

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B080

EEOC Charge No.

CCRD Charge No.

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

PHILIP C. JONES,

Complainant,

vs.

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

Respondent.

Hearing was held on March 6, 1995, before Margot W. Jones, administrative law judge ("ALJ"), in Pueblo, CO at the Colorado Mental Health Institute at Pueblo ("CMHIP"). Respondent appeared at the hearing through Toni Jo Gray, assistant attorney general. Complainant, Philip C. Jones, was present at the hearing and represented by Darol C. Biddle, attorney at law.

Respondent called the following employees of CMHIP to testify at hearing: Louis Brothers; Gene Guerrero; Marilou Tagliatela; Dorlan Conklin; Keith Helmick; Gabe Hernandez; Judith Bernard; William Ross; and Roger Gillespie. Complainant testified in his own behalf and called the following witnesses to testify at hearing: Philip Nelson; Kenneth Tafoya; Jonathan Olin; Marlene Rodman; and Orlando Trujillo.

Respondent's exhibits 1, 2, 4 through 15, 17 through 20, 23 through 29, 32 and 40 through 42 were admitted into evidence without objection. Respondent's exhibits 3, 16, 21, 22 and 36 were admitted into evidence over objection. Respondent's exhibit 38 was offered but was not admitted into evidence. Complainant's exhibit A, the three full paragraphs at page 3 of the exhibit, was admitted into evidence over objection.

MATTER APPEALED

Complainant appeals his termination from employment as a psychiatric security specialist at CMHIP.

ISSUES

1. Whether Respondent established by a preponderance of the evidence that Complainant did the acts for which discipline was imposed.

2. Whether the conduct of the Rule R8-3-3 meeting was arbitrary, capricious or contrary to rule or law.
3. Whether the decision to discipline Complainant was arbitrary, capricious or contrary to rule or law.
4. Whether either party is entitled to an award of attorney fees.

PRELIMINARY MATTERS

1. At Respondent's request, the witnesses were sequestered from the hearing room.
2. Respondent requested that an exception to the sequestration order be made for the witness, Louis Brothers, during the argument with regard to a subpoena of his personnel record. The request was denied.
3. Complainant subpoenaed the custodian of the personnel records for CMHIP, Jack Ford, to appear at hearing and to produce the personnel records for Louis Brothers. Complainant maintained that the appointing authority referred to Brothers in the notice of disciplinary action as a credible person and an experienced observer. Complainant argued that he should be permitted to have access to Brothers' personnel file because he believed that it contained information which would show that Brothers is not credible.

On March 6, 1995, Respondent moved to quash the subpoena on the basis that the subpoena constitutes a discovery request and was therefore not timely served.

The ALJ ordered Respondent to produce the personnel record at hearing on March 6, 1995.

4. The patient who was involved in the altercation which lead to the imposition of discipline is referred to herein as "R.H.". These are the patient's initials and this is done to protect the patient's right to privacy.

FINDINGS OF FACT

1. Complainant, Philip C. Jones, was employed by CMHIP from January 2, 1963, to December 6, 1994, when his employment was terminated. In 1994, Jones worked at CMHIP as a Psychiatric Security Specialist II in Unit F-4.
2. Unit F-4 is the maximum security forensic psychiatry unit of the Division of Forensic Psychiatry. Housed in this unit are

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patients who have been referred through the court system for treatment and evaluation. Patients in this unit are unpredictable and potentially violent. The unit remains locked at all time and patients are secured in their individual rooms.

3. During the performance rating period immediately preceding Jones' termination in December, 1994, Jones received a performance rating of "above standard".

4. Jones was previously disciplined during his employment at CMHIP. The two incidents for which discipline was imposed occurred 19 years ago. In July, 1993, Jones was counseled about using profanity in addressing a client.

5. On October 7, 1994, patient R.H. on Unit F-4 was exhibiting abusive and assaultive behavior. R.H. is six foot two inches tall and weighs approximately 160 pounds. R.H. was grossly disorganized and psychotic. R.H. spat on an employee. Dr. Jonathan Olin, a psychiatrist at CMHIP, after examining the patient, prescribed emergency medication because the patient appeared to be a danger to himself and others.

6. Olin examined the patient during October, 1994. R.H. was determined by Olin to be mentally incompetent during this period.

7. The staff on Unit F-4 were advised that R.H. would be administered emergency medication prescribed by Olin. On the basis of the staffs' previous encounters with R.H., it was anticipated that he would resist being administered the medication. A number of staff members prepared to assist in the administration of the medication.

8. Staff on Unit F-4 receive special training in the appropriate method of handling aggressive behaviors. Therapeutic Intervention with Physical Safety ("TIPS") training is taken by all staff members. A part of this training cautions staff members not to forcefully grab patients in the neck area. The neck area is deemed to be vulnerable and is an area which, if handled improperly, can cause serious injury to the patient. Jones participated in TIPS training.

9. On Unit F-4, the staff addresses aggressive behavior by the patients by attempting to manage the behavior with a minimum of force and with the utmost safety for the patient and staff. A component of accomplishing this is for the staff to deal with a patient's aggressive behavior with numerous staff members present. In the event that physical intervention is required, the presence of additional staff members reduces the risk of harm or injury to the patient and staff.

10. Gene Guerrero, a mental health worker on Unit F-4, was the

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first to approach R.H. to administer the emergency medication.
Guerrero entered the patient's room with Jones.

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11. The room in which the patient was housed was six by ten feet in dimension. There was a bed located in the middle of the room and a toilet in one corner of the room. The door to the room locked securely.

12. Guerrero advised R.H. that he had been prescribed emergency medication. Guerrero inquired whether R.H. was willing to take the medication orally. Guerrero warned R.H. that if he failed to take the medication orally it would be administered by injection.

13. R.H. agreed to take the medication orally. Guerrero handed him the medication which was in liquid form. R.H. placed the medication in his mouth and then spit it out. Jones and Guerrero left the patient's room and returned with another dosage of the liquid medication.

14. Guerrero again gave the medication to the patient to ingest. This time, R.H. poured the medication down the front of his clothing.

15. Guerrero announced to R.H. that the medication would be given by injection. Staff members were preparing to enter the room to assist with the injection. Judith Bernard, a nurse on the unit, retrieved the medication and syringe.

16. Guerrero and Jones reentered R.H.'s room in preparation for giving R.H. the injection. Guerrero was positioned in front of Jones closest to the patient. The patient swung at Guerrero grazing him in his eyebrow. Jones believed that Guerrero had been stuck forcefully.

17. After the patient swung at Guerrero, staff members entered the room and positioned themselves at various points around the small room to assist Jones and Guerrero in controlling the patient for the injection.

18. Marilou Tagliatela, a social work student at the University of Colorado, was on the unit on October 7, 1994. Tagliatela was an intern working under the supervision of Louis Brothers, a CMHIP social worker. As the staff assisted in laying R.H. face down on the bed in his room, Tagliatela remained outside the room holding the door of the patient's room open to avoid having the staff locked in the room with the patient. In her position, Tagliatela was unable to see what was occurring in the room.

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19. Louis Brothers was also present to assist. Brothers did not enter the room, but stood in the doorway observing.

20. Jones was the first to have physical contact with R.H., after R.H. swung at Guerrero. Jones grabbed the patient, placing one hand on R.H.'s back at the base of his neck, as a means of leverage, while pushing R.H. to the bed with his other hand.

21. Dorlan Conklin, a male employed as a registered nurse at CMHIP, Keith Helmick, a psychiatric security specialist, and Gary Hernandez, a psychiatric care aide, were entering the room as Jones forced R.H. to the bed.

22. None of the staff who entered the room to assist in controlling R.H. recalled their exact position in relation to the patient. The encounter with R.H. during which the injection was given took a minute or less. In the small confined area of R.H.'s room, with R.H. struggling against the staff, it was difficult for the staff to recall their positions. Each staff member attempted to take a limb and to control R.H.'s head. One staff person climbed on top of the bed, straddling R.H.'s body.

23. Initially, R.H. laid at an angle across the bed. R.H. was straightened out on the bed and placed in four point restraints. Placing the patient in four point restraints is, for the patient, "an unredeemably terrifying and humiliating experience".¹

24. At some point, either prior to straightening the patient out on the bed, or after the patient was placed in four point restraints, Bernard administered the injection.

25. Jones was the first staff person to leave the patient's room. Thereafter, the remaining staff persons also left the room. Jones was observed leaving the patient's room grimacing and shaking his hand. Jones suffers from carpal tunnel syndrome and frequently eased the pain in his hand by massaging and shaking it.

26. Shortly after R.H. was brought under control, Brothers approached Bernard at the nursing station on the unit. Brothers told Bernard that he observed Jones strike the patient. Bernard was shocked by this and told Brothers that she did not observe this. Bernard advised Brothers that if he believed that this occurred, he should report it to Roger Gillespie, the nursing supervisor and Jones' immediate supervisor.

¹ This quotation is from Exhibit 1, which is the letter from Bill Ross notifying Jones of the termination of his employment. The quotation is Ross' perception of four point restraints for the CMHIP patient.

27. Gillespie was not on duty on Friday, October 7, and was not scheduled to return to work until the following Tuesday, October 11th. On October 7, neither Bernard nor Brothers returned to R.H.'s room to check on him to determine whether he was injured. Bernard and Brothers did not request that any other medical personnel check the patient to determine if he was injured.

28. Dr. Olin, who prescribed the emergency medication on October 7, 1994, returned to R.H.'s room after the injection was administered. Since no one advised Olin that it had been alleged that R.H. was struck in the head, Olin did not specifically examine the patient to determine whether there was any head injury.

29. Olin observed and examined R.H. for three to five minutes. In the course of this examination, R.H. told Olin "I've been fucking assaulted". Olin did not observe injury to the head in or around the location where Brothers alleged Jones hit the patient.

30. On October 11, 1994, Brothers reported his observation to Gillespie. Brothers reported to Gillespie that he "felt" that Jones hit R.H. during the takedown on October 7. Brothers described the blow to Gillespie, and later to Bill Ross, the appointing authority, to be one where Jones pulled his fist back three to four feet and then hit R.H. with the full force of his fist.

31. Gillespie learned that Guerrero was present during the incident with R.H. and he spoke with him. Guerrero told Gillespie that he did not see Jones hit R.H. Gillespie asked Guerrero if he had reason to believe that Jones might have hit R.H. Guerrero did not respond audibly. Guerrero smiled and nodded his head. Guerrero intended to communicate that he believes that Jones is capable of hitting a patient.

32. Gillespie examined R.H. on October 11, to determine whether there were any bumps or bruising in the area where Brothers alleged Jones hit the patient. Gillespie observed no physical evidence of any injury to the patient. During Gillespie's examination of the patient, Gillespie did not ask R.H. if he suffered a head injury or had been struck.

33. Gillespie reported the allegations of patient abuse by Jones to Norma Edmundson, chief nurse, who reported the allegations to Bill Ross, the Director for Forensic Psychiatry. On October 11, Ross placed Jones on administrative suspension pending the outcome of the investigation.

34. On October 11, 1994, hospital security was notified by Ross

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of the allegations. Orlando Trujillo, a CMHIP security officer, was assigned to investigate. On October 11, and 12, 1994, Trujillo spoke with the staff members present in the room with R.H. on October 7. Trujillo spoke to Brothers, Bernard, Helmick, Tagliatela, Jones, Guerrero, Conklin and R.H. Trujillo was unaware that Gabe Hernandez was present in the room during the incident on October 7, and therefore did not speak with him during the investigation.

35. On or around October 11, 1994, Trujillo found R.H. to be lucid and present with their conversation. Trujillo quizzed R.H. to determine if he was conscious of his surroundings. R.H. responded to Trujillo's questions with clarity.

36. R.H. recounted to Trujillo the events of October 7, 1994, when the staff placed him in four point restraints and administered the medication by injection. R.H. recounted the events in the same manner that most of the staff members who were present had recounted the events.

37. Trujillo specifically and repeatedly asked R.H. whether he was struck in the head by Jones during the incident. R.H. responded each time he was asked, that he was not struck by Jones.

38. During Trujillo's investigation, Bernard, Helmick, Conklin and Guerrero reported that they did not observe Jones strike R.H. Brothers was the only staff member who alleged that he saw Jones hit the patient.

39. Tagliatela, who was responsible for holding the door open to R.H.'s room, was interviewed by Trujillo on October 11, 1994. Tagliatela provided a written statement on that date in which she reported that she could not see into the room from her vantage point. She reported in her statement that she heard sounds of a struggle and loud voices.

40. Upon reflection the day after preparing the written statement, Tagliatela recalled additional information about the incident and decided to add it to her statement. Tagliatela recalled that she heard the staff voices calling out "We got him!" or "Get that!". She reported in her statement that she was not able to identify the voices making these statements. However, she reported that she heard Jones say "That motherfucker!".

41. Trujillo supplied his investigative report to Ross, including the statements of the staff. Ross reviewed Trujillo's report. Ross personally interviewed all the staff members who were in the room with R.H. on Oct 7. Ross also spoke to R.H.. R.H. stated that no one hit him. However, during the conversation, R.H. appeared to Ross to be delusional.

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42. Ross spoke to Brothers a total of eight times. Ross spoke to Brothers four times prior to holding an R8-3-3 meeting with Jones and four times following the R8-3-3 meeting with Jones.

43. Ross prepared diagrams of each staff persons' explanation of their placement in the room during the altercation with R.H. Ross also prepared a narrative explaining his understanding of what the staff told him about the incident. The diagrams did not accurately reflect what the staff reported to Ross.

44. Each staff person had a different rendition of what occurred. Each person had a different recollection of where they were and where other staff were during the altercation. Some of them explained that they heard many voices using profanity and the movement of furniture and bodies, while other staff members did not hear anything.

45. As a result of the information collected by Ross during the investigation, he decided to hold a R8-3-3 meeting with Jones. Jones met with Ross and Jones' attorney, Darol Biddle, on November 4, 1994. During the R8-3-3 meeting, Jones denied that he struck R.H. Jones explained to Ross how he assisted the staff in helping to control R.H. so that an injection could be administered. Jones admitted that he touched R.H. near the nape of his neck in order to have leverage to force R.H. to the bed.

46. Following this meeting on December 6, 1994, Ross concluded that Jones used inappropriate restraint procedures when he grabbed the patient at his neck when forcing him to the bed. He further concluded that Jones used profanity in addressing R.H. and struck him during the altercation on October 7, 1994. Ross finally concluded that Jones' conduct constituted willful misconduct and a failure to comply with standards of efficient service and competence. Ross concluded that Jones should be terminated from his position as a result of the October 7, incident. Jones was provided notice of his termination in a letter dated December 6, 1994.

DISCUSSION

A certified state employee can only be terminated 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 cause exists for the discipline rests with the appointing authority. Cf., Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The State Personnel Board ("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

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of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of a discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

In this case, the versions of incident testified about by the Brothers and the other staff are conflicting in all relevant portions. When there is conflicting testimony, as here, the credibility of the witnesses 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).

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 question 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).

Respondent argues that the action of the appointing authority should be upheld because of the message that would be sent to the employees of the agency if the termination of Complainant's employment is overturned. Respondent maintains that there is a CMHIP sub-culture among the staff in which the norm is for employees to cover-up allegations of patient abuse. It is Respondent's contention that this subculture also dictates that any employee who does report patient abuse by a staff member is ostracized by his co-workers. Respondent maintains that, in light of this sub-culture, it is no wonder that there are conflicting accounts by the many employees in the patient's room when the alleged abuse occurred on October 7, 1994.

Respondent further argues that if the Board considers itself to be a champion of the employee then in this case it must champion the employees, Brothers and Ross. Respondent argues that these employees are the true heroes in this matter because Brothers came forward with his allegation of patient abuse and Ross took action on this complaint and terminated Complainant's employment.

Respondent further maintains that although Brothers is the only employee who is alleged to have observed Jones strike the patient, there is corroboration for his allegation. Respondent points to the testimony of Tagliatela who testified that she overheard Complainant's voice in the room with the patient during the altercation. Respondent further points to Guerrero's confusing communication with Gillespie and argues that Guerrero's testimony

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should be relied on as corroboration of Brother's allegation.

Respondent contends that the staff involved with this altercation were intensely involved in the conflict, in the six by ten foot room, with the patient. Respondent contends that they were focused on the patient and thus could not observe Complainant pulling his arm back and with his full force striking the patient in the head.

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With regard to the patient, Respondent contends that he was deemed to be incompetent to stand trial on criminal charges, thus any statement he made to any of the staff, Olin, Gillespie, Ross and Trujillo, denying that he was struck by Jones, should be disregarded.

Complainant argues that the preponderance of the evidence weighs against the appointing authority's conclusion that Complainant struck the patient. Complainant argues that the appointing authority's decision to terminate Complainant's employment was arbitrary, capricious and contrary to rule and law because the appointing authority neglected or ignored information that he had before him and the appointing authority reached a conclusion based on the evidence in such a way that reasonable people must reach a contrary conclusion.

Complainant points to the testimony of Conklin, Hernandez, Helmick, Guerrero and Bernard. Complainant argues that they were in the six by ten foot room with Complainant on October 7, and they did not observe the patient being struck by Complainant.

Complainant further relies upon the testimony of Trujillo, Olin, Ross and Gillespie to support his contention that the determination that he engaged in wilful misconduct was arbitrary and capricious. Complainant argues that each of these individuals either spoke to and or examined R.H. after the alleged altercation and none of these witnesses testified that they observed any injury. Complainant argues that Trujillo, Gillespie and Ross testified that the patient when asked whether he had been struck by Complainant, specifically responded that he had not been struck.

Complainant argues that Brothers should not be deemed to be a credible witness. Complainant argues that Brothers' employment history with CMHIP established that he had a long history of insubordination and failure to be truthful in his dealings with CMHIP management. Complainant contends that Brothers was not an honest and truthful individual whose report of patient abuse on this occasion should be believed.

Finally, Complainant argues that Ross was predisposed to terminate his employment when he met with him at the R8-3-3 meeting. Complainant argues that Ross met with Brothers eight times in an effort to convince himself of the truth of Brothers' allegation. Complainant further argues that he met with the other witnesses to the incident and prepared diagrams and statements that did not accurately reflect the witnesses' reports of the incident, but were intended to bolster Brothers' allegation.

Complainant contends that he should be reinstated to his position with full back pay and benefits and awarded attorney fees.

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All the relevant facts and circumstances presented in evidence at hearing are taken into account. Some of the facts and circumstances which had the greatest significance, include the following: the witnesses demeanor during their testimony; the fact that Brothers' testimony was contradicted by several witnesses who had an equally good vantage point from which to observe the altercation with the patient; the fact that neither Brothers nor Bernard checked the patient for injury on October 7; the fact that neither Brothers nor Bernard reported to any medical personnel the allegation of assault on the patient; the fact that Olin checked the patient on Oct 7 and observed no injury in the area where Complainant was alleged to have struck him; and the fact that the patient was interviewed by Trujillo, Gillespie and Ross and did not mention that he was struck by Jones or anyone else.

The weight of the evidence must lead to the conclusion that Complainant did not strike patient R.H. It is concluded that Brothers' testimony is not as credible as that of the other witnesses, who testified that they did not observe Complainant strike the patient.

It is important to note that Respondent's contention that CMHIP employees cover up patient abuse is not much more than argument by Respondent's counsel. In fact, the records maintained by the Board, of which the ALJ takes administrative notice, do not support this contention.

Furthermore, the only witness who spoke to this mind set, of fear and intimidation among the staff to prevent the reporting of patient abuse, was the witness Guerrero. Guerrero was described by Gillespie as communicating with him in nods and smiles. It can be presumed that the same reticence that prevents Guerrero from speaking in a forthright manner with Gillespie about matters of significance pervades this employees whole manner of professional interaction.

The evidence further fails to establish that there was adequate support for the conclusion that Jones' hold on the patient was contrary to TIPS training. The evidence established that, within an approximate one minute period, the following altercation occurred: a patient, incarcerated in the maximum security forensic psychiatry unit at CMHIP, who is a six foot two inches tall and 160 pounds, was advised that he would receive emergency medication by injection; the patient swung his fist at a staff member; Complainant approached the patient and forced him down on a bed; in the process of forcing the patient to the bed, Complainant placed a hand at the nape of the patient's neck, while using the other hand to force the patient to the bed; and thereafter five staff members surrounded the patient on the bed and placed the patient in four point restraints.

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Based on that evidence, it cannot be concluded that Complainant's contact with the patient's neck was contrary to TIPS procedures. Based on Tagliatela's testimony, Complainant used the term "motherfucker" in addressing the patient during the altercation. The use of profanity does not support the conclusion that Complainant's employment should be terminated. In July, 1993, Gillespie addressed Complainant's use of profanity in addressing a client with counselling. The appointing authority may elect to address Complainant's use of profanity on October 7, in the same manner. However, in no case should the action taken be more severe than a corrective action.

In this case, it is not possible to conclude that Complainant engaged in the conduct alleged. The evidence necessary to reach such a conclusion is not present in this record. Nor was such evidence available to Ross during the pre-disciplinary process.

Complainant in his prehearing statement challenges the conduct of the R8-3-3 meeting. While the ALJ has found the discipline imposed to be unsupported by the evidence, it cannot be concluded that Complainant was denied due process in the R8-3-3 proceedings.

Based on the evidence presented at hearing, there is no basis for a finding that the personnel action from which this appeal arose provides justification for an award of attorney fees under 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

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. Complainant was afforded due process in the conduct of the R8-3-3 meeting.
3. Respondent acted arbitrarily, capriciously or contrary to rule or law in deciding to terminate Complainant's employment.
4. Neither side is entitled to an award of attorney fees or costs.

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ORDER

Respondent is ordered to rescind the action terminating Complainant's employment. Complainant is reinstated to his position with Respondent with full back pay and benefits, with the appropriate offset as provided by law, from the date of the termination of his employment to the date of reinstatement.

Dated this 20th day of

_____, April, 1995 at Denver,

Margot W. Jones

CO.

Administrative Law Judge

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:

Darol C. Biddle
Attorney at Law
323 South Union Avenue
Pueblo, CO 81003

and in the interagency mail, addressed as follows:

Toni Jo Gray
First 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 **\$828.00**. 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.

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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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