

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

---

JOHN PATINO,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,

Respondent.

---

Hearing was held on November 8 and 9, 2000 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by First Assistant Attorney General Jill M. M. Gallet. Complainant appeared pro se.

**PRELIMINARY MATTERS**

Respondent called the following witnesses: John Patino, Complainant; Michael Cullen, former Chief of Unemployment Insurance Benefits, Division of Unemployment Insurance, Department of Labor and Employment ("DOLE"); Glenda Barry, Director of Human Resources, DOLE; Patricia Moore, Director of Risk Management, DOLE; JoAnna Miller, Equal Employment Opportunity Administrator, DOLE; and Don Peitersen, Director of the Division of Unemployment Insurance, DOLE.

Complainant appeared as the only witness on his own behalf.

Respondent's Exhibits 1-3 and 5 - 27 were admitted by stipulation. Exhibit 4 was admitted over objection.

Complainant's Exhibits B - Q were admitted by stipulation. Complainant withdrew Exhibit A.

A witness sequestration order was entered.

## **MATTER APPEALED**

Complainant appeals his termination for excessive absenteeism and exhaustion of leave. He alleges that his termination was discriminatory on the basis of disability, and that he was retaliated against for utilizing Family Medical Leave Act leave and applying for short-term disability leave. For the reasons set forth below, Respondent's action is affirmed.

## **ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
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.

## **FINDINGS OF FACT**

1. Complainant John Patino commenced employment with DOLE in the Division of Unemployment Insurance Benefits on October 15, 1991 as an Unemployment Insurance Representative I-A. From September 1993 forward, his class was Labor and Employment Specialist II.
2. The division of unemployment insurance is comprised of approximately 200 people.
3. Patino's duties during the period 1996 through his termination included taking unemployment claims, collecting information on the claim, and making the final decision on a claim. He worked on a multifunctional team.
4. In 1996, Complainant developed a chronic neck and back condition involving what appeared to his treating physicians to be a tear of a cervical disk.
5. Respondent approved Complainant for Family Medical Leave Act leave under its provision for serious health conditions.

6. On June 3, 1997, a doctor treating Complainant submitted a Fitness-To-Return Certification to Respondent indicating that Complainant was able to work with the following restrictions from June 3, 1997 through August 3, 1997: no lifting or carrying or pushing or pulling objects over 10 pounds; no continuous sitting or standing; no reaching away from the body greater than 5 feet with either arm; and no assaultive or arrest situations.
7. Respondent allowed Complainant to work within these restrictions. Of particular importance was his ability to get up and move around and stretch periodically.
8. In the late summer of 1997, Respondent determined it was necessary to move the work stations of those in Complainant's work group. Complainant opposed this, and on September 28, 1997 his doctor wrote a letter to Respondent indicating that Complainant was concerned that the move "will displace him from a comfortable location that provides him access to move around when he experiences pain or discomfort. This is one of the instructions that I have given him to speed his recovery and I feel that if it is at all possible to keep him in his location it would be preferable for his healing program."
9. Respondent moved Complainant to another cubicle of the same size which accommodated his ability to get up and move around and stretch. Respondent also sent Complainant a memo responding to his doctor's September 28 letter indicating that he could still "get up and move around for exercise when you feel the need."
10. Despite the fact Complainant had been fully released to work full time and Respondent was meeting his restrictions, he continued to be absent often.
11. During fiscal year 1998 (July 1, 1997 through June 30, 1998), Complainant utilized the maximum amount of FMLA leave, 520 hours, by May 1998. (The total number of work hours in a year is 2080.) Respondent then granted Complainant an additional 207 of leave without pay.
12. On May 21, 1998, Michael T. Cullen, Chief of Unemployment Benefits, sent a certified letter to Complainant stating the following in part:

"The last year has seen a significant increase in the number of absences resulting from your continuing neck and back problems. It has reached the point that I must evaluate the impact those absences have on the workplace. In order to do so I would like to know what the prognosis is for your return to work full time. You are required to provide to me no later

than Wednesday, June 3, 1998 medical documentation which substantiates:

- 1) The nature of the condition which has impaired your ability to report for work on a regular basis.
  - 2) Any limitations and restrictions resulting from that condition.
  - 3) How long we can expect to see high rates of absenteeism. I consider that 1 or more days absent per week resulting from your medical condition.
  - 4) When can we expect you to be able to return to work full time (40 hours per week on a regular basis)."
13. On June 10, 1998, Complainant's doctor responded to Cullen's May 21, 1998 letter. The letter indicated that Complainant had a C5-6 disc disruption with an annular tear; the restrictions from the previous certification continue to apply; and, "it is possible that he will have some intermittent days when his symptom levels are to a point where he is unable to work, but I would encourage him to try to meet his normal work schedule as possible."
14. In addition, on June 1, 1998, another doctor treating Complainant submitted a Fitness-To-Return Certification to Respondent indicating that he was "able to work a full, regularly scheduled day with no restrictions beginning 5/21/98."
15. Respondent continued to allow Complainant to function under the restrictions.
16. Notwithstanding his doctors' certification that he would only need to be absent from work "some intermittent days," Complainant's rate of absenteeism increased dramatically.
17. In Fiscal Year 1999 (July 1, 1998 through June 30, 1999), Complainant used all FMLA leave available, or 520 hours, in a period of five and a half months, by December 15, 1998.
18. On December 3, 1998, Cullen wrote Complainant another letter concerning his excessive absenteeism. It stated in part:
- "As we discussed at our meeting this morning I need to make some decisions regarding your continued employment with the department.

In June of this year you provided documentation which indicated you could return to work with 'intermittent' days of absence. In September you provided a medical release statement with no restrictions. However, during the period July 1, 1998 through November 30, 1998 you were absent from work 491.5 hours or 56% of the time. This is clearly more than intermittent absenteeism.

I would like you to provide a statement from your doctor which supports this rate of absenteeism and, assuming your absences are justified, a prognosis as to how long it will continue. This statement is due to me no later than close of business, Friday, December 11, 1998."

19. On December 11, 1998, Complainant's new doctor wrote Cullen a letter indicating that Complainant's condition was actually "myofascial syndrome," which would require a:  
  
"very diligent course of self-conducted physical therapy. This must take place repeatedly at brief intervals throughout the day, every day and quite frequently. I believe that he is highly motivated to do this. This will require interruption of his work for a few minutes every 20 to 40 minutes on days when the pain is severe. He is worried that it might also require that he actually lose some work. I have strongly recommended that he keep this absolutely to a minimum, as this painful syndrome resolves only very slowly and recurs easily."
20. On December 22, 1998 (after Complainant's FMLA leave had expired), Cullen wrote a letter directly to Complainant's doctor seeking clarification of his December 11 letter. Cullen stated that based on the letter, he expected Complainant would be absent no more than one day every two weeks, and requested to be notified in the event this was erroneous.
21. Complainant's doctor did not respond to Cullen's letter.
22. For the following three months Cullen closely monitored Complainant's attendance at work. The absenteeism continued, and in fact increased: in January, 1999, Complainant was absent 54 hours; in February he was absent 64 hours; from March 1 - 15 he was absent 56 hours.
23. On March 15, 1999, Cullen wrote a letter to DOLE Unemployment Division Director Donald B. Peitersen, requesting that disciplinary action be taken against Complainant for excessive absenteeism.

24. On March 17, 1999, Peitersen sent Complainant a letter scheduling a pre-disciplinary meeting. The letter cited Director's Procedure P-5-10 and Board Rule R-6-10. P-5-1- provides for the administrative discharge of an employee who has exhausted all leave and is unable to return to work for medical reasons.
25. Complainant stopped coming to work on March 25, 1999; this was his last day at work.
26. At no time after March 25, 1999 did Complainant provide a medical certification to Respondent demonstrating a medical condition warranting his failure to attend work.
27. Complainant's representative informed Cullen that Complainant would be applying for short-term disability within 30 days of his last day of work.
28. Complainant did apply for short-term disability. During the pendency of Complainant's application, Respondent put the disciplinary process on hold.
29. On June 1, 1999, the state's insurance company informed DOLE by letter that Complainant's application for short-term disability had been denied on the basis that "he does not meet the definition of disability nor has proof of loss been provided."
30. On June 3, 1999, having received notice that Complainant's application for short-term disability was denied, Peitersen sent Complainant another letter setting a pre-disciplinary meeting.
31. On June 10, 1999, Complainant sent Peitersen a letter requesting a further delay of the meeting so that he could appeal the short-term disability determination. He further indicated he was filing a grievance against DOLE and the ADA coordinator for discriminating against him on the basis of disability.
32. Upon receipt of Complainant's grievance letter, Peitersen immediately contacted the Department of Human Resources for DOLE and initiated an investigation by that office of Complainant's grievance.
33. On June 16, 1999, Peitersen sent Complainant a letter indicating that the pre-disciplinary meeting would be postponed until the Department's investigation of his grievance had been completed.

34. The Equal Employment Opportunity Administrator for DOLE conducted the investigation into Complainant's grievance. She conducted numerous interviews of individuals with whom Complainant worked, and all parties relevant to his grievance. In her July 19, 1999 thirteen-page single-spaced report, she concluded that the Department had not engaged in intentional discrimination against Complainant on the basis of disability.
35. On July 22, 1999, with the investigation completed, Peitersen sent Complainant a letter scheduling the pre-disciplinary meeting for August 2, 1999. In his letter, he again cited P-5-10, allowing for administrative termination after exhaustion of leave, and B-6-9 and B-6-10, which he indicated "provides for disciplinary action to be taken for reasons related to absences from the job that have not been supported by proper documentation."
36. On July 24, 1999, Complainant sent Peitersen a letter requesting postponement of the meeting on the basis that he had filed a petition for preliminary review and a request for settlement and mediation with the State Personnel Board.
37. Peitersen or Cullen spoke to Complainant on the phone and denied his request for postponement.
38. Complainant did not appear at the August 2, 1999 pre-disciplinary meeting.
39. Complainant called Peitersen after that meeting to attempt to reschedule, but provided him with no reason why he had missed the August 2 meeting. Peitersen refused.
40. On August 2, Peitersen issued his letter terminating Complainant's employment. The letter recited most of the facts related above, and concluded,

"In reviewing all of the information available to me, I can find no evidence to support 1) your high rate of absenteeism during the period December 10, 1998 - March 15, 1999, and 2) your complete absence from work beginning March 25, 1999. All documentation provided by you to this Department clearly indicates that you should be able to perform your work duties on a fairly regular basis as long as you abide by the exercise program given to you by your doctor. And, in December, 1998, we had given you permission to conduct your exercise program in the manner prescribed by your doctor.

It is an employee's responsibility to provide the required medical documentation to substantiate absences from work. You have failed to provide me with any verifiable information that substantiates your absences are necessary and required. Therefore, it is my decision that your employment . . . is terminated effective August 2, 1999 due to absences from work that are classified as unauthorized because of your failure to submit sufficient justification for the absences."

41. Respondent's Americans with Disabilities Act coordinator at all times relevant was Patricia Moore, Director of Risk Management at DOLE. Respondent issued periodic regulations through its work teams informing employees of her title and telephone number.
42. Complainant never contacted Ms. Moore regarding any need for an accommodation on the job.
43. During Complainant's absences from work, his teammates had to perform his job duties. This imposed a hardship on the team.
44. At the time of his termination, Complainant had exhausted all available leave.
45. Complainant seeks reinstatement, back pay and benefits.

## **DISCUSSION**

Respondent's letters to Complainant scheduling the pre-disciplinary meeting cited Director's Procedure P-5-10 and Board Rule R-6-9. Respondent's termination of Complainant was both an administrative termination for exhaustion of leave, as well as a disciplinary termination for excessive absenteeism. Different burdens of proof apply to administrative terminations and disciplinary terminations. It is Complainant's burden to prove that an administrative termination under P-5-10 was arbitrary, capricious, or contrary to rule or law. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). It is the agency's burden to prove that the acts or omissions upon which the discipline was based occurred and that just cause warranted the discipline imposed. Id.

Respondent's burden will be addressed first.

### **A. Did Complainant commit the acts for which he was disciplined?**

Respondent has proven that Complainant committed the acts for which he was terminated. In fact, there is no factual dispute regarding Complainant's absences from work, as outlined above in the Findings of Fact.

**B. Was the Action of Respondent Arbitrary, Capricious, or Contrary to Rule or Law?**

Director's Procedure P-5-33, governing Family Medical Leave Act ("FML") leave, provides:

"The employee is required to provide proper medical certification, including additional medical certificates and fitness-to-return certificates as prescribed under sick leave. Failure to provide certification in a timely manner may result in a delay of starting or continuing FML. If the required documents are never provided, the leave is not FML and the employee is covered by the other provisions of this chapter."

During both periods of FML leave in FY 98 and 99, Complainant failed to provide medical certification demonstrating his need to be absent at such a high rate. Despite this fact, Respondent continued to allow him to use the maximum 520 hours of FML leave in both fiscal years. Respondent essentially waived its right to exclude Complainant from FML coverage under this rule, bending over backwards to give Complainant time to rest, recuperate, and recover from his chronic back problem. It then gave him a significant amount of additional leave without pay for this purpose.

By December of 1998, Complainant had exhausted his second year of FML leave. Despite medical certifications indicating that Complainant would need to be absent from work only on an "intermittent basis," Complainant's absenteeism rate during the period January and February 1999 was over 25%, and in the first half of March 1999 it was over 50%.

Director's Procedure P-5-6 states,

"A state of Colorado Medical Certificate form (or equivalent) completed by a health care provider must be provided within 15 calendar days, absent extenuating circumstances, for any absence of more than three consecutive, full working days in accordance with statute. Certification may also be required for absences of fewer days at the discretion of the appointing authority . . . when a pattern of absences indicates possible abuse. Failure to provide the certificate will result in denial of leave and possible corrective/disciplinary action."

Director's Procedure P-5-10 provides as follows:

"If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication . . . . No employee may be administratively discharged if FML and/or short-term disability leave . . . apply and/or if the employee is a qualified individual with a disability who can be reasonably accommodated without undue hardship."

Complainant's pattern of absences from January through mid-March, 1999 was far in excess of that certified by his doctors. It therefore indicated a possible abuse of sick leave that fully justified Respondent's requests for further medical certification. After Complainant failed to provide medical certification excusing his absences, Respondent was further justified in sending Complainant a notice of pre-disciplinary meeting on March 17, 1999. Respondent complied with all relevant rules and procedures.

#### Complainant Received Adequate Notice of a Performance Problem

Complainant suggests that he never received notice that his absences would constitute a performance problem warranting disciplinary action. However, commencing in May, 1998, Cullen sent letters to Complainant indicating that his excessive absences were a problem. Cullen's May 21, 1998 letter stated, "It has reached the point that I must evaluate the impact those absences have on the workplace," and requested medical certification for his absences and information on "When can we expect you to be able to return to work full time." Any reasonable person would construe this letter as an indication that in the absence of medical certification justifying the high rate of absenteeism, he was expected to work full-time. Cullen's March 17, 1999 letter setting the pre-disciplinary meeting informed Complainant that his "continuing problems with attendance" were about to subject him to disciplinary action, including dismissal. Complainant had ample notice that his excessive absenteeism without medical justification was a serious performance problem.

#### Hotchkiss v. DOC does not Apply

Complainant avers that State Personnel Board Case No. 95B062, *Hotchkiss v. Department of Corrections*, governs this case and requires that Respondent's action be overturned. However, that case is factually inapplicable to this situation. In *Hotchkiss*, the appointing authority administratively terminated an employee where: the factual record was unclear as to whether he had exhausted all available sick leave, and no notice of impending termination or opportunity to attend a pre-disciplinary meeting were provided. Here, the record is undisputed that Complainant had exhausted all available leave at the time of termination. Further, Respondent gave Complainant the opportunity to attend a pre-termination meeting, and, after Complainant chose not to attend the

meeting, gave Complainant additional time in which to provide mitigating information. Complainant provided none. Therefore, *Hotchkiss* is not applicable here.

#### Respondent did not Violate Board Rule R-9-5.

On November 16, 1999, Respondent issued Departmental Letter 99-20, "Americans with Disabilities Act." The purpose of DL 99-20 is to "communicate grievance procedures" for ADA complaints and issues. It lists Ms. Moore as ADA Coordinator, and provides her address and telephone number. Analogous DL's preceded this one and were in effect at the time relevant herein.

Complainant argues that Respondent violated Board Rule R-9-5 by failing to provide him with a copy of DL 99-20 personally. Respondent counters that, pursuant to its internal standard procedures, it was disseminated to employees through its team leaders.

Board Rule R-9-5 provides that "Each agency must notify applicants and employees of the policy prohibiting discrimination. Any means or method reasonably designed to clearly communicate the information may be used." Respondent utilized the team structure to organize work performed. It also chose the team structure as the vehicle through which it communicates information regarding departmental policies and procedures. Complainant was a member of a team that was provided a copy of DL 99-20 and its precedents. Team units constitute a reasonable means through which to communicate information regarding discrimination policies and procedures. There is no evidence in the record that Respondent failed to provide copies of its discrimination policies to Complainant's team. Respondent has not violated R-9-5.

#### Respondent Did Not Discriminate Against Complainant on the Basis of Disability

Complainant alleges that Respondent discriminated against him on the basis of disability, in violation of the Colorado Anti-Discrimination Act, section 24-34-401, C.R.S., *et seq.* ("the Act"). Complainant must first demonstrate that he is a qualified person with a disability under the Act. The Act defines disability as follows: "a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment."

Section 24-34-301(2.5)(a), C.R.S.

The Colorado Civil Rights Commission has promulgated rules which adopt federal case law interpreting the ADA as persuasive authority in construing the Colorado Act, where the two acts are substantially equivalent. Colorado Civil Rights Commission Rule 60.1(A) through (C), 3 CCR 708-1 (1999). The definitions of "disability" in both acts are substantially equivalent; therefore, federal case law will be given persuasive authority with respect to this provision.

Complainant has failed to demonstrate that he has a physical impairment which substantially limits one or more major life activities. The major life activities protected as disabilities by the Act consist of such things as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994). It is uncontested that Complainant could perform all major life activities at all times relevant. His medical certifications demonstrate that he was capable of working full-time with intermittent absences, and that he needed to get up from his desk often to stretch. These facts do not meet the standard of what constitutes a disability under the Act. This issue alone cleanly disposes of the disability discrimination issue.

Even assuming that Complainant had a disability covered by the Act, the Act provides that it is not a discriminatory employment practice to discharge an employee if "the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1)(a), C.R.S. Complainant failed to even appear for work during the four-month period from March 25 through August 2, 1999, the date of his termination. Again, although it is unclear that Complainant's alleged disability precluded him from working during this period, assuming that it did, attendance is an "essential" function of any job, and an employee that is unable to attend work is not entitled to the protections of the disability discrimination laws. Cisneros v. Wilson, 2000 WL 1336658 (10<sup>th</sup> Cir., September 11, 2000); Corder v. Lucent Technologies, Inc., 162 F.3d 924, 927-28 (7<sup>th</sup> Cir. 1998).

Lastly, even assuming that Complainant were a disabled individual capable of performing the duties of his position, unpaid leave of indefinite duration is not a reasonable accommodation. Taylor v. Pepsi-Cola Company, 196 P.3d 1106 (10<sup>th</sup> Cir. 1999).

Complainant argued at hearing that Respondent should have accommodated him in the summer of 1997 by allowing him to remain at his original cubicle. However, based on the above analysis, he was not entitled to any accommodation. Further, the evidence did not demonstrate that the new cubicle precluded Complainant from getting up and moving around and stretching.

#### Respondent Did Not Retaliate Against Complainant

Complainant alleges that he has been retaliated against for exercising FMLA leave and applying for short-term disability leave. To establish a prima facie case of retaliation, Complainant must establish: 1) he engaged in a protected (here, use of FMLA leave and applying for short-term disability leave); 2) he was subjected to adverse employment action; and 3) a causal connection exists between the protected activity and the adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10<sup>th</sup> Cir. 1996). Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to

the employer to articulate a nondiscriminatory reason for the challenged action. The plaintiff may then demonstrate that reason to be a pretext for retaliation.

Complainant has established that he engaged in protected conduct by utilizing FML leave and applying for short-term disability leave. He has also suffered adverse employment action in the form of termination. However, the record in this case is devoid of any evidence from which causation might be found. In fact, the record herein demonstrates that Respondent treated Complainant with the utmost compassion, and was remarkably flexible in its response to his absenteeism.

As discussed above, Respondent allowed Complainant to take 520 hours of FMLA leave for two years in a row, despite the fact that the medical certification for Complainant's condition demonstrated no need for the amount of leave taken. Respondent then gave Complainant additional leave without pay, despite no medical certification that his high rate of leave was needed.

Even assuming causation existed, establishing a prima facie case of retaliation, Respondent has articulated a legitimate nondiscriminatory reason for its termination of Complainant. Complainant never provided medical certification justifying his excessive rate of absence from January through mid-March of 1999, or his total absence from work from late March through August 2, 1999. Respondent was fully justified under both R-6-9 and P-5-10 in terminating Complainant.

Complainant has failed to demonstrate that Respondent's proffered reason for the adverse action is a pretext for retaliation. Pretext may be demonstrated in a number of ways. One such means is by demonstrating disparate treatment, as in Civil Rights Commission v. Big O Tires, 940 P.2d 397 (Colo. 1997). Complainant has not demonstrated that any other similarly situated employee was treated differently from him. Another means of demonstrating pretext is to show "that an employer's proffered explanation is unworthy of credence." Randle v. City of Aurora, 69 F.3d 441, 451-2 (10<sup>th</sup> Cir. 1995). Here, Respondent bent over backward to give Complainant two years of FML leave, plus additional discretionary leave without pay. This act of compassion demonstrates a complete absence of any motive to retaliate against Complainant. Respondent's explanation for its termination of Complainant was fully supported by the evidence. There is no evidence in this record supporting a finding of retaliation against Complainant.

#### Respondent did not Violate Complainant's Physician-Patient Privilege

Complainant avers that Respondent violated his right to physician/patient confidentiality by contacting his doctor directly. P-5-7 prohibits employer contact with an employee's health care provider if FML applies. Respondent appropriately made all requests for medical certifications during Complainant's FML coverage period through Complainant. It was only after Complainant's FML leave had expired, on December 22,

1998, that Cullen wrote a final letter to Complainant's doctor directly. Respondent did not violate Complainant's right to physician/patient confidentiality.

**C. The Discipline Imposed Was Within the Range of Reasonable Alternatives**

Respondent gave Complainant numerous opportunities to medically certify his high rate of absenteeism. Complainant failed to do so. Then, Complainant simply failed to appear at work for four months. Complainant's work team suffered as a direct result of having to perform his work during his absence. Respondent made an eminently reasonable decision to terminate Complainant's employment.

**D. Complainant has not met his burden of proving that Respondent's action was arbitrary, capricious, or contrary to rule or law.**

As the discussion above demonstrates, Complainant has failed to prove that Respondent's termination of him was arbitrary, capricious, or contrary to rule or law. Respondent was fully justified under P-5-10 to administratively terminate Complainant's employment after exhaustion of all available leave.

**CONCLUSIONS OF LAW**

1. Complainant committed the acts for which he was disciplined;
2. Respondent's action was not arbitrary, capricious or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.

**ORDER**

Respondent's action is **affirmed**. This case is dismissed with prejudice.

DATED this \_\_\_\_\_ day of  
December, 2000, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, Colorado 80203

## 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. Section 24-4-105(15), C.R.S. 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. The notice of appeal must be received by the Board no later than the 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. 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).

### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may 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. 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.

### RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee 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.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### 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 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

### 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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of December, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

John Patino  
1885 South Quebec Way, #115  
Denver, Colorado 80231

and in the interagency mail, addressed as follows:

Jill M.M. Gallet  
First Assistant Attorney General  
Consumer Protection Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

---