

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B081

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN J. RODGERS,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
DIVISION OF MENTAL HEALTH,
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

Hearing was held on March 13, and 14, 1995, at the Colorado Mental Health Institute at Pueblo ("CMHIP") before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at hearing through Thomas S. Parchman, assistant attorney general. Complainant, John Rodgers, was present at the hearing and represented by David Bruno, attorney at law.

Respondent called the following employees of CMHIP to testify at hearing: Manual Ortiz; Beverly Garcia; Jacqueline Cekis; Pam Pomeleo; Louis Archuleta; Doris Fox; Scott Gibbs; Richard Burns; Anthony Pinnelle; Jack Ford; Walt Shuerman; and Lee Smith. Respondent also called as a witness at hearing a CMHIP patient, Margie Lucero.

Complainant testified in his own behalf and called Carol Ritchey and Susan McTavish, employees of the Minnequa Medi Center, to testify at hearing.

Respondent's exhibits 2 through 4, 17, 18, 21, 22 and 25 were admitted into evidence without objection. Respondent's exhibits 5, 7 through 12, 26, 28 and 29 were admitted into evidence over objection. Respondent's exhibit 27 was marked and withdrawn. Complainant's exhibits D, F and G were admitted into evidence without objection. Complainant's exhibits C and E were admitted into evidence over objection.

MATTER APPEALED

Complainant appeals the termination of his employment.

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ISSUES

1. Whether Complainant did the acts for which discipline was imposed.
2. Whether Complainant's conduct constituted wilful misconduct or a failure to comply with standards of efficient service and competence.
3. Whether the appointing authority's decision to terminate Complainant's employment was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. Respondent's request to sequester the witnesses from the hearing room was granted,
2. Initially, Respondent requested that in order to protect the CMHIP patient's right to privacy, the patient whose treatment is at issue in this matter should be referred to by her initials. Thereafter, Respondent decided to call the patient as a witness at hearing. The parties then referred to the witness by her name, Margie Lucero.
3. At hearing on March 13, 1995, Complainant requested the production of Margie Lucero's medical records. Complainant maintained that without the records Complainant could not inquire about the patient's competence to offer testimony. Complainant contended that he was not aware that Respondent intended to call the patient as a witness at hearing until March 10, 1995, just three days prior to the hearing. Complainant argued, in the alternative, that if Respondent would not be required to produce the medical records for the patient, then evidence should be limited to exclude the testimony of the witness Lucero.

Respondent argued that a formal request for the medical records was never made and therefore Complainant's request for the records made on the day of hearing should not be granted. Respondent further argued that Complainant had notice that Respondent might call any witness endorsed by Complainant, and Complainant endorsed Lucero as a witness in its prehearing statement. Respondent finally argued that the medical records are not required to determine the competence of the patient to testify at hearing. Respondent maintained that competence to testify is based on the witness' ability to observe, communicate and recollect, and this can be determined by the trier of fact without the medical records

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of the patient being produced.

Complainant's motion to have the medical records produced at hearing and the motion in limine were denied.

FINDINGS OF FACT

1. Complainant John Rodgers began his employment with CMHIP as a security guard in August, 1987. In July, 1989, Rodgers became a police officer I at CMHIP. In August 1991, Rodgers was promoted to the position of acting police officer II, holding the rank of corporal. And, in January, 1993, he was promoted to the position on a permanent basis. It is the latter position from which Rodgers was terminated on December 13, 1994.

2. Rodgers is 37 years old. He began his career in law enforcement at the age of 14 as a sheriff's cadet in New York. From 1980 to 1982, Rodgers was employed by the Pueblo County Sheriff's Department. In 1982, he joined the Army as a private first class and was assigned to the U.S. Army Military Police. After the military, Rodgers operated his own business for five years, before starting work with CMHIP as a security officer. In April, 1988, Rodgers became a reserved deputy sheriff for the Custer County Sheriff's Department. He continued in that position during his employment with CMHIP.

3. During Rodgers' employment with CMHIP, he received job performance ratings of "standard" or above. From August through November, 1987, Rodgers received a job performance rating of "standard". From August, 1987, through August, 1989, he received performance ratings of "above standard". From August, 1989, through August, 1991, Rodgers received job performance ratings of "commendable". From August 1992 through August, 1993, Rodgers received a job performance rating of "Outstanding".

4. In August, 1994, Rodgers received a job performance rating of "commendable" for the preceding twelve month period. Rodgers filed a grievance concerning this rating. He maintained that he deserved an "outstanding" rating. At the conclusion of the grievance process, it was resolved that Rodgers was not properly evaluated. Rodgers' 1994 evaluation was rewritten giving him a job performance rating of "good".

5. During Rodgers's employment at CMHIP, he received no disciplinary action. He received a corrective action for an incident occurring on October 6, 1993. This pertained to an incident during which Rodgers made a traffic stop contrary to the direction of his supervisor.

6. Rodgers received a high school diploma. He attended two years of college and received an associate degree. He attended

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numerous classes, receiving extensive law enforcement training. Rodgers is a P.O.S.T. certified police officer. P.O.S.T. is a nationally recognized safety training program. He received extensive law enforcement training in all areas, except arrest control and law enforcement driving. He received training at Pike Peak Community College, Trinidad Junior College Police Academy, Colorado Law Enforcement Training Academy in Golden and training at the Custer County Sheriff's Department.

7. P.O.S.T. certification is not required for the police officer I or II positions at CMHIP. Most officers employed by CMHIP do not have P.O.S.T. certification.

8. Police officers employed by CMHIP have full police authority on CMHIP property. Their job training at CMHIP consists primarily of newly hired employees spending the first three months of their employment with another officer on the job.

9. Rodgers has knowledge of the P.O.S.T. procedures and CMHIP policy concerning instructions to officers about controlling resistive behavior with the least amount of intervention. There is a continuum of force to be used as a guideline in the officer's interaction with patients and the public.

10. The continuum of force, defined in the CMHIP manual, guides officers to control resistive behavior by first utilizing their presence as a control tactic. It is known that the mere presence of an authority figure, such as a CMHIP police officer, can cause an individual resisting direction to comply. The next levels in the continuum of force are verbal direction, empty hand control, intermediate weapons and the use of deadly force.

11. On November 11, 1994, Margie Lucero resided at the Minnequa Medi Center (the center), a nursing home and child care center. Lucero was sent to the center because of her mental health. Her husband was unable to care for her and she was not able to care of herself. Lucero is 78 years old. Her physical stature is small and thin. Lucero does not have a physical infirmity. She ambulates very well.

12. At the center's nursing home patient's suffer from mental and physical infirmities. Patients, because of their age, are very fragile and can be seriously injured if they are struck. Patients who become combative and are a danger to themselves or others are transferred to CMHIP for care.

13. On and before November 11, 1994, Lucero was hallucinating, delusional and physically aggressive with other patients and staff. Lucero was very agitated. She struck patients and staff at the center, she claimed the food at the center was poison and she was generally not complying with the directions of the staff.

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14. Prior to November 11, Lucero's left arm and shoulder were injured at the center's nursing home when she had a conflict with members of the nursing staff. The arm was bruised and sore. Touching Lucero's arm caused her pain on November 11, 1994.

15. The center managers consulted with the county mental health department and decided to move Lucero to CMHIP on November 11, 1994. The mental health department advised CMHIP of Lucero's arrival. The CMHIP dispatcher was warned that Lucero was physically aggressive.

16. It is the normal procedure at the center to move patients in the center's van. Lucero became angry when she was advised that she was going to be moved to CMHIP. She refused to be transported in the center's van.

17. The center's nursing supervisor, Carol Ritchey, was involved in the transfer of Lucero to CMHIP. When Lucero refused to ride in the van, Ritchey agreed to use her personal vehicle. The social service director for the center, Susan McTavish, also accompanied Lucero to CMHIP.

18. Lucero struck Ritchey when she attempted to get Lucero into her personal vehicle. Lucero was directed to sit in the back seat of the vehicle, and she refused. Lucero was placed in the front seat of the car. A scuffle ensued because she got in the car at an angle and would not voluntarily straighten her body out so that the door could be closed.

19. During the 10 mile ride from the center to CMHIP, Lucero ranted and rave. She demanded to see a judge and the Governor. Lucero was angry, frightened and confused. She believed that she was being taken to jail.

20. At CMHIP, Ritchey parked the vehicle in the parking spaces immediately across from the front west entrance. Rodgers and Archuleta were contacted by the dispatcher and advised that a combative patient was arriving. Their assistance was requested. Rodgers and Archuleta arrived at the west entrance shortly after Lucero arrived in the parking lot. Ritchey advised Archuleta that Lucero was resisting her directions to exit the car. No one mentioned to the officers that Lucero's left arm was injured prior to her arrival at CMHIP.

21. Lucero's passenger side door was opened. McTavish sat directly behind Lucero unable to get out of the two door vehicle while Lucero was in the front seat. Ritchey got out of the vehicle and stood beside it on the passenger side. Two other CMHIP police officers, Manual Ortiz and Pam Pomeleo, stood near the car on the passengers side as Archuleta and Rodgers assisted

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Lucero into CMHIP.

22. Archuleta asked Lucero to get out of the car, but she refused. Lucero told Archuleta and Rodgers that she would not get out of the car until a judge or the governor arrived.

23. Lucero was assisted out the car by Archuleta. Once out of the vehicle, Archuleta stood on the right side of Lucero and Rodgers was on the left side. Rodgers stood slightly behind Lucero. This is a CMHIP approved stance. It is a position taken with an individual who is acting unpredictably and needs to be controlled.

24. Rodgers took hold of Lucero's left arm at the wrist. He held Lucero's wrist at her back at waist level. Rodgers hold is referred to as a "come along" hold. It is not intended to cause injury or pain. It is intended to give the officer some degree of control over Lucero's movement and give the officer contact with Lucero to help the officer anticipate movement.

25. As Archuleta, Lucero and Rodgers began to walk toward the west entrance, Lucero abruptly fell to her knees in an effort to resist. Her actions caught Rodgers and Archuleta by surprise. Lucero's knees barely touched the pavement as she was assisted back to her feet by the officers.

26. Lucero continued into CMHIP admissions office with the assistance of the officers without incident. In admissions, Lucero complained that her left arm hurt. She cried and was frightened. Later, Lucero was placed in a locked geriatrics ward where she continued to reside at the time of the hearing.

27. Manual Ortiz is another police officer at CMHIP. He was present near the vehicle Lucero arrived in and observed Archuleta and Rodgers assist Lucero out of the car and into CMHIP. Ortiz believed that he observed Rodgers use excessive force with Lucero. He was concerned about his observation.

28. On November 11, 1994, Ortiz canvassed hospital staff in the area about their observations. Ortiz shared his perceptions of Rodgers' handling of Lucero with these individuals. Ortiz found a number of employees who agreed with him that Rodgers abused Lucero by using excessive force when getting her out of the car and into CMHIP.

29. On November 11, 1994, Rodgers was the commanding officer on duty. Therefore, Ortiz reported the alleged incident involving patient abuse the following day to Sergeant Burns.

30. Burns reported the information received from Ortiz to Anthony Pinnelle, the acting chief of CMHIP police. Pinnelle assigned

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Burns to investigate the incident. Lee Smith, the chief of public safety, was advised of the allegation of patient abuse and he decided to place Rodgers on administrative suspension, on November 15, 1994, while the incident was investigated.

31. Following the investigation, on November 21, 1994, Smith requested that someone with greater objectivity be delegated appointing authority to conduct the R8-3-3 meeting and decide whether to impose discipline. Appointing authority was delegated to Jack Ford, a human resource specialist II in the CMHIP personnel office.

32. Ford received the investigative report prepared by Burns which contained ten witness statements describing the incident. Based on this information Ford decided that he should conduct a R8-3-3 meeting. Rodgers was given notice of the meeting by letter dated November 23, 1994.

33. On November 30, 1994, Ford met with Rodgers for the R8-3-3 meeting. Rodgers attended with a business representative from the Colorado Association of Public Employees, James Peaslee. Rodgers adamantly denied that he used excessive force in handling Lucero on November 11, 1994. Rodgers reenacted the event for Ford in the parking lot where it occurred on November 11.

34. After the November 30, meeting, Ford spoke with five of the ten individuals who supplied statements concerning the incident. After considering the evidence, Ford decided to terminate Rodgers' employment for failure to comply with standards of efficient service or competence and wilful misconduct.

35. In reaching the decision to terminate Rodgers' employment, Ford gave weight to the allegation that several witnesses heard Lucero cry out in pain when Rodgers was holding her arm. Ford attributed further significance to the fact that the three police officers in close proximity to the incident believed that Rodgers used excessive force with Lucero. Ford further considered Rodgers' employment record.

36. Ford discounted Ritchey and McTavish's observations because he concluded that they did not have a good vantage point from which to observe the incident. Ford did not speak to Lucero at anytime prior to terminating Rodgers' employment.

DISCUSSION

A certified employee may be disciplined only for just cause as specified in Article XII, Section 13(8) of the Colorado Constitution. Colorado Association of Public Employees v. Department of Highways, et. al., 809 P.2d 988 (Colo 1991). The burden of proving by a preponderance of the evidence that just

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cause exist for the discipline imposed rests with the appointing authority. Section 24-4-105(7), C.R.S. (1988 Repl. Vol. 10A). To sustain a finding in its favor, Respondent must do more than put the mind of the trier of fact in a state of equilibrium. If the evidence presented weighs evenly on both sides, the finder of fact must resolve the questions against the party having the burden of proof. People v. Taylor, 618 P.2d 1127 (Colo. 1980). See also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

The Board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B). The capricious or arbitrary exercise of discretion by an appointing authority can arise in only three ways, namely: (a) by 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) by failing to give candid and honest consideration to the evidence before it on which it is authorized to act in exercising its discretion; and (c) by exercising its discretion in such a manner that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. Van de Vegt v Board of Commissioners of Larimer County, 55 P2d 703, 705 (Colo 1936).

Respondent argues that the decision of the appointing authority should be sustained because it was based on competent evidence establishing that Complainant used excessive force with the patient. Respondent argues that the numerous witnesses who observed the incident could not be expected to report their observations of the same event exactly alike. Respondent argues that it is not uncommon in a patient abuse case for there to be varying versions of the same incident. Respondent argues that reliance should be placed on the conclusions of the numerous staff members who consistently testified that Rodgers used excessive force on November 11.

Respondent maintains that despite Complainant's good employment record, he must be terminated because he refuses to take responsibility for his actions on November 11. Respondent maintains that Complainant's conduct cannot be corrected since he fails to recognize the error of his ways. Finally, Respondent argues that it does not tolerate staff members who abuse patients. Once this conduct occurs, it is Respondent's contention that terminating the employee is the appropriate discipline.

Complainant argues that he did not abuse Lucero and that Respondent failed to establish that he did through the evidence presented at hearing.

Where there is conflicting testimony, the credibility of witnesses

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and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

This case turns on the credibility of the parties' witnesses. Colorado Jury Instruction 3:16: offers guidance to the trier of fact with regard to credibility determinations. It states,

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; their motives; whether their testimony has been contradicted; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses. If you believe that any witness has wilfully testified falsely to any material fact in this case, you may disregard all or any part of the witness' testimony.

Respondent's case rests on ten witnesses who stood at varying vantage points and observed two officer, Complainant and Archuleta, remove a patient from a car to admissions. Other than Archuleta, the witnesses did not physically or verbally interact with Lucero. All the witnesses were relatively undistracted from observing the incident with Lucero.

Each of these witnesses offered significantly different testimony. Most of the witnesses were canvassed by Ortiz on November 11, following the incident and prior to it being reported to Burns. Ortiz testified to the most extreme and least credible version of the incident. During these encounters with Ortiz on November 11, he shared with the witnesses his concern about Complainant's treatment of Lucero.

Some of Respondent's witnesses testified that Complainant grabbed the right arm, others believe that Complainant grabbed the left arm. Ortiz testified that Complainant twisted Lucero's arm around to her back and brought the wrist up between her shoulder blades to the nape of her neck. Another witness testified that the arm was twisted to the middle of the back. Still another witness testified that the arm was twisted and extended straight out from Lucero's body with the wrist flexed and pressure applied at the wrist. Another witness observed Lucero's arm brought to the front of her body and supported at the wrist and elbow by Complainant.

Some of Respondent's witnesses testified that Lucero fell to her knees appearing to go limp from the pain. Some witnesses

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testified that Lucero fell down limp to the cement immediately after getting out of the car. Other witnesses testified that Lucero was lifted out of the car, stood on her feet, walked toward the CMHIP entrance and then fell limp to the cement halfway to the entrance.

Two witnesses testified that Lucero screamed loudly, "You're hurting my arm!" Another witness heard Lucero scream, "My arm! My arm! It's already injured!" Another witness, observing from a window near the parking lot, testified that Complainant used excessive force with Lucero, but she observed nothing that suggested that Lucero was grimacing or screaming. Archuleta testified that he heard no scream from Lucero, though she carried on a constant stream of complaints and demands about being brought to CMHIP against her will.

The incident took one to three minutes and involved only Complainant and Archuleta in the business of interacting with Lucero. Yet, the eight "disinterested" observers have little in common in their accounts of the incident.

Respondent places importance on witness testimony about remarks made to Lucero by Complainant outside the car and in the CMHIP lobby. Again, there are varying version of what Complainant is reported to have said. The remarks, made by Complainant as Lucero got out the car demanding a judge or the Governor, were to the effect that Complainant is a police officer and that is all Lucero would get. Another remark made by Complainant in the lobby advised Lucero that if she had not resisted entering the building, she would not have had to lose her dignity. Respondent maintains that these remarks bolster its case that Complainant dealt with Lucero with excessive hostility.

These remarks might have significance if supported by the evidence that Complainant physically abused Lucero. However, it is concluded that Respondent failed to establish by preponderant evidence that Complainant used excessive force with Lucero.

Of relevance in this case is Lucero's testimony. She was called as a witness by Respondent over Complainant's objection. Lucero testified that she clearly recalled the incident on November 11. She testified that on November 11, her arm hurt when touched due to the pre-existing injury she suffered at the center. She testified, and demonstrated, that Complainant pulled her arm to the back at her waist in a "come along" hold.

Of further significance is the testimony of McTavish and Ritchey. They testified that they heard no screams of pain from Lucero. They testified that while their attention during the brief incident was distracted or at times their view of the officers was blocked, they saw no conduct by Complainant that rose to the level

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of patient abuse.

Complainant and Archuleta were not advised that Lucero had a pre-existing injury. The only information relayed to the officers was that Lucero was resisting direction to enter the building. The evidence established that Complainant exercised some caution in dealing with Lucero. There was no credible evidence that he used excessive force.

Complainant seeks an award of attorney fees. Section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act provides for the recovery of attorney fees and costs upon a finding that the personnel action from which the proceeding arose was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. Given the findings and conclusions contained herein, an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent failed to establish by a preponderance of the evidence that Complainant did the acts for which discipline was imposed.
2. Therefore, Complainant cannot be found to have engaged in wilful misconduct or to have failed to maintain standards of efficient service or competency.
3. The decision to terminate Complainant's employment was arbitrary, capricious and contrary to rule and law.
4. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Complainant shall be reinstated to his position at CMHIP. He shall be awarded full back pay and benefits from the date of termination to the date of his reinstatement, with any offset provided by law.

DATED this 28th day of
April, 1995, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

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CERTIFICATE OF MAILING

This is to certify that on the _____ day of April 1995, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

David J. Bruno
Attorney At Law
One Civic Center Plaza
1560 Broadway, #1099
Denver, CO 80202-5143

and in the interagency mail, addressed as follows:

Thomas S. Parchman
Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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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 and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). 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), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board 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).

RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$1552.50**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment 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. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

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

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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 7 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. rule R10-10-5, 4 Code of Colo. Reg. 801-1.

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. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. 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.

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