

COLORADO WORKERS FOR INNOVATIVE  
AND NEW SOLUTIONS (COWINS),  
Union,

and

COLORADO DEPARTMENT OF REVENUE,  
Employer

**ARBITRATOR'S DECISION  
AND AWARD**

**FMCS Case No. 240305-04133  
Grievance of RP**

**Arbitrator: Donna E. Lurie**

SENT ELECTRONICALLY TO THE PARTIES:

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**INTRODUCTION**

This matter came before Arbitrator Donna Lurie upon the filing of a Demand for Arbitration by Colorado Workers for Innovative and New Solutions (hereafter "COWINS or Union") regarding a Partnership Agreement Dispute (PAD) grievance filed against the Colorado Department of Revenue (hereafter "DOR or Employer") (Joint Exhibit 2.1). The Grievance asserted that Annual Performance Evaluations for Taxation Call Center employees utilized a 3-tier system under the Key Performance Indicators (KPIs) core competency that allegedly caused objectiveness and consistency in ratings to vary (Joint Exhibit 2.1). Five individuals signed the PAD grievance originally filed by Grievant RP (Joint Exhibit 2.1). This arbitration is governed by the 2022 Amended Partnership Agreement, Colorado Revised Statute §24-50-1112, which functioned as the Collective Bargaining Agreement ("hereafter Partnership Agreement") between the parties (Joint Exhibit 1). The PAD grievance asserted that DOR violated Article 27.3 of the Partnership Agreement, and the Union sought a re-evaluation of core competencies to be translated into a 5-tier rating and updated guidance for KPIs (Joint Exhibit 2.1).

After selection of the Arbitrator, the parties requested a videoconference evidentiary hearing. DOR challenged the substantive and procedural arbitrability of the PAD throughout the grievance process. By request, both parties were given the opportunity to submit a pre-hearing letter on the arbitrability issues. In a pre-hearing conference call on June 11, 2024, the parties discussed holding separate hearings on arbitrability and the merits of the grievance versus having a consolidated hearing. The parties agreed to participate in a consolidated hearing and present testimony and exhibits on the issues of arbitrability and the merits of the PAD grievance. The Arbitrator informed the parties that she would consider the parties' evidence and arguments when first deciding the arbitrability issues and then deciding the merits of the PAD grievance, saving both parties delay and extra expense. Following the pre-hearing conference call, a letter summarizing DOR's arbitrability concerns and a copy of the PAD grievance were received.

A videoconference evidentiary hearing was held on August 27, 2024 on the Arbitrator's Zoom platform. The hearing was recorded on Zoom, and links were sent to each representative. COWINS and DOR were given a full opportunity to provide opening statements, introduce documents, examine and cross examine sworn witnesses, and make arguments in support of their positions. There were three Joint Exhibits (with several subsections). COWINS submitted five separate exhibits, and DOR submitted six separate exhibits.

Two witnesses testified on behalf of COWINS – Tax Examiner I RP, Tax Examiner I and Union Steward JO. Three witnesses testified on behalf of DOR – Senior HR Partner MB; Director of Taxpayer Services EM; and Taxation Deputy Director MS. The parties requested the opportunity to submit post-hearing briefs. The Hearing record was closed after receipt of post-hearing briefs on September 27, 2024.

### **ISSUE STATEMENT AGREED BY THE PARTIES**

1. Is the grievance subject to arbitration?
2. With respect to the annual performance evaluations for Tax Examiner 1 of the DOR Call Center, do the three categories used to evaluate Agent Performance metrics of the Key Performance Indicators core competency violate the requirement to universally implement a five-tier employee performance rating system pursuant to Article 27.3 of the Partnership Agreement?
3. If the Partnership Agreement was violated, what is the appropriate remedy?

## **FACTUAL BACKGROUND**

Colorado Revised Statute §24-50-1101 is known as the “Partnership Act”. This statute formalized the labor management relationship and required collective bargaining between the executive branch of State government and Colorado State employees. The resulting collective bargaining agreement has been referred to as the “Partnership Agreement” (§24-50-1112). The original Partnership Agreement contained language to establish a three-tier performance rating system (Barton testimony). The language in Article 27 was amended on November 17, 2022 to reflect changed expectations for a 5-tier employee performance rating system (Joint Exhibit 1; Ortega testimony).

Grievant RP worked as a Tax Examiner I in the Taxation Call Center to answer calls and questions from individual and business taxpayers (Peterson testimony). As a Tax Examiner I, RP and his colleagues were evaluated by the annual performance evaluation system implemented by the Department of Revenue (DOR). The Performance Planning and Evaluation Form utilizes six major categories – Communication, Interpersonal Skills, Customer Service, Accountability, Job Knowledge, and Key Performance Indicators (KPIs) (Employer Exhibit 4). Each of the first five categories carry a weight of 15 percent of the total evaluation ranking and are rated on a 5-tier scale (Employer Exhibit 4). Each of the first five categories contain definitions, bullet-point examples, and a narrative section for the supervisor to comment on the basis for the evaluation (Employer Exhibit 4).

Key Performance Indicators (KPIs) have a weight of 25 percent, a definition section, a list of specific KPIs that are tied to the DOR and/or the Taxation Division's KPIs, specific Agent Performance Metrics, and a narrative section (Employer Exhibit 4, pp.7-8). The list of KPI's used in the Taxation Division include coaching forms, call flow, customer service, and accuracy (Ibid., p. 7). Agent Performance Metrics include average time between calls; average skillset talking time per call; average answered call per hour; and calls returned to the que (p.7 of Employer Exhibit 4). Quantifiable metrics define Needs Improvement, Successful, and Exceptional ratings (Ibid., p. 7). The KPI category has an overall rating that uses the five-tier scale (Ibid., p. 7). This rating is based on quantifiable and non-quantifiable criteria (Myers testimony).

RP's Final Evaluation was a compilation of the ratings for each of the six categories (Employer Exhibit 4, p. 9). DOR's Office of Human Resources provided training and an

explanation of the five-tier performance evaluation system (Union Exhibit 4). The five-tier system was described as follows:

## **5-Point Rating Scale Descriptions**

### **LEVEL 1 (Unacceptable)**

At this level, employee performance and/or behavior do not meet minimum job expectations of the position. The employee does not meet key goals and/or does not demonstrate competence in critical job skills.

### **LEVEL 2 (Needs Improvement)**

At this level, employee performance and/or behavior do not consistently meet minimum expectations of what is expected of the employee's position.

\*Board Rule 6-6 (B) became effective July 1, 2021, a "Needs Improvement" or an "Unacceptable" final rating shall result in a performance improvement plan and/or a corrective action.

### **Level 3: (Effective)**

Employees at this level reliably and consistently meet all the expectations, standards, requirements, and objectives of the employee's position.

### **Level 4: (Highly Effective)**

Employees at this level demonstrate highly effective performance by making significant contributions and impact on the goals of the Department.

### **Level 5 (Exceptional)**

Consistently make extra extraordinary contributions though supervisor performance on key goals, serve as a role model of organizational values, and contribute significantly to the mission of the Department.

(Union Exhibit 4, pp. 6-7)

RP's 2022-2023 performance evaluation was received on August 24, 2023 (Union Exhibit 5; Joint Exhibit 2.2). The overall rating of Level 2 resulted in a loss of RP's flexible work schedule (testimony of RP and MB). RP filed a total of three grievances with DOR – the first grievance was filed with the State Personnel Board grievance process outlined in Article 8, Part A (MB testimony; Joint 2.2). The second grievance was filed with DOR's Performance Management Program (MB testimony; Joint 2.2). Both of these grievances were denied as untimely (MB testimony; Joint Exhibit 2.2), and RP was notified on September 21, 2023 (MB testimony; Joint Exhibit 2.2). While copies of the earlier two grievances were not submitted as exhibits, the Union does not dispute the fact that RP filed these two grievances prior to the PAD grievance involved in this arbitration.

The third grievance was filed as a class action Partnership Agreement Dispute (PAD) for all Tax Examiner I's (Joint Exhibit 2.1). The date of the grieved action is listed as August 31, 2023 (Joint Exhibit 2.1). RP signed this grievance and a waiver statement on October 18, 2023, confirming that he had not initiated any appeal or grievance of the issues raised in the PAD when he used the processes set forth in the State Personnel Board Rules or the State Personnel Director's Procedures (Joint 2.1, p. 3). RP argued that the instant PAD grievance differed from the earlier grievances in that the PAD grievance challenges the metrics portion within the KPIs as lacking a five-tier rating scale for each performance metric (testimony of MB and RP). Both parties confirm that RP discussed the impact of the Level 2 evaluation rating and the loss of his flexible work schedule at his informal PAD grievance meeting with MB (Joint Exhibit 2.2). MB responded that the waivers filed by COWINS were improper, particularly the waivers filed by Grievant RP. MB denied the PAD grievance on the merits and stated that DOR continued to object to RP's waivers and the arbitrability of the PAD grievance (Joint Exhibit 2.2).

The parties were unable to resolve this grievance through the PAD process (Joint Exhibit 2.4). COWINS filed a timely Demand for Arbitration.

## **APPLICABLE CONTRACT PROVISIONS**

### **DEFINITIONS**

1.3 "Agreement" refers to the Partnership Agreement, sometimes referred to as a Collective Bargaining Agreement or Contract, by and between COWINS and the State.

1.9 "Days" unless otherwise distinguished, means Monday through Friday except for State holidays...

1.12 "Dispute" or "Partnership Agreement Dispute" refers to any dispute concerning the interpretation, application or enforcement of any provision of the Agreement as further defined in Article 9 of this Agreement that can be resolved through the Agreement Dispute Resolution Process.

1.20 "Grievance" is an informal and formal process designed to allow employees and managers an opportunity to resolve workplace issues using the State Personnel Board Rules.

## ARTICLE 9 – PARTNERSHIP AGREEMENT DISPUTE RESOLUTION PROCESS

### 9.1 Subject Matter of Partnership Agreement Disputes

A Partnership Agreement dispute shall mean any dispute concerning the interpretation, application or enforcement of any provision of the Agreement and shall be resolved through the Partnership Agreement Dispute Resolution Process set forth in this Article. However, pursuant to the Rules, a dispute regarding actions that require a mandatory hearing of the State Personnel Board -- specifically disciplinary actions against Employees or any other action taken by a State Entity that adversely affects an Employee's base pay, status, or tenure -- may only be appealed to the State Personnel Board.

Any Employee who wants to dispute a decision that is subject to the State Personnel Board's discretionary review process **may choose** whether to pursue review by the State Personnel Board, **or**, if the dispute alleges a violation of the Agreement, to resolve the dispute as a Partnership Agreement Dispute under this Article. This includes any dispute alleging the following (and that does not concern an action that adversely affects the Employee's base pay, status, or tenure as set forth above):

- A. The employment action appears to violate the Whistleblower Act;
- B. The employment action appears to violate the Colorado Anti-Discrimination Act ("CADA");
- C. The grievance decision as outlined in Chapter 8 of the Rules appears to violate an Employee's rights under the federal or state constitution; or
- D. The grievance decision as outlined in Chapter 8 of the Rules appears to violate the Employee's rights under the State Personnel Board's grievance Rules or the State Entity's grievance procedures.

***When an Employee elects to file a dispute in accordance with this Article, rather than appealing a grievance decision or appeal under Chapter 8 of the Rules, the Employee will be required to sign a written acknowledgement that they are waiving the right to pursue an appeal through the Board or Director.*** The waiver form to be used by the Parties is appended to this Agreement as Appendix A. ***Nothing in this Agreement amends or alters any deadlines*** to appeal a grievance decision to the State Personnel Board or Director. Regardless of which avenue the Employee chooses to pursue a dispute/grievance, they may elect union representation by COWINS. The provision of such representation on behalf of said Employee shall be at the sole discretion of COWINS...

### 9.2 Partnership Agreement Dispute Resolution Process

Prior to initiating the Partnership Agreement Dispute Resolution Process described in this Article, the Employee(s) and/or COWINS may attempt to informally resolve the conflict concerning the interpretation, application or enforcement of any provision of this Agreement. Such informal resolution may include a meeting with the Employee(s) and COWINS to discuss the concern; any such meeting shall not unnecessarily delay or prevent an Employee(s) or COWINS from initiating the Level I process outlined below. If the conflict is resolved, there will be documentation reflecting that mutual understanding. If informal resolution is unsuccessful, the Employee(s) and/or COWINS may move to the Partnership Agreement Dispute Resolution Process as outlined below.

The Partnership Agreement Dispute Resolution Process shall be as follows:

**Level 1: State Entity Resolution Meeting**

An Employee and/or COWINS shall submit the Partnership Agreement Dispute in writing via hand delivery or email to the State Entity's Human Resources Director or designee **no later than 20 days from when the Employee knew, or should have known, about the facts giving rise to the Partnership Agreement Dispute.** Such written Partnership Agreement Dispute shall identify the Article(s) of the Agreement and any associated law(s), policy(ies), and/or practice(s) identified in the Agreement believed to have been violated, the Employee(s) affected by the violation, state how and when the violation took place, and state the remedy sought. If a Partnership Agreement Dispute is brought by multiple Employees, the written Partnership Agreement Dispute must specifically name, and identify how and when the violation affected each individual Employee.

A Partnership Agreement Dispute Resolution meeting shall be convened within 10 days of receipt of the written Partnership Agreement Dispute. If the Parties mutually agree in writing, a meeting may be waived. The State Entity's Human Resources Director or designee shall respond in writing within 15 days of the Partnership Agreement Dispute Resolution meeting or waiver thereof. The State Entity's response should include any facts or reasons for the decision that the State Entity believes are relevant. If the State Entity's Human Resources Director or designee fails to respond within this time limit, the Employee(s) and COWINS may advance the Partnership Agreement Dispute to Level II.

**Level II: State Personnel Director Resolution Meeting**

In the event the Employee(s) and COWINS wish to appeal an unsatisfactory decision at Level I, the appeal shall be presented in writing via hand delivery or email to the Director or designee, and copying the State Entity's Human Resources Director or designee via email, within 10 days following the receipt of the Level I decision or, if no decision is made, from the expiration of the State Entity's response deadline. ***Such an appeal shall be limited to the Level I Partnership Agreement Dispute, and identify the reasons the Employee(s) and COWINS disagree with the State Entity's response and remedy sought.*** The Director or designee shall have the authority to request additional information from or make inquiries of the State Entity, the Employee(s) and COWINS. The State Entity, the Employee(s) and COWINS shall provide any required or requested information to the Director or designee in a timely manner. A dispute resolution meeting shall be convened with the Employee(s), COWINS, and the Director or designee within 10 days of receipt of the written appealed Partnership Agreement Dispute. If the Parties mutually agree in writing, a meeting may be waived. The Director or designee shall issue a response in writing within 30 calendar days of the meeting or waiver thereof. The Director or designee at Level II shall have the authority to sustain, vacate or modify a decision or action taken at the lower level.

**Level III: Arbitration**

Disputes unresolved at Level II may be brought to arbitration ***solely by COWINS*** by filing a written notice to the State. Such notice must be given to the State in person or via email within 30 calendar days of the receipt of an unsatisfactory Level II response. ***Arbitration shall be limited to the subject matter of the Partnership Agreement Dispute.***

### 9.3 Arbitration Process

Once arbitration has been requested by COWINS, COWINS shall request a list of Federal Mediation and Conciliation Service (FMCS) arbitrators, licensed to practice law or inactive status or retired, and not employed by either party, from FMCS...

***The Arbitrator shall have no power to add to, subtract from or modify any provision of this Agreement or to issue any decision or award inconsistent with applicable law. The decision or award of the Arbitrator shall be final and binding...***

Arbitrators will issue a written decision, and are encouraged to do so within 30 days of receipt of the Parties' post-hearing brief or closing oral argument, whichever is later, detailing whether the State Entity properly interpreted, applied or enforced the Agreement to the situation giving rise to the Partnership Agreement Dispute and, if not, citing specific facts and conclusions of law that specify why the State Entity did not properly interpret, apply, or enforce the Agreement. Upon request of either COWINS or the State, the Arbitrator will retain jurisdiction for 60 days after the issuance of a decision in the event of a dispute over implementation. An Arbitrator's decision on a Partnership Agreement Dispute may be appealed as permitted by Section 24-50-1115(2)(b) of the Act.

### 9.4 Time Limits

Any Level in the Partnership Agreement Dispute Resolution Process, as well as time limits prescribed, ***may be extended or waived by mutual agreement of the Parties in writing***. The State must follow all procurement requirements and the Parties agree that the time limits will be adjusted as needed for procurement requirements...

## ARTICLE 27 – PERFORMANCE MANAGEMENT

### 27.3 Performance Tiers

The parties agree the Director shall establish a ***five-tier employee performance rating system including criteria for each tier*** beginning with the 2022-2023 performance year, that is ***universally implemented*** with the goal of providing better quantitative and qualitative assessments and objective differentiation in performance ratings among employees.

(Joint Exhibit 1, emphasis supplied)

## DISCUSSION

### IS THE PAD GRIEVANCE SUBJECT TO ARBITRATION?

#### A. Substantive Arbitrability

DOR representatives argue that the PAD grievance is not substantively arbitrable. Article 27.3 of the Partnership Agreement explicitly authorizes the Director to establish the criteria for each tier of the five-tier employee performance rating system (Joint Exhibit 1, p. 40). Senior Human Resources Partner MB testified that the parties could have negotiated inclusion of specific competencies needing further breakdown into five tiers, but such



language was not negotiated into Article 27.3 (MB testimony). DOR argues that the Agreement's silence on whether KPIs should be rated on three tiers versus five tiers leads to a conclusion that the dispute is not subject to arbitration. In addition, DOR maintains that the Union's requested relief is outside the scope of Article 27.3 and would require an addition or modification of Agreement language that would violate Article 9.3 (Joint Exhibit 1, p. 18).

DOR bears the burden of proof in challenging substantive arbitrability of a PAD grievance. "There is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Steelworkers v Warrior & Gulf Navigation Co.*, 363 US 574, 46 LRRM 2416 (1960). The Arbitrator distinguishes between the substantive arbitrability of a grievance and the appropriateness of a requested remedy for an alleged Contract violation.

As DOR representatives pointed out, a determination of substantive arbitrability is made by analyzing the reasonable expectations of the parties and the application of the parties' arbitration language to the factual nature of a particular dispute. See *City & County of Denver*, 939 P.2d 1353 (Colo. 1997). The parties' definition of "dispute" or "Partnership Agreement Dispute" in Article 1.12 and Article 9.1 covers "any dispute concerning the interpretation, application or enforcement of any provision of the Agreement" (Joint Exhibit 1, pp. 2 and 15). A PAD grievance over the meaning of "universal implementation" and whether the Agent Performance Metrics in the Key Performance Indicators factor should be three-tiers versus five-tiers is a dispute concerning the interpretation and application of Article 27.3. The Arbitrator finds the PAD grievance to be substantively arbitrable.

## **B. Procedural Arbitrability**

DOR representatives argue that the PAD grievance is not procedurally arbitrable for two reasons – the grievance is untimely and RP's waiver is invalid. Article 9.1 contains specific timelines for the filing of a PAD grievance. An employee and/or COWINS must file a written grievance no later than 20 days from when the employee knew or should have known about the facts giving rise to the dispute (Joint Exhibit 1, p. 16). The Union did not challenge DOR's

assertion that RP received his 2022-2023 evaluation on August 24, 2023. The facts are undisputed that RP first attempted to grieve his evaluation through the State Personnel Board grievance process outlined in Article 8, Part A (MB testimony; Joint 2.2). The second grievance was filed with DOR's Performance Management Program (MB testimony; Joint 2.2). Both of these grievances were denied as untimely (MB testimony; Joint Exhibit 2.2). Grievant RP was notified of DOR's response on September 21, 2023 (MB testimony; Joint Exhibit 2.2).

There were more than 20 workdays between August 31, 2023 and October 18, 2023 (Joint Exhibit 2.1). The Arbitrator counts at least 30 workdays between the date of receiving the performance evaluation and the date that the PAD grievance was filed. The evaluation was received by RP on a finite date – this is not a case of a continuing contract violation. No evidence was provided of a mutual agreement to extend or waive the contractual timelines, nor was any evidence provided to show lax enforcement of grievance timelines in previous cases. DOR representatives clearly stated their objections to the timeliness of the PAD grievance early in the grievance process (Joint Exhibit 2.2). The Employer's procedural objections were not a surprise to the Union in the arbitration phase.

Article 9.1 requires employees to select the forum that they wish to pursue in challenging DOR's interpretation and/or application of Agreement language. Employees must confirm that they waive "any and all rights to appeal or grieve this dispute using the processes contained within the State Personnel Board Rules and/or State Personnel Director's Procedures to remedy the issues" in question (Joint Exhibit 1, p. 15 and Joint Exhibit 2.1, p.3). The requirement to select a forum is clearly stated in the Partnership Agreement and requires an employee signature on the PAD grievance form. Selection of forum language is often negotiated to avoid relitigating an issue and ending up with conflicting determinations of the same issue in multiple forums. Grievant RP signed a waiver AFTER he pursued the State Personnel Board grievance process and AFTER he pursued the DOR Performance Management appeal process. RP's waivers were invalid and meaningless, since the PAD grievance was essentially the third grievance over substantially similar issues and the third request for substantially similar relief. An employee cannot pursue multiple forums and claim to submit a valid waiver of forums after being rejected by decision-makers in those forums.

Pursuant to the parties' negotiated language, the employee must make a selection in Article 9.1 to use the PAD process OR the State Personnel Board/Director procedures BEFORE proceeding with a PAD grievance. The Union's evidence and arguments focused on the merits of the grievance and did not address the procedural arbitrability issues.

Based on the testimony, documentation, arguments, and caselaw presented by the parties, the Arbitrator concludes that the PAD grievance was untimely and RP's waivers were invalid. The arbitrability of the PAD grievance is denied on procedural grounds. The Arbitrator does not make a ruling on the merits of the grievance, due to the lack of procedural arbitrability.

### **AWARD**

Based on the evidence and arguments presented by the parties, the Arbitrator finds that the PAD grievance lacked procedural arbitrability under the parties' Partnership Agreement. The grievance is dismissed.

In accordance with Article 9.3 of the parties' Agreement, all fees and costs for the services of the Arbitrator shall be divided equally between COWINS and the State entity DOR.

Respectfully submitted on October 1, 2024.

/s/ Donna E. Lurie

Arbitrator Donna E. Lurie

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