. Administrative Law And Procedure 460; States 53

28. Witnesses

In a hearing challenging a certified state employee's discharge, the employee can subpoena any employee or official of a state agency to appear and testify as well as to produce relevant documentary evidence. Velasquez v. Department of Higher Educ., App.2003, 93 P.3d 540, certiorari denied 2004 WL 1375406. Officers And Public Employees 72.64

In hearing on Department of Corrections (DOC) employee's termination, administrative law judge (ALJ) properly limited employee's impeachment of witness to questions concerning witness' character for reputation or truthfulness

and denied employee's request to call two other witnesses to attack witness' credibility. Rice v. Department of Corrections, App.1997, 950 P.2d 676, rehearing denied. Officers And Public Employees 72.32

In public employee disciplinary hearing, administrative law judge (ALJ) did not abuse his discretion by allowing Department of Corrections (DOC) to call unendorsed witness in its rebuttal case or by refusing to allow employee to call surrebuttal witness, where employee made no showing of prejudice resulting from testimony of DOC's rebuttal witness and did not indicate before ALJ what witnesses he intended to call on surrebuttal, what anticipated content of their testimony would have been, or how, if at all, he was prejudiced by their exclusion. Rice v. Department of Corrections, App.1997, 950 P.2d 676, rehearing denied. Officers And Public Employees 72.57

In public employee disciplinary hearing, employee was not entitled to make inquiries into mental conditions of some of female witnesses who had made allegations of sexual harassment against him; employee did not show that witnesses had waived privileges or that he had particularized need for information, and women had not placed their mental conditions in controversy. Rice v. Department of Corrections, App.1997, 950 P.2d 676, rehearing denied. Officers And Public Employees 72.32

29. Notice

Hand delivery to state employee of notice of predisciplinary meeting and notice of paid administrative suspension was proper; statute requiring certified mail delivery applied to postdisciplinary notices, and administrative suspension did not constitute "discipline" since it did not affect employee's pay, status, or tenure. Harris v. State Bd. of Agriculture, App.1998, 968 P.2d 148. Officers And Public Employees 72.12

30. Immunity

Disciplinary proceedings initiated by Department of Corrections (DOC) against a supervisory employee regarding allegations of sexual harassment involved quasi-judicial proceedings, and thus, statements made by a fellow employee, as a witness at supervisory employee's disciplinary hearing, were made in a quasi-judicial setting, such that they were entitled to absolute immunity from civil liability, considering that the hearing was subject to direct judicial review, it was adversarial in nature, and hearing officer reviewing DOC's decision was required to make written findings and conclusions. Hoffler v. Colorado Dept. of Corrections, 2001, 27 P.3d 371. Officers And Public Employees 114

Key participants in quasi-adjudicatory administrative proceedings are granted absolute immunity from civil liability for damages because they function

analogously to key participants in judicial proceedings. Hoffler v. Colorado Dept. of Corrections, 2001, 27 P.3d 371. Officers And Public Employees 🔑 114

Absolute immunity from civil liability enjoyed by employee at Department of Corrections (DOC) for her testimony in a quasi-judicial disciplinary proceeding against a co-employee accused of sexual harassment did not extend to shield the testifying employee from DOC's subsequent personnel disciplinary action against her for allegedly making false statements during the investigation of the co-employee; overruling Department of Administration v. State Personnel Board, 703 P.2d 595. Hoffler v. Colorado Dept. of Corrections, 2001, 27 P.3d 371. Officers And Public Employees 🔑 69.7

C. R. S. A. § 24-50-125, CO ST § 24-50-125
Current through the end of the 2005 First Regular Session of the 65th General Assembly

§ 24-50-125.3. Discrimination appeals

An applicant or employee who alleges discriminatory or unfair employment practices, as defined in part 4 of article 34 of this title, in the state personnel system may appeal within ten days of the alleged practice by filing a complaint in writing with the board or the Colorado civil rights division in the department of regulatory agencies, which shall investigate such complaint on behalf of the board pursuant to the procedures and time limits set forth in section 24-34-306. In an appeal involving the civil rights division, the state personnel board shall contract with a third party to investigate the complaint. If, after said civil rights division or third party has found no probable cause or has attempted after a finding of probable cause to resolve the complaint by conference, conciliation, and persuasion, the applicant or employee remains dissatisfied, such person shall have ten days from the date he is notified of the civil rights division's or third party's action in which to appeal to the board. The board may set the complaint for hearing or adopt the findings of the civil rights division or third party as its own. If the complaint is set for hearing, it shall be subject to the same time limits as other appeals heard by the board. If the board adopts a no probable cause finding as its own, such action shall not operate to deny an employee a hearing to which he is otherwise entitled by law or rule.

NOTES OF DECISIONS

Examination 1
Time limits 2

1. Examination

All complaints about selection and examination process for state employees not involving allegations of discrimination are to be filed with director of State Personnel Department, while any claims of discrimination with respect to process must be filed with State Personnel Board or civil rights division. Cunningham v. Department of Highways, App.1991, 823 P.2d 1377, certiorari denied. Civil Rights 1707; States 53

2. Time limits

Order of State Personnel Board denying hearing to terminated probationary state university employee, who claimed national-origin discrimination, was final agency action subject to judicial review, thereby triggering 45-day period to file for appeal, notwithstanding employee's subsequent unsuccessful filing of exceptions; filing of exceptions was nullity that did not toll 45-day period, since there was no statutory or regulatory authorization for filing exceptions. Hussein v. Regents of University of Colorado, University of Colorado at Colorado Springs, App.2005, 2005 WL 1176071. Officers And Public Employees 72.45(3)

If state employee is not given notice of right to pursue discrimination claim, and has no actual knowledge of procedure involved, then statutory ten-day limitation period will start to run only after he receives notice thereof. Cunningham v. Department of Highways, App.1991, 823 P.2d 1377, certiorari denied. Civil Rights ⚿ 1708

Department of Highways, which provided notice to black foreman at time he was advised that he failed to pass examination for superintendent position that he had right to complain to director of State Personnel Department, but which did not notify him that any claim of discrimination was required to be made to State Personnel Board or civil rights division, could not be heard to assert that foreman's appeal to Board raising discrimination claim was untimely; foreman filed timely appeal with director and included charge of racial discrimination, and director, rather than simply forwarding charge of discrimination to Board, referred all of complaints to panel, which noted that it lacked authority to consider discrimination charge. Cunningham v. Department of Highways, App.1991, 823 P.2d 1377, certiorari denied. Civil Rights ⚿ 1708

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§ 24-50-125.4. Hearings

(1) Except for discrimination appeals that may also be filed with the Colorado civil rights division in the department of regulatory agencies, all appeals from actions of the state personnel director, appointing authorities, and agencies that are specifically appealable to the board under the state constitution or this article shall be filed with the board within ten days of receipt of notice of such action.

(2) The board shall give written notice of the time and place of a hearing to the parties involved at least twenty days before the date set for the hearing. The hearing shall commence not later than ninety calendar days after submission of the appeal to the board and may be continued only once for good cause for no longer than thirty days with the approval of the board.

(3) The board or an administrative law judge for the board shall issue a written decision within forty-five calendar days after the conclusion of the hearing and the submission of briefs. Any party may appeal the decision of the board to the court of appeals within forty-five days in accordance with section 24-4-106(11).

(4) If an administrative law judge conducts a hearing on behalf of the board, any party who seeks to modify the initial decision must file an appeal with the board within thirty days of the initial decision pursuant to section 24-4- 105(14). Within sixty days after the record is designated in accordance with section 24-4-105(15)(a), the board shall certify the record. The board shall conduct its review in accordance with section 24-4-105(15)(b) and issue its final decision within ninety days after the record has been certified.

(5) If any party is responsible for any inexcusable delay in conducting the hearing or in the issuance of a decision, the responsible party shall pay the opposing party's costs, including attorney fees.

NOTES OF DECISIONS

1. Retroactive application

Statute, that permits appeal of decision of State Personnel Board to Court of Appeals, rather than district court, substituted one method of judicial review for another, was procedural, and, therefore, was applicable to appeals from decisions made after effective date of statute, even though General Assembly

delayed effective date, where no intent was expressed to apply statute prospectively. Kardoley v. Colorado State Personnel Bd., App.1987, 742 P.2d 934. Administrative Law And Procedure 17

2. Jurisdiction

State Personnel Board had jurisdiction, on remand from Court of Appeals, to order former police officer for Colorado Mental Health Institute at Pueblo (CMHIP) to reimburse CMHIP for back pay and benefits previously awarded by Board when Board had reversed CMHIP's employment termination decision. Rodgers v. Colorado Dept. of Human Services, App.2001, 39 P.3d 1232. Officers And Public Employees 76

Court of Appeals had jurisdiction to review State Personnel Board's order awarding attorney fees, despite the fact that the amount thereof remained to be determined; Board had consistently construed its organic statute as requiring it to notify parties of the right to appeal from an order awarding attorney fees, even if the amount of the award had not been determined. Colorado State Personnel Bd. v. Department of Corrections, Div. of Adult Parole Supervision, 1999, 988 P.2d 1147. Officers And Public Employees 72.41(1)

Statute, which states that State Personnel Board or hearing officer shall issue written decision within 45 days, was directory, rather than mandatory, and, thus, hearing officer's failure to issue decision within 45 days did not deprive hearing officer or Board of jurisdiction. Shaball v. State Compensation Ins. Authority, App.1990, 799 P.2d 399, certiorari denied. Administrative Law And Procedure 489.1; Officers And Public Employees 72.16(1)

State Personnel Board has authority to review State Personnel Director's decision approving or disapproving personal services contract with state university. University of Southern Colorado v. State Personnel Bd. of State of Colo., App.1988, 759 P.2d 865. Officers And Public Employees 11.1

3. Decision

Failure by hearing officer of State Personnel Board to issue decision within 45 days did not entitle discharged employee of State Compensation Insurance Authority to economic sanction. Shaball v. State Compensation Ins. Authority, App.1990, 799 P.2d 399, certiorari denied. Administrative Law And Procedure 489.1; Officers And Public Employees 76

4. Review

Department of Institutions did not preserve issue for review by raising issue in its brief on complainant's appeal to State Personnel Board. Rose v. Department of

Institutions, Pueblo Regional Center, App.1991, 826 P.2d 379, certiorari denied. Officers And Public Employees 72.44

5. Filing of appeal

If Department of Institutions wished to challenge authority of hearing officer to modify appointing authority's disciplinary sanction, it was required to file appeal of hearing officer's ruling with State Personnel Board. Rose v. Department of Institutions, Pueblo Regional Center, App.1991, 826 P.2d 379, certiorari denied. Officers And Public Employees 72.44

C. R. S. A. § 24-50-125.4, CO ST § 24-50-125.4
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