

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 95B074

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JACK E. MURRAY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
CANON REGIONAL CENTER,

Respondent.

Hearing was held on February 16, 1995, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by David A. Beckett, Special Assistant Attorney General. Complainant appeared and was represented by Nora V. Kelly, Attorney at Law.

Respondent's witnesses were: Robert Cantwell, Chief of Staff and acting Inspector General, Department of Corrections; William Bell, Criminal Investigator; Alexander Wold, Criminal Investigator; Patricia Donice Neal, Superintendent of the Colorado State Penitentiary; and H.B. Johnson, Canon Region Director, Department of Corrections. Complainant testified in his own behalf and called no other witnesses.

Respondent's Exhibits 1, 3 through 8, 11, 12, 14 and 15 were stipulated into evidence. Exhibit 9 was admitted without objection. Exhibits 2 and 13 were admitted over objection. Complainant's Exhibits C, G through J and L were admitted without objection. Exhibits A, B, D, E, F, K and M through R were admitted over objection.

MATTER APPEALED

Complainant appeals a November 25, 1994 disciplinary termination which was premised upon a violation of DOC Regulation 1150-4.

ISSUES

1. Whether Complainant committed the acts (willful misconduct) for which discipline was imposed;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, Jack Murray, began his employment with the Department of Corrections (DOC) on April 11, 1988. He worked as a correctional officer at the Buena Vista Correctional Facility (BVCF) for three years before transferring to the Colorado Territorial Correctional Facility (CTCF) in Canon City in April 1991. He was assigned to the Colorado State Penitentiary (CSP) in Canon City when it opened in August of 1993 and was certified in the position of Correctional Officer II (Sergeant) at the time he was dismissed from employment.

2. Robert Cantwell has been the DOC Chief of Staff for one and one-half years. Because of a vacancy in the position of Inspector General, he also acts in that capacity, which requires him to review investigations of correctional officers. Cantwell previously was employed for twenty-nine years with the Denver Police Department, having retired in 1991 as the interim Chief of Police.

3. As acting Inspector General, Cantwell has the authority to

direct an employee to submit to a urinalysis drug test pursuant to DOC Regulation 1150-4, which provides in pertinent part:

7. INVESTIGATIVE PROCEDURES

a. Authority:

When an investigation is initiated into an issue of alleged employee misconduct, the investigator shall have the written approval of the Inspector General. The Inspector General shall also have the authority to establish and promulgate procedures invested in accordance with this regulation.

b. Investigative Plan:

An investigative plan will be developed by the principle investigator in coordination with the office of the Inspector General. The plan shall include a time for initial report. A written interim progress report shall be submitted to the Inspector General each thirty (30) day period that the investigation is in effect.

c. Employee Cooperation:

Employees contacted in regard to any authorized internal affair investigation shall cooperate and relate fully and truthfully their knowledge of all issues pertaining to the alleged conduct under investigation. Failure of any employee to cooperate and give truthful information may be cause for corrective or disciplinary action.

d. Advisements:

Employees under investigation may be advised of their right not to incriminate themselves (Miranda Warning) if there is suspicion of unlawful conduct. Employees under investigation, but not under criminal investigation, and who are not advised of their rights (Miranda Warning), shall be given the warning as cited in attachment 3, Internal Investigation Warning, D.C. Form 183 (1/86). When an employee is given an Internal Investigation Warning but not a Miranda Warning, they (sic) must answer all questions

fully and truthfully. Failure to do so can result in corrective or disciplinary action. Any advisements given to an employee shall not be construed to mean the person has broken any law or violated any regulation.

....

f. Drug and Alcohol Tests:

Employees shall submit to a chemical or mechanical test to determine [the] presence of alcohol or drugs in their system [at] any time while on Department of Corrections facility premises. Failure to submit to such tests may be cause for corrective or disciplinary action.

(Respondent's Exhibit 12, pgs. 5-6.)

4. In August 1994, Cantwell received a report from a DOC investigator (Lutenberg) which stated that information from a confidential informant (CI) indicated that BVCF Correctional Officers Rusty Ahart and Gavin McWhirter, and Complainant were involved in illegal drug activity. This report, dated August 22, 1994, provides in full:

Information received from a CI indicates that several DOC staff are involved in the use and/or sale of illegal narcotics. These staff include Rusty Ahart (Major BVCF), Gavin McWhirter (Sgt. BVCF) and Jack Murray (Sgt. CSP). Information is that these officers get their drugs from a supplier in Salida by the name of Renfrow. (Chaffee CO. SO is aware of this subject.)

Rusty Ahart's wife (they are in the process of getting a divorce) had agreed to talk to CID Investigators but then changed her mind saying that her lawyer had advised her not to say anything. Information was received that it was not her lawyer but Jerry Poole (Capt. CTCF) that told her not to talk to CID. The CI states that Jerry Poole used to date Rusty's wife before she married Rusty and that Jerry used drugs in her presence.

(Respondent's Exhibit 2.)

5. Cantwell did not, and does not, know the identity of the CI or if the informant had ever provided information before, but he was satisfied that the informant existed.

6. Cantwell decided not to act on the August report because the report did not contain "new information", i.e., it was written "mostly in the past tense".

7. DOC does not have a policy for random drug testing.

8. On November 3, 1994, DOC Investigator Larry Rand advised Cantwell of information of marijuana use by BVCF staff, particularly Ahart and McWhirter. Complainant was not mentioned or otherwise implicated in this report. The information came from sources other than the CI who provided the information contained in the August report. (Respondent's Exhibit 13, November 8, 1994 Rand report.) Because this was the second report of illicit drug activity by Ahart and McWhirter, Cantwell directed the two of them to submit to a urinalysis test. They did, and the test results were positive for the use of marijuana. This, to Cantwell, enhanced the credibility of the August report as to Complainant.

9. Knowing that two of the three officers who were implicated in the August report had tested positive, Cantwell believed that he had "probable cause" to believe that the third officer, Complainant, was also involved in illegal drug usage. Cantwell had no other information pertaining to the use of drugs by Complainant, past or present, and did not inquire with respect thereto. Cantwell did not know that Complainant had transferred from Buena Vista to Canon City in 1991.

10. On November 4, 1994, Rand, the BVCF Investigator, telephoned Investigator Alex Wold at CTCF in Canon City and advised Wold that Cantwell had directed Rand to order a urinalysis test of Complainant. Wold then telephoned Cantwell and received the

instruction himself. Wold, in turn, directed Investigator William Bell to follow through on Cantwell's order.

11. Early in the afternoon of November 4, upon the instruction of H.B. Johnson, Complainant was summoned to the office of CSP Superintendent Donice Neal, who advised him that he was to report to CTCF at 1:00 for a drug screen.

12. Complainant arrived at CTCF at about 1:00 to be interviewed by Investigators Bell and Wold. Bell advised Complainant that there had been allegations of drug use and distribution, and that he had been implicated. Bell advised Complainant that his statements could be used against him in an administrative proceeding but not in a criminal court. (Respondent's Exhibit 3.) Bell stated that this was not his investigation, that he had no detailed information, and that he was following a directive from Cantwell. Complainant stated that McWhirter had called him the previous day and informed him of what had transpired at BVCF. Complainant volunteered that he thought the confidential informant might be his former girlfriend, who was having an affair with a DOC investigator. Bell inquired as to the name of the investigator, but Complainant would not answer that question, although he gave the name of the girlfriend.

13. Bell ordered Complainant to provide a urine sample for testing. Complainant refused, stating that he would not submit to a test unless everybody else did. Bell then told him that Ahart and McWhirter had submitted to such a test. (Complainant testified at hearing that what he meant by "everybody" was everybody in DOC in accordance with a policy of random drug testing.) Complainant understood that DOC did not have a random drug test policy. Bell repeated the order, and Complainant again refused. Investigator Wold then advised Complainant that this was not a request but was a direct order, and he gave the order, and Complainant refused to comply. In Wold's view, Complainant answered all of the questions

he was asked about the investigation.

14. At the conclusion of the interview with Bell and Wold, Complainant went directly home because his shift at CSP ended at 2:00, with a "shift change" at 1:45, and that would have been near the time of his arrival at CSP.

15. Bell telephoned Cantwell to advise him that Complainant had refused the urinalysis test. Cantwell then telephoned Superintendent Neal and asked her to personally direct Complainant to comply with the order. Since Complainant had not reported back to CSP, Neal telephoned him at home and ordered him to come back to be tested and advised him that the order was being made pursuant to DOC Regulation 1150-4(7)(f), which she read to him. Complainant responded that it was his belief that he did not need to provide a urine sample because there was not a reasonable suspicion to believe that he was using illegal drugs. He told Neal that he was refusing to submit to the test because he felt that he was being dragged into something he didn't know anything about and he was afraid of being "labeled" as having a part in what was going on in Buena Vista. Neal then advised Complainant that he was under administrative suspension pending a Rule R8-3-3 meeting, and that the oral suspension would be followed up in writing.

16. Neal interprets Regulation 1150-4(7)(f) to require reasonable suspicion before ordering an employee to submit to a drug test. Cantwell believes that "probable cause" is required.

17. H.B. Johnson is the DOC Director for the Canon Region and is the delegated appointing authority for all disciplinary actions at the facilities located in Canon City. Upon receipt of the information that Complainant had refused to take a drug test, Johnson scheduled a predisciplinary meeting with Complainant and his representative, James Peaslee. The meeting was held on November 16, 1994. Peaslee, speaking on Complainant's behalf,

stated at the meeting that Complainant cooperated with the investigation in every respect except that he would not submit to a drug test because Regulation 1150-4 was unconstitutional in that it did not require reasonable suspicion before requiring an employee to submit to urinalysis testing.

18. Johnson concluded that Complainant had violated Regulation 1150-4 by not cooperating fully with the investigation (not giving the name of the investigator who he thought was having an affair with his former girlfriend) and by refusing to submit to a urinalysis test. Johnson also took into consideration a June 8, 1994 corrective action (Respondent's Exhibit 11) which Complainant had received for having been arrested for driving under the influence of alcohol and driving under suspension. (Complainant's driver's license had been suspended as the result of a traffic violation in Florida. Johnson testified that he also considered the fact that a week later Complainant was again arrested for driving under suspension, an allegation which Complainant denies and of which there is no corroborating evidence.)

19. Johnson felt that Complainant's willful misconduct warranted termination even though Complainant was known to be a "very good" employee who had received primarily "commendable" performance ratings during the duration of his employment because, in his view, Complainant had established a pattern of obeying only those laws he chose to obey. (See Complainant's Exhibits A through R, performance evaluations and letters of commendation.)

20. By letter dated November 23, 1994, hand-delivered to Complainant by Johnson, Johnson terminated Complainant's employment effective November 25, 1994, for willful misconduct premised upon the alleged violation of Administrative Regulation 1150-4, subsections 7(c) and (f). (Respondent's Exhibit 8.)

21. Complainant filed a timely appeal of his disciplinary

termination on November 30, 1994.

DISCUSSION

Although DOC Regulation 1150-4 does not, on its face, require reasonable suspicion before directing employees to submit to a chemical or mechanical test to determine the presence of alcohol or drugs in their system, the parties seem to agree that there is a constitutional requirement of reasonable suspicion unless the tests are administered randomly to all employees.¹ It is undisputed that the agency does not conduct random drug testing. The central issue, then, is whether reasonable suspicion of drug use existed at the time Complainant was ordered to provide a urine sample for drug testing.

Complainant was dismissed from employment for willful misconduct, refusing to comply with a direct order, i.e., insubordination. If it is found, however, that the order was not a lawful one, then it was not willful misconduct to refuse to comply with the unlawful order.² The order to submit to urinalysis testing was lawful only if there was reasonable suspicion, at the time the order was given, to believe that Complainant was involved in the use of illegal drugs.

The Fourth Amendment to the Constitution of the United States provides "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

¹ According to the testimony of Donice Neal, the administrative regulation is being revised to include a reasonable suspicion requirement.

² Insubordination requires a lawful order: "Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer." Black's Law Dictionary 801 (6th ed. 1990).

seizures...." The restrictions of the Fourth Amendment are effective against the federal government and apply to state and local governments through the due process clause of the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961). The Fourth Amendment guards against intrusions by the government but not against intrusions by private entities.

The Fourth Amendment was designed to prevent "arbitrary and oppressive interference with the privacy and personal security of individuals," United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976). The Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer. O'Connor v. Ortega, 480 U.S. 709, 717 (1989) (plurality opinion). A urinalysis drug test is a search within the meaning of the Fourth Amendment. Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). The purpose of requiring a warrant, or probable cause or reasonable suspicion before conducting a search is to prevent random or arbitrary intrusions by governmental agents. Id. at 621-22.

The term "reasonable suspicion" was first defined by the United States Supreme Court for Fourth Amendment purposes in Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the Court explained that, in order for a suspicion to be reasonable, it must be supported by "specific and articulable facts which, taken together with rational inferences from those facts, warrant [the search or seizure]" Id. at 21. A demand for specificity of information is the central feature of Fourth Amendment jurisprudence. United States v. Cortez, 449 U.S. 411, 418 (1981) (quoting Terry, supra).

While reaffirming the proposition that a request for a urine sample to be analyzed for evidence of illegal drug use is a search and consequently must satisfy the reasonableness requirement of the Fourth Amendment, the Supreme Court upheld the suspicionless testing of United States Customs Service employees in National

Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). However, the Court limited the permissibility of suspicionless testing to the special circumstances of incumbent Custom Service employees who applied for transfer or promotion to positions directly involving the interdiction of illegal drugs or the carrying of a firearm. Id. at 679. In finding a compelling governmental interest under the circumstances of this case, the Court said:

The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interest of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.

489 U.S. at 679.

It was significant to the Von Raab Court that the testing requirement was automatic and only effected those employees who chose to apply for one of the subject positions. In the testing process, there was no room for a discretionary decision to search based upon a determination that certain conditions existed. Id. at 656. The only employees who were tested were ones who had been accepted for promotion or transfer to a covered position, and who knew when they applied for the position that a drug test was a condition of employment. The employees also had advance notice of the drug test schedule, thus minimizing the "show of authority". Id. at 672 n. 2.

It is noteworthy that the governmental interest in Von Raab was not assumed, as some observers (including lawyers) are inclined to do with respect to security-sensitive positions. Rather, the government was required to introduce evidence amounting to proof that a compelling governmental interest was present. 489 U.S. at

659-60, 664, 669-70.

In American Federation of Government Employees v. Barr, 794 F. Supp. 1466 (N.D.Cal. 1992), the federal district court approved reasonable suspicion drug testing of Bureau of Prisons employees on the condition that the reasonable suspicion be supported by: "(1) evidence of specific, personal observations concerning job performance, appearance, behavior, speech, or bodily odors of the employee; or, if based on hearsay evidence, (2) corroborating evidence from a manager or supervisor with training and experience in the evaluation of drug-induced impairment." Id. at 1479.

Under facts similar to those established in the present proceeding, the federal court of appeals in Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992) found improper the dismissal of a police officer for insubordination that was based upon the officer's refusal to submit to compulsory urinalysis testing which was not supported by an articulable, individualized suspicion of drug use. The drug test had been ordered as the result of the police officer's mere association with another officer who was under investigation for illicit drug activity. Id. at 653.

Finding that the employee's Fourth Amendment rights were violated even though he did not submit to the urinalysis test, the appellate court said:

[I]t is improper to discharge an officer from duty to punish him for exercising rights guaranteed to him under the constitution. Thus, it is established law that no one should suffer harm by state action for asserting a constitutionally protected right Because the right to be free from unreasonable searches is contained explicitly in the Fourth Amendment, it follows that the right to be free from adverse consequences for refusing to submit to an unreasonable search must also be found there.

975 F.2d at 653 (relying on Gardner v. Broderick, 392 U.S. 273,

276-79 (1968)).

The compelling interest exception of Von Raab was not found in Jackson. The test was not ordered pursuant to a policy of random drug testing. In essence, the court found that the disciplinary termination of an employee for the valid exercise of a constitutional right was repugnant to the established principles of American law. See also Pike v. Gallagher, 829 F. Supp. 1254, 1263 (D.N.M. 1993) (public employment cannot be conditioned on the waiver of a constitutional right). Information rising to the level of reasonable suspicion must be possessed by the employer-agency at the time drug testing is ordered. Id. at 1262.

In City and County of Denver v. Casados, 862 P.2d 908 (Colo. 1993), the Colorado Supreme Court upheld as facially constitutional an executive order implementing a mandatory drug testing program for Denver employees. The executive order called for reasonable suspicion of drug use or impairment before a test could be mandated. The court held:

Because we prefer any reasonable and practical interpretation of the Order that renders it facially constitutional, ... we construe the Order as requiring reasonable suspicion established by objective and credible evidence to the extent that such suspicion may trigger a drug test of an employee for alleged on- or off-duty alcohol or drug use or impairment.

For the foregoing reasons, the provisions of the Order that pertain to drug testing based on reasonable suspicion are not facially invalid under the Fourth Amendment,

862 P.2d at 915.

The Casados court makes clear that reasonable suspicion of drug use or impairment is necessary before an employee can be required to submit to drug testing. DOC Regulation 1150-4 would not survive a

constitutional challenge to its facial validity under Casados. The regulation can survive an as-applied challenge only if there was, in fact, a reasonable suspicion of drug use or impairment on the part of the employee when the order for a drug test was given.

Under Colorado's drunk driving law, a police officer must have both probable cause for the arrest and reasonable suspicion for the initial stop in order to direct a motorist to submit to drug and alcohol testing. Peterson v. Tipton, 833 P.2d 830, 832 (Colo. App. 1992). The well-established standard in Colorado is that reasonable suspicion requires "an articulable and specific basis in fact for suspecting that criminal activity has taken place, is in progress, or is about to occur". People v. Garcia, 789 P.2d 190, 191 (Colo. 1990) (citing People v. Contreras, 780 P.2d 552, 555 (Colo. 1989) and People v. Ratcliff, 778 P.2d 1371, 1376 (Colo. 1989)). Any observations made or evidence seized after an illegal investigatory stop are "fruit of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471 (1963) and must consequently be excluded from presentation at trial, i.e., suppressed. Thus, without reasonable suspicion for the initial stop of the motorist, evidence of his refusal to submit to drug and alcohol testing, otherwise admissible by statute, must be suppressed under the Fourth Amendment. By analogy, without reasonable suspicion of drug use, Complainant's refusal to comply with the order for drug testing should be suppressed, and without the refusal there is no willful misconduct.³ However, it is not necessary to apply the

³ Respondent's contention that Complainant's refusal to provide the name of the investigator who he thought was having an affair with his former girlfriend constitutes willful misconduct trivializes the real issue in this case. Complainant answered the questions directed to him pertaining to the matter under investigation. And, although Complainant does not state the argument, the record does not reflect that the investigation was authorized and conducted in accordance with subparts (a), (b) and (c) of Regulation 1150-4(7). In any event, this aspect of Complainant's conduct could not reasonably be considered "so flagrant or serious" as to warrant immediate disciplinary

"exclusionary rule" in this particular administrative proceeding; to do so would not change the outcome of the case. See United States v. Janis, 428 U.S. 433 (1976) (application of exclusionary rule in administrative proceedings involves a cost-benefit analysis requiring the administrative law judge to balance the probable deterrent effect of suppression against the need for the evidence). See also U.S. v. \$37,780 in United States Currency, 920 F.2d 159 (2d Cir. 1990) (application of exclusionary rule in civil proceedings remains uncertain).

A reading of all of the case law cited above leads to the inescapable conclusion that Complainant must be reinstated because the order he disobeyed was an unlawful order for lack of reasonable suspicion of illegal drug use, and because the order contravened his rights under the Fourth Amendment.

When the Inspector General originally received the August investigative report he did not rely on the information contained in the report because it was "not new". If the information was old in August, it was certainly stale by November, yet it remained the only information of any kind implicating Complainant in drug usage. The November report not only did not reference Complainant but instead referred to marijuana use by members of the BVCF staff, of which Complainant had not been one since 1991. The agency's suspicion of Complainant rested solely on Complainant's purported August association with two other correctional officers, with whom he did not work. By any judicially approved definition, as shown above, there was insufficient information to reasonably suspect Complainant of using illegal drugs at the time he was ordered to provide a urine sample for testing. Even if the information of the August report had instead surfaced in November, this uncorroborated hearsay evidence would fail to establish "specific and articulable facts" to the extent necessary to form a particularized,

termination. R8-3-1(C), 4 Code Colo. Reg. 801-1.

individualized suspicion as to Complainant and does not satisfy the reasonableness requirement of the Fourth Amendment. A compelling governmental interest, under the standard of Von Raab, supra, was not demonstrated.

In reaching this conclusion, the administrative law judge adopts and applies the following legal principles: It is improper to dismiss a government employee for exercising rights guaranteed under the constitution. It is not insubordination for an employee to refuse to obey an order to submit to urinalysis drug testing in the absence of an articulable, individualized suspicion of drug use by the employee. The employee's Fourth Amendment rights are violated even if he does not, in fact, submit to the test. An employee cannot constitutionally suffer adverse consequences for refusing to submit to an unreasonable search. Reasonable suspicion for the search must exist at the time the search is ordered. An employee cannot be compelled to waive a constitutional right as a condition of employment.

Respondent made a mistake of law. However, it cannot be found under the circumstances of this case that Respondent's actions warrant an award of attorney fees and costs to Complainant under sec. 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B) of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Complainant did not commit the acts (willful misconduct) for which discipline was imposed.
2. Respondent's action was arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was not within the range of alternatives available to the appointing authority.

4. Neither party is entitled to an award of attorney fees.

ORDER

The disciplinary action is rescinded. Complainant is reinstated to his former position with full back pay and benefits as of the date of termination with an offset for any substitute earnings or unemployment compensation benefits.

DATED this 24 day of
March, 1995, at
Denver, Colorado.


Robert W. Thompson, Jr.
Administrative Law Judge

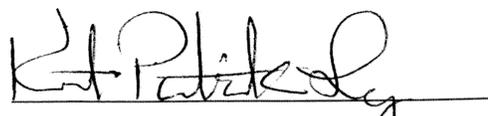
CERTIFICATE OF MAILING

This is to certify that on the 24th day of March, 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:

Nora V. Kelly
Attorney at Law
1775 Sherman Street, Suite 1775
Denver, CO 80203

and in the interagency mail, addressed as follows:

David A. Beckett
Special Assistant Attorney General
Department of Law
Human Resources Section
1525 Sherman Street, 5th Floor
Denver, CO 80203


95B074

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 \$670.00. 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 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.