



PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

**STATE OF COLORADO
DEPARTMENT OF LAW**

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000
Office of the Attorney General

FORMAL)
OPINION)

No. 19-01

OF)

September 30, 2019

PHILIP J. WEISER)
Attorney General)

Kara Veitch, Executive Director of the Colorado Department of Personnel and Administration and designee of Governor Jared Polis, requested this Formal Opinion under § 24-31-101(1)(b), C.R.S. (2019).

QUESTIONS PRESENTED AND SHORT ANSWERS

Questions Presented. Your request for a Formal Opinion contained two questions: in connection with those state public bodies whose enabling statutes provide them with the power to appoint, or control the appointment, of a director of a division in a principal department of state government,

- (1) does the provision of the Colorado Constitution at article XII, § 13(7) negate such power, removing from that state public body the power to make the division director's appointment, and
- (2) if so, what are examples of state public bodies that may be impacted by such a conflict with said § 13(7)?

Short Answer 1. Yes, the Colorado Constitution, article XII, § 13(7), reserves to the head of each principal department the authority to appoint division heads whose positions are within the state personnel system. State statutes that purport to grant this appointing authority to a different body, such as a state board or commission, are inconsistent with the state constitution and, thus, without legal effect.

Short Answer 2. Examples of state public bodies whose statutory appointing authority may be affected by a conflict with article XII, § 13(7) include:

1. The State Board of Stock Inspection Commissioners;
2. The Colorado Wine Industry Development Board;
3. The Early Childhood Leadership Commission;
4. The State Council on Developmental Disabilities;
5. The Colorado State University Board of Governors;
6. The Colorado Water Conservation Board;
7. The Parks and Wildlife Commission;
8. The Automobile Theft Prevention Authority Board;
9. The Public Utilities Commission;
10. The Securities Board;
11. The Colorado Aeronautical Board;
12. The High Performance Transportation Enterprise Board; and
13. The Statewide Bridge Enterprise Board.

This Formal Opinion is limited to the appointing authority of *statutorily*-created state public bodies. It does not address the appointing authority for constitutionally-created public bodies.

Moreover, certain state government positions identified in this Formal Opinion may *currently* fall outside of the personnel system and, thus, are not subject to the analysis in this Formal Opinion. The classification of such positions within the personnel system, however, is subject to change through legislative or administrative action. Such a change may render a given position subject to this Formal Opinion at a later date. Information regarding the current classification of positions within, or outside of, the personnel system is maintained by the Department of Personnel and Administration.

ANALYSIS

I. The Colorado Constitution reserves to the head of each principal department the authority to appoint division heads whose positions are within the state personnel system.

In Colorado, the executive branch of state government and its respective functions, powers, and duties are currently allocated among 19 principal departments. § 24-1-110(1), C.R.S. (2019); *see also* Colo. Const. art. IV, § 22 (stating executive branch functions, powers, and duties shall be “allocated by law among and within not more than twenty departments”). With the exception of principal departments headed by the attorney general, secretary of state, state treasurer, and the commissioner of education, the head of each principal department is appointed by the governor and holds the title of “executive director” of his or her principal department or such other title as specifically designated by statute. §§ 24-1-103 & 108(1), C.R.S.

Within each principal department, the appointment of employees in the State's personnel system is governed by the Colorado Constitution and corresponding state statutes. *See* Colo. Const. art. XII, § 13(7); § 24-1-108(1). As a general rule, the head of each principal department is the appointing authority for "employees of his office and for heads of divisions" within his or her principal department, provided that the employee or division head is a position within the State's personnel system.¹ Colo. Const. art. XII, § 13(7).

Although the terminology is not always used consistently, a "head of division" is generally a high-ranking department employee, "ranking next below the head of [the] department." *Id.*; *see also* § 24-1-107 (recognizing that heads of principal departments hold some limited discretion to reorganize "divisions, sections, and units" in the department for "efficient administration and operation").

Moving further down the organizational ladder, each division head within a principal department is the appointing authority for "all positions in the personnel system" within his or her division. Colo. Const. art. XII, § 13(7); *see also* § 24-1-108(1) (similar language). Thus, the Colorado Constitution contemplates an organizational pyramid where appointments within the personnel system are made by officials at cascading levels of authority: the governor appoints principal department heads; principal department heads appoint division heads; and division heads appoint division employees.

This general constitutional rule governing appointing authority is in tension, however, with other statutory provisions that give different public bodies the power to appoint, or participate in the appointment, of specific positions. By way of example, within the Colorado Department of Agriculture is the Division of Brand Inspection, the head of which is the brand commissioner. § 24-1-123(4)(g)(I). The brand commissioner is "subject to the state personnel system laws," § 35-41-101(2), seemingly rendering the position subject to the general constitutional rule discussed above. But yet, a state statute grants a five-member board within the division—the State Board of Stock Inspection Commissioners—authority to appoint the brand commissioner. *See* § 35-41-101(2) ("The board shall appoint a brand commissioner").

Recognizing this conflict, a prior Formal Opinion from this office applied the general constitutional rule to conclude that the head of the Department of Agriculture, not the board, is the appointing authority for the brand commissioner. *Formal Op. of A.G. Duane Woodard*, 1987 WL 273586 (Colo. A.G. Oct. 13, 1987). That opinion is also consistent with other Formal Opinions from this office pertaining to other similarly-situated positions within Colorado's state government.

¹ Certain positions within state government are exempt from the State's personnel system. *See* Colo. Const. art. XII, § 13(2). This Formal Opinion does not address the appointment of such positions.

See, e.g., Formal Op. No. 06-05, 2006 WL 2356148 (Colo. A.G. July 24, 2006) (stating the Limited Gaming Commission “has no legal role in selecting or retaining the director or any employees of the Division”); *Formal Op. of A.G. J.D. MacFarland*, 1978 WL 27704 (Colo. A.G. Feb. 27, 1978) (stating the State Electrical Board “cannot appoint a director, although the director of the Division of Registrations may do so.”).²

These opinions remain correct. Where the state constitution conflicts with a state statute, the constitution is “paramount” and prevails over the statute. *Lang. v. Colo. Mental Health Inst. in Pueblo*, 44 P.3d 262, 266 (Colo. App. 2001); *accord Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (collecting cases); *Colorado Ass’n of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo.1984) (holding that no legislation inconsistent with the express or implicit requirements of art. XII can survive a constitutional challenge).

With that said, nothing in Colorado law *forbids* the head of a principal department or division head from consulting with a board or commission as part of the decision-making process when making an appointment. Indeed, consulting with subject-matter experts on a board or commission may be beneficial, providing the appointing authority with valuable information and diverse perspectives on the qualities the appointee should possess. In some instances, the General Assembly not only encourages this type of informal consultation but has attempted to affirmatively *require* it. *See* §§ 24-34-302(1) (stating the head of the Department of Regulatory Agencies “shall give good faith consideration” to the recommendations of the Civil Rights Commission when appointing the director of the Civil Rights Division); 43-1-106(12)(a) (stating the head of the Department of Transportation “shall give presumptive consideration” to the recommendations of the Transportation Commission when appointing an internal auditor).

At bottom, however, even if consultation is encouraged or required by statute, the Colorado Constitution reserves to the head of each principal department the ultimate appointment decision for division heads within the personnel system. Colo. Const. art. XII, § 13(7); *cf. Yenter v. Baker*, 126 Colo. 232, 242, 248 P.2d 311, 316 (1952) (“Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to them, unless the

² A separate Formal Opinion from this office determined that the director of the Charter School Institute, whose position was exempt from the State’s personnel system, was not an employee of the Colorado Department of Education but rather was an employee of the Institute. *Formal Opinion No. 07-02*, 2007 WL 2670296 (Colo. A.G. August 13, 2007). That opinion remains consistent with the general constitutional rule that the head of each principal department is the appointing authority for division heads and employees of his or her office “*within the personnel system.*” Colo. Const. art. XII, § 13(7) (emphasis added).

Constitution gives that power.”) (quoting *People ex rel. Hoyne v. McCormick*, 103 N.E. 1053, 1056 (Ill. 1913)).³ This is confirmed by other constitutional provisions that affirmatively require an appointing authority to consult with or seek “advice” from other government bodies before making an appointment. *See, e.g.*, Colo. Const. art. XVI, § 1 (requiring the governor to seek “advice and consent” from the state senate before appointing the commissioner of mines). No such requirement appears in article XII, § 13. Thus, a principal department head’s failure to consult with a board or commission under statute does not render a subsequent appointment of a division head within the personnel system constitutionally invalid.

In summary, as a general constitutional rule in Colorado, the head of each principal department is the appointing authority for employees of their office and division heads within his or her department, provided the position is within the State’s personnel system. Colo. Const. art. XII, § 13(7). Similarly, each division head is the appointing authority for all positions within his or her division that fall within the State’s personnel system. *Id.* Because state statutes that purport to grant this appointment power to other bodies, such as a board or commission, are inconsistent with the state constitution, such statutes are without legal effect.

II. Examples of state public bodies whose statutory appointing authority may be affected by article XII, § 13(7).

The second question presented by your request seeks examples of state public bodies that may be affected if, as discussed above, article XII, § 13(7) of the Colorado Constitution removes from a state public body the statutory power to make a division director’s appointment.

Below is a listing of state public bodies that may be affected. Two prefatory notes are in order. *First*, as discussed, the constitutional appointing authority derived from article XII, § 13(7) applies only to division heads and employees “within the personnel system.” As a general matter, the classification of any given position in state government within the personnel system is not static but rather is subject to change. Whether the state public bodies below, in fact, fall within the purview of this Formal Opinion will depend on the current classification of the position at issue within the state personnel system, which records are kept by the Department of Personnel and Administration.

Second, the below list is not intended to be exhaustive. Other state public bodies not listed below may exist that fall within the legal analysis contained in this Formal Opinion. In addition, future legislative changes by the General Assembly

³ This Formal Opinion expresses no view on whether an appointing authority may delegate their authority to another person or body.

may cause a state public body to fall within, or out of, the analysis contained in this Formal Opinion.

A. Colorado Department of Agriculture

i. State Board of Stock Inspection Commissioners

The Colorado Department of Agriculture (“CDA”) is one of Colorado’s 19 principal departments. § 24-1-110(1)(m). The head of CDA is the commissioner of agriculture. § 24-1-123(1). As indicated, CDA contains the Division of Brand Inspection, whose head is the brand commissioner. § 24-1-123(4)(g)(I). CDA also contains the State Board of Stock Inspection Commissioners, whose five commissioners are appointed by the governor. § 35-41-101(1).

The statute creating the State Board of Stock Inspection Commissioners, § 35-41-101, states as follows:

The board shall appoint a brand commissioner who shall be under its supervision and who, in the absence of the board, shall carry out its policies. The brand commissioner shall be subject to the state personnel system laws.

§ 35-41-101(2). Because the brand commissioner is “subject to the state personnel system laws,” *id.*, his or her appointment is subject to article XII, § 13(7) of the Colorado Constitution. The appointment provision in the Board’s statute thus conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

ii. Colorado Wine Industry Development Board

The Colorado Wine Industry Development Board is located within CDA. §§ 24-1-123(5), 35-29.5-103(1). The Board consists of nine members appointed by the governor. § 35-29.5-103(2)(a). Section 35-29.5-104 sets forth the duties and powers of the Board. The statute provides that the Board may “[a]ppoint subordinate officers and employees of the board and prescribe their duties and fix their compensation.” § 35-29.5-104(1)(g).

Section 35-29.5-104 is unclear whether the authorization for the Board to appoint “subordinate officers and employees” includes a division head. Regardless, even if the statutory authorization applies to positions falling lower down on the organizational ladder which are not considered a “head of division,” the Board may still be affected.

Under the state constitution, each division head within a principal department is the appointing authority for “all positions in the personnel system” within his or her division. Colo. Const. art. XII, § 13(7); *see also* § 24-1-108(1). Thus, if the “subordinate officer or employee” is a position within the personnel system, either the commissioner of agriculture or a division head within CDA, not the Board, is the appointing authority. In that event, the appointment provision in Commission’s statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

B. Colorado Department of Human Services

i. Early Childhood Leadership Commission

The Colorado Department of Human Services (“CDHS”) is one of Colorado’s 19 principal departments. § 24-1-110(1)(w). The head of CDHS is the executive director. § 24-1-120(1). The Early Childhood Leadership Commission is located within CDHS. § 24-1-120(5)(m). The Commission is comprised of up to twenty members consisting of up to fourteen governor appointees, the commissioner of education, the Head Start Collaboration director, and the executive directors of CDHS, the Colorado Department of Public Health and Environment (“CDPHE”), the Colorado Department of Health Care Policy and Financing (“HCPF”), and the Colorado Department of Higher Education (“CDHE”). § 26-6.2-103(2). The head of the Commission is the director. § 26-6.2-103(5). Section 26-6.2-103(5) provides,

The commission, in collaboration with the executive director of the state department, may appoint a director to assist the commission in fulfilling its duties pursuant to this article 6.2. The director may appoint such additional persons as may be necessary to assist the commission.

Id. at § 26-6.2-103(5) (emphasis added).

Although the director of the Early Childhood Leadership Commission is not expressly described as a “head of division” by statute, a “head of division” is generally a high-ranking department employee, “ranking next below the head of [the] department.” Colo. Const. art. XII, § 13(7).

Even if the director of the Early Childhood Leadership Commission falls lower down on the organizational ladder and is not considered a “head of division,” he or she may still be affected. Under the state constitution, each division head within a principal department is the appointing authority for “all positions in the personnel system” within his or her division. Colo. Const. art. XII, § 13(7); *see also* § 24-1-108(1). Thus, if the director is a position within the state personnel system, either the CDHS executive director or a division head within CDHS, not the Commission, is the appointing authority for the director. *See* § 24-1-107 (recognizing

that heads of principal departments hold some limited discretion to reorganize “divisions, sections, and units” in the department for “efficient administration and operation”). In that event, the appointment provision in the Commission’s statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

ii. State Council on Developmental Disabilities

The State Council on Developmental Disabilities is located within the office of the executive director of CDHS. § 27-10.5-203(1). The Council consists of twenty-four members appointed by the governor. § 27-10.5-203(2). The head of the Council is the staff director. § 27-10.5-206. Section 27-10.5-206 states, “The executive director . . . will appoint the staff director to the state council, *accepting the recommendations of the council.*” *Id.* (emphasis added).

Although the staff director of the State Council on Developmental Disabilities is not expressly described as a “head of division” by statute, a “head of division” is generally a high-ranking department employee, “ranking next below the head of [the] department.” Colo. Const. art. XII, § 13(7). Even if the staff director of the State Council on Developmental Disabilities is not considered a “head of division,” but rather an employee of the executive director’s office, the staff director position may still be affected.

Under the Colorado Constitution, the executive director of a principal department is the appointing authority for both heads of divisions and employees of his or her office. Colo. Const. art. XII, § 13(7). Thus, regardless of whether the staff director is a division head or employee of the executive director’s office, if the staff director is within the State’s personnel system, the executive director of CDHS is the appointing authority. In that event, § 27-10.5-206, which requires the executive director to accept the recommendations of the Council conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

C. Colorado Department of Natural Resources

i. Colorado State University Board of Governors

The Colorado Department of Natural Resources (“DNR”) is one of Colorado’s 19 principal departments. § 24-1-110(1)(n). The head of DNR is the executive director, § 24-1-124(1), and the Division of Forestry is a division of DNR. § 24-1-124(3)(j). The head of the Division of Forestry is the state forester. *Id.* By statute, the Division of Forestry and the state forester exercise their powers, duties, and functions within DNR under its executive director. *Id.*

The statutes establishing the Colorado State University System, however, purport to vest the Board of Governors of Colorado State University with the authority to appoint the state forester. The relevant statute states,

The [Board of Governors of Colorado State University] may appoint, pursuant to its personnel powers, in consultation with the executive director of the department of natural resources, to carry out the provisions of this part 2 and part 3 of this article, a professional forester, to be known as the state forester, whose duties shall be primarily of an educational or regulatory nature.

§ 23-31-207. To the extent the state forester is, or may be in the future, a position within the personnel system, the appointment provision in the Board of Governor's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

ii. Colorado Water Conservation Board

The Colorado Water Conservation Board is a division of DNR. § 24-1-124(3)(b). The Colorado Water Conservation Board consists of fifteen members. § 37-60-104. The division head of the Colorado Water Conservation Board is the director. § 37-60-111(2). Section 37-60-111(2) purports to vest the authority to appoint the director of the Colorado Water Conservation Board in the Board itself: "The office of director of the water conservation board is hereby created. *The board shall appoint* a person who is well versed in water matters and qualified by experience, knowledge, and personality to represent the board and carry out its functions." *Id.* (emphasis added).

To the extent the director is, or may be in the future, a position within the personnel system, the appointment provision in the Board's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

iii. Parks and Wildlife Commission

The Parks and Wildlife Commission is a division within DNR. § 24-1-124(3)(k)(I)(A). The Parks and Wildlife Commission itself consists of thirteen members, eleven of whom are appointed by the governor. § 33-9-101(2). The division head of the Parks and Wildlife Commission is the director. § 33-9-103(1)(a).

Section 33-9-103(1)(a) provides that that the Parks and Wildlife Commission, with the consent of the executive director, shall appoint the director. To the extent the director is, or may be in the future, a position within the personnel system, the appointment provision in the Commission's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect. Although the statute

attempts to share the appointment power between the Commission and DNR's executive director, that does not save the statute. Article XII, § 13(7) gives DNR's executive director the exclusive authority to appoint division heads who are within the personnel system.

D. Colorado Department of Public Safety

i. Automobile Theft Prevention Board

The Colorado Department of Public Safety ("CDPS") is one of Colorado's 19 principal departments. § 24-1-110(1)(u). The head of CDPS is the executive director. § 24-1-128.6(1). The Automobile Theft Prevention Authority is located within CDPS. § 42-5-112(1). The Authority includes the Automobile Theft Prevention Board, which consists of eleven members appointed by the governor. *Id.* § 112(2)(a). Section 42-5-112(3)(c), authorizes the Board to appoint the director of the Authority, who in turn may employ the staff necessary to operate and administer the Authority. *Id.* Thus, the statute purports to vest in the Automobile Theft Prevention Board the exclusive authority to appoint the director of the Authority.

Although the director of the Automobile Theft Prevention Authority is not expressly described as a "head of division" by statute, a "head of division" is generally a high-ranking department employee, "ranking next below the head of [the] department." Colo. Const. art. XII, § 13(7).

Even if the director falls lower down on the organizational ladder and is not considered a "head of division," he or she may still be affected. Under the state constitution, each division head within a principal department is the appointing authority for "all positions in the personnel system" within his or her division. Colo. Const. art. XII, § 13(7); *see also* § 24-1-108(1). Thus, if the director is a position within the state personnel system, either the CDPS executive director or a division head within CDPS, not the Board, is the appointing authority for the director. *See* § 24-1-107 (recognizing that heads of principal departments hold some limited discretion to reorganize "divisions, sections, and units" in the department for "efficient administration and operation"). In that event, the appointment provision in Board's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

E. Colorado Department of Regulatory Agencies

i. The Public Utilities Commission

The Colorado Department of Regulatory Agencies ("DORA") is one of Colorado's 19 principal departments. § 24-1-110(1)(l). The head of DORA is the executive director. § 24-1-122(1). The Public Utilities Commission is a division of

DORA. § 24-1-122(2)(a). The Public Utilities Commission consists of three members appointed by the governor with the consent of the senate. § 40-2-101(1). By statute, the Commission must approve the appointment of the director of the Public Utilities Commission. § 40-2-103. Section 40-2-103(1) states in pertinent part,

The executive director of the department of regulatory agencies, pursuant to section 13 of article XII of the state constitution, *and with the approval of the commission*, shall appoint a director of the commission. The director shall manage the operations of the agency in order to carry out the public utilities law, to carry out and implement policies, procedures, and decisions made by the commission . . . The director has all the powers and responsibilities of the division director for this purpose[.]

§ 40-2-103(1) (emphasis added). To the extent the director is, or may be in the future, a position within the personnel system, the approval provision in the Public Utilities Commission's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

Although the statute attempts to share the appointment power between the Commission and DORA's executive director, that does not save the statute. Article XII, § 13(7) gives DORA's executive director the exclusive authority to appoint division heads who are within the personnel system.

ii. The Securities Board

DORA contains the Division of Securities, whose head is the commissioner of securities. § 11-51-701. DORA also contains the Securities Board, whose five members are appointed by the governor. § 11-51-702.5.

The Division of Securities' enabling statute purports to vest in both the executive director of DORA and the Securities Board the authority to appoint the commissioner of securities:

“There is hereby created the division of securities within the department of regulatory agencies, the head of which shall be the commissioner of securities, *who shall be appointed by the executive director of the department of regulatory agencies*, pursuant to the provisions of section 13 of article XII of the state constitution, *and the securities board.*”

§ 11-51-701 (emphasis added). To the extent the commissioner of securities is, or may be in the future, a position within the personnel system, the appointment provision in the Division's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

F. Colorado Department of Transportation

i. Colorado Aeronautical Board

The Colorado Department of Transportation (“CDOT”) is one of Colorado’s 19 principal departments. § 24-1-110(1)(v). The head of CDOT is the executive director. § 24-1-128.7(1). CDOT contains the Aeronautics Division, which is headed by the director of the Aeronautics Division. § 24-1-128.7(3)(b). CDOT also houses the Colorado Aeronautical Board, whose seven members are appointed by the governor. § 43-10-104.

The statute creating the office of the director of the Aeronautics Division, § 43-10-107, provides in pertinent part as follows:

The office of director of the division is hereby created. Any other provision of the law to the contrary notwithstanding, *the board, with the consent of the executive director, shall appoint the director*, who shall possess such qualifications as may be established by the board and the state personnel board. The director shall oversee the discharge of all responsibilities of the division.

Id. (emphasis added). To the extent the director is, or may be in the future, a position within the personnel system, the appointment provision in the Division’s statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

Although the statute attempts to share the appointment power between the Board and CDOT’s executive director, that does not save the statute. Article XII, § 13(7) gives CDOT’s executive director the exclusive authority to appoint division heads who are within the personnel system.

ii. High Performance Transportation Enterprise Board

The High Performance Transportation Enterprise is a division of CDOT.⁴ § 43-4-806(2)(a)(I). The Enterprise is headed by the director of the High Performance Transportation Enterprise. § 43-4-806(2)(b). Also housed within the Enterprise is the High Performance Transportation Enterprise Board, consisting of seven members. § 43-4-806(2)(a)(I). According to statute, the Board is authorized to appoint the director of the High Performance Transportation Enterprise “with the consent of the executive director.” *Id.* § 806(2)(b).

⁴ The High Performance Transportation Enterprise is a TABOR enterprise, which status does not influence the legal analysis in this Formal Opinion.

To the extent the director is, or may be in the future, a position within the personnel system, the appointment provision in the Division's statute conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

Although the statute attempts to share the appointment power between the Board and CDOT's executive director, that does not save the statute. Article XII, § 13(7) gives CDOT's executive director the exclusive authority to appoint division heads who are within the personnel system.

iii. Statewide Bridge Enterprise Board

The Statewide Bridge Enterprise is housed within CDOT and headed by the director of the Statewide Bridge Enterprise.⁵ *See* § 43-4-805 (2)(a)(I) (“The bridge enterprise director shall oversee the discharge of all responsibilities of the bridge enterprise[.]”). Also housed within the Statewide Bridge Enterprise is the Bridge Enterprise Board, which is comprised of the members of the Colorado Transportation Commission. *Id.* The Bridge Enterprise Board is tasked with appointing a director: “[T]he bridge enterprise board . . . shall, with the consent of the executive director, appoint a bridge enterprise director who shall possess such qualifications as may be established by the commission and the state personnel board.” *Id.* Just as the High Performance Transportation Enterprise operates as a government-owned business within CDOT, the Statewide Bridge Enterprise also operates as a government-owned business within CDOT. *Id.* However, unlike the High Performance Transportation Enterprise, the Statewide Bridge Enterprise is not expressly recognized by statute as a division of CDOT.

Although the director of the Statewide Bridge Enterprise is not expressly described as “head of division” by statute, a “head of division” is generally a high-ranking department employee, “ranking next below the head of [the] department.” Colo. Const. art. XII, § 13(7). Even if the director falls lower down on the organizational ladder and is not considered a “head of division,” he or she may still be affected. Under the state constitution, each division head within a principal department is the appointing authority for “all positions in the personnel system” within his or her division. Colo. Const. art. XII, § 13(7); *see also* § 24-1-108(1).

Consequently, if the director is a position within the state personnel system, either the CDOT executive director or a division head within CDOT—rather than the Board—is the appointing authority. *See* § 24-1-107 (recognizing that heads of principal departments hold some limited discretion to reorganize “divisions, sections, and units” in the department for “efficient administration and operation”).

⁵ Like the High Performance Transportation Enterprise, the Statewide Bridge Enterprise is a TABOR enterprise, which status does not influence the legal analysis in this Formal Opinion.

In that event, the appointment provision in Board's statute, as written, conflicts with article XII, § 13(7) of the Colorado Constitution and is without legal effect.

Although the statute attempts to share the appointment power between the Board and CDOT's executive director, that does not save the statute, as written. Article XII, § 13(7) gives CDOT's executive director the exclusive authority to appoint division heads who are within the personnel system; it similarly gives division heads the exclusive authority to appoint all positions in the personnel system within his or her division.

CONCLUSION

Article XII, § 13(7) of the Colorado Constitution establishes an orderly organizational structure for the executive branch of state government and its 19 principal departments: the governor appoints the head of each principal department, each principal department head appoints the division heads in the personnel system within his or her principal department, and each division head appoints the positions in the personnel system within his or her division. Consistent with prior opinions of this office, this Formal Opinion concludes that where the General Assembly has statutorily vested in other state public bodies the appointing authority reserved by the state constitution to heads of principal departments, such statutes are inconsistent with article XII, § 13(7) and are without legal effect.

The list of state public bodies that may be affected by the conclusion of this Formal Opinion is exemplary rather than exhaustive. Other state public bodies not listed in the legal analysis above may fall within the conclusion of this Formal Opinion.

Finally, only positions within State's personnel system are governed by the analysis in this Formal Opinion. The Department of Personnel and Administration maintains records on the current classification of each state government position within the personnel system. The classification of any given position, however, is subject to change in accordance with future legislative amendments or administrative actions.

Issued this 30th day of September 2019.

/s/ Philip J. Weiser

PHILIP J. WEISER
Colorado Attorney General