COLORADO
Department of
Labor and Employment

Division of Labor Standards and Statistics
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STATEMENT OF BASIS, PURPOSE, SPECIFIC STATUTORY AUTHORITY, AND FINDINGS

State Labor Relations ("SLR") Rules, 7 CCR 1103-12 (2021), as adopted November 9, 2020.

I. BASIS. The Director ("Director") of the Division of Labor Standards and Statistics ("Division") has authority to adopt rules and regulations under the authority listed in Part II, which is incorporated into Part I as well.

II. SPECIFIC STATUTORY AUTHORITY. These rules are issued under the authority of, and as implementation and enforcement of, Colorado Revised Statutes ("C.R.S.") Title 24, Article 50 (2020) (the "Colorado Partnership for Quality Jobs and Services Act," C.R.S. § 24-50-1101 et seq.), as well as the general labor law implementation and enforcement authority of C.R.S. Title 8, Articles 1 and 3 (2020), and are intended to be consistent with the rulemaking requirements of the Administrative Procedures Act, C.R.S. § 24-4-103. These rules are promulgated pursuant to express authority including but not limited to in C.R.S. §§ 24-50-1103, -1106(4), and C.R.S. § 8-3-105.

III. FINDINGS, JUSTIFICATIONS, AND REASONS FOR ADOPTION. Pursuant to C.R.S. § 24-4-103(4)(b), the Director finds as follows: **(A)** demonstrated need exists for these rules, as detailed in the findings in Part IV, which are incorporated into this finding as well; **(B)** proper statutory authority exists for the rules, as detailed in the list of statutory authority in Part II, which is incorporated into this finding as well; **(C)** to the extent practicable, the rules are clearly stated so that their meaning will be understood by any party required to comply; **(D)** the rules do not conflict with other provisions of law; and **(E)** any duplicating or overlapping has been minimized and is explained by the Division.

IV. SPECIFIC FINDINGS FOR ADOPTION.

(A) Broad Purpose of Rules

The Colorado Partnership for Quality Jobs and Services Act (C.R.S. § 24-50-1101 et seq.) ("the Act") requires the Division to promulgate rules as may be necessary for implementation and enforcement of the Act and its provisions.

These Rules detail procedures, rights, and responsibilities for two key aspects of the Act. First, for the new unfair labor practice charges that the Act permits employees, labor organizations, or the state to file, these Rules detail how the Division will receive, investigate, issue determinations on, and hold appeals of, unfair labor practice charges. Second, these Rules offered similar details as to the new appeals of union coverage determinations by the Colorado Department of Personnel Administration that the Act permits a certified employee organization or the state to file. These Rules do not cover union elections, for three reasons. First, while the Division needs to adopt election-related rules, under the Act, no such elections can occur until 2022, so the need is not imminent. Second, the ongoing public health emergency complicates many in-person activities, and while the Division is not anticipating the continuation of such complications into 2022, the Division believes it is difficult to adopt rules now setting procedures (*e.g.*, setting in-person voting procedures) that would be impermissible now. Third, as remote communication technology and individuals' comfort level using it evolves, and has done so at an accelerated pace during the public health pandemic, it would be premature to decide now to what extent any election procedures might be viable to conduct remotely in 2022 or later.

(B) Rule 1.3 Incorporations by Reference

The Colorado Attorney General ("AG"), as attorneys for the Colorado Department of Personnel Administration ("DPA"), opined that the final sentence of proposed Rule 1.3 -- "[w]here these Rules have provisions different from or contrary to any incorporated or referenced material the provisions of these Rules govern" -- could be read to "impl[y] that the Rules govern over conflicting language in the Act, … contrary to the Administrative Procedures Act's directive that '[a]ny rule … by any agency, ... which conflicts with a statute shall be void.' C.R.S. § 24-4-103(8)(a)." The Division thus added a clause to reassure that the Division in no way asserts that its rules trump Colorado statutory or constitutional provisions.

(C) Rule 2.2, and Rule 5 Covered Employees

The AG's written comments argued that proposed language in Rule 2.2 and Rule 5 as to "classification" and whether employees were properly "classified" as "covered employees" under C.R.S. § 24-50-1106(4) could risk confusion with a separate form of "classification," *i.e.*, the determination of whether employees are properly exempted from the State Personnel System. Under C.R.S. § 24-50-1106(4), "challenges to the exemption of an employee from the state personnel system" may be filed only with the State Personnel Board. To avoid any possible confusion with the latter process, the Division amended the references to "classification" in the header of the rule, but retained the statutory language regarding whether employees were properly "classified *as covered employees*." C.R.S. § 24-50-1106(4) (emphasis added).

(D) Rule 2.8 Definition of Unfair Labor Practices

The AG's written comments requested "removing '-1108' and '-1112'" from the language of proposed Rule 2.8, "because C.R.S. §§ 24-50-1108 and -1112 do not expressly define unfair labor practices." However, none of the statutory provisions cited in the Rule "expressly define[s]... [an] unfair labor practice[]," and Sections -1108 and -1112 provide for statutory duties of the state and the certified employee organization, and either party can remedy violations of those duties by bringing a complaint before the Division. *E.g.,* C.R.S. §§ 24-50-1108 (providing that a certified employee organization "shall have reasonable access to covered employees at work, through electronic communication and other means"); -1112(1) (providing that within a certain timeframe, "the state shall begin meetings to discuss and cooperatively draft a mutually agreed upon written partnership agreement to be binding on the state, the certified employee organization, and covered employees," and "both the certified employee organization and the state shall bargain in good faith to reach agreement on wages, hours, and terms and conditions of employment with all covered employees… disputes shall be resolved pursuant to section 24-50-1113); -1112(2) ("the parties shall bargain over wages, hours, and terms and conditions of employment. All other subjects are permissive and may be addressed during bargaining upon mutual agreement of the parties.") However, to provide greater clarity about the definition's scope, the Division amended Rule 2.8 to explain that, per C.R.S. § 24-50-1112(4), "unfair labor practices" do not include disputes over the interpretation, application, and enforcement of any provision of the partnership agreement, as such disputes are resolved in a separate arbitration process.

(E) Rule 3.1 Filing

The AG's written comments requested "adding language similar to C.R.C.P. 6(a), which describes computation of days and provides that the last day in any period of time prescribed by the Rules shall be included in computations, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday." The plain language of all Rules regarding computation of days (4.1.8, 4.2.1, 5.2, and 5.3), now indicates that such computations are based on "calendar days." *E.g.,* R. 4.1.8 (emphasis added) ("The respondent shall file an answer responding to each allegation in the complaint, and attach any documentation or evidence the respondent wishes the Division to consider in reviewing the complaint, *within twenty-one (21) calendar days of the date* the Division sends a copy of the complaint to the respondent"). The Division viewed further such language as unnecessary.

(F) Rule 4.1.2 Statute of Limitation for Unfair Labor Practice Charges

The Act does not provide an explicit statute of limitations for unfair labor practice charges, and representatives from both the State of Colorado and the current certified employee organization, Colorado Workers for Innovative and New Solutions ("CO-WINS"), proposed that the Division adopt one in rule. The AG proposed a four-month limitations period, while also agreeing in rulemaking hearing testimony that it would alternatively be acceptable to apply the longstanding six-month limitations period for unfair labor practice ("ULP") charges in the Colorado Labor Peace Act (CLPA), C.R.S. § 8-3-110(16). After that proposal by the AG, CO-WINS proposed a six-month limitations period, consistent with the Labor Peace Act; the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b); and state public sector labor relations laws in California, Washington, Oregon, Massachusetts, and Illinois. The Division finds that the six-month statute of limitations provides a reasonable timeframe for ULP charges, balancing the competing interests of (1) allowing parties sufficient time to bring claims and access legal remedies, and (2) finality and the assurance that

neither party has to litigate stale claims. Rule 4.1.2 thus provides that "[a]n unfair labor practice complaint must be received by the Division no later than six (6) months after the latest of (1) the date that the alleged unfair labor practice occurred, (2) the date the charging party knew about the unfair labor practice, or (3) the date the charging party reasonably should have known about the alleged unfair labor practice, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of the person's discharge," and "shall be dismissed as untimely" if not filed within that deadline.

(G) Rules 4.1.7-4.1.8 (Proposed Rules 4.1.6-4.1.7) Receipt of ULP and Respondent's Response

CO-WINS's written comments suggested that the Division provide further clarification regarding the precise scope of disclosure required under Proposed Rule 4.1.6's service/notification requirements, contending that witness affidavits from individual employees should be exempt from disclosure because providing them to the employer "may produce a chilling effect" on employees' willingness to bring unfair labor practice charges or participate in investigations thereof. The Division agrees that confidential witness affidavits should not be disclosed as a matter of course in the preliminary phase of an investigation, and provides additional guidance about what kinds of information is subject to disclosure in Rule 4.1.9.

The AG requested revising the proposed rules to provide for the respondent to receive (A) a copy of a filed ULP immediately rather than after a Division screening of the ULP or (B) 21 rather than 14 days to respond. Based on its experience with tens of thousands of other kinds of labor charges and alleged violations before this Act, the Division sees value in its process of screening charges before notifying the respondent; if those claims clearly are outside the Division's jurisdiction or otherwise not valid charges, (A) the privacy of the charging party and/or witnesses can be preserved because their names will have proven unnecessary to disclose, and (B) the respondent can be saved the trouble of investigating and preparing a response. The Division thus retained the rule that a respondent is notified and not automatically notified upon filing, but rather, upon the Division concluding that (A) it has jurisdiction to investigate the charge and (B) the charge contains sufficient allegations and evidence that, if proven true, would state a claim of an unfair labor practice.

The Division agrees with the AG request for 21 rather than 14 days to respond to a ULP. CO-WINS responded that the 14-day timeframe should be retained because "21 days is unnecessary as the following [Rule] 4.1.8[] allows for extension of time for good cause." The Division concludes that 21 days (A) still allows sufficient time for an investigation to be conducted swiftly, and (B) may obviate the need for as many extension requests by the respondent, due to the adoption in rule of the respondent's preferred longer deadline.

The AG also noted that Proposed Rule 4.1.6 provided that an unfair labor practice complaint would be sent to a respondent only by regular mail, shortening the respondent's timeframe to investigate and respond. The Division agrees that notice via electronic mail is sufficient, so the rule now provides for only "notice" to a respondent. The AG also proposed to "require the Division to email a copy of the complaint to the Attorney General's office's designated collective bargaining email address"; existing rules provide for notice to be sent to all relevant parties, including by email, and if the AG's designated bargaining office is designated by the state as one of the representative parties, it will be included in such notice. The AG also suggested amending "to provide that the answer deadline is triggered on the date notice is sent by email or, if sent by mail, the date such mailing is received." Due to the fact that notice will now be provided via email in the large majority of cases, and the difficulties in determining when an individual receives regular mail, the Division did not amend the rule in this regard.

(H) Rule 4.1.9 Confidentiality

Rule 4.1.9 clarifies that individuals who provide the Division information on labor violations can do so confidentially. While state law details the Division's need to protect confidential information, it does not expressly detail specific information that is confidential, which leaves confidentiality determinations to Division discretion, but leaves promises of confidentiality on uncertain ground. Consequently, the Division has been refused information on possible violations due to worker fear that providing information on violations leaves them vulnerable without legally binding assurances of confidentiality. The Division finds that its inability to offer legally binding assurances of confidentiality has generated the following problems that it finds are substantial, based on its experience and its

extensive experience with employees and employees in labor investigations. Accordingly, Rule 4.1.9 copies the identical Wage Protection Rule 4.7 provision that the Division has already applied to other labor investigations.

(I) Rule 4.2.2 Standard of Review

The Division initially proposed requiring the appellant of an unfair labor practice charge determination to "explain[] the clear error in the determination that is the basis for the appeal." Comments from both DPA and CO-WINS expressed a preference for a *de novo* standard of review. The text of the Act is silent, delegating appeal rules to the Division.[1] The Division concludes that *de novo* review of questions of law, and clear error review of questions of fact, strikes the right balance, preserving administrative efficiency while protecting the independence of the ultimate decision maker.

On the one hand, unique among all labor laws within Division jurisdiction, the state is a direct party in ULP charges, so power to make determinations regarding the legality of the state's labor policies and practices should reside with an official, such as an Administrative Law Judge, whose higher job title makes them relatively more insulated by civil service protection from pressure (implicit or explicit), because higher-titled employees are relatively less susceptible to (for example) possible fear as to future pay or promotion decisions. The Act explicitly provides that the Division hearing decisions are "final agency action pursuant to C.R.S. § 24-4-106" and should be conducted subject to "section 24-4-105(6)." C.R.S. § 24-50-1104(2). C.R.S. § 24-4-105(6), in turn, provides that "[n]o person engaged in conducting a hearing or participating in a decision or an initial decision shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency."

On the other hand, there are real efficiencies in the Division's administrative process that would be sacrificed if the investigator's factual findings were given no measure of deference. Division investigations are conducted by investigators with training and education relevant to the subject matter, including in labor relations law for ULP investigations. The investigator, able to take more time than an ALJ to obtain documents or witness statements, review them as carefully as needed, and request follow-up information, is in a better position to obtain evidence that may be voluminous, or may derive from multiple sources, than an administrative law judge. As the United States Supreme Court has explained:

> Standards of review are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof. They are … normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity. *See, e.g.*, Fed. Rule Civ. Proc. 52(a). As the terms readily indicate, *a reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference.* This makes sense because in many circumstances the costs of providing for duplicative proceedings are thought to outweigh the benefits (the second would render the first ultimately useless), and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.[2]

Amended Rule 4.2.2 thus applies clear error review to questions of fact, and *de novo* review to questions of law.

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[1] The Act provides only that "the Director shall enforce this part 11 and shall promulgate rules in accordance with Article 4 of this Title 24 as may be necessary for the enforcement of this part 11," and "pursuant to section 24-4-104, the Director may conduct hearings for … [a]djudicating disputes and enforcing sections 24-50-1107, 24-50-1108, and 24-50-1109 and the rules adopted pursuant to this part 11, subject to section 24-4-105(6)." C.R.S. § 24-50-1104(2). C.R.S. § 24-4-105(6) provides that "[n]o person engaged in conducting a hearing or participating in a decision or an initial decision shall be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency."

[2] *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622-623 (1993) (emphasis added).

(J) Rule 4.2.4 (Proposed Rule 4.2.3) Depositions

Proposed Rule 4.2.4 covered hearing officer "power and authority to ... take depositions." The AG's written comments opined that this language "suggests that the hearing officer, rather than a party or party's authorized representative, can take depositions but not necessarily order the taking of depositions. If the purpose of the language is to give the hearing officer the authority to order depositions or compel attendance at depositions, we recommend that 'take depositions' be replaced with 'order depositions.'" The language is intended to give the hearing officer the authority to issue subpoenas to order witnesses to appear for testimony at hearing, and to compel the attendance of witnesses at the parties' own depositions. The Rule thus now provides that the hearing officer has the authority to both take and order depositions.

(K) Rule 4.2.6 (Proposed Rule 4.2.5) Good Cause Standard

Based on concerns that the State may not have adequate time to respond to an unfair labor practice complaint, the AG's comments suggested removing Rule 4.2.6's good cause standard for admission of new documentary evidence on appeal. However, as explained above, Rule 4.1.10 permits the respondent to an unfair labor practice complaint to request an extension when a complaint involves a particularly complicated issue or voluminous evidence, and Rule 4.2.6's limits are necessary to preserve the efficiencies of the Division's administrative process and to encourage the parties to search diligently for, and submit, all available documentary evidence to the Division during the investigation. The good cause standard, applicable to other Division appeals, and as applied in Division practice, provides ample opportunity for new evidence when for any reason there is legitimate reason the evidence was not submitted at the investigation stage.

The AG's written comments noted possible ambiguity as to whether a Rule 4.2.6 reference to "new testimonial evidence" refers to "new declarations, affidavits, or deposition transcripts, or instead refers to live witness examinations at hearing," and the suggested "clarifying what is meant by submitting new testimonial evidence, and to set reasonable and appropriate time limits for the parties to submit new evidence before a hearing, to avoid allowing for the possibility of unfair surprise." The Division agrees, adding a "testimonial evidence" definition that includes new declarations, affidavits, and deposition transcripts: "any evidence that is elicited through the statements of individual witnesses."

(L) Rule 5.3 Filing

Proposed Rule 5.3 provided that "[t]he SPD shall have twenty (20) calendar days to file a Response to a Notice of Appeal, and after which the appellant shall have twenty (20) calendar days to file a Reply." To make this deadline consistent with Rule 4.1.8, governing the timelines for responses to unfair labor practice complaints, the Division amended Rule 5.3 to provide for a twenty-one day time period for response and reply.

(M) Rule 5.4 Delegation by State Personnel Director

The AG's written comments suggested amending proposed Rule 5.3, which provided that an appellate "shall provide the State Personnel Director with a copy of the Notice of Appeal at the time of filing with the Division," because

> Rule 5.3 *in effect designates the State Personnel Director*, … the decision maker on underlying coverage disputes, *as the party in interest in an appeal of a decision by the State Personnel Director regarding coverage*. The parties in coverage disputes before the State Personnel Director will be the particular State department, agency, or division that employs the employee at issue and the certified employee organization. *See* C.R.S. § 24-50-1106(4) (stating that a certified employee organization or "the state" may file a petition with the State Personnel Director). We recommend clarifying that the "appellee" for … Rule 5 appeals are either a certified employee organization or the particular State department, agency, or division which is challenging or defending a coverage determination. This recommended change will ensure the State party with the greatest knowledge about a position—and the greatest interest in ensuring the position is properly designated … —remains the party appealing or defending the State Personnel Director's decision.... We recommend revising this to say the "appellee"—meaning either the certified employee organization or the

particular State department, agency, or division … defending a coverage determination—file the response...

CO-WINS's written comments responded to this suggestion as follows:

> CO-WINS believes that allowing departments to argue in unit/out of unit decisions does not conform to the statute, specifically 24-50-1106(4) which clearly states the Director resolves disputes concerning appropriately classified employees and appeals of the Director's decisions are adjudicated by the Division. There is no mention of departments being parties in interest, and it would not make sense for the Director to make the initial decision and then someone else to defend that decision on appeal.

The Act does not specify that the "particular State department, agency, or division which is defending a coverage determination" is the *per se* "party in interest" in an appeal; it refers only to general "appeals": *i.e.*, "a certified employee organization or the state may file a petition with the [State Personnel] Director to resolve disputes about whether certain employees are appropriately classified as covered employees. Appeals of the Director's Decision shall be brought to the Division for adjudication." C.R.S. § 24-50-1106(4). "The state," in turn, is defined as "the state of Colorado, *including its agencies, divisions, and departments*." C.R.S. § 24-50-1102 (emphasis added).

Recognizing that the State Personnel Director may wish to involve a particular State department, agency, or division in a coverage determination appeal, but that nothing in the statute mandates such a result, the Division created new Rule 5.4 to provide that "[t]he State Personnel Director (SPD) may authorize another official, department, division, agency, or other person to respond to the Notice of Appeal, provide information or evidence regarding the Notice of Appeal, or otherwise participate in the appeal; the SPD may so authorize in writing, or a state official may represent that they have been so authorized in a submission that is also copied to the SPD."

V. EFFECTIVE DATE. These rules take effect on January 1, 2021.

Scott Moss
Director
Division of Labor Standards and Statistics
Colorado Department of Labor and Employment

November 9, 2020
Date